



January 2008

Corporations

Glenn D. West

W. Benton Lewis Jr.

Recommended Citation

Glenn D. West & W. Benton Lewis, *Corporations*, 61 SMU L. REV. 743 (2008)
<https://scholar.smu.edu/smulr/vol61/iss3/11>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

CORPORATIONS

Glenn D. West*
W. Benton Lewis, Jr.**

TABLE OF CONTENTS

I. INTRODUCTION	743
II. THE SANCTITY OF THE CORPORATE FORM IN TEXAS	745
A. REVERSE VEIL PIERCING	746
1. <i>Outsider Reverse Veil Piercing</i>	747
2. <i>Insider Reverse Veil Piercing and Single Business Enterprise</i>	750
B. UPDATE: SINGLE BUSINESS ENTERPRISE AND JURISDICTIONAL VEIL PIERCING	752
III. LAPSE OF THE CORPORATE FORM AS A SOURCE OF DIRECTOR AND OFFICER LIABILITY	754
IV. AVOIDING EXTRA-CONTRACTUAL CLAIMS THROUGH THE EFFECTIVE USE OF NON-RELIANCE CLAUSES	755
V. CONCLUSION	765

I. INTRODUCTION

IN keeping with the approach we adopted in 2000, this Survey will review the Texas court decisions¹ from the previous year² that we believe are most relevant to the practice of corporate law in Texas.³

* Glenn D. West is a partner in the Corporate Department of Weil, Gotshal & Manges LLP in Dallas, Texas.

** W. Benton Lewis, Jr. is a student associate in the Corporate Department of Weil, Gotshal & Manges LLP in Dallas, Texas. Mr. West and Mr. Lewis express special thanks to S. Scott Parel, a partner in the Corporate Department of Weil, Gotshal and Manges LLP, for his thoughtful edits, and to Richard L. White, an associate in the Corporate Department of Weil, Gotshal & Manges LLP, for his editorial assistance.

1. As in previous years, this Survey has examined the decisions of Texas state courts, federal district and bankruptcy courts in Texas and the United States Court of Appeals for the Fifth Circuit. Since the scope of the Survey is limited to issues of Texas corporate law, we have not discussed purely federal corporate issues or federal or state securities law issues.

2. Although the 2008 Survey period formally runs between October 1, 2006 and September 30, 2007, we incorporated noteworthy cases decided as late as March 13, 2008.

3. See generally Glenn D. West & Emmanuel U. Obi, *Corporations*, 60 SMU L. REV. 885 (2007); Glenn D. West & Benton B. Bodamer, *Corporations*, 59 SMU L. REV. 1143 (2006); Glenn D. West & Sarah E. Stasny, *Corporations*, 58 SMU L. REV. 719 (2005); Glenn D. West & Adam D. Nelson, *Corporations*, 57 SMU L. REV. 799 (2004); Glenn D. West & Susan Y. Chao, *Corporations*, 56 SMU L. REV. 1395 (2003); Glenn D. West &

As in the past, our review encompasses not only traditional statutory corporate law issues, but also the Texas judiciary's willingness to ignore the statutorily mandated separateness of the corporate form to achieve equitable results. While veil piercing cases continue to comprise a large number of Texas corporate law decisions each year, the cases that assess liability against non-parties to corporate contracts based upon extra-contractual theories of liability are equally important, and must be fully appreciated and distinguished. In approaching these issues, we have organized our discussion into three parts.

First, Part II of this Survey examines judicial veil piercing. In the past, we have generally emphasized "*traditional*" veil piercing actions, which are governed by Article 2.21 of the Texas Business Corporation Act.⁴ This year, however, we highlight the reappearance of what courts and commentators have called "*reverse*" veil piercing actions.⁵ In Part II (A) we recount the history of Texas reverse veil piercing jurisprudence, and discuss two cases from this Survey period that grapple with its proper application. Our coverage of judicial veil piercing concludes in Part II (B) with a report on a Texas Supreme Court decision that reversed a lower court opinion we criticized in 2006 for its aggressive application of the dubious "single business enterprise" doctrine.

Next, Part III of this Survey reminds practitioners that judicial veil piercing and personal participation in conduct giving rise to extra-contractual claims do not constitute the only means by which corporate directors, officers, shareholders, or affiliates may be held legally responsible for the liabilities of a corporate entity. As we have warned in the past, the Texas Tax Code⁶ renders the directors and officers of a corporation individually liable for each debt that the company incurs after the corporation fails to pay franchise taxes, and forfeits its corporate charter as a result.

Finally, Part IV of this Survey examines recent Texas cases that address the enforceability of merger, disclaimer of reliance, and "as-is" clauses, which are designed to limit a contracting party's exposure to extra-contractual claims. Because extra-contractual tort claims can impose personal liability on the officers of corporations without judicially piercing the corporate veil, these provisions are vital to the preservation of the

Brandy L. Treadway, *Corporations*, 55 SMU L. REV. 803 (2002); Glenn D. West, *Corporations*, 54 SMU L. REV. 1221 (2001); Glenn D. West & Christopher M. Fairman, *Corporations*, 53 SMU L. REV. 773 (2000).

4. See TEX. BUS. CORP. ACT ANN. art. 2.21 § A (Vernon 2003); TEX. BUS. ORGS. CODE ANN. § 21.223(a)(2) (Vernon Supp. 2008). Note that for corporations formed on or after January 1, 2006, for corporations formed prior to January 1, 2006 that self-elect, and as of January 1, 2010, for all corporations, section 21.223-.225 of the Texas Business Organizations Code ("TBOC") replaces Article 2.21 as the controlling law. Because the requirements of the TBOC are identical to those of Article 2.21, however, the change does not affect the substance of the current law. See also *Formosa Plastics Corp. v. Kajima Int'l, Inc.*, 216 S.W.3d 436, 461 n.6 (Tex. App.—Corpus Christi 2006, pet. denied).

5. Gregory S. Crespi, *The Reverse Pierce Doctrine: Applying Appropriate Standards*, 16 J. CORP. L. 33, 34 (1990).

6. See TEX. TAX CODE ANN. § 171.255(a) (Vernon 2008).

corporate shield. By identifying the factors that courts emphasized as dispositive in these decisions, we hope that this discussion will help practitioners draft unassailable agreements capable of facilitating “walk-away deal certainty,” not only for the corporate obligor, but also for its officers.⁷

II. THE SANCTITY OF THE CORPORATE FORM IN TEXAS

Texas courts have consistently emphasized the importance of separating the liabilities of a corporation, on the one hand, from the liabilities of that corporation’s officers, directors, shareholders, and affiliates, on the other hand.⁸ During this Survey period, the Fifth Court of Appeals in Dallas recognized that it is a “bedrock principle of corporate law [in Texas] . . . that an individual can incorporate a business and thereby . . . shield himself from personal liability for the corporation’s contractual obligations.”⁹ Another Texas case from this Survey period acknowledged the tenet, “long embedded in [American law], that a parent corporation (or shareholder) is not liable for the acts of its subsidiary.”¹⁰

Nevertheless, as we have lamented in prior surveys, Texas judges have frequently exercised their equitable authority to “pierce the corporate veil,” and blur the long-recognized distinction between corporations and their shareholders or subsidiaries.¹¹ While Texas veil piercing jurisprudence has retreated from its most radical stage, set when the Texas Supreme Court held in *Castleberry v. Branscum* that a corporation’s contract creditors could recover against its shareholders wherever “recognizing the separate corporate existence would bring about an inequitable result,” courts have continued to apply various theories to render individuals or affiliated entities liable for corporate-level obligations.¹² And we believe that the continued recognition and application of the “single busi-

7. See Glenn D. West & Emmanuel U. Obi, *Avoiding Fraud and Other Extra-Contractual Claims: There May be More to the Deal than the Contract—2007*, 2007 MERGERS & ACQUISITIONS INST. 1 (2007); Glenn D. West, *Avoiding Extra-Contractual Claims in Portfolio Company Sales Transactions—Is “Walk-Away” Deal Certainty Achievable for the Seller?*, WEIL, GOTSHAL & MANGES LLP PRIVATE EQUITY ALERT (Mar. 2006), <http://www.weil.com>.

8. See West & Obi, *supra* note 3, at 886-87 (noting that “Texas courts have long purported to uphold the importance of the corporation as an entity separate and distinct from its officers, shareholders, and affiliates.”); Crespi, *supra* note 5, at 34.

9. Sparks v. Booth, 232 S.W.3d 853, 868 (Tex. App.—Dallas 2007, no pet.) (citing Willis v. Donnelly, 199 S.W.3d 262, 271 (Tex. 2006)).

10. *In re Moore*, 379 B.R. 284, 289 (Bankr. N.D. Tex. 2007) (citing United States v. Bestfoods, 524 U.S. 51 (1998)).

11. See *In re Morrison*, 361 B.R. 107 (Bankr. W.D. Tex. 2007); PHC-Minden, L.P. v. Kimberly-Clark Corp., 235 S.W.3d 163 (Tex. 2007); Formosa Plastics Corp. v. Kajima Int’l, Inc., 216 S.W.3d 436, 461-63 (Tex. App.—Corpus Christi 2006, pet. denied); PHC-Minden, L.P. v. Kimberly-Clark Corp., 202 S.W.3d 193 (Tex. App.—Tyler 2005), *rev’d*, 235 S.W.3d 163 (Tex. 2007); see also Crespi, *supra* note 5, at 34.

12. See *Castleberry v. Branscum*, 721 S.W.2d 270, 272-73 (Tex. 1986). During this Survey period, the First Court of Appeals in Houston extended state law principles for piercing the corporate veil to limited liability companies. See also *McCarthy v. Wani Venture, A.S.*, 251 S.W.3d 573 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

ness enterprise” theory in veil piercing cases threatens to return Texas to its most radical period.¹³

In the wake of *Castleberry* and its progeny, the Texas legislature acted to arrest the debilitating commercial uncertainty created by the Texas judiciary’s approach towards the sanctity of the corporate form, particularly with respect to contractual obligations.¹⁴ Now, under Article 2.21.A of the Business Corporation Act, a court may only hold a shareholder or affiliate liable for “any contractual obligation of the corporation or any matter relating to or arising from the obligation” on the basis of “alter ego” or “other similar theory” if the shareholder or affiliate has used the corporation to perpetrate an “actual fraud” for his or her “personal benefit.”¹⁵ Article 2.21.B reserves Article 2.21.A as the exclusive means by which Texas courts may impose corporate obligations on shareholders or affiliates.¹⁶ Accordingly, to hold the shareholders or affiliates of a corporation liable in “any matter arising out of or related to” a contractual obligation of that corporation, a plaintiff must prove that the shareholder or affiliate used that same corporation to perpetrate an “actual fraud” against a counterparty to the contract in furtherance of some direct “personal benefit.”¹⁷

A. REVERSE VEIL-PIERCING

Though initially reluctant, Texas courts have increasingly recognized Article 2.21 as the sole means of “*traditional*” veil piercing, at least in situations involving a direct, contractually created obligation.¹⁸ But during this Survey period, a series of cases addressed the more novel issue of “*reverse*” veil piercing, whereby “a corporate insider or a person with a claim against a corporate insider” attempts to treat the insider and the corporate entity as a single person for some purpose.¹⁹ Because reverse veil-piercing claims appear to fall outside the scope of Article 2.21, courts

13. See West & Obi, *supra* note 3, at 891-93; West & Bodamer, *supra* note 3, at 1145-53.

14. See TEX. BUS. CORP. ACT ANN. art. 2.21; TEX. BUS. ORGS. CODE ANN. §§ 21.223-.225; West & Chao, *supra* note 3, at 1396-97 (tracing amendments to Article 2.21, enacted to reverse judicial attempts to disregard the separateness of the corporate entity); Crespi, *supra* note 5, at 34.

15. TEX. BUS. CORP. ACT ANN. art. 2.21 § A; TEX. BUS. ORGS. CODE ANN. § 21.223(A)(2).

16. See TEX. BUS. CORP. ACT ANN. art. 2.21 § B; TEX. BUS. ORGS. CODE ANN. § 21.224.

17. TEX. BUS. CORP. ACT ANN. art. 2.21 § A; TEX. BUS. ORGS. CODE ANN. § 21.223 (A)(2). During this Survey period, the Fourteenth Court of Appeals in Houston reiterated that a plaintiff must present affirmative evidence of a tangible “personal benefit” to pierce the corporate veil in an action governed by Article 2.21 § A. A mere allegation will not suffice. See *Solutioneers Consulting, Ltd. v. Gulf Greyhound Partners, Ltd.*, 237 S.W.3d 379, 388-89 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

18. Texas courts have been less receptive to the application of Article 2.21 to “matters arising out of or related to” contractual obligations. See West & Obi, *supra* note 3, at 888-95; West & Bodamer, *supra* note 3, at 1146-53; West & Chao, *supra* note 3, at 1396-1408; West & Treadway, *supra* note 3, at 804-18; Crespi, *supra* note 5, at 55-56.

19. See generally *ASARCO LLC v. Ams. Mining Corp.*, 382 B.R. 49 (S.D. Tex. 2007); *Acceptance Indem. Ins. Co. v. Maltez, C.A. No. H-04-2222*, 2007 WL 2908433 (S.D. Tex.

have examined the attendant policy considerations to prescribe appropriate standards for their adjudication.²⁰

At least one commentator has recognized two distinct types of reverse veil piercing: “outsider” reverse veil piercing and “insider” reverse veil piercing.²¹ In an outsider reverse veil piercing claim, the creditors of a shareholder of a corporation attempt to execute upon the assets of that corporation in order to satisfy claims against such shareholder.²² In an insider reverse veil piercing claim, by contrast, a dominant shareholder or other controlling insider seeks to disregard the corporate form to “avail the insider of corporate claims against third parties,” or to shelter corporate assets from third party claims.²³ Accordingly, while insiders pursue insider reverse veil piercing claims over the objections of adversely affected third parties who dealt in good faith with the corporate entity (not the insider), insiders generally oppose outsider reverse veil piercing claims because they directly expose the assets of a corporate entity to the separate liabilities of shareholders.²⁴

1. *Outsider Reverse Veil Piercing*

Outsider reverse veil piercing actions invoke a different set of policy considerations than traditional or insider reverse veil piercing actions.²⁵ First, outsider reverse veil piercing “prevent[s] the shareholders of a corporation from shielding corporate assets from claims against a controlling insider,” and thereby impairs investors’ expectation that the corporation in which they invest will be insulated from the personal dealings of controlling shareholders.²⁶ But even where an outsider reverse veil piercing action may not affect a corporation’s other investors, this extreme remedy could “[pervert] established Bankruptcy Code priorities and state law creditor[s]’ rights provisions by putting creditors of an individual shareholder on a parity with creditors of the corporation.”²⁷ Generally, where a shareholder’s creditor seeks recourse (by choice or necessity) against the shareholder’s interest in the corporation, the creditor must attach the shareholder’s equity, and assume the shareholder’s subordinate position relative to the corporation’s creditors.²⁸ Outsider reverse veil piercing, however, permits a shareholder’s creditor to bypass equity, and share *pari*

Oct. 3, 2007); *In re Moore*, 379 B.R. 284 (Bankr. N.D. Tex. 2007); see also Crespi, *supra* note 5, at 35-37.

20. See Crespi, *supra* note 5, at 34, 37.

21. See, e.g., *id.* at 37-38.

22. See *id.* at 56. In the context of the parent-subsidary relationship, the reverse veil piercing remedy permits the creditors of a debtor parent corporation to target the assets of a non-debtor subsidiary to fulfill the parent corporation’s obligations. See *id.* at 55-56; see also *In re Moore*, 379 B.R. at 289-94.

23. Crespi, *supra* note 5, at 37-38; see also *ASARCO*, 382 B.R. at 66-67; *Acceptance Indem.*, 2007 WL 2908433, at *1, 4-6.

24. Crespi, *supra* note 5, at 37-38.

25. See *id.* at 64.

26. See *id.*

27. See *In re Moore*, 379 B.R. 284, 295 (Bankr. N.D. Tex. 2007).

28. See *id.*

passu with the corporation's pre-existing contract and tort creditors.²⁹ This allows a shareholder's individual creditors to benefit at the expense of the corporation's unsecured creditors.³⁰

Because neither the Texas Legislature nor the Texas Supreme Court has directly addressed the legal viability of outsider reverse veil piercing, a small number of intermediate appellate decisions offers a murky roadmap for the doctrine's application under Texas law.³¹ The Second Court of Appeals in Fort Worth first recognized outsider reverse veil piercing in its 1966 *American Petroleum Exchange, Inc. v. Lord* decision, which featured a judgment creditor's attempt to execute upon the property of a corporation in which the judgment debtor, individually and as trustee for his daughter, owned "the great majority" of the outstanding stock.³² Finding that the judgment debtor and the corporation were "one and the same" under the "alter ego" theory, the court emphasized that only "two or three" other individuals owned "very few shares" of the corporation's stock before affirming the trial court's decision to "disregard the corporate fiction," and subject the corporation to the debtor's individual liability.³³ Two marital property division cases from the same court comprise the balance of Texas reverse veil piercing case law,³⁴ each treating the assets and earnings of a corporation as belonging to an individual spouse.³⁵

In 1990, the Fifth Circuit cited the foregoing cases in *Zahra Spiritual Trust v. United States* to support the proposition that outsider reverse veil piercing was permissible upon a "finding that the individual (debtor) and the corporation should be treated as alter egos."³⁶ Nevertheless, because Texas would "not treat a corporation and an individual as [alter egos] unless the individual [had] some ownership interest in the corporation," the *Zahra* court ultimately remanded the case to determine whether the affected debtors' possible interest in a trust, which owned shares in the targeted corporation, sufficed to "equate them with shareholders for purposes of disregarding" the corporate fiction.³⁷ Since *Zahra*, the Fifth Circuit has "acknowledged" the availability of reverse veil piercing as an equitable remedy in Texas on at least three occasions, but has not re-

29. *See id.*

30. *See id.*

31. *See id.* at 292-95 for more information on the history of reverse veil piercing in Texas.

32. *See Am. Petroleum Exch., Inc. v. Lord*, 399 S.W.2d 213, 216-18 (Tex. App.—Fort Worth 1966, writ ref'd n.r.e.).

33. *See id.*

34. For Fifth Circuit decisions discussing reverse veil piercing under Texas law, see *Bollore S.A. v. Imp. Warehouse, Inc.*, 448 F.3d 317, 325 (5th Cir. 2006); *Schimmelpenninck v. Byrne*, 183 F.3d 347, 358 (5th Cir. 1999); *Permian Petroleum Co. v. Petroleos Mexicanos*, 934 F.2d 635, 644 (5th Cir. 1991); *Zahra Spiritual Trust v. United States*, 910 F.2d 240, 244 (5th Cir. 1990).

35. *See In re Moore*, 379 B.R. 284, 296 (Bankr. N.D. Tex. 2007); *Zisblatt v. Zisblatt*, 693 S.W.2d 944, 955 (Tex. App.—Fort Worth 1985, writ dismissed w.o.j.); *Dillingham v. Dillingham*, 434 S.W.2d 459, 462 (Tex. App.—Fort Worth 1968, writ dismissed w.o.j.).

36. *See Zahra*, 910 F.2d at 244.

37. *Id.*

cently applied the doctrine to resolve a dispositive issue.³⁸

Against this backdrop, we are encouraged that the United States Bankruptcy Court for the Northern District of Texas finally circumscribed Texas outsider reverse veil piercing jurisprudence during this Survey period.³⁹ In *In re Moore*, a Chapter Seven Trustee⁴⁰ (the “Trustee”) alleged that Mr. Moore, an individual debtor, whose wife owned 100% of JHM Properties, Inc. (“JHM”), which in turn owned 50% of Brunswick, Inc. (“Brunswick”), controlled and manipulated JHM, and therefore Brunswick, to defraud his creditors.⁴¹ Accordingly, the Trustee argued that Mr. Moore was the alter ego of both corporations, and the court should reverse pierce the veil of each, so that Mr. Moore’s creditors could access Brunswick’s assets to satisfy their claims against him.⁴²

After reciting the relevant Texas and Fifth Circuit case law, the bankruptcy court properly expressed concern that reverse veil piercing “has evolved and become accepted into the mainstream, starkly during a time when the Texas Legislature is limiting the availability of traditional veil piercing, and without meaningful discussion of what, in substance, the doctrine does (and can potentially do).”⁴³ Indeed, the opinion continued, “this court believes that reverse veil piercing—if generally applied without tight parameters—is a somewhat draconian remedy,” stressing the doctrine’s implications for the rights of corporate creditors.⁴⁴

Given the “absence of any Texas Supreme Court case clearly adopting reverse veil piercing” and the “absence of Texas or Fifth Circuit authority that clearly defines the specific parameters for its use,” the court imported a standard observed in other jurisdictions to limit the doctrine’s application.⁴⁵ Reverse veil piercing, the court held, “should only be applied when it is clear that it will not prejudice non-culpable shareholders or other stakeholders (such as creditors) of a corporation.”⁴⁶ The foregoing approach, the court concluded, “not only respects due process and established creditors’ rights principles, but also gives proper deference to the will of the Texas Legislature—*i.e.*, to impose a measured use of alter

38. See *In re Moore*, 279 B.R. at 294 (citing *Bollore*, 448 F.3d at 325; *Schimmelpenninck*, 183 F.3d at 358; *Permian Petroleum*, 934 F.2d at 644).

39. See *In re Moore*, 379 B.R. at 295-96.

40. The Chapter Seven Trustee brought suit against Mr. Moore, JHM and Brunswick on behalf of plaintiff creditors to enhance the value of the bankruptcy estate. *Id.* at 285-86.

41. See *id.* at 286-88 for a more comprehensive discussion of the relevant facts.

42. See *id.* at 285, 287-88. Beyond the threshold issue of whether the court could reverse pierce the veils of both corporations, the plaintiffs’ case required them to establish: (1) that Mr. Moore was a *de facto* shareholder of JHM because Mrs. Moore’s equity interest in the corporation was not her separate property; and (2) that JHM was the alter ego of Mr. Moore so that Mr. Moore, and not JHM, owned a *de facto* equity interest in Brunswick. See *id.* at 296.

43. *Id.* at 294.

44. *Id.* at 295.

45. *Id.* See also *Stoebner v. Lingenfelter*, 115 F.3d 576, 579-80 (8th Cir. 1997) (indicating that Minnesota has only recognized the doctrine of reverse corporate piercing in very limited circumstances; namely, when no shareholder or creditor would be adversely affected); *Scholes v. Lehmann*, 56 F.3d 750, 758 (7th Cir. 1995).

46. *In re Moore*, 379 B.R. at 295.

ego doctrine.”⁴⁷

Although unresolved issues of material fact precluded summary judgment,⁴⁸ we applaud the bankruptcy court’s recognition that Article 2.21 should restrict a judge’s discretion to disregard the corporate form, both traditionally and in reverse.⁴⁹ The *Moore* court articulated an unambiguous standard that defines a judge’s equitable power to reverse pierce the corporate veil.⁵⁰ Importantly, by limiting the availability of outsider reverse veil piercing to cases in which the remedy would not prejudice non-culpable stakeholders, the rule promotes commercial certainty, and precludes the type of collateral impact on unsuspecting parties contemplated in the insider reverse veil piercing case discussed below.⁵¹

2. *Insider Reverse Veil Piercing and Single Business Enterprise*

Without appropriate restrictions, insider reverse veil piercing can be as debilitating for commercial certainty as outsider reverse veil piercing.⁵² A case before the United States District Court for the Southern District of Texas during the Survey period illustrates the hazard that insider reverse veil piercing could present if permitted on the basis of the legally dubious “single business enterprise” theory.⁵³

As our prior Survey articles have explained, some intermediate appellate courts in Texas have employed the “single business enterprise” doctrine to pierce the veil separating affiliated corporations, and aggregate their respective activities to hold one such corporation liable for the debts of the other, or subject one corporation to litigation in the same jurisdictions as the other.⁵⁴ Courts have exposed corporations to the liabilities and jurisdictional contacts of their affiliates under this “single business enterprise” theory whereby a balance of factors suggests that the entities

47. *Id.* at 296.

48. The court identified the following factual issues as unresolved: (1) whether Mr. Moore was a *de facto* shareholder of JHM Properties, Inc.; (2) whether JHM Properties, Inc. was the alter ego of Mr. Moore, so that Mr. Moore and not JHM Properties, Inc. was the *de facto* equity interest owner of Brunswick; (3) whether plaintiff could demonstrate that Mr. Moore satisfied *Zahra’s* general standards for a finding of alter ego for purposes of reverse veil piercing; and (4) whether applying veil piercing against Brunswick would prejudice non-culpable shareholders or other stakeholders, such as creditors. *Id.* at 296-97.

49. *See id.* at 290-91, 296.

50. *See id.* Cf. *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 175 (Tex. 2007).

51. *See Acceptance Indem. Ins. Co. v. Maltez*, No. H-04-2222, 2007 WL 2908433, at *6-7 (S.D. Tex. Oct. 3, 2007); *In re Moore*, 379 B.R. at 296-96.

52. *Crespi*, *supra* note 5, at 50-51.

53. *See Acceptance Indem.*, 2007 WL 2908433, at *1, 4-7.

54. *See PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 202 S.W.3d 193, 200-203; *West & Obi*, *supra* note 3, at 891-93; *West & Bodamer*, *supra* note 3, at 1146-48. *But see Country Vill. Homes, Inc. v. Patterson*, 236 S.W.3d 413, 427 (Tex. App.—Houston [1st Dist.] 2007, pet. granted, judm’t vacated w.r.m.) (stating that the Texarkana Court of Appeals has emphasized that Article 2.21 controls all veil piercing claims founded in contract, so the “actual fraud” requirement of the statute applies) (citing *Texas-Ohio Gas, Inc. v. Mecom*, 28 S.W.3d 129, 137-38 (Tex. App.—Texarkana 2000, no pet.)).

integrated their resources in pursuit of a “common business purpose.”⁵⁵

In *Acceptance Indemnity Insurance Co. v. Maltez*, a judgment debtor corporation invoked single business enterprise principles as an insider to access the insurance policy of its affiliate, even though the judgment debtor was not specifically named on the policy as an insured.⁵⁶ The case involved an insurer’s (“Indemnity”) attempt to resolve a dispute with its named insured (“AAI”) regarding the scope of a policy covering AAI’s automotive repair business.⁵⁷ After an employee (“Maltez”) won a state court judgment against AAI’s separately-incorporated affiliate (“Salvage”) for injuries he suffered while working on the joint premises of the two entities, AAI and Salvage alleged that they constituted a single business enterprise, and therefore, the policy required Indemnity to indemnify Salvage for its losses.⁵⁸ There is no question that this same corporation would have vehemently objected if a creditor of its affiliate asserted that it and its affiliate were a single business enterprise for the purpose of assessing liability under a traditional veil piercing theory, and Article 2.21 would have aided this corporation in avoiding such result.⁵⁹

The court declined to grant summary judgment in favor of Indemnity because the parties had not settled dispositive factual issues, but properly cautioned that “it is a serious and questionable step to hold a party to any contract, let alone a contract in the complex arena of insurance, liable for the debt of another party with whom the original party had no contractual or tort relationship.”⁶⁰ After deferring decision on the applicability of the single business enterprise doctrine as alleged, the court inserted an instructive footnote that illustrated the subjectivity of “equity” as the basis for disregarding the corporate form:⁶¹

The uncertainty of application of the SBE [single business enterprise] doctrine in this context is highlighted by the fact that the doctrine is designed to prevent “inequitable results.” . . . The doctrine would appear to achieve its goal if liability is assigned to constituent members of an SBE, allowing an injured plaintiff to seek recovery from the enterprise as a whole. It is not clear, [however,] how requiring a non-SBE entity, such as an insurance company, to indemnify an SBE constituent, that was not a named insured under the

55. See West & Bodamer, *supra* note 3, at 1146-48 (noting that the “single business enterprise theory treats the sanctity of the corporate form as a mere balancing test between non-exhaustive, non-exclusive factors”); Marilyn Montano, Note, *The Single Business Enterprise Theory in Texas: A Singularly Bad Idea?*, 55 BAYLOR L. REV. 1163, 1176 (2003) (setting forth a list of factors that Texas courts consider in applying single business enterprise theory, including common employees, common offices, centralized accounting, common business names, common officers, common shareholders, and a common telephone number).

56. See *Acceptance Indem.*, 2007 WL 2908433, at *1, 5-6.

57. *Id.* at *1.

58. *Id.* at *5 (“a finding that two or more entities operated as [a single business enterprise] permits recovery against one entity for the debts and liabilities of another”).

59. See TEX. BUS. CORP. ACT ANN. art. 2.21 § A; TEX. BUS. ORGS. CODE ANN. § 21.223(a)(2).

60. See *Acceptance Indem.*, 2007 WL 2908433, at *7.

61. *Id.* at *6-7.

insurance contract, and whose risks may not have been considered during the underwriting process, furthers the goal of a narrow doctrine that is intended primarily to permit recovery from a wrongdoer.⁶²

Though the court did not expressly identify *Acceptance Indemnity* as an insider reverse veil piercing case, the opinion commendably considered the consequences of defendants' claim in the context of the malleable single business enterprise theory.⁶³ Indeed, because the single business enterprise doctrine only requires a showing that two or more entities integrated their resources to achieve a common business purpose, the doctrine, as a facility for insider reverse veil piercing, could empower nearly any affiliate of the separate corporate beneficiary of a contractual obligation to seek the benefits of that separate corporate beneficiary.⁶⁴

B. UPDATE: SINGLE BUSINESS ENTERPRISE AND "JURISDICTIONAL" VEIL PIERCING

While *Acceptance Indemnity* revealed the extent to which parties may seek to exploit the single business enterprise theory at the expense of unsuspecting third parties, another case decided during this Survey period illuminated the doctrine's dubious legality and unpredictable application under Texas law generally.⁶⁵ In *PHC-Minden v. Kimberly-Clark Corp.*, the plaintiff's estate asserted a wrongful death claim in Texas state court against Kimberly-Clark Corporation, alleging that Kotex tampons manufactured by Kimberly-Clark triggered the toxic shock syndrome that caused the plaintiff's death.⁶⁶ Kimberly-Clark filed a third-party petition in the same forum against PHC-Minden, L.P. ("Minden"), which owned the Louisiana hospital at which plaintiff sought treatment, claiming that Minden's negligence proximately caused the plaintiff's death.⁶⁷ Because Minden was a not a Texas resident and did not conduct business in Texas, Kimberly-Clark alleged that the court should impute the Texas contacts of Minden's parent, Province Health Care ("Province"), to Minden because Minden and Province constituted a single business enterprise. Therefore, Kimberly-Clark claimed that Minden could also be subject to the jurisdiction of a Texas court.⁶⁸

In a decision that we criticized in 2006, the Twelfth Court of Appeals in Tyler applied a malleable balancing test to determine that Province's operations in Texas could, in fact, be imputed to Minden, emphasizing the

62. *Id.* at *7 n.22 (internal citations omitted).

63. *See id.* at *5.

64. *See id.*

65. *See* *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 175 (Tex. 2007); *Olympia Capital Assocs., L.P. v. Jackson*, 247 S.W.3d 399, 412 (Tex. App.—Dallas 2008, no pet.); *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 202 S.W.3d 193, 200-03 (Tex. App.—Corpus Christi 2006), *rev'd*, 235 S.W.3d 163 (Tex. 2007); West & Bodamer, *supra* note 3, at 1146-48.

66. *PHC-Minden*, 235 S.W.3d at 165.

67. *Id.*

68. *Id.* at 165-66.

extent to which the entities shared control, offices, employees, accounting services, employee services, and profits and losses.⁶⁹ Stressing factors common to most parent-subsidiary relationships, the court disregarded the corporate form without indicating what, if anything, affiliated corporations could do in the future to avoid a similar result.⁷⁰

The Texas Supreme Court reversed, declaring that a finding of a single business enterprise, for purposes of “jurisdictional” veil piercing, requires proof of greater control than that which a parent typically exercises over its subsidiary.⁷¹ The court first cited its *Southern Union Co. v. City of Edinburg* decision to reiterate that the Texas Supreme Court has never endorsed the single business enterprise theory.⁷² Nevertheless, the supreme court held that the plaintiff in a jurisdictional veil piercing action must prove a “degree of control . . . greater than that normally associated with common ownership and directorship.”⁷³ The evidence, the court continued, “must show that the two entities cease to be separate so that the corporate fiction should be disregarded to prevent fraud or injustice.”⁷⁴ Accordingly, absent any “evidence of control other than that consistent with Province’s investor status . . . the court of appeals erred in imputing Province’s Texas contacts to Minden.”⁷⁵

Though we commend the Texas Supreme Court’s acknowledgment that common indicia of affiliation should not compel judges to eviscerate the corporate form, we remain concerned by the court’s refusal to clarify the legal legitimacy or application of the single business enterprise doctrine under Texas law.⁷⁶ Indeed, by consistently declining to decide whether the doctrine constitutes “a necessary addition to Texas law,”⁷⁷ the court provides little guidance to corporate planners regarding the extent to which entities may be accountable for the acts of their affiliates.⁷⁸

Compounding this ambiguity, the discretionary standard articulated by the *PHC-Minden* court reeks of *Castleberry* and the commercial uncertainty that it unleashed.⁷⁹ Just as practitioners could not confidently advise their clients when “recognizing the separate corporate existence would bring about an inequitable result,”⁸⁰ counsel will also have trouble

69. *Kimberly-Clark*, 202 S.W.3d at 200. See West & Bodamer, *supra* note 3, at 1146-48.

70. See *id.* at 200, 204.

71. *PHC-Minden*, 235 S.W.3d at 176-77.

72. *Id.* at 173 (citing *Southern Union Co. v. City of Edinburg*, 129 S.W.3d 74, 86-87 (Tex. 2003) (noting that the Texas Supreme Court has “never considered the ‘single business enterprise’ concept in any detail” and declining to decide “whether a theory of ‘single business enterprise’ is a necessary addition to Texas law regarding the theory of alter ego for disregarding corporate structure”)).

73. *Id.* at 175.

74. *Id.*

75. *Id.*

76. See *id.* at 173-75.

77. See *id.* at 174 (citing *Southern Union Co.*, 129 S.W.3d at 86-87).

78. See *id.*

79. See *id.* at 175; *Castleberry v. Branscum*, 721 S.W.2d 270, 272-73 (Tex. 1986); West & Chao, *supra* note 3, at 1396-97.

80. See *Castleberry*, 721 S.W.2d at 272-73.

determining what degree of control is “greater than that normally associated with common ownership and directorship,”⁸¹ such that “the corporate fiction should be disregarded to prevent fraud or injustice”⁸² under *PHC-Minden*.

III. LAPSE OF THE CORPORATE FORM AS A SOURCE OF DIRECTOR AND OFFICER LIABILITY

The cases discussed in the foregoing paragraphs examined judicial veil piercing; namely, the application of a court’s equitable authority to conflate the claims, liabilities, or jurisdictional contacts of a corporation and its shareholders or affiliates. As we have warned in prior surveys, however, a corporation’s failure to comply with certain legislative requirements may trigger the *statutory* disintegration of the corporate veil, leaving directors and officers with no barrier to shield them from the liabilities of the entity.⁸³

Section 171.255 of the Texas Tax Code imposes liability on the directors and officers of a corporation that has forfeited its corporate privileges⁸⁴ “for each debt of the corporation that is created or incurred in [Texas] after the date on which [a] report, tax, or penalty is due [under the statute] and before the privileges are revived.”⁸⁵ Once a corporation has forfeited its corporate privileges, “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 was a partnership.”⁸⁶

In light of this risk, we are pleased that the Fifth Court of Appeals in Dallas clarified the limits of the statute’s application during this Survey period.⁸⁷ *PACCAR Financial Corp. v. Potter* raised the question of whether liability under the Tax Code provision extends to individuals who served as directors and officers of a corporation when the corporation failed to timely file its tax report, but resigned before the disputed debt was created or incurred.⁸⁸ In *Potter*, plaintiff PACCAR, a financial corporation, alleged that two former officers and directors (“the Potters”) of an accounting firm were liable for various contract claims that arose after the Potters relinquished their positions on the board of directors of PACCAR.⁸⁹ Because the Potters held their board seats on the date that

81. See *PHC-Minden*, 235 S.W.3d at 172-75.

82. *Id.* at 175.

83. See TEX. TAX CODE ANN. § 171.255(a); *In re Trammell*, 246 S.W.3d 815, 821-22 (Tex. App.—Dallas 2008, no pet.); *PACCAR Fin. Corp. v. Potter*, 239 S.W.3d 879, 880 (Tex. App.—Dallas 2007, no pet.); West & Chao, *supra* note 3, at 1399-1401.

84. Under section 171.251 of the Texas Tax Code, the state comptroller may forfeit the privileges of a corporation to transact business in the state if such corporation does not timely file a required report or pay taxes due under the statute. TEX. TAX CODE ANN. § 171.251.

85. West & Chao, *supra* note 3, at 1399-1400 (citing TEX. TAX CODE ANN. § 171.255(a)).

86. *Trammell*, 246 S.W.3d at 822 (citing TEX. TAX CODE ANN. § 171.255(b)).

87. See *Potter*, 239 S.W.3d at 881-83.

88. *Id.* at 881.

89. *Id.*

the franchise report became delinquent, PACCAR argued that the statute required the court to hold the Potters individually liable for the asserted claims.⁹⁰

The court rejected PACCAR's theory, explaining that the legislature designed the provision to penalize directors for permitting a delinquent corporation to create or incur debts, not to punish tardy filings.⁹¹ "It is the act of creating or incurring a debt when the franchise report is delinquent that triggers personal liability once the corporate privileges are forfeited."⁹² According to the court, "the legislature intended that personal liability [attach] only to those directors and officers 'of the corporation' at the time the debt is created or incurred" because those directors "abused the corporate privilege," and are, therefore, "culpable."⁹³

Beyond its interpretation of section 171.255, PACCAR serves as an important reminder that practitioners must ensure that their corporate clients take all necessary precautions to avoid the statutory imposition of liability on directors, officers, shareholders, and affiliates.⁹⁴

IV. AVOIDING EXTRA-CONTRACTUAL CLAIMS THROUGH THE EFFECTIVE USE OF NON-RELIANCE CLAUSES

Failure to perform a contractual promise under Texas law generally renders the non-performing party liable only for breach of contract damages, which courts typically confine to the benefit that the non-breaching party would have derived from full performance of the agreement. Indeed, cognizant that parties to sophisticated commercial transactions diligently allocate the attendant risks, courts are reluctant to subject private agreements to "readjustment by judges and juries"⁹⁵ under the less predictable principles of tort law.⁹⁶

Against parties' interest in establishing their rights and obligations by contract, however, courts have balanced "the perceived public policy need to avoid treating a contract that was procured 'by fraud [as] simply another contract dispute.'"⁹⁷ Accordingly, while "mere nonfeasance under a contract creates liability only for breach of contract,"⁹⁸ a "contractual promise made with no intention of performing may give rise to an action for fraudulent inducement,"⁹⁹ because "the duty not to induce 'another to enter into a contract through the use of [fraud] . . . is separate

90. *Id.* at 882.

91. *Id.* at 883.

92. *Id.*

93. *Id.*

94. *See id.* at 881-83.

95. *See Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 306 (Tex. 2006)

96. *See West & Obi, supra* note 3, at 896.

97. *West & Obi, supra* note 3, at 896.

98. *Lookshin v. Union Planters Bank*, No. H-05-3834, 2006 WL 3147330, at *10 (S.D. Tex. 2006 Oct. 30, 2006) (quoting *Crawford v. Ace Sigh, Inc.* 417 S.W.2d 12, 13 (Tex. 1996)).

99. *See Tony Gullo*, 212 S.W.3d at 304.

and independent from the duties established by the contract itself.’”¹⁰⁰ Therefore, “if one makes a promise in a written agreement, any subsequent breach is simply a breach of contract.”¹⁰¹ But “if one makes a promise that induces someone to enter into a contract in which that promise is memorialized, personal liability for fraud may exist.”¹⁰² As a result, the Texas Supreme Court has held that tort damages are “recoverable for a fraudulent inducement claim irrespective of whether the fraudulent representations are later subsumed in [the] contract.”¹⁰³

Beyond its implications for both freedom of contract and commercial certainty, the imposition of tort liability in a contractual dispute threatens serious consequences for non-performing parties.¹⁰⁴ First, while prevailing contract claimants are generally entitled only to the “benefit of their bargain,” a successful tort plaintiff may recover exemplary or punitive damages “in excess of the actual damages the aggrieved party sustained.”¹⁰⁵ Moreover, courts may hold corporate officers, even those acting solely in their occupational capacities, personally liable for any tortious conduct in which they directly participated on behalf of their employers.¹⁰⁶ As we have reminded practitioners in prior surveys, it is not necessary to pierce the corporate veil to impose liability on a corporate officer if a tort plaintiff can demonstrate that the corporate officer knowingly participated in the wrongdoing.¹⁰⁷ And that wrongdoing may be as simple as negligently failing to schedule an appropriate exception to a contractual representation that is later judged to have induced the formation of the contract.¹⁰⁸

100. See West & Bodamer, *supra* note 3, at 1157 (quoting *Formosa Plastics Corp. v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 46 (Tex. 1998)). In *Thompson Advisory Group, Inc. v. First Horizon National Corporation*, decided during this Survey period, the United States District Court for the Northern District of Texas held that “allowing for the recovery of fraud damages sounding in tort only when a plaintiff suffers an injury that is distinct from the economic losses recoverable under a breach of contract claim is inconsistent with well-established law.” *Thompson Advisory Group v. First Horizon Nat'l Corp.*, No. 3:07-CV-0683-G, 2007 WL 2284352, at *3 (N.D. Tex. Jul. 6, 2007). Accordingly, the court held that “if a plaintiff presents legally sufficient evidence on each of the elements of a fraudulent inducement claim, any damages suffered as a result of the fraud sound in tort.” *Id.*

101. West & Obi, *supra* note 3, at 896.

102. *Id.*

103. *Formosa*, 960 S.W.2d at 47.

104. See *Morris v. Kohls-York*, 164 S.W.3d 686, 695 (Tex. App.—Austin 2005, pet. dismissed); *Centurion Planning Corp. v. Seabrook Venture II*, 176 S.W.3d 498, 509 (Tex. App.—Houston [1st Dist.] 2005, no pet.); *Glattly v. CMS Viron Corp.*, 177 S.W.3d 438, 448 (Tex. App.—Houston [1st Dist.] 2005, no pet.); West & Bodamer, *supra* note 3, at 1157 (citing *Ennis v. Loiseau*, 164 S.W.3d 698, 707-08 (Tex. App.—Austin 2005, no pet.)). See also *Gen. Elec. Capital Corp. v. Posey*, 415 F.3d 391 (5th Cir. 2005)).

105. See *Whitney Nat'l Bank v. Air Ambulance By B& C Flight Mgmt., Inc.*, No. H-04-2220, 2007 WL 3145788, at *13 (S.D. Tex. Oct. 25, 2007); West & Obi, *supra* note 7, at 2.

106. See, e.g., *Alexander v. Lincare, Inc.*, No. 3:08-CV-1137-D, 2007 WL 4178592, at *3 (N.D. Tex. Nov. 27, 2007); see also West & Bodamer, *supra* note 3, at 1157.

107. See *Walker v. Anderson*, 232 S.W.3d 899, 918-19 (Tex. App.—Dallas 2007, no pet.) (citing *Kingston v. Helm*, 82 S.W.3d 755, 758 (Tex. App.—Corpus Christi 2002, pet. denied)); see also West & Stasny, *supra* note 3, at 726; West & Nelson, *supra* note 3, at 804; West & Chao, *supra* note 3, at 1403; West & Treadway, *supra* note 3, at 811.

108. See West & Obi, *supra* note 7, at 6-8; West & Bodamer, *supra* note 3, at 1158-60.

Given the risk associated with tort liability, sophisticated contracting parties have sought to mitigate or eliminate their extra-contractual damages in search of “walk-away deal certainty.”¹⁰⁹ Because fraudulent inducement actions require proof that the plaintiff relied on the relevant misrepresentation or failure to disclose, contracts often include “merger” or “disclaimer of reliance” clauses, which exclude extra-contractual representations from the scope of the parties’ agreement, and thereby defeat the “reliance” element of a fraudulent inducement claim as a matter of law.¹¹⁰

Texas law respects the “power of contracting parties to create contractual provisions that disclaim reliance on prior representations or promises.”¹¹¹ But “fraud in the inducement prevents a contract, including merger [clauses] and disclaimers of reliance, from coming into being.”¹¹² The Texas Supreme Court reconciled these seemingly contradictory principles in *Schlumberger Tech. Corp. v. Swanson*, when it held that “the contract and the circumstances surrounding its formation determine whether [a] disclaimer of reliance is binding.”¹¹³ If the contract and attendant circumstances “evinced clear and specific intent to disclaim reliance on prior representations, then the element of reliance in a fraudulent inducement claim is negated as a matter of law.”¹¹⁴

So-called “as-is” clauses, which stipulate a buyer’s agreement to purchase property in its current condition without any related assurances

109. See West & Obi, *supra* note 3, at 895-96; West & Bodamer, *supra* note 3, at 1160.

110. See West & Obi, *supra* note 7, at 8. See also *Springs Window Fashions Div., Inc. v. Blind Maker, Inc.*, 184 S.W.3d 840, 870-71 (Tex. App.—Austin 2006, pet. granted, judgment vacated w.s.m.) (“By contractually ‘canceling’ all pre-[contract] ‘agreements, negotiations, commitments and understandings’ and ‘superseding’ them with the [contract], a merger clause . . . [amounts] to a disclaimer of the existence of pre-contract agreements, promises or representations and any right of the parties to rely upon them.”).

111. See West & Bodamer, *supra* note 3, at 1160 (citing *Steinberg v. Brennan*, No. 3:03-CV-0562, 2005 WL 1837961, at *3 (N.D. Tex. July 29, 2005)); see also *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 177-80 (Tex. 1997).

112. See *id.* During this Survey period, however, the Fourth Court of Appeals in San Antonio supported its refusal to enforce a merger clause under *Schlumberger* by expressing concern that “if [seller] is correct in its argument that the merger clause precludes [buyer’s] fraud claims because it negates the element of reliance, ‘there could never be a cause of action for fraud in the sale of real estate unless the misrepresentation were contained in the deed itself.’” *San Antonio Props., L.P. v. PSRA Invs., Inc.*, 255 S.W.3d 255, 262 (Tex. App.—San Antonio 2008, pet. filed) (citing *ECC Parkway Joint Venture v. Baldwin*, 765 S.W.2d 504, 512 (Tex. App.—Dallas 1989, writ denied)).

113. *Schlumberger*, 959 S.W.2d at 179.

114. *Steinberg*, 2005 WL 1837961 at *3 (citing *Schlumberger*, 959 S.W.2d at 179). New York law approaches the enforceability of merger clauses similarly. New York courts focus on the “extent to which a merger clause was expressly negotiated by sophisticated parties using specific language or whether it was merely a general clause or standard clause.” To defeat a fraud claim, “a merger clause must disclaim reliance on the representation that allegedly induced [a party] to enter into the agreement.” And the “language of the merger clause must directly relate to the specific misrepresentations which form the basis of the fraud claim.” *Superior Technical Res., Inc. v. Lawson Software, Inc.*, No. 2003-10104, 2007 WL 4291575, at *10-11 (N.Y. Sup. Dec. 7, 2007) (citing *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 320 (1959); *Citibank, N.A. v. Plapinger*, 66 N.Y.2d 90, 95 (1985); *Homestead Dev. Corp. v. Ayres*, 244 A.D.2d 928, 928 (N.Y. App. Div. 1997); *Sugar Ctr. Stores, Inc. v. Pitts*, 198 A.D.2d 833, 834 (N.Y. App. Div. 1993)).

from the seller, operate similarly under Texas law, permitting parties to “contractually allocate the risk inherent in their respective transactions” in pursuit of “walk-away deal certainty.”¹¹⁵ Logically, then, Texas jurisprudence regarding the enforceability of as-is causes parallel that of merger clauses and disclaimers of reliance, emphasizing the parties’ intentions as revealed through the words and context of their agreements.¹¹⁶ According to the Texas Supreme Court in its influential *Prudential v. Jefferson Associates* decision, “a buyer’s affirmation and agreement that he is not relying on representations by the seller should be given effect” where “the ‘as-is’ clause is an important part of the basis of the bargain, not an incidental or ‘boiler-plate’ provision, and is entered into by parties of relatively equal bargaining position.”¹¹⁷

During this Survey period, Texas courts generally interpreted *Schlumberger* and *Prudential* narrowly to preclude enforcement of merger, disclaimer of reliance, and as-is clauses.¹¹⁸ This reverses a trend that we noted in prior Surveys.¹¹⁹ And in the context of corporate contracts, this reversal heightens the risk that the officers who negotiate these agreements will face personal liability.

In *In re the Heritage Organization, LLC*, the United States Bankruptcy Court for the Northern District of Texas incorrectly asserted that Texas courts have only enforced merger and disclaimer of reliance clauses in cases that are factually similar to *Schlumberger*.¹²⁰ The trustee, defen-

115. See West & Obi, *supra* note 7, at 15 (citing *Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156, 162 (Tex. 1995)). Note that while as-is clauses and disclaimers of reliance are conceptually distinct, they intersect under Texas law to the extent that *Prudential* deems an otherwise enforceable as-is clause unenforceable if the seller fraudulently induced the buyer into assenting to the clause, unless the contract also included a disclaimer of reliance that is enforceable under *Schlumberger*. See *San Antonio Props.*, 255 S.W.3d at 216-62; *Warehouse Assocs. Corp. Ctr. II, Inc. v. Celotex Corp.*, 192 S.W.3d 225, 232-33 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

116. See *Prudential*, 896 S.W.2d at 162. See also *Lim v. Baker*, No. 04-06-00703-CV, 2007 WL 4180153, at *5-6 (Tex. App.—San Antonio 2007, no pet.); *Chesson v. Hall*, No. H-01-315, 2007 WL 1964538, at *18-19 (S.D. Tex. Jul. 3, 2007); *Kupchynsky v. Nardiello*, 230 S.W.3d 685, 696-97 (Tex. App.—Dallas 2007, pet. filed); *Fryar v. Mees*, No. 10-06-00135, 2007 WL 1218221, at *2 (Tex. App.—Waco Apr. 25, 2007, no pet.); *Gym-N-I Playgrounds v. Snider*, 220 S.W.3d 905, 911-13 (Tex. 2007).

117. *Prudential*, 896 S.W.2d at 162.

118. See *Whitney Nat’l Bank v. Air Ambulance By B&C Flight Mgmt., Inc.*, No. H-04-2220, 2007 WL 3145788, at *7-8 (S.D. Tex. Oct. 25, 2007); *Gen. Retail Serv., Inc. v. Wireless Toyz Franchise, LLC*, 225 F. App’x 775, 790-91 (5th Cir. 2007); *Mansfield Heliflight, Inc. v. Bell/Agusta Aerospace Co.*, 507 F. Supp. 2d 638, 648-49 (N.D. Tex. 2007); *In re The Heritage Org., LLC*, 375 B.R. 230, 263-66 (Bankr. N.D. Tex. 2007); *Garza v. State and County Mut. Fire Ins. Co.*, No. 2-06-202-CV, 2007 WL 1168468, at *5-7 (Tex. App.—Fort Worth Apr. 19, 2007, pet. denied); *Chesson*, 2007 WL 1964538, at *20-26; *Kupchynsky*, 230 S.W.3d at 690-91. *But see Lim*, 2007 WL 4180153 at *4-7; *Fryar*, 2007 WL 1218221 at *2-3; *Jacuzzi, Inc. v. Franklin Elec. Co., Inc.*, No. 3:07-CV-1090-D, 2008 WL 190319, at *4-5 (N.D. Tex. Jan 22, 2008); *Morgan Bldgs. & Spas, Inc. v. Humane Soc’y of Se. Tex.*, 249 S.W.3d 480, 490 (Tex. App.—Beaumont 2008, no pet.).

119. See West & Obi, *supra* note 3, at 901-06; West & Bodamer, *supra* note 3, at 1161-66.

120. See *Heritage*, 375 B.R. at 265 n.50. See also *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 180 (Tex. 1997) (The *Schlumberger* court emphasized the following factors in deciding to enforce the disclaimer clause at issue: (1) the parties were attempting to put

dant, and debtor (“Heritage”) in *Heritage* proposed an amended plan of reorganization in a Chapter 11 proceeding that featured an offer to settle a majority of the litigation then pending against Heritage, including the fraudulent inducement action of one claimant.¹²¹ In the Fifth Circuit, a bankruptcy court may only approve such a settlement if it is “fair and equitable and in the best interest of the estate,” considering, among other factors, the probability that the debtor defendant would have prevailed on the merits in the relevant litigation.¹²² Accordingly, the fraudulent inducement action required the court to evaluate the strength of Heritage’s defense that a merger clause in the disputed agreement barred the plaintiff customer’s claim as a matter of law.¹²³

Plaintiff alleged that Heritage, a developer of complex estate and tax planning strategies for “high net-worth” individuals, falsely represented that its schemes “[were] legal,” and that the IRS had not indicated interest in, or skepticism regarding, the Heritage products, which representations fraudulently induced plaintiff into purchasing debtor’s advice.¹²⁴ Heritage contended in its defense that the “waiver,” “release,” “merger,” and “reliance disclaimer” provisions of the contract between plaintiff and Heritage defeated the reliance element of the plaintiff’s claim.¹²⁵

The bankruptcy court summarily dismissed Heritage’s contention that the various disclaimer clauses barred plaintiff’s claim, concluding that the plaintiff would likely prevail in its fraudulent inducement action under *Schlumberger*.¹²⁶ The court grounded its analysis on the faulty premise that “the general rule [in Texas is] that [merger and reliance disclaimer] clauses . . . can be avoided by proof of fraud in the inducement, and the parol evidence rule does not bar proof of such fraud.”¹²⁷ Consequently, the court effectively presumed that the provisions were invalid, requiring Heritage to “carve around this general rule” by affirmatively establishing that the *Schlumberger* “exception” applied.¹²⁸

The bankruptcy court then argued that Texas state courts, unlike federal courts within the Fifth Circuit, “appear to require facts similar to *Schlumberger* before concluding that a fraudulent inducement claim has been contracted away” under the “exception.”¹²⁹ While some Texas

an end to their deal; (2) highly competent and able legal counsel represented both parties; (3) the parties were dealing at arm’s length; (4) the parties were knowledgeable and sophisticated business players; and (5) the parties signed the release in the context of an adversarial dispute); *accord* Steinberg v. Brennan, No. 3:03-CV-0562, 2005 WL 1837961, at *4 (N.D. Tex. July 29, 2005).

121. *Heritage*, 375 B.R. at 238.

122. *Id.* at 259-60.

123. *See id.* at 263-64.

124. *Id.* at 250-51.

125. *Id.* at 263.

126. *Id.* at 263-66.

127. *Id.* (citing *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 179-81 (Tex. 1997)).

128. *Id.* at 263.

129. *Id.* at 264-65 (citing *Coastal Bank SSB v. Chase Bank of Tex., N.A.*, 135 S.W.3d 840 (Tex. App.—Houston [1st Dist.] 2004, no pet.)); *see generally* Carousel’s Creamery,

courts have improperly applied *Schlumberger* only in factually analogous cases, those facts are not a pre-requisite to the enforceability of a merger or disclaimer provision in Texas state court.¹³⁰ Indeed, less than three weeks before *Heritage*, for example, the Fifth Court of Appeals in Dallas acknowledged in *ISG State Operations, Inc. v. National Heritage Insurance Co.* that “nothing in the [*Schlumberger*] opinion suggests its analysis is limited to settlement agreements.”¹³¹ Although *Schlumberger* “did spend considerable time discussing the parties’ dispute and settlement,” the court of appeals continued, “it did so in light of the requirement that ‘the contract and the *circumstances surrounding its formation* determine whether the disclaimer of reliance is binding.’”¹³²

Having chosen the Texas courts’ allegedly “narrower interpretation of the circumstances under which a prospective reliance disclaimer is enforced,” the bankruptcy court read *Schlumberger* to be a “fact-sensitive ruling,” and thus inferred that it was “unlikely that [*Heritage*] could prevail on a motion for summary judgment.”¹³³ Without even considering the relevant facts, the bankruptcy court concluded that “in light of [*Heritage*’s] failure to refute [plaintiff’s] factual contentions, relying instead on the [waiver and disclaimer of reliance provisions] . . . it appears there is a substantial likelihood that [plaintiff] would prevail on [its] fraudulent inducement claims”¹³⁴

Ultimately, the *Heritage* court failed to balance the concern that enforcing merger and disclaimer clauses would encourage fraudulent inducement against the competing need to ensure that parties may “bargain

LLC v. Marble Slab Creamery, Inc., 134 S.W.3d 385 (Tex. App.—Houston [1st Dist.] 2004, pet. dismissed by agr.); Woodlands Land Dev. Co., L.P. v. Jenkins, 48 S.W.3d 415 (Tex. App.—Beaumont 2001, no pet.); Yzaguirre v. KCS Res., Inc., 47 S.W.3d 532 (Tex. App.—Dallas 2000), *aff’d* 53 S.W.3d 368 (Tex. 2001); Fletcher v. Edwards, 26 S.W.3d 66 (Tex. App.—Waco 2000, pet. denied).

130. Steinberg v. Brennan, No. 3:03-CV-0562, 2005 WL 1837961, at *4 (N.D. Tex. July 29, 2005). See, e.g., Morgan Bldgs. & Spas., Inc. v. Humane Soc’y of Se. Tex., 249 S.W.3d 480, 490 (Tex. App.—Beaumont 2008, no pet. h.); ISG State Operations, Inc. v. Nat’l Heritage Ins. Co., 234 S.W.3d 711, 721-22 (Tex. App.—Eastland 2007, pet. denied); *Coastal Bank SSB*, 135 S.W.3d at 843-44 (absent any reference to the specific facts of *Schlumberger*, the court held that “[t]he circumstances surrounding the formation of the contract here and the nature of the disclaimers included in both the [pre-contract memorandum] and the contract persuade us that [plaintiff’s] reliance on [defendant’s] statement . . . was not justified.”). While the “particular constellation of facts that appeared in *Schlumberger*” is not required to enforce a merger or disclaimer of reliance clause under Texas law, courts will not likely enforce such a provision in cases where none of the relevant factors is present. See Farnham v. Electrolux Home Care Prods., Ltd., 527 F. Supp. 2d 584, 588-89 (W.D. Tex. 2007).

131. *ISG*, 234 S.W.3d at 721-22 (citing *Coastal Bank*, 135 S.W.3d at 844-45, which applied *Schlumberger* to resolve a dispute over a bank syndicate agreement); Ikon Office Solutions, Inc. v. Eifert, 125 S.W.3d 113, 128 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (applying *Schlumberger* to resolve a dispute over an acquisition and employment agreement); *Woodlands*, 48 S.W.3d at 420-22 (applying *Schlumberger* to resolve a dispute over a real estate contract).

132. *ISG*, 234 S.W.3d at 721-22 (emphasis in original).

133. *Heritage*, 375 B.R. at 265.

134. *Id.* at 266.

for and obtain a release barring all further dispute[s].”¹³⁵ By limiting *Schlumberger* to its particular facts, *Heritage* and the cases that it purported to follow could restrict the prospect of “walk-away deal certainty” to settlement agreements under specific circumstances, and thereby obstruct the very policy that *Schlumberger* sought to advance.¹³⁶

While other courts applied *Schlumberger* to contracts other than settlement agreements during this Survey period, these decisions generally required that the disputed provisions be specifically tailored and visually prominent.¹³⁷ In *Mansfield Heliflight v. Bell/Agusta Aerospace Co.*, for example, the United States District Court for the Northern District of Texas declined to enforce a merger clause that excluded extra-contractual “representations” because the provision did “not clearly express an intent to waive fraudulent inducement claims and [did] not expressly disclaim reliance on representations about specific matters in dispute.”¹³⁸ Indeed, though the parties appeared to be sophisticated and to have bargained at arm’s length, the court limited its inquiry to the language of the merger clause, which it construed narrowly.¹³⁹ The same court concluded in *Netknowledge Technologies, Inc. v. Rapid Transmit Technologies, Inc.* that an arbitrator did not “manifestly disregard the law” when the arbitrator determined that a boilerplate merger clause, buried in a lengthy paragraph titled “Miscellaneous,” did not bar a plaintiff’s fraudulent inducement claim.¹⁴⁰ And the Fourth Court of Appeals in *San Antonio Properties, L.P. v. PSRA Investments, Inc.* similarly refused to enforce a merger clause that was one of eighteen unrelated agreements in a section

135. See *id.* at 264 (citing *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.3d 171, 179 (Tex. 1997)).

136. See *id.*

137. See *Gen. Retail Serv., Inc. v. Wireless Toyz Franchise, LLC*, F. App’x 775, 790-91 (5th Cir. 2007); *Mansfield Heliflight, Inc. v. Bell/Agusta Aerospace Co.*, 507 F. Supp. 2d 638, 648-49 (N.D. Tex. 2007); *Netknowledge Tech. v. Rapid Transmit Tech.*, No. 3:02-CV-2406-M, 2007 WL 518548 (N.D. Tex. Feb. 20, 2007). See also *West & Obi*, *supra* note 3, at 901-06; *West & Bodamer*, *supra* note 3, at 1161-66. It is also important that merger clauses do not include the very extra-contractual representations that practitioners intend them to exclude. During this Survey period, the United States District Court for the Southern District of Texas declined to enforce a merger clause because the provision implicitly incorporated a series of fraudulent extra-contractual representations in the “final agreement.” Therefore, the court held, the parties did not intend to preclude reliance on the fraudulent representations under *Schlumberger*. See *Whitney Nat’l Bank v. Air Ambulance by B&C Flight Mgmt., Inc.*, No. H-04-2220, 2007 WL 3145788, at *4-7 (S.D. Tex. Oct. 25, 2007).

138. *Mansfield*, 507 F. Supp. 2d at 649. But see *Wireless Toyz*, 255 F. App’x at 791 (a “merger clause itself does not have to explicitly mention or refer to prior representations, so long as the entire agreement as a whole indicates that there was a clear, unequivocal disclaimer of reliance.”).

139. *Mansfield*, 507 F. Supp. 2d at 648-49. The facts of the case did not indicate whether both parties were represented by counsel.

140. *Netknowledge*, 2007 WL 518548, at *5. See also *Kupchynsky v. Nardiello*, 230 S.W.3d 685, 690-91 (Tex. App.—Dallas 2007, pet. filed), for a similar disposition of an as-is clause under *Prudential*. But see *Owens v. Mercedes Benz USA, LLC*, 541 F. Supp. 2d 869, 862 (N.D. Tex. 2008) (holding that a fraudulent inducement plaintiff must produce something more than a copy of the standard form contract that set forth a disputed “as-is” provision to demonstrate that the provision is ineffective to negate causation—for example, evidence that he lacked relative sophistication).

entitled “Buyer and Seller Agree to the following,” and did not “specifically and expressly disclaim reliance on any representations regarding the subject-matter of the [agreement].”¹⁴¹

Given the stringency of the foregoing decisions, we are pleased that the United States District Court for the Northern District of Texas adopted a broader interpretation of *Schlumberger* near the end of this Survey period to enforce a merger provision and separately stipulated disclaimer of reliance.¹⁴² In *Jacuzzi, Inc. v. Franklin Electric Co.*, plaintiff licensor (“Jacuzzi”) alleged that defendant licensee (“Franklin”) fraudulently induced Jacuzzi into granting Franklin the exclusive right to promote and sell Jacuzzi’s underground water pumps by failing to disclose its plans to develop a competing product and by misrepresenting the value of the sales on which it projected Jacuzzi would receive royalty payments.¹⁴³ Franklin filed a motion under Federal Rule 12(b)(6) to dismiss Jacuzzi’s action, maintaining that Jacuzzi had waived reliance on Franklin’s extra-contractual representations when it acceded to the license agreement’s merger and disclaimer clauses, set forth below:

MERGER CLAUSE (title and emphasis added): This Agreement supercedes (sic) all prior agreements and understandings of the [parties] regarding the Licensed Marks in the Territories and it contains the entire understanding between the [parties] with respect thereto. DISCLAIMER OF RELIANCE (title and emphasis added): The Parties are relying solely on the representations made in the Agreement and not upon any representations made prior to the date hereof by, but not limited to, any employee or agent of the Parties.¹⁴⁴

Applying *Schlumberger*, the district court determined that the disputed provisions “clearly and unequivocally [waived] reliance on extrinsic representations related to anticipated sales of Jacuzzi brand pumps.”¹⁴⁵ Unlike the bankruptcy court in *Heritage*, the district court correctly recognized that “both Texas and federal courts have applied the principles of *Schlumberger* to contracts other than [settlement agreements] in holding that a disclaimer (of) reliance precludes a fraudulent inducement claim.”¹⁴⁶ The district court then reviewed state and federal cases enforce-

141. *San Antonio Props., L.P. v. PSRA Invs., Inc.*, 255 S.W.2d 255, 262 (Tex. App.—San Antonio 2008, pet. filed). The court also noted that the agreement “represented the beginning of the parties’ relationship and not its end” to contrast the disputed provision from that enforced in *Schlumberger*. But the court did not state or indicate that *Schlumberger* was limited to its particular facts.

142. *See Jacuzzi, Inc. v. Franklin Elec. Co.*, No. 3:07-CV-1090-D, 2008 WL 190319, at *4 (N.D. Tex. Jan. 22, 2008).

143. *Id.* at *2.

144. *Id.*

145. *Id.* at *4.

146. *Id.* at *3 (citing *Armstrong v. Am. Home Shield Corp.*, 333 F.3d 566, 571 (5th Cir. 2003) (employment contract); *U.S. Quest, Ltd. v. Kimmons*, 228 F.3d 399, 403 (5th Cir. 2000) (consulting contract); *Steinberg v. Brennan*, No. 3:03-CV-0562, 2005 WL 1837961, at *8 (N.D. Tex. 2005) (stock purchase agreement); *Coastal Bank SSB v. Chase Bank of Tex., N.A.*, 135 S.W.3d 840, 845 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (acquisition agreement)).

ing merger provisions under *Schlumberger*, concluding that “disclaimers less clear than the one contained in the License Agreement have precluded claims of fraudulent inducement” in Texas.¹⁴⁷ Finally, the district court distinguished the clauses at issue in *Jacuzzi* from a provision in a settlement agreement that the Fifth Circuit declined to enforce in *Dunbar Medical Systems, Inc. v. Gammex, Inc.*¹⁴⁸ Acknowledging that the “decisions of the Fifth Circuit have sometimes appeared to be inconsistent in interpreting disclaimers of reliance,” the court highlighted the fact that the license agreement expressly referenced “reliance on representations” and placed the reliance disclaimer “in an independent sentence, separate from the merger clause.”¹⁴⁹

The *Jacuzzi* court’s reading of *Schlumberger* is consistent with the broader enforcement of merger clauses that we observed in our 2006 and 2007 Survey articles.¹⁵⁰ But *Jacuzzi* stands out during the 2008 Survey period as one of the few decisions that enforced a disclaimer provision. Because Texas courts have not adopted a predictable approach to the enforceability of merger clauses, prudent practitioners should draft these provisions to withstand the most rigid *Schlumberger* test. Accordingly, we recommend that counsel devise merger and disclaimer of reliance clauses to survive even an egregious misreading of *Schlumberger* that limits the holding to that case’s particular facts.¹⁵¹

To that end, we offer several suggestions. First, contracting parties should document the arm’s length negotiations by which they agreed to incorporate a merger or disclaimer provision in a contract.¹⁵² Second, the contract document should stipulate the parties’ sophistication as business players and the competence of their legal counsel.¹⁵³ And third, to ensure that the provisions specifically and unequivocally disclaim reliance

147. *Id.* at *4 (citing *Armstrong*, 333 F.3d at 571; *U.S. Quest Ltd.*, 228 F.3d at 403; *Ikon*, 125 S.W.3d at 125-28; *Steinberg*, 2005 WL 1837961, at *6).

148. *Id.* at *5 (citing *Dunbar Med. Sys., Inc. v. Gammex, Inc.*, 216 F.3d 441, 448-49, 451 (5th Cir. 2000), which declined to enforce the following merger clause: “the Settlement Agreement contains the entire agreement between the parties, and no representations, inducements, promises or agreement, oral or otherwise between the parties with reference thereto and not embodied herein shall be of any force” because it did not “reflect the requisite clear and unequivocal expression of intent necessary to disclaim reliance on the specific representations.”).

149. *Id.* at *5. Having concluded that the license agreement “clearly and unequivocally” precluded reliance on Franklin’s extra-contractual representations, the court then determined that it could dismiss *Jacuzzi*’s fraudulent inducement claim at the Rule 12(b)(6) stage, explaining that “when the contract on which a plaintiff’s fraudulent inducement claim is based clearly and unequivocally disclaims reliance on extrinsic representations, the plaintiff’s claim for relief is not facially plausible when the complaint fails to allege the factual basis for avoiding enforcement of the contract’s reliance disclaimer.” Because *Jacuzzi* was “directly involved in the formation of the License Agreement,” the court continued, “any facts necessary to circumvent the reliance disclaimer should be available to it, without the necessity of first conducting discovery.” *Id.* at *5.

150. See West & Obi, *supra* note 3, at 901-06; West & Bodamer, *supra* note 3, at 1161-66.

151. See *In re Heritage Org.*, 375 B.R. 230, 265-66 (Bankr. N.D. Tex. 2007).

152. See *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 180 (Tex. 1997).

153. *Id.*

on all prior representations, we recommend that practitioners reference, but not replicate as boilerplate, the following “Exclusivity of Agreement” and “Non-Reliance of Buyer” clauses:

EXCLUSIVITY OF AGREEMENT. The parties hereto have voluntarily agreed to define their rights, liabilities, and obligations respecting the subject matter of this Agreement exclusively in contract pursuant to the express terms and provisions of this Agreement; and the parties hereto expressly disclaim that they are owed any duties or are entitled to any remedies not expressly set forth in this Agreement. Furthermore, the parties each hereby acknowledge that this Agreement embodies the justifiable expectations of sophisticated parties derived from arm’s length negotiations; all parties to this Agreement specifically acknowledge that no party has any special relationship with another party that would justify any expectation beyond that of an ordinary buyer and an ordinary seller in an arm’s length transaction. The sole and exclusive remedies for any breach of the terms and provisions of this Agreement (including any representations and warranties set forth herein) shall be those remedies available at law or in equity for breach of contract only (as such contractual remedies may be further limited or excluded pursuant to the express terms of this Agreement); and the parties hereto hereby settle, waive and release any and all tort claims and causes of action that may be based upon, arise out of or relate to this Agreement, or the negotiation, execution or performance of this Agreement (including any tort claim or cause of action based upon, arising out of or related to any representation or warranty made in or in connection with this Agreement or as an inducement to enter into this Agreement).

NON-RELIANCE OF BUYER. Except for the specific representations and warranties expressly made by the Company or any Selling Stockholder in Article ___ of this Agreement, (1) Buyer acknowledges and agrees that neither the Company nor any Selling Stockholder is making any representation or warranty, expressed or implied, at law or in equity, in respect of the Business, the Company, the Company’s Subsidiaries, or any of the Company’s or its Subsidiaries’ respective business, assets, liabilities, operations, prospects, or condition (financial or otherwise), including with respect to merchantability or fitness for any particular purpose of any assets, the nature or extent of any liabilities, the prospects of the Business, the effectiveness or the success of any operations, or the accuracy or completeness of any confidential information memoranda, documents, projections, material or other information (financial or otherwise) regarding the Company or any Company Subsidiary furnished to Buyer or its representatives or made available to Buyer and its representatives in any “data rooms,” “virtual data rooms,” management presentations or in any other form in expectation or, or in connection with, the transactions contemplated hereby, or in respect of any other matter or thing whatsoever, (2) Buyer specifically disclaims that it is relying upon or has relied upon any such other representations or warranties and acknowledges and agrees that the Company and the Selling Shareholders have specifically disclaimed and do hereby specifically disclaim

any such other representation or warranty made by any Person, and (3) Buyer is acquiring the Company on an “as is, where is” basis, “with all faults,” subject only to the specific representations and warranties set forth in Article ___ of this Agreement as further limited by the specifically bargained-for limitations on remedies set forth in Section ___. The provisions of this Section ___, together with the limited remedies provided in Section ___, were specifically bargained-for between Buyer, the Company, and the Selling Stockholders and were taken into account by Buyer, the Company, and the Selling Stockholders in arriving at the Purchase Price. Buyer represents and warrants to the Selling Shareholders and the Company that Buyer has conducted, to its satisfaction, its own independent investigation of the condition, operations and business of the Company and its Subsidiaries and Buyer has been provided access to and an opportunity to review any and all information respecting the Company and its Subsidiaries requested by Buyer in order for Buyer to make its own determination to proceed with the transactions contemplated by this Agreement and with the limited representations, warranties and remedies specifically bargained for in Section ___.¹⁵⁴

By undertaking these precautionary measures, practitioners can attempt to provide better “walk-away deal certainty” for their corporate clients, and, hopefully, shield the corporation’s officers from extra-contractual liability for routine conduct in arm’s length commercial negotiations.

V. CONCLUSION

Our review of the cases decided during this Survey period reveals both encouraging and discouraging trends with respect to the Texas judiciary’s willingness to fulfill the intentions and expectations of a corporation’s investors, affiliates, directors, and officers. Indeed, while we are pleased that the *Moore* and *Acceptance Indemnity* courts adopted cautious approaches to the “outsider” and “insider” reverse veil piercing theories proposed in those cases, we remain concerned that the Texas Supreme Court once again refused to clarify the legality of the precarious “single business enterprise” theory in *PHC-Minden*. And while the *Jacuzzi* court’s enforcement of the disputed merger and disclaimer of reliance clauses at the end of this Survey period evinced appropriate respect for the parties’ freedom to define their rights and obligations by contract, we are troubled by the Texas courts’ increasing tendency to interpret *Schlumberger* as limited to its particular facts. Accordingly, we are hopeful that the 2009 Survey period will produce holdings in each of the foregoing areas of corporate law that offer more definitive guidance for practitioners and, consequently, more certainty for their clients.

154. For similar provisions, see West & Obi, *supra* note 7, at 18, 20; West & Stasny, *supra* note 3, at 723.

