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Partnerships

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PARTNERSHIPS

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I. INTRODUCTION

There were several notable partnership law cases decided during the Survey period. Additionally, the Texas Legislature enacted changes to both the limited partnership and general partnership statutes.

II. CASES

A. PARTNERSHIP ASSETS—ON DISSOLUTION, GOODWILL DOES NOT INCLUDE INDIVIDUAL PARTNERS' EARNING CAPACITY—SALINAS V. RAFATI

Texas Supreme Court partnership law cases are so rare that respect (and the authors' excitement!) requires top billing. The Court's holding in *Salinas v. Rafati*[1] was that the earning capacity of former partners of a professional partnership was personal to the individual partners, and not a partnership asset; therefore, any value attributed to that earning capacity was not subject to division (i.e., was not counted as part of the value of the partnership) on dissolution of the partnership.[2]

The facts were straightforward. Drs. Rafati, Salinas, and Salazar were partners in a radiology medical practice that operated successfully for several years before the relationship between Rafati and the other two partners deteriorated. After inconclusive discussions about a Rafati withdrawal, Salinas dissolved the partnership "by his express will."[3] Thereafter, Salinas and Salazar formed a new partnership and, effectively, continued the dissolved partnership's practice, from the same office with the same employees. Although Rafati and his trial expert witness convinced the jury that Salinas and Salazar wrongfully dissolved the partner-

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1. 948 S.W.2d 286 (Tex. 1997).
2. *See id.* at 289-90.
3. A partnership not formed for a specific term or particular undertaking is a "partnership at will" that may rightfully (that is, without breaching the agreement) be dissolved at any time by any partner. The court of appeals and Supreme Court disagreed with the trial jury's determination that Salinas's dissolution was wrongful. *See Salinas*, 948 S.W.2d at 288, 290.

ship, breached their fiduciary duty to Rafati and did not pay the full value of Rafati's partnership interest, the court of appeals found no wrongful dissolution or fiduciary breach, and Rafati dropped those claims in the Supreme Court. Rafati's "theory of the case" in the Supreme Court was that "the future earning capacities of former partners can be considered in valuing a professional partnership on dissolution."[4] When the Supreme Court disagreed with this theory, Rafati's entire case fell apart.[5]

Because of the relative rarity of Texas Supreme Court authority in this area, the following discussion is longer than the legal value of the case might alone justify. The Court made the following statements or reached the indicated conclusions:

(1) There was no contention that the name of the dissolved partnership had any separate value, or that any party wanted to continue the business using that name;[6]

(2) Rafati improperly treated the partnership on dissolution as if it were a "salable going concern" instead of an entity whose existence ended after winding up;[7]

(3) Valuing the dissolved partnership "based on the goodwill attributable to the personal skills and talents of former partners . . . improperly took into account intangibles that were not partnership assets;"[8]

(4) A distinction must be drawn between the goodwill that attaches to a professional because of the person's skills, and the goodwill of a trade or business that arises because of its name or location (which might survive the coming and going of individuals);[9] and

(5) There can be "goodwill in a professional partnership that is separate from the skills or personal attributes of [the individual professionals]."[10] There is no absolute rule—the result depends on the facts.

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4. *Salinas*, 948 S.W. 2d at 289.

5. The Court noted that "[t]here was no evidence from which the jury could find anything approaching [the value given by the jury to the partnership as a whole, based on value testimony of Rafati's expert]." *Id.* That was enough to reverse the case. The Court went further and dismissed the expert's theory that the future earning capacities of the partners should be included. *See id.* That ended the possibility of a remand on this issue.

6. *See id.* at 290.

7. *Id.*

8. *Id.*

9. *See id.* In discussing this point the Court drew on the venerable case of Rice v. Angell, 73 Tex. 350, 11 S.W. 338 (1889), and the more recent Nail v. Nail, 486 S.W. 2d 761 (Tex. 1972). In *Rice*, two partners in an insurance business dissolved their relationship, and the Court found that thereafter each former partner had the same right to compete to represent the insurance companies formerly represented by the firm, and that patronage was not determined by office location. Rather, it was attributable to the individual characteristics of the former partners. The situation was different from that of a "trading partnership" in which one partner "may secure the right to continue the business at 'the old stand.'" *Salinas*, 948 S.W.2d at 290 (citing *Rice*, 11 S.W. at 340).

10. *Salinas*, 948 S.W.2d at 291. The Court discussed the case of Geesbreght v. Geesbreght, 570 S.W.2d 427 (Tex. Civ. App.—Fort Worth 1978, writ dism'd), which involved a partnership whose business was to supply emergency room physicians to hospitals. The firm had contracts with several hospitals and up to a hundred part-time and ten full-time doctors, and created over time an identity and goodwill separate from the individual professionals.

Rafati's ultimate problem, the Court found, was that he was not able to successfully compete, either for the former patients or employees.[11] He had the same right and freedom to do so, he just did not succeed.

There is one aspect of this case that might have come out differently. The former partnership benefited from a very valuable radiology services contract with a hospital. The contract required that one of the individual doctors, and not the partnership, be the contracting party and become the director of the radiology department of the hospital. Discussions were held by the hospital with both Salinas and Rafati, and the hospital expressed no preference between the two. Salinas signed the contract because he was more willing than Rafati to assume required administrative duties. Although Salinas could not assign the contract to his partners or the partnership, it was clear that the hospital could allow (and would allow) radiologists who were employees or partners of Salinas to perform services to the hospital.[12] Relying on the technical fact that neither Salazar nor Rafati could obtain an assignment of the contract on dissolution, or insist that the hospital allow one of them to continue the contract if, for example, Salinas died (even if it was probable that the hospital would do so), the Court found that the contract was not an asset of the partnership, but was one for personal services to be rendered by Salinas.[13]

B. Fiduciary Duty—Duty of Notice of Sale of Assets—Hughes v. St. David's Support Corp.

In reversing and remanding a summary judgment in favor of the defendant, the court in *Hughes v. St. David's Support Corp.*[14] declared that a general partner owes a *fiduciary duty of notice* to its limited partners when the general partner sells assets under its control.[15] A general partner, said the court, owes a duty of notice even to limited partners who have only a minute interest, amounting to a "royalty."[16]

To expand its services and facilities, defendant St. David's Medical Center decided to develop two hospitals to be operated by St. David's Health Care System, Inc., the sole shareholder of St. David's Support

11. *See Salinas*, 948 S.W.2d at 291.

12. *See id.* at 292.

13. *See id.* at 293. Although it may be likely, based on his lack of success with employees and patients, that Rafati would have been unsuccessful in a heads-up competition for the contract, the inertia of the contract already being with Salinas, who continued with Salazar from the same location with the same employees, certainly helped Salinas and Salazar. A truer test would have resulted if the facts involved a switch by the hospital from Rafati to the others after the partnership dissolved.

14. 944 S.W.2d 423 (Tex. App.—Austin 1997, writ denied).

15. *See id.* at 424. The court used the term "under its control" because the limited partnership in which the plaintiffs (Hughes) were limited partners did not directly own an interest in the property that was sold; rather, their partnership owned a one percent general partner's interest in the operating partnerships that sold their assets. *See id.*

16. *See id.* at 426. It is not surprising that the size of the ownership interest did not eliminate the duty. On the other hand, the indirect ownership issue discussed *supra* note 15 is much more relevant.

Corporation ("St. David's" or the "General Partner") and the defendant here. To finance the development, the General Partner organized a master limited partnership that, in turn, owned two operating partnerships, one for each new hospital to be built. The General Partner owned a fifty-one percent interest in the master partnership; Mr. Hughes (who conceived the idea for and initiated implementation of the ownership structure, for which he was paid $425,000 when the General Partner later assumed development responsibility) and his affiliates (collectively, the "Hughes Limited Partners") owned forty-nine percent as limited partners. The master partnership was the one percent general partner of each operating partnership.[17]

In 1991 new Medicare regulations restricted physicians' ability to participate in the ownership of hospital facilities to which those physicians refer patients. The General Partner of the master partnership determined that the operating partnerships (whose general partner was the master limited partnership itself) were at risk of violating the new regulations. The General Partner decided to solve the dilemma by selling the operating partnerships' assets (i.e., the two hospitals) and dissolving and terminating the partnerships.

Although the General Partner discussed the asset sale solution with the physician limited partners of the operating partnerships, it admittedly did not consult the Hughes Limited Partners about the impending sales or dissolutions. In fact, the General Partner acknowledged that it did not give the Hughes Limited Partners notice because it feared "they might impede or possibly stop the sale and dissolution."[18] On learning of the sale of the operating partnerships' assets,[19] the Hughes Limited Partners sued the General Partner for breach of fiduciary duty in failing to give notice of the sale and dissolution.[20] The General Partner argued that it had no such duty to give notice.[21] Both parties sought a summary judg-

17. The original plan was for referring physicians to own all of the limited partner interests in the operating partnerships; however, physicians did not buy them all, and the General Partner bought the unsold limited partner interests to complete the financing and ownership structure.

18. *Hughes*, 944 S.W.2d at 425. The court thought that it was "highly significant" that the Hughes Limited Partners were the only parties in any way involved in the sales and dissolutions that did not receive prior notice. *See id.* at 426. It seems that the General Partner could have responded that the physician limited partners were partners in the partnerships whose assets were sold, while the Hughes Limited Partners were not.

19. It appears that the Hughes Limited Partners learned of the sale when they received their portion ($19,765) of the master limited partnership's share of the net proceeds.

20. In fact, the court noted that the record suggested that the sale itself was not a public bid, but through a private sale at which the General Partner bought the assets itself. *See Hughes*, 944 S.W.2d at 425.

21. There is established partnership case law authority supporting the notion that a partner who purchases partnership assets owes its co-partners a duty of full disclosure. *See, e.g.*, Johnson v. Peckham, 120 S.W.2d 786, 787 (Tex. 1938) (holding that in a sale of partnership interests between partners, each party to the sale is obligated to fully disclose to the other "all material facts within his knowledge in any way relating to the partnership affairs"); Gum v. Schaeffer, 683 S.W.2d 803, 805 (Tex. App.—Corpus Christi 1984, no writ) ("[I]t is established that partners who buy and sell their partner's interest are fiduciaries since each is the confidential agent of the other."). Clearly, the General Partner failed to

ment; the trial court granted the General Partner's motion, from which the Hughes Limited Partners appealed.

The plaintiffs presented seven points of error on appeal, which the court narrowed to the single issue of whether the General Partner owed the Hughes Limited Partners a fiduciary duty that included a duty to notify them of the proposed sale of the operating partnerships' assets. Perhaps because of the summary judgment context, the court easily found such a duty within a broader, more general fiduciary duty owed by a general partner to limited partners.[22] Citing its own precedents, the court noted that "in a limited partnership, the general partner stands in the same fiduciary capacity to the limited partners as a trustee stands to the beneficiaries of a trust."[23] The court also noted the Texas common law principle that "managing partners owe their copartners the highest fiduciary duty recognized in the law."[24] Interestingly, in 1993 the Texas Legislature, adopted the Texas Revised Partnership Act (TRPA),[25] which eliminates any reference to the term "fiduciary" and in section 4.04 specifically states that partners are not trustees and are not held to the same standards owed by a trustee to a beneficiary.[26] This was intended to better reflect the parties' expectations in a modern commercial context in which the partnership form may have been chosen for reasons[27] very different from the historical setting involving broad mutual agency and trust and joint and several liability of all partners.

The General Partner argued that, even if it owed a fiduciary duty, it had no duty to notify the Hughes Limited Partners of the asset sale because their interest was "infinitesimal."[28] The court disagreed, stating

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make a disclosure to the Hughes Limited Partners; however, there is a separate question about whether that principle applies here because the General Partner did not sell assets in which the plaintiffs had a direct ownership interest. The opinion does not contain enough detail to indicate whether any of the partnership agreements had relevant provisions supporting the General Partner's action—e.g., a broad grant of authority to the General Partner to dispose of partnership assets. One must conclude that they did not, or the General Partner would have urged their relevance.

22. *See Hughes*, 944 S.W.2d at 425. As required in the summary judgment context, all evidence favorable to the plaintiffs was accepted and every reasonable inference and doubt was resolved in their favor. *See id.* The significance of this case must be weighed in that light.

23. *Id.* at 425-26 (citing Crenshaw v. Swenson, 611 S.W.2d 886, 890 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.)).

24. *Id.* at 425 (citing Huffington v. Upchurch, 532 S.W.2d 576, 576 (Tex. 1976)).

25. TEX. REV. CIV. STAT. ANN. arts. 6132b-1.01-11.04 (Vernon 1994 and Supp. 1998) [hereinafter TRPA].

26. *See* TRPA § 4.04(f).

27. Those reasons typically include federal income tax pass-through treatment (partnerships are not separately taxed), avoidance of Texas franchise taxes (they do not apply to partnerships), and, with the proliferation of limited partnerships, limitations on liability. Also, the agreement among the partners often carefully circumscribes the authority of the partners involved in management, which greatly reduces the risk that vicarious liability will be created by one partner for another without the liable partner's consent.

28. *See Hughes*, 944 S.W.2d at 426. Nothing in the opinion suggests that the General Partner argued that it did not owe the Hughes Limited Partners a fiduciary duty relating to the sale by the operating partnerships of their assets because the Hughes Limited Partners owned *no* interests whatsoever in the operating partnerships. That would have been, based

that, being in the nature of royalty interests, the Hughes Limited Partners' interest, although small, nevertheless entitled them to notice before the General Partner sold the operating partnerships' assets.[29] It was clear that the court believed the circumstance to be controlled by the principle that "a partner owes it co-partners . . . [a] duty of 'full disclosure of all matters affecting the partnership.'"[30] More specifically, the court found that a general partner owes to its limited partners the same duty of full disclosure.[31]

As a final plea, the General Partner asserted that it had the power to execute the sale documents on behalf of the master limited partnership (as general partner of the selling operating partnerships). The court said that power did not obviate the duty to give prior notice of the sale of operating partnership assets to all limited partners of the master partnership.[32]

C. PARTNERSHIP-BY-ESTOPPEL—KONDOS ENTERTAINMENT, INC. V. QUINNEY ELECTRIC, INC.

In *Kondos Entertainment, Inc. v. Quinney Electric, Inc.*,[33] an electrical contractor, Quinney, sued a corporation and the corporation's "contact person" (Snyder) for breach of contract, failing to pay amounts owed for work done on a nightclub being constructed by the defendants. Earlier, in a bankruptcy court proceeding involving an affiliate of the defendants, V-Ball, Inc., the same contract claim was allowed and paid, except for prejudgment interest, attorneys' fees, and court costs. This state court suit was continued by Quinney (it was filed about four months before V-Ball sought bankruptcy protection) to recover the balance of the claim. The trial court entered judgment for Quinney and awarded damages, with a credit for the amount that Quinney received in the bankruptcy case.

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on the facts described in the opinion, an accurate statement. Of course, the Hughes Limited Partners owned an *indirect* interest in those assets.

29. *See id.* "[A] limited partner holder of a royalty interest is certainly entitled to notice *before* the general partner sells the underlying assets that generate the royalty interest." *Id.* (emphasis in original). The court did not acknowledge, however, that unlike a true royalty interest, which gives its holder a direct real property interest under Texas law, *see* Haile v. Holtzclaw, 414 S.W.2d 916, 923 (Tex. 1967), the Hughes Limited Partners' partnership did not have a direct ownership interest in the hospitals that were sold.

30. *Hughes*, 944 S.W.2d at 426 (quoting Hawthorne v. Guenther, 917 S.W.2d 924, 934 (Tex. App.—Beaumont 1996, writ denied)). The 1993 Survey Article, Steven A. Waters & Felicity A. Fowler, *Partnerships*, 46 SMU L. REV. 1631, 1638-40 (1993), discussed the Fifth Circuit case of LSP Investment Partnership v. Bennett (*In re* Bennett), 970 F.2d 138 (5th Cir. 1992). In *Bennett*, a case of first impression, the court decided that the sole general partner of a limited partnership that was, in turn, the managing general partner of a limited partnership that owned a hotel, did not owe the same fiduciary duty to the limited partners of the hotel partnership that he owed to the limited partners of the managing general partner limited partnership. *See Bennet*, 970 F.2d at 149. The bankruptcy context of that case was a factor in the decision (where the "quality" of the duty affected whether a discharge was granted), but it is difficult to know how its principle might have been applied in *Hughes*.

31. *See Hughes*, 944 S.W.2d at 426.

32. *See id.*

33. 948 S.W.2d 820 (Tex. App.—San Antonio 1997, writ requested).

The partnership law issue in the case was whether certain affiliated parties were *partners-by-estoppel.* The court identified two elements required to find a partnership-by-estoppel: (1) a *representation* must be made that the person sought to be bound is a member of a partnership, and (2) the party to whom that representation is made must *rely* on the representation by giving credit to the partnership.[34] The court of appeals held that Snyder, the corporation's contact person, was estopped to deny partnership with the corporation after Snyder, in dealings with Quinney, said he was a partner and signed checks on a V-Ball account to pay invoices submitted to Kondos for work performed by Quinney.[35] The court found numerous representations to, and reliance by, Quinney, sufficient to satisfy the partnership-by-estoppel requirements.[36]

The case ultimately was decided on *collateral estoppel* grounds.[37] Ironically, even though the court agreed that the defendants were partners, because they were partners not only with themselves but with V-Ball, the disposition of Quinney's claim in the V-Ball bankruptcy constituted a disposition as to the defendants here. The result does not seem quite right on equitable grounds—Quinney was not made whole in the bankruptcy and filed the state court suit to recover prejudgment interest, attorneys' fees, and court costs not paid in the bankruptcy case.[38] That still does not explain why a creditor cannot pursue a jointly and severally liable partner to satisfy the creditor's claim that remains unsatisfied after a portion of the claim is paid by a different partner.[39]

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34. *See id.* at 823. Quoting the Texas Legislature, the court explained,

> [w]hen a person, by words spoken or written or by conduct, represents himself . . . as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership.

Id. (quoting TEX. REV. CIV. STAT. ANN. art. 6132b, § 16 (Vernon Supp. 1997) [hereinafter TUPA]).

35. *See Kondos*, 948 S.W.2d at 823.

36. *See id.*

37. The court identified three elements under federal law (which apply because of the bankruptcy context) that must be met for collateral estoppel to apply to a subsequent, related state court proceeding: (1) final judgment in the federal action; (2) the fact issues present in the later state court action must have been "actually litigated" in the prior federal action; and (3) disposition of those fact issues must have been "necessary to the outcome" of the prior federal matter. *Kondos*, 948 S.W. 2d at 824 (citing Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979)).

38. The court acknowledged this fact ("We recognize that the result we reach today may seem unjust because there was no double recovery . . . ."), but said that it was outweighed by the public policy behind the doctrine of collateral estoppel that reflects "the need to bring all litigation to an end . . . to protect parties from multiple lawsuits, promote judicial efficiency, and prevent inconsistent judgments by precluding the relitigation of issues." *Kondos*, 948 S.W.2d at 825 (citing Sysco Food Servs., Inc. v. Trapnell, 890 S.W.2d 796, 801 (Tex. 1994)).

39. *See* TUPA § 15; TRPA § 3.04. (The author's litigation and bankruptcy colleagues had no better understanding of the result. One suggested confusion between *issue preclusion* of collateral estoppel and *double recovery* preclusion.)

D. PROCEDURE—DIVERSITY JURISDICTION—INTERNATIONAL PAPER CO. V. DENKMANN ASSOCIATES

In a brief and succinct analysis, the Fifth Circuit explained that the citizenship of a partnership, for purposes of diversity jurisdiction, is determined by looking to the citizenship of the partners.[40] The citizenship of a partner who is deemed an *indispensable party* to the action is considered for purposes of determining whether complete diversity exists.[41] One consequence of this is that an indispensable party may not be dismissed from an action in an effort to secure diversity jurisdiction. This principle was noted in the last two Survey articles.[42]

E. ATTORNEYS' FEES—GANZ V. LYONS PARTNERSHIP, L.P.

The case of *Ganz v. Lyons Partnership, L.P.*[43] interprets the Texas Civil Practice & Remedies Code (TCPRC)[44] to not allow attorneys' fees to be awarded against a limited partnership. The court concluded that partnerships are not included among the defined parties against whom a claim for attorneys' fees may be made (the Subject Parties).[45] At the root of the court's analysis was a change in the TCPRC's language, modifying the Subject Parties from "*person* or corporation" to "*individual* or corporation."[46] The court started its analysis by recognizing a general rule in Texas that "each litigant must compensate his own attorney."[47] That general rule does not apply, however, if a contract between the parties, or a statute, provides otherwise.[48] Section 38.001 of the TCPRC provides specifically that a "person may recover reasonable attorneys' fees from an individual or corporation, in addition to the amount of a valid claim and costs" if the claim falls within one of the eight enumerated situations.[49] That language represents a change from the wording of the TCPRC's predecessor, which provided that "any person, corporation, partnership, or other legal entity having a valid claim against a *person or corporation* for services rendered" may recover reasonable attorneys' fees.[50]

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40. *See* International Paper Co. v. Denkmann Assocs., 116 F.3d 134, 137 (5th Cir. 1997).

41. *See id.*

42. *See* Steven A. Waters & Janna R. Melton, *Partnerships*, 50 SMU L. REV. 1393, 1405-08 (1997) (discussing Moore v. Simon Enters., 919 F. Supp. 1007 (N.D. Tex. 1995)); Steven A. Waters, *Partnerships*, 49 SMU L. REV. 1205, 1212-15 (1996) (discussing Bankston v. Burch, 27 F.3d 164 (5th Cir. 1994) and Mallia v. PaineWebber Inc., 889 F. Supp. 277 (S.D. Tex. 1995)).

43. 173 F.R.D. 173 (N.D. Tex. 1997).

44. TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (Vernon 1986).

45. *See Ganz*, 173 F.R.D. at 176.

46. *Id.* (emphasis added) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (Vernon 1986)).

47. *Id.* (citing Turner v. Turner, 385 S.W.2d 230, 233 (Tex. 1964)).

48. *See id.* at 175 (citing *Turner*, 385 S.W.2d at 233). There was no contract issue in this case.

49. TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (Vernon 1986).

50. TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1985) (repealed 1986) (emphasis added).

One explanation for that change is based upon the Code Construction Act, which defines "person" to include corporations, partnerships, or other legal entities.[51] The Legislature, by changing the statute from "person or corporation" to "individual or corporation," signaled that the various entities that fall under the general heading of "person" in the Code Construction Act may not be subjected to the attorneys' fees provision of the TCPRC.[52] The court summarized that change as follows:

> The natural and logical explanation is that the legislature, knowing that the Code Construction Act defined "person" to include "partnerships," among others, thereby intended to exclude those who by definition are not "individuals" or "corporations." It excluded "partnerships." To now read "partnerships" back in would defy the ordinary expectation of the legislative act.[53]

Interestingly, the court issued this memorandum and order to reverse its earlier memorandum and order, which it termed "hasty and ill-considered."[54]

III. LEGISLATION

As part of a comprehensive legislative package[55] submitted by the Texas Business Law Foundation, an organization created to promote and support the passage of quality business legislation, both the Texas Revised Limited Partnership Act (TRLPA)[56] and the Texas Revised Partnership Act (TRPA) were amended. The amendments ranged from very significant, to minor changes to conform to the national Uniform Partnership Act (UPA) or to corresponding changes made to the Texas Business Corporation Act (TBCA)[57] and Texas Limited Liability Company Act (TLLCA)[58] as part of the same legislative package.

A. TEXAS REVISED LIMITED PARTNERSHIP ACT

1. Liability

Section 3.03(b), which is a "safe harbor" of rights that a limited partner may possess or exercise without being considered to have the control and liability of a general partner, was expanded to include acting as a member

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51. *See* TEX. REV. CIV. STAT. ANN. art. 5429b-2 (Vernon Supp. 1998).
52. *See id.*
53. *Ganz*, 173 F.R.D. at 176.
54. *See id.* at 173. The court decided that the cases that it relied on (because their facts involved attorneys' fees being imposed against limited partnerships) were not good authority because the award of fees was not a contested issue in those cases. *See id.*
55. Tex. S.B. 555, 75th Leg., R.S. (1997) (§§ 1-126, ch. 375) (known to the sponsors as "BOB IV," shorthand for "Business Organizations Bill, IV"—I - III were introduced in prior sessions). Most of the changes made were anticipated by the 1996 Survey. *See* Waters, *supra* note 42, at 1219-20.
56. TEX. REV. CIV. STAT. ANN. art. 6132a-1, §§ 1.01-13.09 (Vernon Supp. 1998) [hereinafter TRLPA].
57. TEX. BUS. CORP. ACT. ANN. arts. 1.01-12.39 (Vernon Supp. 1997) [hereinafter TBCA].
58. TEX. REV. CIV. STAT. ANN. art. 1528n, §§ 1.01-11.07 (Vernon Supp. 1998).

or manager of a limited liability company that is a general partner of the limited partnership.[59]

2. Withdrawal/Dissolution

Before the 1997 amendments, the TRLPA provided that the withdrawal of a general partner caused a *dissolution* of a limited partnership, but allowed the limited partnership to be *reconstituted* if another general partner remained or was appointed and either the partnership agreement allowed reconstitution and continuation or all of the partners voted to reconstitute and continue.[60] This scheme has been changed to provide that dissolution occurs, and the affairs of a limited partnership are required to be wound up, only if the partners do not act in the manner formerly required to effect a reconstitution.[61] Section 8.01 also has been broadened to allow the partnership agreement to specify that the vote to continue be made by "another group or percentage of partners," with the fall back being unanimous vote.[62] The judicial dissolution allowed pursuant to section 8.02 has been conformed to the judicial dissolution provisions of the TRPA.[63]

Section 6.02(b) of the TRLPA was amended to make clarifying changes regarding the effect of a withdrawal of a general partner. As before, section 6.02(a) states that a general partner who withdraws from the limited partnership ceases to be a general partner, as provided by section 4.02(a). The amendments to section 6.02(b) clarify that the remaining general partner or partners or, if there are none, a majority-in-interest of the limited partners, may either convert the general partner's partnership interest into that of a limited partner or pay the general partner for its interest. These amendments add the notion that, until one of those steps is taken, the owner of the partnership interest of the withdrawn general partner enjoys the status of an *assignee* under Article VII of the Act.[64]

Section 6.03 was amended to delete the very long-standing right of a limited partner to withdraw from a limited partnership upon giving six months notice to the general partners. That withdrawal right often, perhaps even typically, was eliminated in the partnership agreement for the particular partnership.[65]

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59. *See* TRLPA § 3.03(b)(1).

60. *See id.* § 8.01.

61. Avoiding dissolution versus enabling reconstitution is a fairly subtle change, and one that brings the TRLPA into line with the national UPA. *See* UNIF. PARTNERSHIP ACT § 802, 6 U.L.A. 97-98 (Supp. 1994).

62. TRLPA § 8.01(1).

63. *Compare* TRPA § 8.01(e) *with* TRLPA § 8.02.

64. An assignee essentially owns the economic rights of a partner, but does not have voting or other management rights. The new statement makes express the result that analytically could be derived from the statute before.

65. It was that very ability to, by contract, override the statutory withdrawal right that caused certain tax problems in the so-called family limited partnership area, in which federal income tax regulations measured certain allowable discounts by whether partners' rights had lapsed. The ability to override the statute by agreement was considered such a lapse.

3. *Capitalization*

Section 5.01 was amended to liberalize the types of property that could be contributed by a limited partner, which also conformed the TRLPA to the TBCA provision regarding allowable contributions for shares of stock.[66] Section 5.02(d) was amended to provide that a *conditional obligation* may not be enforced unless the conditions have been satisfied or waived as to the particular limited partner. A specific example of a conditional obligation is a contribution payable on a discretionary call before the time the call is made.

4. *Conversions*

Business Organizations Bill IV introduces into Texas law a new business organization transaction called a "conversion," which permits corporations, limited liability companies, and partnerships to directly convert from one business form to another by adopting a "plan of conversion." The enabling provisions of TRLPA are contained in new section 2.15. Numerous conforming changes were made elsewhere within the TRLPA, as was also done by BOB IV in the other business organization statutes, to accommodate the new conversion concept.[67]

5. *Electronic Filing*

Section 13.04 was amended to authorize the Secretary of State to accept filings in electronic format (in addition to the previously allowed facsimile filings) and to establish rules for electronic filings.

B. Texas Revised Partnership Act

1. *Liability*

By far the most significant change made to the TRPA was the expansion of the liability shield afforded a partner in a registered limited liability partnership.[68] New subparagraph (1) was added to section 3.08(a) to provide that a partner in a registered limited liability partnership is not liable "for debts and obligations of the partnership incurred while the partnership is a registered limited liability partnership."[69] Formerly, this liability shield existed only as to torts ("debts and obligations of the part-

66. Among the types of property that now qualify as a limited partner contribution under section 5.01 are "a contract for services to be performed." Previously, only services actually rendered were allowed.

67. Those TRLPA sections include 2.01, 2.03(a), 2.03(c), 2.04(a), 2.06(a)-(d), 2.12, and 12.01.

68. In Texas, a registered limited liability partnership is a species of general partnership that has taken the steps required by § 3.08 to be treated as a registered limited liability partnership, including making an annual filing with the Secretary of State and maintaining certain insurance or equivalent coverages. Other states have treated LLP's, as they are often called, as a separate type of legal entity. *See, e.g.*, Ohio Rev. Code Ann. § 1775.14 (Anderson 1995). This is the one material addition to BOB III, introduced in the 1995 Legislature. *See* Waters, *supra* note 42, at 1220 (discussing 1995 statutory amendments).

69. TRPA § 3.08(a).

nership arising from errors, omissions, negligence, incompetence, or malfeasance") committed by a partner not supervised by the shielded partner and without the knowledge of the shielded partner.[70]

A more minor change made in the liability area, considered by most practitioners to be the plugging of an unintended, potential hole, clarifies that a shielded partner's freedom from liability includes direct or indirect liability "by contribution, indemnity, or otherwise."[71] The fear was that a court would accept the argument that a partner's obligation to indemnify the partnership or another partner, or to make a contribution on the dissolution and winding up of the partnership superseded the shield, even if the liability that gave rise to the need for indemnity or a contribution was one against which the partner was shielded by registered limited liability partnership status.

2. *Conversion*

The conversion concept is introduced into the TRPA by the addition of new section 9.05. Conforming changes made elsewhere include the addition of subsection (d) to section 2.02, entitled "Partnership Resulting From Merger Or Conversion."

3. *Foreign Limited Liability Partnerships*

As an acknowledgment to the proliferation of limited liability partnerships,[72] a new Article X has been added to the TRPA, dealing with the law governing a foreign limited liability partnership,[73] a requirement that a foreign LLP file with the Secretary of State a statement of foreign qualification before it transacts business in Texas,[74] the effect of a failure to qualify[75] and identification of activities that do not constitute transacting business.[76]

4. *Conforming To Other Statutes*

As was the case with amendments to the TRLPA, a number of changes were made to conform language or provisions of the TRPA to the TBCA[77] and the national Uniform Partnership Act. These include language changes to sections 3.02, 3.04, 4.01, 4.06, 6.02, 8.06 and 9.01.

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70. This concept is retained in § 3.08(a)(2), making the shield from tort liability conditional upon the absence of knowledge and supervision by the shielded partner.

71. *See, e.g.*, TRPA § 3.08(a)(1), (2), (5) and § 8.06(b), (c).

72. LLP's were "invented" in Texas in 1987 and are now available in virtually every state.

73. *See* TRPA § 10.01. "The laws of a state under which the foreign LLP is formed govern." *Id.*

74. *See id.* § 10.02.

75. *See id.* § 10.03. Basically, the sanction is denial of access to Texas courts.

76. *See id.* § 10.04. The list was taken from the list that has been contained for many years in article 8.01.B. of the TBCA.

77. For example, changes were made to §§ 9.02 and 9.03 (regarding mergers and interest exchanges) to parallel provisions of the TBCA.

5. Electronic Filing

Section 3.08, which contains registered limited liability partnership requirements, was amended to authorize the Secretary of State to accept filings in electronic format and to establish rules for those filings.[78]

6. Governing Law

Section 1.05 was amended to include the determination of whether a partnership will be governed by the law of the state chosen by the partners (if that state bears a reasonable relation to the partners or the partnership business) or the law of the state in which the partnership has its chief executive office.

78. Except for assumed name filings covered by another statute, there are no other filing requirements in Texas for general partnerships.