SMU | Dedman School of Law

SMU Law Review

Volume 59
Issue 3 *Annual Survey of Texas Law*

Article 21

January 2006

Partnerships

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PARTNERSHIPS

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I. INTRODUCTION

AS is the case most years, there were no monumental partnership-law cases for this Survey period. There was, however, one case of first impression dealing with the consequences for limited liability partnerships that do not maintain registered status. Other cases covered are a sampling of the types of issues that are litigated among partners or that otherwise involve partnerships, including some procedural issues that frequently arise in partnership cases. None will change the face of Texas law.

II. CASES

A. COMPLIANCE WITH STATUTORY LLP REGISTRATION REQUIREMENTS—DOES A PARTNER OF AN LLP RECEIVE LIMITED LIABILITY PROTECTION IF THE LLP DOES NOT CONTINUOUSLY COMPLY WITH THE STATUTORY REGISTRATION REQUIREMENTS?—*APCAR INVESTMENT PARTNERS VI, LTD. V. GAUS*[1]

In a case of first impression, the Eastland Court of Appeals held that a partnership must be in compliance with the statutory LLP registration requirements for the partners to receive protection from individual liability.[2] On March 6, 1995, Smith & West, L.L.P. registered as a domestic limited liability partnership under the Texas Revised Partnership Act.[3] On August 11, 1999, the LLP entered into a sixty-month lease for office space with MF Partners I, Ltd.[4] Michael Gaus and John West, the LLP's partners, personally guaranteed the LLP's performance under the lease during the first twenty-four months. MF Partners I, Ltd. assigned its landlord's interest in the lease to Apcar Investment Partners VI, Ltd. ("Apcar"). According to Apcar, the LLP stopped paying rent and aban-

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1. 161 S.W.3d 137 (Tex. App.—Eastland 2005, no pet. h.).
2. *Id.* at 140, 142.
3. *Id.* at 138 (citing TEX. REV. CIV. STAT. ANN. art. 6132b, § 3.08 (Vernon Supp. 2004-05)).
4. *Id.*

doned the leased premises as of October 31, 2002.[5] Apcar filed suit for breach of lease against the LLP, Gaus, and West. Gaus and West moved for summary judgment, arguing that they were not individually liable for the LLP's lease obligations because they are partners in a limited liability partnership, and they personally guaranteed the LLP's performance under the lease only for its first two years.[6] Apcar moved for partial summary judgment, claiming that Gaus and West were personally liable for the LLP's lease obligations because the LLP was not a registered limited liability partnership when it entered the lease.[7] The court of appeals noted, "No Texas case has addressed the issue before this court."[8]

Under the Texas Revised Partnership Act, "a partner in a registered limited liability partnership is not individually liable . . . for debts and obligations . . . incurred while the partnership is a registered limited liability partnership."[9] The LLP's status as a registered limited liability partnership expired in 1996. Thus, Apcar argued that Gaus and West were personally liable for the debts incurred on a lease created in 1999.[10] Gaus and West asserted that the LLP's initial status as a registered limited liability partnership protected them from individual liability on lease obligations that arose after their two-year guarantee expired.[11] They relied on limited partnership cases, which have held that strict compliance with statutory filing requirements is not necessary to protect the limited partners from individual liability.[12]

To register as a limited liability partnership, a partnership must file a completed initial or renewal application with the secretary of state and pay the required fee.[13] An initial application expires one year after the date of registration unless it is renewed annually.[14] To renew a limited liability partnership registration, the partnership must file a renewal application with the secretary of state and pay a fee of $200 for each partner.[15] The renewal registration is effective for one year from the date that the effective registration otherwise would expire.[16]

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5. *Id.*
6. *Id.* at 138-39.
7. *Id.* at 139.
8. *Id.* at 140.
9. *Id.* (quoting TEX. REV. CIV. STAT. ANN. art. 6132b, § 3.08(a)(1) (Vernon Supp. 2004-05)).
10. *Id.*
11. *Id.*
12. *Id.* at 141 (citing Laney v. Comm'r, 674 F.2d 342, 347-48 (5th Cir. 1982); Shindler v. Marr & Assocs., 695 S.W.2d 699, 702-04 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.); Garret v. Koepke, 569 S.W.2d 568, 570-71 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.); Voudouris v. Walter E. Heller & Co., 560 S.W.2d 202, 207-08 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ)).
13. *Id.* at 140 (citing TEX. REV. CIV. STAT. ANN. art. 6132b, § 3.08(b)(4) (Vernon Supp. 2004-05)).
14. *Id.* (citing TEX. REV. CIV. STAT. ANN. art. 6132b, § 3.08(b)(5) (Vernon Supp. 2004-05)).
15. *Id.* (citing TEX. REV. CIV. STAT. ANN. art. 6132b, § 3.08(b)(7) (Vernon Supp. 2004-05)).
16. *Id.*

In this case, the LLP filed its initial application to register the partnership as a limited liability partnership on March 6, 1995.[17] The LLP did not renew that registration; thus, the LLP's status as a registered limited liability partnership expired on March 6, 1996. The court stated that, because the LLP was not a registered limited liability partnership when it incurred the lease obligations, "the clear language of Article 6132b-3.08(a)(1) supports Apcar's position that Gaus and West are not protected from individual liability for the lease obligations."[18] The court of appeals also distinguished limited partnership cases from limited liability partnership cases on two bases.[19] First, applying the reasoning of the limited-partnership cases "would conflict with the clear language of Article 6132b-3.08," which "provides that partners are protected from individual liability only for debts and obligations that are incurred while the partnership is a registered limited liability partnership."[20] Second, the Texas Revised Limited Partnership Act has a "substantial compliance" provision that is not present in Article 6132b-3.08.[21] The Texas Revised Limited Partnership Act provides that "a limited partnership is formed at the time of the filing of the initial certificate of limited partnership with the secretary of state or at a later date or time specified in the certificate if there has been *substantial compliance* with the requirements of this section."[22] If the Texas Legislature intended limited liability partners to only substantially comply with registration requirements, they knew how to and would have done so. Therefore, the court of appeals held "that a partnership must be in compliance with the registration requirements in Article 6132b-3.08(b) for its partners to receive protection from individual liability under Article 6132b-3.08(a)(1)."[23] The LLP was not a registered limited liability partnership when it entered into the lease and incurred the lease obligations, and accordingly, Gaus and West were not protected from individual liability for the lease obligations.[24]

B. Winding up a Partnership—How Should a Capital Account Imbalance Be Computed in the Absence of a Partnership Agreement Regarding Sharing Losses?—*Farnsworth v. Deaver*[25]

In this case, the Amarillo Court of Appeals applied the Texas Revised Partnership Act to the winding up of a partnership because there was no partnership agreement that covered how the partners would share

17. *Id.*
18. *Id.* at 140-41.
19. *Id.*
20. *Id.*
21. *Id.* at 142. This is a crucial distinction on which the limited-partnership cases heavily rely.
22. *Id.* at 141-42 (citing Tex. Rev. Civ. Stat. Ann. art. 6132a-1, § 2.01(b) (Vernon Supp. 2004-05)) (emphasis added).
23. *Id.* at 142.
24. *Id.*
25. 147 S.W.3d 662 (Tex. App.—Amarillo 2004, no pet.).

losses.[26] Johnny and Janie Farnsworth and John and Carol Deaver entered into a partnership, which later dissolved.[27] The jury found that the Farnsworths had a capital account balance of $22,080.68, and the Deavers a capital account balance of $34,349.41.[28] The jury ordered the Farnsworths to pay the Deavers $6,134.37, half of the difference between those balances.[29]

Because the Deavers and Farnsworths did not have a partnership agreement that controlled the manner in which the capital accounts were to be settled, the Texas Revised Partnership Act filled that gap.[30] Under the Act, when winding up a partnership, a partner "shall contribute to the partnership an amount equal to that partner's negative balance in the partner's capital account."[31] Because a partnership that is being wound up must make distributions to partners equal to the positive balances in the partners' capital accounts, the "capital accounts having a positive balance are debts of the partnership."[32] Partners share these capital losses in the same proportion as they share the profits.[33]

On dissolution in this case, the partnership owed a debt of $56,430.09, the sum of the balances in the partners' capital accounts.[34] The Farnsworths and the Deavers agreed to share the profits equally; thus, they shared losses equally under the Texas Revised Partnership Act.[35] Each couple would owe $28,215.04 to cover the capital loss, assuming that the partnership had no cash left after paying all other debts.[36] When this amount was offset by each partner's capital account balance, the Deavers had a positive capital account balance of $6,134.37, and the Farnsworths had a negative capital balance of $6,134.26.[37] However, evidence produced at trial indicated that the partnership had $880 in cash remaining after paying all of the partnership's other debts[38] that was not taken into consideration by the trial court in computing the capital losses of each partner. Therefore, the amounts determined by the trial court were incorrect, but the basic application of the statute to the facts was correct and thus upheld.[39]

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26. *Id.* at 664 n.2.
27. *Id.* at 663-64.
28. *Id.* at 664 n.1.
29. *Id.*
30. *Id.* at 664 n.2.
31. *Id.* at 664 (citing TEX. REV. CIV. STAT. ANN. art. 6132b, § 8.06(b) (Vernon Supp. 2004-05)).
32. *Id.* (citing 2 A. BROMBERG & L. RIBSTEIN, PARTNERSHIP § 7.10(b) (2004)).
33. *Id.* (citing 2 A. BROMBERG & L. RIBSTEIN, PARTNERSHIP § 7.10(b) (2004); TEX. REV. CIV. STAT. ANN. art. 6132b, § 4.01(b) (Vernon Supp. 2004-05)).
34. *Id.* at 665.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 666. The Farnsworths' negative capital balance was $5,694.36 after applying their half of the $880.

C. Existence of a Partnership—Does the Evidence Support a Jury's Finding of a Partnership and Joint Enterprise So As to Allow the Appellant to Be Held Jointly and Severally Liable for Damages?—*Reagan v. Lyberger*[40]

This case examined whether a partnership existed between a builder and his bookkeeper. Guy and Peggy Lyberger entered into an agreement with Mike Anderson, d/b/a Great Western Homes, for the construction of a new house.[41] Mike Reagan, who handled Great Western's bookkeeping, attended a meeting in August 1994 with Anderson, the Lybergers, and the bank that was funding the project to discuss how the money allocated to the project was being spent.[42] After the meeting, the Lybergers dealt solely with Reagan on all financial matters.

The state filed criminal charges against Anderson, he pled guilty to misappropriation of trust funds, and the court ordered him to pay $40,000 to unpaid subcontractors on the Lybergers' house job.[43] The Lybergers also brought a civil suit against Anderson, Reagan, and a concrete company for negligence, gross negligence, breach of contract, breach of warranty, fraud, violations of the Texas Deceptive Trade Practices Act, and conversion.[44] Trial evidence showed that Anderson referred to Reagan as his partner and that Reagan told third parties that he was Anderson's partner. Other evidence showed that Reagan allowed Anderson to use his credit card to purchase appliances for one house being built and that Reagan lent Anderson $6,000 around the time that the Lybergers' house was being built.[45] In addition, Reagan testified that he and Anderson were negotiating a "Profits Participation Agreement," under which Great Western Homes would build homes and Reagan would act as business manager. The agreement, which included provisions pertaining to profit sharing and allocating losses and liabilities, was signed in October 1994, after construction began on the Lybergers' house but before the closing occurred in March 1995.[46]

The jury found that Anderson and Reagan were involved in both a partnership and a joint enterprise and that Reagan was part of the conspiracy that damaged the Lybergers. Thus, the Lybergers were able to recover the awarded $45,799.14 jointly and severally from Anderson and Reagan.[47] Reagan appealed, contending that there was no evidence, or insufficient evidence, to support the jury's finding of his liability based on partnership, joint enterprise, or conspiracy.[48]

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40. 156 S.W.3d 925 (Tex App.—Dallas 2005, no pet. h.).
41. *Id.* at 926.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 927.
46. *Id.* at 926-27.
47. *Id.* at 927.
48. *Id.*

Under the Texas Revised Partnership Act, "an association of two or more persons to carry on a business for profit as owners creates a partnership, whether the persons intend to create a partnership and whether the association is called a 'partnership,' 'joint venture,' or other name."[49] The factors indicating the formation of a partnership include: "(1) receipt or right to receive a share of profits of the business; (2) expression of intent to be partners in the business; (3) participation or right to participate in control of the business; (4) sharing or agreeing to share losses of the business or liability for claims by third parties against the business; and (5) contributing or agreeing to contribute money or property to the business."[50] Not all of the factors must be present for a partnership to exist, and no one factor is dispositive.[51] If a partnership exists, then "a partner is liable jointly and severally for all debts and obligations of the partnership."[52]

The Dallas Court of Appeals applied the statutory factors indicating the formation of a partnership to the evidence presented at trial and found sufficient evidence to support a finding of a partnership. First, the court found that Reagan "was actively participating in the home building business with Anderson and had at least some control over the business's financial aspects."[53] Second, the fact that Anderson referred to Reagan as his partner and Reagan identified himself as Anderson's partner supported Anderson and Reagan's subjective intent to operate as partners.[54] Finally, by lending money to Anderson and allowing Anderson to charge appliances on his credit card, Reagan contributed money to the business.[55] This evidence fit within the second, third, and fifth factors in the above list. Therefore, the court found sufficient evidence to support the jury's finding that Reagan and Anderson were engaged in a partnership.[56] The court also found that the "Profits Participation Agreement" between Reagan and Anderson supported their conclusion. Even though they did not sign this agreement until after construction on the Lybergers' house had already commenced, the court found that their subsequent written agreement on how to allocate profits and losses, in addition to the three factors already present in the business relationship, suggested that Anderson and Reagan intended their business relationship to be a partnership from the beginning.[57]

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49. *Id.* (quoting TEX. REV. CIV. STAT. ANN. art. 6132b, § 2.02 (Vernon Supp. 2004-05)).

50. *Id.* at 927-28 (citing TEX. REV. CIV. STAT. ANN. art. 6132b, § 2.03 (Vernon Supp. 2004-05)).

51. *Id.* at 928 (citing McDowell v. McDowell, 143 S.W.3d 124, 129 (Tex. App.—San Antonio 2004, pet. denied)).

52. *Id.* at 927 (citing TEX. REV. CIV. STAT. ANN. art. 6132b, § 3.04 (Vernon Supp. 2004-05)).

53. *Id.* at 928.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

In the alternative, Reagan, relying on two prior cases, argued that the Lybergers' claims against him based on the alleged partnership should fail because the Lybergers did not name the partnership as a party in the suit.[58] The court distinguished the cases and found his reliance on them "misplaced."[59] In *Fincher*, the issue was whether a partner could be held individually liable when only the partnership had been sued; the court concluded that joint and several liability of the individual partners followed as a matter of law once liability against a partnership was established.[60] In *Wolfe*, the court upheld the jury's finding that Wolfe was not liable on the basis of partnership, but only because the plaintiff did not assert partnership in either its trial pleadings or its motion for new trial.[61] Thus, the court found no cases "requiring that the partnership entity be sued separately to hold the individual partners liable."[62] The court of appeals therefore affirmed the trial court's judgment.[63]

D. A General Partner's Chapter 7 Bankruptcy Discharge—Can a General Partner Be Held Liable for a Partnership Debt after Receiving a Discharge in Bankruptcy?—*United States v. Williams*[64]

In this case, the government sued Charles Williams, D.D.S. under the Federal Debt Collections Procedures Act and common law to collect a debt of Hillside Apartments Partnership, of which Williams was a general partner. In October 1975, the Partnership executed a $327,500 promissory note payable to the Farmers Home Administration ("FHA") of the USDA.[65] The Partnership also obtained the loan through the FHA's Rural Development Housing Loan Program, now known as the Rural Housing Service ("RHS"). Williams signed the loan documents as a partner of the Partnership.[66] These loans were used to build an apartment complex in Mexia, Texas. In May 1987, Williams and his wife filed a chapter 7 bankruptcy petition. Williams did not list the debt of the Partnership, although he did list the Partnership as an asset.[67] Williams also did not list the USDA, the FHA, or RHS as creditors, nor did any of those enti-

58. *Id.* Reagan cited Fincher v. B & D Air Conditioning and Heating Co., 816 S.W.2d 509 (Tex. App.—Houston [1st Dist.] 1991, writ denied) and Texaco, Inc. v. Wolfe, 601 S.W.2d 737 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.) for the proposition that the alleged partnership must be sued in order for him to be held liable as a partner.

59. *Id.*

60. *Id.* (citing *Fincher*, 816 S.W.2d at 513).

61. *Id.* at 929 (citing *Wolfe*, 601 S.W.2d at 741).

62. *Id.* It certainly is the better practice to bring an action against a partnership and all partners. In fact, it would be interesting to know how the case would have been decided if Tex. Rev. Civ. Stat. Ann. art. 6132b, § 3.05 (Vernon Supp. 2004-05)) applied, which in some cases requires exhaustion of partnership assets before a partner's assets may be pursued to satisfy a judgment.

63. *Id.*

64. No. 3:03-CV-2321-D, 2005 U.S. Dist. LEXIS 15857 (N.D. Tex. Aug. 3, 2005).

65. *Id.* at *2.

66. *Id.*

67. *Id.* at *3-4.

ties receive notice of Williams's bankruptcy petition.[68] Because Williams was hospitalized for four weeks in April 1987 for treatment of a substance-abuse problem and thus was unable to provide his counsel with information concerning his creditors and assets, the court found that Williams' failure to list the debt was not intentional.[69] Williams's bankruptcy case was treated as a no-asset case, and he received a discharge in November 1987. The case was closed in April 1992.[70]

Because Williams did not list the Partnership debt in his bankruptcy filings, the USDA never released Williams from his obligations under the loan documents that he executed in connection with the loan to the Partnership. Therefore, in 1997, the USDA notified Williams that the Partnership needed to take corrective action or the debt would be accelerated. Williams informed the USDA that he had relinquished his Partnership interest in 1987, but did not mention his bankruptcy.[71] The USDA accelerated the debt in December 1997 and purchased the apartment complex at foreclosure in August 1998. A deficiency of $144,183.17 remained after the proceeds of the sale were credited against the debt.[72] The USDA demanded payment from Williams for the deficiency, plus accrued interest, which totaled $224,315.93 as of June 1, 2005.[73]

Williams argued that his personal liability for the Partnership's debts was discharged in his bankruptcy.[74] His position was that the USDA had an unmatured, contingent claim that arose before he filed his bankruptcy petition. The USDA asserted that the claim did not arise in 1987 because the Partnership was performing in accordance with its obligations under the loan agreement;[75] rather, the USDA contended that its enforceable claim against Williams arose in 1997 when the Partnership defaulted on the loan.[76]

To resolve the issue of when the USDA's claim against Williams arose, the court considered the Bankruptcy Code's definition of a "claim" and case law involving that definition. The court concluded that "Congress intended the term 'claim' to be read broadly so that 'all legal obligations of the debtor, no matter how remote or contingent[,] will be able to be dealt with in the bankruptcy case.'"[77]

Further, the court found that a claim exists in bankruptcy only if, before filing the bankruptcy petition, the creditor had a right to payment

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68. *Id.*

69. *Id.*

70. *Id.* at *4.

71. *Id.* That would all have been sorted out in the bankruptcy, of course, had all of the requisite information been included in the filings.

72. *Id.* at *5.

73. *Id.*

74. *Id.*

75. *Id.* at *6.

76. *Id.* at *7.

77. *Id.* at *8 (citing *In re* Nat'l Gypsum Co., 139 B.R. 397, 405 (N.D. Tex. 1992) (Sanders, C.J.) (quoting H.R. REP. NO. 595, at 22 (1977)).

under the relevant non-bankruptcy law.[78] However, a creditor "need not have a cause of action that is ripe for suit outside of bankruptcy in order for it to have a pre-petition claim for purposes of the [Bankruptcy] Code."[79] In this case, the Partnership incurred the debt to the USDA before Williams filed his bankruptcy petition.[80] Williams, as a general partner of the Partnership, could be held jointly and severally liable for partnership debts under the Texas Uniform Partnership Act, which governed in 1975 and in 1987.[81] Thus, the USDA could enforce the Partnership's obligation directly against Williams without having to first proceed against the Partnership.[82] Even if the USDA's claim against Williams was considered to be unmatured, contingent, or both before his bankruptcy filing, the USDA still had a "claim" against Williams at the time of his filing as defined by the Bankruptcy Code.[83] Consequently, the claim would have been dischargeable in bankruptcy.[84]

The court next addressed whether Williams's failure to list the USDA as a creditor precluded the USDA's claim from being discharged.[85] The court concluded that Williams's failure to list the USDA as a creditor was inadvertent, that no court's docket would be unduly disrupted by allowing Williams to discharge the debt, and that the USDA did not suffer any prejudice by the discharge of the debt because Williams's bankruptcy was a no-asset case.[86] Thus, the court held that Williams's debt to the USDA was discharged in his bankruptcy.[87]

E. Dissolution of a Partnership—Did a Partner Breach a Dissolution Agreement, and Was the Other Partner's Claim for an Accounting Barred by Limitations?—*Boulle v. Boulle*[88]

Franco Boulle and Jean-Raymond Boulle formed the Boulle Group and the Boulle Partnership, a mining business. They also formed Exdiam with other investors.[89] During litigation between the Partnership and another company, a disagreement between Franco and Jean led to the dissolution of the Boulle Partnership.[90] Jean confirmed in a letter to Franco

78. *Id.* at *9 (citing *Nat'l Gypsum Co.*, 139 B.R. at 405; Carrieri v. Jobs.com, Inc., 393 F.3d 508, 524, 525 n.17 (5th Cir. 2004)).
79. *Id.* at *9-10 (quoting *Nat'l Gypsum Co.*, 139 B.R. at 405).
80. *Id.* at *11.
81. *Id.*
82. *Id.*
83. *Id.* at *13 (citing *In re* Loewen Group Int'l, Inc., 274 B.R. 427, 438-39 (Bankr. D. Del. 2002) for the proposition that creditors may assert claims against debtors in bankruptcy for all amounts owed to the creditor as of the petition date, even if the amounts are unmatured).
84. *Id.* at *14.
85. *Id.*
86. *Id.* at *20.
87. *Id.*
88. 160 S.W.3d 167 (Tex. App.—Dallas 2005, pet. denied).
89. *Id.* at 170.
90. *Id.*

dated August 20, 1991 that "any existing partnership" had been dissolved on January 1, 1991.[91] On June 22, 1992, Franco and Jean executed an agreement to separate the interests in the Boulle Group and the Boulle Partnership.[92] Under the agreement, Franco was to convey to Jean any interest that Franco might have in the Boulle Partnership projects, including Exdiam, its Arkansas Diamond Development Corporation joint venture ("ADDC"), and any other entity that he owned jointly with Jean.[93] In return, Jean paid Franco $45,000, assumed all of Franco's liabilities related to the projects, and assigned to Franco a "five percent (5%) interest in the net revenues received by Jean Boulle from the projects in which Franco Boulle transfers his interest to Jean Boulle under this agreement, with a maximum of $5,000,000."[94] Jean then transferred 85% of the interest in ADDC to a corporation he owned, Diamond Mining Company of America ("DMCA"). Another of Jean's companies, Maria Investment Limited, held the stock of DMCA. In 1993, Maria Investment Limited conveyed its DMCA stock to a publicly traded Canadian company, which Jean and a colleague acquired earlier that year and re-named Diamond Fields Resources, Inc. ("DFR").[95] Significant nickel deposits were found in one of DFR's mining interests in Canada, and Jean and his colleague conveyed those deposits to a large Canadian mining company.[96] In return for that conveyance, Jean received stock in the mining company valued at more than $250 million.[97] Franco sued Jean for his percentage of Jean's "net revenues" from the transaction, claiming breach of contract, fraud, rescission, breach of fiduciary duty, and a partnership accounting.[98]

Jean argued that Franco never owned any interest in most of the projects at issue and that the one project in which Franco did own an interest, ADDC, did not generate any net revenues. Thus, Jean had no duty to pay Franco under the Agreement's five-percent provision.[99] Jean also argued that even if the five-percent provision were intended to include receipts realized from the sale of a project, Franco's claim was barred by the statute of limitations because Jean transferred his interest in the projects more than four years before Franco filed the lawsuit.[100] Therefore, the trial court granted Jean's motion for summary judgment.

On appeal, Franco argued that the trial court erred in granting summary judgment on the breach-of-dissolution-agreement claim, as it misinterpreted the terms of the agreement. In addition to mineral production from a project, Franco argued that "revenue" included receipts generated

91. *Id.* at 170-71.
92. *Id.* at 171.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 171-72.
97. *Id.* at 172. If you followed this bouncing ball, you should work for the CIA!
98. *Id.*
99. *Id.* at 173.
100. *Id.*

by the sale or transfer of the project itself.[101] Further, Franco argued that Jean "received" revenue when he sold the DFR stock for $250 million, not when he transferred partnership assets in exchange for shares of DFR.[102] The court concluded that the terms "revenue," "net revenue," and "received" were subject to two or more reasonable interpretations, and thus the agreement was ambiguous. The ambiguity prevented the court from upholding Jean's summary judgment for breach of the dissolution agreement.[103]

Franco also argued that his claim for a partnership accounting was not barred by limitations.[104] A partner has a right to an accounting at the date of dissolution if there is no agreement otherwise.[105] Franco argued that the agreement, which was dated June 22, 1992, was an agreement otherwise.[106] However, the agreement did not mention accounting. The court refused to "imply an agreement to allow an accounting for an indefinite period of time when the record contains no evidence of such an agreement."[107] Because the statute of limitations for partnership accounting is four years[108] and Franco's right to an accounting from Jean accrued as of the dissolution date, January 1, 1991, Franco's claim for an accounting was barred by limitations.[109]

F. Indemnification—Must a Texas Limited Partnership Indemnify a Former Officer of Its Corporate Predecessor under the Texas Business Corporations Act?—*Galley v. Apollo Associated Services, Ltd.*[110]

In this case, a former officer of a Texas limited partnership's corporate predecessor sought indemnification for attorney's fees that the officer incurred while successfully defending claims brought against him by the partnership.[111] Apollo Associated Services, Ltd. sued Mark Galley for tortious interference with business relations, misappropriation of trade secrets, breach of loyalty, conversion, breach of contract, and conspiracy arising from his actions as an employee and officer of Apollo Associated Services, Incorporated ("Apollo Inc."), the predecessor-in-interest to Apollo Ltd.[112] Galley moved for summary judgment and counterclaimed, seeking indemnification from Apollo Ltd. for his expenses and attorney's fees under the Texas Business Corporation Act ("TBCA").[113]

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101. *Id.*
102. *Id.* at 173-74.
103. *Id.* at 174.
104. *Id.* at 175-76.
105. *Id.* at 176.
106. *Id.*
107. *Id.*
108. *Id.* (citing Tex. Civ. Prac. & Rem. Code Ann. § 16.004(c) (Vernon 1999)).
109. *Id.*
110. 177 S.W.3d 523 (Tex. App.—Houston [1st Dist.] 2005, no pet. h.) (not designated for publication).
111. *Id.* at 525.
112. *Id.*
113. *Id.*

The trial court partially granted summary judgment, and Galley moved to add Apollo Inc. as an indispensable party to the litigation. Under court order, Appollo Ltd. added Appollo Inc. as a defendant.[114] Apollo Ltd. then nonsuited its remaining claims against Galley and moved for summary judgment, seeking dismissal of Galley's counterclaim for indemnification. The trial court granted the motion and Galley appealed.[115]

Galley's employment with Apollo Inc. terminated sixteen months before Apollo Ltd. purchased Apollo Inc.'s assets. In the asset purchase agreement, Apollo Ltd. agreed to assume and pay Apollo Inc.'s debts and liabilities as of December 31, 2001, to pay all contract obligations, and to hold Apollo Inc. harmless from any and all liability on the existing contracts—one of which was the employment agreement between Galley and Apollo, Inc.[116]

Galley argued that because Apollo Ltd. purchased Apollo Inc.'s assets, Apollo Ltd. should indemnify him for his litigation costs under Article 2.02-1 of the TBCA.[117] Apollo Ltd., on the other hand, contended that because it was not a corporation, it should not be subject to the statutory indemnification provision of the TBCA.[118] Apollo Ltd. further argued that because indemnification of Galley would be a liability of Apollo Inc., and Apollo Inc.'s liabilities were not included in the asset-purchase agreement, Apollo Ltd. should not be liable for Galley's indemnification claim.[119]

The court recognized that the TBCA applies to corporations and predecessors of corporations but not to a Texas limited partnership, unless a corporation acquires the partnership or merges with a partnership to become a corporate entity.[120] Because Apollo Ltd. was not a *predecessor* in interest to a corporation but a *successor* in interest of a corporation, the court found that Apollo Ltd. was not included in the Article 2.02-1 definition of corporation.[121] The Texas Revised Limited Partnership Act ("TRLPA") also contains an indemnification provision.[122] Although Galley requested indemnification under this TRLPA provision in his second amended counterclaim, he abandoned the issue on appeal, contending only that he was entitled to indemnification under the TBCA.[123] In a footnote, the court of appeals noted that the TRLPA only provides *discretionary* indemnification of a limited partnership's employees and agents.[124] Thus, even if Galley had pursued the indemnification claim

114. *Id.* at 525-26.
115. *Id.* at 526.
116. *Id.*
117. *Id.* at 527.
118. *Id.*
119. *Id.*
120. *Id.* at 528.
121. *Id.*
122. *Id.* at n.2 (citing TEX. REV. CIV. STAT. ANN. art. 6132a-1 § 11.01-.17 (Vernon Supp. 2004-05)).
123. *Id.*
124. *Id.*

under TRLPA on appeal and the TRLPA provision was found to be applicable, the provision would not mandate that Apollo Ltd. indemnify him.[125] The court of appeals therefore upheld the trial court's summary judgment on the indemnification claim.[126]

G. Partnership-Related Issues Presented in Litigation

Several cases presented partnership-related issues in litigation, requiring the courts to construe the scope of a partnership, to decide whether to grant mandamus relief for an order to compel production of documents during discovery, and to determine whether notice of delinquent taxes could be imputed to a partnership when delivered to an alleged partner.

1. *Scope of a Partnership—Did the Partnership Exist for the Development of Multiple Oil and Gas Wells?*—Texas Nom Limited Partnerships v. Akuna Matata Investments, Ltd.[127]

John Mathewson and Martin O'Neill started Garrison, Ltd., an oil- and gas-exploration business, in San Antonio in 1995.[128] O'Neill was Garrison's sole limited partner and owned a 99% limited partner's interest. Texas Nom Limited Partnership owned the remaining 1% interest. Its general partner, Roland Hurni-Gosman and his wife, Ann, both acquaintances of Mathewson, orally agreed to invest $250,000 from their retirement account, Akuna Matata Investments, Ltd., in Garrison to develop oil and gas wells in Colorado County (known as the "Gracey Ranch" project). After some of the wells drilled in Colorado County made a profit, Akuna Matata requested a profit distribution; however, Garrison never responded. As a result, Akuna Matata filed suit against O'Neill, Mathewson, and Texas Nom, claiming that they breached their oral agreement and their fiduciary duty to Akuna Matata.[129]

During a bench trial, O'Neill and Texas Nom claimed that the oral partnership agreement was not for the development of multiple wells in Colorado County, but for the development of only one well, which turned out to be a dry hole.[130] Thus, they argued that they did not breach the agreement or any fiduciary duty to Akuna Matata because there were no profits to distribute.[131] Regardless, the trial court found in favor of Akuna Matata and awarded $225,309 in damages and $139,780 in attorney's fees.[132]

Texas Nom argued on appeal that there was legally insufficient evidence to support a finding that the scope of the oral partnership between

125. *Id.*
126. *Id.*
127. No. 04-04-00447-CV, 2005 WL 159459 (Tex. App.—San Antonio Jan. 26, 2005, pet. denied).
128. *Id.* at *1.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at *2.

the parties involved the development of multiple wells. Consequently, the court of appeals first examined the evidence.

During the trial, both O'Neill and Roland testified to the existence of the partnership, but their testimony differed on its scope.[133] Roland claimed that the partnership was formed to develop multiple oil and gas wells in Colorado County, and O'Neill argued that the partnership was established to drill only one well. However, O'Neill also testified that the Gracey Ranch project comprised all wells drilled in Colorado County. The court held that the trial court had sufficient evidence to conclude that an oral partnership existed for the development of multiple wells in Colorado County.[134] Further, the court held that a fiduciary duty existed as a matter of law because both parties testified that a partnership existed.[135]

Alternatively, Texas Nom argued that the agreement was too indefinite to be enforceable because the following terms were not specified in the agreement: (1) each partner's percentage of ownership; (2) the oil and gas leases to be developed; (3) the number of wells and their location; (4) additional capital contributions; (5) profit distribution and return of capital; (6) control of the partnership; and (7) the duration of the partnership.[136] The court disagreed with Texas Nom's contention, finding that the record contained evidence regarding most of the partnership's terms.[137] That evidence showed that profit distribution, capital return, and each partner's percentage of ownership were all based on the relative amount of the partner's capital contributions. Trial evidence indicated that the partnership's scope was to develop all of the oil and gas leases in Gracey Ranch. Texas Nom was to contribute any and all additional capital needed.[138] The fact that the agreement did not cover the duration, management, or control of the partnership did not make the partnership agreement too indefinite to be enforceable.[139] Rather, the Texas Revised Partnership Act supplied any missing terms.[140] Under the Texas Revised Partnership Act, either party could terminate the partnership at any time, and each partner had equal rights to manage and conduct the partnership's business.[141]

Texas Nom also argued that the agreement was unenforceable under the statue of frauds.[142] Because Akuna Matata's interest in the partnership was a working interest in oil and gas and a conveyance of a working interest in oil and gas under Texas law is a real-property interest subject to the statute of frauds, they reasoned that the agreement was unenforce-

133. *Id.* at *3.
134. *Id.* at *4.
135. *Id.* at n.3.
136. *Id.* at *4.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* (citing Park Cities Corp. v. Byrd, 534 S.W.2d 668, 672 (Tex. 1976)).
141. *Id.* (citing TEX. REV. CIV. STAT. ANN. art. 6132b-2.06, § 4.01(d) (Vernon Supp. 2004-05)).
142. *Id.* at *5.

able.[143] However, the court found that an exception to the statute of frauds applied—when one party fully performs a contract.[144] Akuna Matata contributed $250,000 to the partnership, which was its only obligation under the agreement. Because Akuna Matata fully performed, the statute of frauds did not bar the oral agreement.[145] The court affirmed the trial court's judgment, awarding Akuna Matata reliance damages, which included reimbursement of the investment it made in the partnership, and attorney's fees, which are recoverable in Texas in a successful suit on an oral contract.[146]

2. *Can Notice of Delinquent Taxes Be Imputed to a Partnership?*—Tierra Sol Joint Venture v. City of El Paso[147]

The City of El Paso filed suit against Tierra Sol Joint Venture to collect delinquent taxes on two parcels of land. The Joint Venture was formed in 1981 to acquire the two parcels.[148] The Joint Venture originally was owned by five investors, but after a series of transactions, James E. Branson, Jr. and Robert C. Samuel, who was not one of the original investors, were the remaining partners. During trial, Branson denied that the Joint Venture received notices of the delinquent taxes. Samuel testified that he was not a partner of the Joint Venture between 1982 and 1995, although he did not allege that he had not received notices of the delinquency.[149] On the other hand, an employee of the City's central appraisal district testified that the records listed Samuel as the owner of the two parcels from 1982 through 1995.[150] Furthermore, an employee for the City's tax assessor and collector testified that the tax bills sent to Samuel for the two parcels were not returned to the City as undeliverable. After a bench trial, the trial court entered a judgment in favor of the City, finding that the Joint Venture owned the two parcels on January 1 of the tax years 1989 through 1995, that Samuel was a partner of the Joint Venture from 1982 through 1995, and that the City had sent all tax bills and delinquent notices to Samuel as required by law.[151]

On appeal, the court had to determine whether Samuel was a partner in the Joint Venture as early as 1982. If so, the delinquent-tax notices that were sent to him would constitute notice to the Joint Venture. A partnership under the Texas Revised Partnership Act is "the association of two

143. *Id.* An argument that a partnership interest is personal property, not real property, may have been a successful argument here. *See* TEX. REV. CIV. STAT. ANN. art. 6132b, § 5.02 (Vernon Supp. 2004-05), which states: "A partner's partnership interest is personal property for all purposes." Similarly, TEX. REV. CIV. STAT. ANN. art. 6132a-1, § 7.01 (Vernon Supp. 2004-05) states: "A partnership interest is personal property. A partner has no interest in specific limited partnership property."

144. *Id.*

145. *Id.*

146. *Id.* at *5-6.

147. 155 S.W.3d 503 (Tex. App.—El Paso 2004, pet. denied).

148. *Id.* at 505.

149. *Id.* at 505-06.

150. *Id.* at 506.

151. *Id.*

or more persons to carry on a business for profit as owners, whether the persons intend to create a partnership and whether the association is called a 'partnership,' 'joint venture,' or other name."[152] Samuel & Co., Inc. and the Joint Venture argued that "a partnership consists of an express or implied agreement containing four required elements: (1) a community of interest in the venture; (2) an agreement to share profits; (3) an agreement to share losses; and (4) a mutual right of control or management of the enterprise."[153] Even though Samuel had an interest in the Joint Venture, they argued that there was no evidence of an agreement to share profits and losses and no evidence of mutual right of control of the Joint Venture.[154] Branson testified that he had objected to the transfer of an interest to Samuel and that he had never agreed to admit him as a new partner or to share profits and losses with him. In fact, Branson controlled the books and would not give Samuel access to them. Further, Branson and Samuel filed separate tax returns because they could not agree how to file a single return.[155] Even though Samuel held himself out as a partner of the joint venture between 1982 and 1995 in sworn pleadings and testimony in lawsuits between Branson and Samuel, a finding that a partnership exists cannot be upheld if there is no evidence of one of the elements of a partnership.[156] Thus, the court of appeals found that there was legally insufficient evidence to support the trial court's finding of fact that Samuel was a partner in the Joint Venture from 1982 through 1995.

Because the court of appeals found legally insufficient evidence to support the trial court's finding that Samuel was a partner of the Joint Venture from 1982 through 1995, it followed directly that the trial court's conclusion that the delinquency notices sent to Samuel were imputed to the Joint Venture was erroneous as a matter of law.[157] Consequently, the penalties and interest on the delinquent taxes would be cancelled unless the City presented evidence that the property owner, the Joint Venture, received the delinquent-tax notices. The undisputed evidence presented at trial showed that the City sent the delinquency notices to Samuel.[158] The City presented no evidence that the Joint Venture received the notices, and Branson testified at trial that the Joint Venture had not received any delinquency notices after 1982.[159] Therefore, the court cancelled the penalties and interest on the delinquent taxes.[160]

152. *Id.* at 507 (citing TEX. REV. CIV. STAT. ANN. art. 6132b-2.02(a) (Vernon Supp. 2004-05)).

153. *Id.* (citing Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 176 (Tex. 1997); TEX. REV. CIV. STAT. ANN. art. 6132b-2.03) (Vernon Supp. 2004-05)).

154. *Id.* at 507-08.

155. *Id.* at 508.

156. *Id.* (citing Schlumberger, 959 S.W.2d at 176).

157. *Id.* at 504.

158. *Id.* at 508-09.

159. *Id.* at 504.

160. *Id.*

3. *Writ of Mandamus—Is a Partnership Entitled to Mandamus Relief for an Order Compelling a Former Partner's Discovery?*— In re West Texas Positron, Ltd.[161]

West Texas Positron, Ltd., a Texas limited partnership, West Texas Positron, L.L.C., its general partner, and Michael J. Whyte (collectively, the "relators") brought a proceeding to seek a writ of mandamus to vacate an order compelling production of documents in response to a discovery request in litigation against the Partnership by Nancy Cahill, a limited partner and former employee of the Partnership.[162] The Partnership was formed to operate a cyclotron facility in Lubbock. A written partnership agreement dated September 30, 2002 named the LLC as the Partnership's sole general partner and owner of a one-percent interest in the Partnership. Whyte was the sole member of the LLC and a limited partner of the Partnership, owning a 73-percent interest. Cahill owned a ten-percent interest, with other individuals owning the balance of the interests.[163] The Partnership's principal place of business was in San Francisco, California, which also is where the Partnership's books, records, and accounts were to be maintained.[164]

After only a few months, Cahill terminated her employment with the Partnership because Whyte allegedly refused to comply with the terms of the agreement, refused to provide financial reports and an accounting, and engaged in unethical business practices.[165] In September 2003, Cahill filed the underlying action under Rule 202.[166] In May and June 2004, Cahill filed amended petitions asserting claims against the relators. The relators counterclaimed for breach of fiduciary duty and misappropriation of trade secrets, seeking a declaratory judgment that Cahill's original suit was a breach of the partnership agreement and that her partnership interest was properly terminated.[167] In June 2004, Cahill served a request for production on the Partnership and on its general partner, the LLC. The Partnership and the LLC objected, claiming that the request would require them to disclose trade secrets.[168] In August 2004, Cahill filed a motion to compel production and to impose sanctions. The Partnership raises several arguments in response. First, the Partnership argued that it had fully responded to the request under Rule 196.2(b) of Civil Procedure and reiterated its objections. Second, the Partnership claimed that the controversy pertained to the value of Cahill's partnership interest and that the information that Cahill sought in the production request was not

161. No. 07-04-0506-CV, 2005 WL 146968 (Tex. App.—Amarillo Jan. 20, 2005, no pet. h.).
162. *Id.* at *1.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at *2.
168. *Id.*

relevant to that issue.[169] Further, because the parties agreed to have an independent certified public accountant perform an evaluation to determine the value of Cahill's interest, the Partnership argued that it was unnecessary for it to produce the documents that Cahill sought.[170] Finally, the Partnership argued that if the "highly sensitive" information that Cahill sought was disclosed to the Partnership's competitors, it would be highly detrimental to the Partnership. In fact, Whyte believed that at the time of the suit Cahill was working for one of the Partnership's competitors.[171]

After a hearing at which no evidence was presented, the trial court granted Cahill's motion to compel and directed the parties to enter into a confidentiality agreement.[172] Further, the court ordered that certain pricing information be released only to Cahill's counsel and experts. Cahill also had to provide a list of all of the Partnership's customers to her knowledge, and the Partnership had to produce all records pertaining to the customers that Cahill listed.[173] The record did not disclose whether the trial court found that the information Cahill sought contained trade secrets.

In this proceeding, the relators argued that they were entitled to mandamus relief because they conclusively proved that the information requested contained trade secrets and because Cahill did not prove that the information she sought was necessary for a fair adjudication of her claims against the Partnership.[174] The court disagreed, finding that there was sufficient evidence to establish that the information Cahill sought was necessary to a fair adjudication of her claims.[175] Because the Partnership was closely held and had been in existence for less than two years, the Partnership's financial information was necessary to value Cahill's partnership interest.[176] Cahill also had no other way to obtain the information.[177] Further, the Partnership had significant protection. The trial court's order compelling discovery was conditioned on the parties' reaching a mutually agreeable confidentiality agreement, which permitted the relators to assert privilege with respect to some of the customer information. The order also restricted the disclosure of pricing information to Cahill's counsel and experts. Because the relators did not establish that the trial court abused its discretion in entering the order and did not establish that they had no other remedies, the court denied the relators' petition for writ of mandamus.[178]

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169. *Id.*
170. *Id.* at *3.
171. *Id.* at *2.
172. *Id.* at *3.
173. *Id.*
174. *Id.* at *4.
175. *Id.*
176. *Id.*
177. *Id.* at *5.
178. *Id.* Note the language of TEX. REV. CIV. STAT. ANN. art. 6132a-1, § 1.07(d) (Vernon Supp. 2004-05): "A partner or an assignee of a partnership interest, on written

request stating the purpose, may examine and copy, in person or by the partner's or assignee's representative, at any reasonable time, for any proper purpose, and at the partner's expense, records required to be kept under this section and other information regarding the business, affairs, and financial condition of the limited partnership as is just and reasonable for the person to examine and copy."