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CORPORATIONS AND PARTNERSHIPS

by

Robert W. Hamilton*

DURING the survey period there were significant legislative and administrative developments that affect all Texas practitioners in the corporate and partnership areas. Unlike the last few annual survey periods, however, there were relatively few significant court decisions in these areas.

I. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

A. Corporations as General Partners

In 1975 the Texas Supreme Court decided *Delaney v. Fidelity Lease Ltd.*¹ That case involved the common practice of creating a limited partnership with a single, corporate general partner and having some of the limited partner-investors serve as shareholders, directors, and officers of the corporate general partner. In one of its more unfortunate business-related holdings, the court concluded that a limited partner who acted as an officer of the corporate general partner took part in the "control of the business"² and thereby became personally liable for the debts of the business. Further, the court not only read "control of the business" broadly but also concluded that a creditor might recover even though he was unaware of the putative limited partner and did not rely on his credit. Finally, the court strongly intimated in a dictum that the question whether corporations generally had power to be general partners in limited partnerships was still an open one in Texas.³ This dictum relied solely on earlier case law⁴ and did not address the statutory provisions that were clearly intended to allow a corporation to be a general partner.⁵

In 1978, in perhaps an even more unfortunate ruling, the Texas attorney

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1. 517 S.W.2d 420 (Tex. Civ. App.—El Paso 1974), *rev'd in part*, 526 S.W.2d 543 (Tex. 1975). The case is discussed in Hamilton, *Corporations, Annual Survey of Texas Law*, 30 Sw. L.J. 153 (1976).

2. See TEX. REV. CIV. STAT. ANN. art 6132a, § 8 (Vernon 1970).

3. 526 S.W.2d 543, 546 (Tex. 1975).

4. *Id.* The court referred to *Port Arthur Trust Co. v. Muldrow*, 155 Tex. 612, 291 S.W.2d 312 (1956).

5. *E.g.*, TEX. BUS. CORP. ACT ANN. art. 2.02A(18) (Vernon Supp. 1980) (providing that a corporation has the power to be a member in any partnership). See Hamilton, *supra* note 1, at 156.

general released an opinion⁶ that sought to carry the implications of *Delaney* to their logical conclusion and stated that corporations could not be general partners in limited partnerships. It further asserted that certain acts could be performed only by the unanimous vote of all the limited partners, a practical impossibility in publicly held limited partnerships. This opinion created general consternation, and much of it was quickly withdrawn by the attorney general.⁷

Since a significant number of all risk ventures in Texas take the form of limited partnerships because of federal income tax considerations,⁸ these two developments threatened to create serious, if not devastating, problems. In 1979 the Texas Legislature adopted amendments to the Texas Uniform Partnership and Limited Partnership Acts that sought to reverse completely the implications and holdings of both *Delaney* and H-1229 and to give greater guidance as to what constitutes taking part in "control of the business." First, the new statute specifically provides that responsibility for partnership obligations against a limited partner may be asserted only by "a person who transacts business with the partnership reasonably believing that the limited partner is a general partner."⁹ Secondly, a new section was added to list acts that do *not* constitute taking part in control of the business. According to this section, the limited partner may:

- (1) Consult with and advise the general partners as to the conduct of the business.
- (2) Act as a surety, guarantor, or endorser for obligations of the partnership or to provide collateral for its borrowing.
- (3) Act as a contractor, agent, or employee of the partnership or of a general partner.
- (4) Act as an officer, director, or shareholder of a corporate general partner.
- (5) Approve, individually or by a majority of the limited partners (by number, financial interest, or as otherwise provided in the certificate), material matters that are stated in the certificate, such as:

6. TEX. ATT'Y GEN. OP. NO. H-1229 (1978). See Aldave, *Corporations and Partnerships, Annual Survey of Texas Law*, 33 SW. L.J. 239, 246-47 (1979).

7. A portion was withdrawn "pending reconsideration" within a week of its issuance. TEX. ATT'Y GEN. OP. NO. H-1229A (1978). Other parts of the opinion were withdrawn several months later. *Id.* No. H-1321 (1978). This opinion is discussed in three letters from a group of law professors to the attorney general that were later published. Bromberg, Bate-man, Hamilton, Lebowitz, and Winship, *Corporate General Partners*, 16 TEX. ST. B. BULL. SECTION CORP., BANKING & BUS. L., Sept. 1978, at 24; *Unanimity Requirements in Limited Partnerships, Id.*, Dec. 1978, at 3; *Unanimity in Limited Partnerships no longer required by Attorney General, Id.*, Mar. 1979, at 3.

8. See S. MORRIS, *REAL ESTATE TAX PLANNING* § 4.5 (1977); Haims & Stroock, *Federal Income Tax Classification of Limited Partnerships Formed Under the Revised Uniform Limited Partnership Act*, 9 ST. MARY'S L.J. 489 (1978). See generally Katz, *IRS Agrees to Follow Tests of Partnership Recognition as Stated in Larson*, 51 J. TAX. 12 (1979); Comment, *Viability of a Tax Shelter Vehicle: Limited Partnerships with a Corporation as Sole General Partner*, 49 MISS. L.J. 469 (1978) (general overview of tax benefits).

9. TEX. REV. CIV. STAT. ANN. art. 6132a, § 8 (Vernon Supp. 1980), amended by 1979 Tex. Gen. Laws, ch. 723, § 2, at 1781.

- (A) Dissolution and winding up of the partnership.
- (B) Amendment of the partnership certificate or agreement.
- (C) Sale, exchange, lease, mortgage, pledge, or other transfer of all or substantially all of the assets of the partnership other than in the ordinary course of business.¹⁰

Further, neither the possession of power to do these acts nor the actual exercise of such power constitutes taking part in the control of the business. Thirdly, this legislation specifically supersedes the portion of H-1229 that held that certain acts could be performed only by the unanimous consent of limited partners.¹¹ Finally, to eliminate all remnants of *Delaney*, both partnership acts were amended to provide specifically that the word "person" as used in those acts includes a corporation, a general or limited partnership, a trustee or trust, an executor, administrator, or estate, and a natural person, and that "any person may be a partner unless the person lacks capacity apart from this Act."¹² This legislation should put to rest any doubts that the corporate and partnership law of Texas might be inadequate for a modern industrialized state in which limited partnerships are often preferred investment vehicles.

The legislative changes described have been informally reviewed by the Internal Revenue Service, which concluded that they do not endanger the current favorable tax treatment of Texas partnerships and limited partnerships.¹³

B. *De Facto Mergers*

In 1977 the court of civil appeals of Austin introduced the concept of "de facto mergers" to Texas law. In *Western Resources Life Insurance Co. v. Gerhardt*¹⁴ it held that a successor corporation was liable for obligations of a predecessor corporation even though the transfer transaction involved solely an acquisition of assets, and the successor specifically did not assume liabilities. In 1979 the legislature attempted to reverse this decision.¹⁵ Whether or not this attempt will be successful remains to be seen because in some areas, such as products liability, the plaintiff has strong equities in these "de facto merger" cases.

10. *Id.*

11. *Id.*

12. TEX. REV. CIV. STAT. ANN. art. 6132b, § 6-A (Vernon Supp. 1980), added by 1979 Tex. Gen. Laws, ch. 723, § 5, at 1782; TEX. REV. CIV. STAT. ANN. art. 6132a, § 2a (Vernon Supp. 1980), added by 1979 Tex. Gen. Laws, ch. 723, § 1, at 1781.

13. See Coleman & Bromberg, *Comments of Bar Committee*, 17 TEX. REV. CIV. STAT. ANN. 23 (Vernon Supp. 1980).

14. 553 S.W.2d 783 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.).

15. TEX. BUS. CORP. ACT. ANN. art. 5.10B (Vernon Supp. 1980), added by 1979 Tex. Gen. Laws, ch. 194, § 1, at 422. This section specifically provides that a disposition of all or substantially all the assets of a corporation requiring special authorization of shareholders "is not considered to be a merger or consolidation pursuant to this Act or otherwise," and does not make the acquiring corporation liable for any obligations of the selling corporation unless as expressly provided by another statute. See *id.* § 5.10A (on shareholder authorization).

C. *Minor Legislation in 1979*

1. Corporations formed before 1955 (the date of enactment of the Texas Business Corporation Act) now have perpetual existence despite the fifty-year limitation of pre-TBCA Texas law.¹⁶

2. The maximum criminal fine that may be imposed on corporations convicted of violations of the Motor Fuels Tax is one half the amount corporations may be fined for violations of other criminal statutes.¹⁷

3. An executor or personal representative of a deceased partner who is, by agreement, "entitled to the place of the deceased partner in the firm" is liable for partnership liabilities only to the extent of the deceased partner's capital and the estate's assets.¹⁸

4. Amendments to the Texas Securities Act proposed by the Securities Board were also adopted.¹⁹ These amendments did not make significant substantive changes but were generally designed to make the Texas registration process more similar to the registration process under the Federal Securities Act of 1933.²⁰ Attorneys with Texas Securities Act problems should routinely consult the current version of the Act since a large number of sections were amended in 1979.

5. The legislature changed some of the basic ground rules relating to the formation of domestic corporations and the filing of corporate documents with the secretary of state's office: a \$100 franchise tax deposit now accompany articles of incorporation,²¹ and the requirement of filing duplicate originals has been changed to allow filing one original and one copy.²² The original-and-a-copy amendment is recognition of the virtually universal use of high quality copying machines. The secretary of state keeps the original and returns the copy with the appropriate certificate. This change is applicable to all corporate and professional association filings with the secretary of state where duplicate originals were previously required.

16. TEX. BUS. CORP. ACT ANN. art. 2.02A (Vernon Supp. 1980), *as amended* by 1979 Tex. Gen. Laws, ch. 96, § 1, at 174.

17. TEX. TAX.-GEN. ANN. art. 9.018 (Vernon Supp. 1980), *added by* 1979 Tex. Gen. Laws, ch. 291, § 1, at 626. The reason for this limitation is unclear.

18. TEX. PROB. CODE ANN. § 238A (Vernon Supp. 1980), *added by* 1979 Tex. Gen. Laws, ch. 46, § 1, at 71; TEX. REV. CIV. STAT. ANN. art. 7425b-19 (Vernon Supp. 1980), *added by* 1979 Tex. Gen. Laws, ch. 46, § 2, at 71.

19. 1979 Tex. Gen. Laws, ch. 160, at 348. This enactment made many additions and amendments to the Texas blue sky laws. TEX. REV. CIV. STAT. ANN. arts 581-4 to -7, -22 to -23, -29, -33, -35-1 (Vernon Supp. 1980).

20. 15 U.S.C. § 77 (1976).

21. TEX. TAX.-GEN. ANN. art. 12.06 (Vernon Supp. 1980), *as amended by* 1979 Tex. Gen. Laws, ch. 89, § 1, at 161. Although minor, these changes created a mild furor when they went into effect, because many of the members of the practicing bar were unaware of them, and a large number of filings had to be held up or returned until the filing attorney complied with the new requirements.

22. 1979 Tex. Gen. Laws, ch. 120, at 213. This revision amends several statutes. *See, e.g.*, TEX. REV. CIV. STAT. ANN. arts. 1396-2.05 to -8.12, 1528e-f (Vernon Pam. Supp. 1963-1979); TEX. BUS. CORP. ACT. ANN. arts. 2.10-10.01 (Vernon Supp. 1980); TEX. BUS. & COM. CODE ANN. §§ 16.10-.11 (Vernon Supp. 1980).

D. *Other Administrative Changes*

Administrative changes²³ by the secretary of state in the fall of 1979 were designed to reduce the crush of telephone calls going to the corporations division. A study showed that approximately seventy-eight percent of all calls were terminated by a busy signal.²⁴ A new computer is being installed to reduce the response time for inquiries. In addition, the secretary of state has agreed to make available microfiche containing the computer index of corporations. By an initial investment of \$285 (for a microfiche reader) plus a payment (currently set at \$7.10), an attorney may obtain a current copy of all corporate information kept in the secretary of state's computer. This service will not only reduce the telephone call load but should also be a genuine convenience for attorneys. It will now be possible, for example, to ascertain promptly whether a suggested name is currently in use. The secretary of state has also opened two new post office boxes: one to facilitate the routine filing of documents²⁵ and the other for documents requiring special handling.²⁶

Finally, the Ethics Committee of the Texas Bar Association concluded that a lawyer or professional corporation may use "any name that is not misleading as to the identity, responsibility or status of those practicing thereunder," but that the use of impersonal or assumed names such as "Southwest Trial Associates" may and should be prohibited.²⁷

II. JUDICIAL DEVELOPMENTS

A. *Partnerships*

The conceptual question of whether a partnership should be considered as an aggregate of the individual partners or as an entity to some extent independent of them continues to arise. Neither view is entirely appropriate: in cases of doubt the policies underlying the substantive issue should be considered, and in cases not resolvable by such policies, the entity approach should generally be preferred.²⁸ This issue was considered in *Fidelity & Casualty Co. v. Swayzer*,²⁹ an insurance case. An automobile insurance policy listed the named insured as follows:

Louis E. Brown & Frank Swayzer, Jr.
DBA S & B Trash Service
4630 Alvin
Houston, Harris, Texas 77051.

23. These changes are described in the Newsletter, 42 TEX. B.J., Nov. 1979 (unnumbered).

24. See Newsletter, 42 TEX. B.J., Oct. 1979 (unnumbered).

25. This address is Secretary of State, Corporations Division, P.O. Box 13697, Austin, Texas 78711.

26. This address is Secretary of State, Corporations Division, Special Handling, P.O. Box 12436, Austin, Texas 78711.

27. State Bar of Texas, Ethics Committee, Opinion No. 398 (1978), 42 TEX. B.J. 610 (1979).

28. See 19 R. HAMILTON, TEXAS PRACTICE: BUSINESS ORGANIZATIONS § 151 (1973).

29. 583 S.W.2d 850 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.).

The company refused to defend a claim arising out of an accident caused by one Benjamin, an employee of a partnership called Southwest Specialty Company; Swayzer was a partner in Southwest Specialty, but Southwest Specialty was apparently unconnected with the business of S & B Trash Service. The truck was registered in the name of Southwest Specialty Company. Holding that the designation in the policy was "unambiguous," the court concluded that the policy did not cover the accident in question. This conclusion inferentially follows the entity theory since Swayzer is a named insured on the policy yet is not covered by the policy in his capacity as a partner in another partnership.³⁰ While the result apparently is that Swayzer has no insurance coverage in the specific case, most partners probably realize that each partnership business is sufficiently separate that individual insurance policies should be obtained for each partnership. In another case, *Lone Star Industries, Inc. v. Lomas & Nettleton Financial Corp.*,³¹ the court held that a mortgage signed by a partnership effectively created a lien on a piece of property held solely in the names of the individual partners. This result, which might be cited as supporting an aggregate theory, clearly seems to be contemplated by the real estate section of the Uniform Partnership Act.³² A final case, *Royal v. Moore*,³³ held that for venue purposes the "residence" of a partnership is the residence of the individual partners rather than the location of the partnership business as stated in the partnership agreement.

Other partnership cases decided during the survey period involve primarily issues relating to dissolution and the right to an accounting. *Hughes v. Cole*³⁴ focused on whether a written agreement created a partnership at will or a partnership for a term. This question becomes important only in the event that one partner withdraws prematurely and the other seeks to hold him liable for breach of contract for the premature withdrawal.³⁵ That is precisely what happened in *Hughes v. Cole*; the agreement provided:

1. Jim Hughes hereby agrees to pay to Dennis Cole fifteen (15%) percent of the taxable net income received by Jim Hughes through his work in the Austin Prosthetics Center, Orthotic Division, said payments to be made semi-annually beginning January 1, 1975 through July 1, 1978, with adjustments to be made annually at the end of each taxable year reflecting the actual net taxable income received. . . .

Although Jim Hughes will be bound by this agreement and will be required to make semi-annual payments representing 15% of the taxable net income received from his work at the Austin Prosthetics Center, Orthotic Division, he is in no way bound by this Agreement to

30. The court relied on an early New York case that also applied the entity theory on virtually identical facts. *Hartigan v. Casualty Co. of America*, 227 N.Y. 175, 124 N.E. 789 (1919).

31. 586 S.W.2d 192 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.).

32. TEX. REV. CIV. STAT. ANN. art. 6132b, § 10 (Vernon 1970).

33. 580 S.W.2d 159 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

34. 585 S.W.2d 865 (Tex. Civ. App.—Tyler 1979, no writ).

35. See 19 R. HAMILTON, *supra* note 28, § 190.

remain with this Center and perform his work through this Center.³⁶

The court had little difficulty in concluding that a partnership at will was created. It declared there "is not ambiguity" in the contract, that "every partnership is prima facie a partnership determinable at the will of anyone of the persons who entered into it," and "the agreement makes it clear that Hughes was in no way bound to remain at the Center or work there for any specified period of time."³⁷ The Texas Uniform Partnership Act was not mentioned. Rarely is language so free of ambiguity that constructional aids are unnecessary. Here, the last clause of the second-quoted paragraph appears to contradict the first clause in the same paragraph. Nevertheless, the result reached seems reasonable, since the average, normal partnership is one at will, and in cases of doubt that should be the preferred construction.

Another case, *Mitchell Resort Enterprises, Inc. v. C & S Builders, Inc.*,³⁸ held that a suit between partners for breach of fiduciary duty or negligence cannot be maintained until after the partnership has been dissolved. The court again relied upon common law without citing the Texas Uniform Partnership Act, which rejects the "only at dissolution" rule at least for actions for an accounting.³⁹ Section 22 allows such an action "whenever other circumstances render it just and reasonable."⁴⁰ Moreover, Professor Bromberg's comments state that "[p]rior Texas cases have recognized the right to an accounting only at dissolution; the Section goes considerably beyond."⁴¹ It was not at all clear in this case, however, that what was being demanded was an "account or accounting"; neither word was used in plaintiff's petition and the plaintiff's attorney described the suit as involving "breach of fiduciary duty or negligence."⁴²

Whether or not suits between partners should be permitted prior to dissolution should be based on considerations of judicial efficiency and economy: a suit before dissolution should not be permitted if the same claim will arise in a final accounting after dissolution and such a dissolution has or almost certainly will occur. In some instances circumstances may exist in which it is reasonable for partners to litigate their respective rights and obligations within the context of a going partnership without dissolving the partnership. Such circumstances are probably rare, however, since if disagreements reach the point of litigation, one or more partners will usually terminate the relationship. On the basis of the cryptic description of the facts by the court in *Mitchell Resort Enterprises* it is not possible to determine how such considerations might have been applied in the specific case.

In *Wolfe v. East Texas Seed Co.*⁴³ the court applied section 35 of the

36. 585 S.W.2d at 867-68.

37. *Id.* at 869.

38. 570 S.W.2d 463 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.).

39. TEX. REV. CIV. STAT. ANN. art. 6132b, § 22 (Vernon 1970).

40. *Id.* § 22(d).

41. Bromberg, *Source and Comments*, 17 TEX. REV. CIV. STAT. ANN. 353 (Vernon 1970).

42. 570 S.W.2d at 465.

43. 583 S.W.2d 481 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ dis'm'd).

Texas Uniform Partnership Act⁴⁴ to hold a former partner in a dissolved partnership liable for post-dissolution obligations. The defendant had been active in the partnership business before dissolution, the business was continued under the same name, and no notice of dissolution was given to the plaintiff who had dealt with the partnership prior to dissolution. Section 35 of the Texas Uniform Partnership Act squarely imposes liability on the withdrawing partner in this situation.

Two cases involving post-dissolution accountings also arose during the survey period. *Stone City Attractions, Inc. v. Henderson*⁴⁵ involved a partnership engaged in the business of arranging concerts for "rock 'n' roll" and "country" music. After two of the three partners were imprisoned for marijuana violations, the remaining partner created a corporation, assigned his partnership interest to that corporation, and then apparently funneled the profits from concerts into the corporation and paid expenses from partnership funds. Not surprisingly, the court affirmed a judgment holding that this arrangement violated the managing partner's fiduciary duties and imposing a substantial dollar judgment against the managing partner and his corporation. In *Bailey v. Jackson*⁴⁶ the court held that the burden of proof was on the plaintiff to establish the value of his interest in the partnership at the time of dissolution and the amount of post-dissolution profits earned by the other partner's continuing the business. Such amounts, the court intimated, were jury questions, and it was improper to appoint a receiver to inventory, appraise, and dispose of the partnership assets. A summary judgment in favor of the plaintiff was therefore reversed, and the case was remanded for trial.

B. Corporations

Piercing the Corporate Veil. The argument that the separate identity of an insolvent corporation should be ignored and the officers, directors, or shareholders held personally responsible for corporate obligations appears in four appellate decisions published during the survey period.⁴⁷ In only one case was the shareholder held personally liable,⁴⁸ and the peculiar facts of that case indicate that liability might have been imposed on a theory of fraud on creditors rather than on "piercing the corporate veil." The Texas courts, guided by thoughtful opinions of the Texas Supreme Court,⁴⁹ appear to have developed a reasonable approach toward this

44. TEX. REV. CIV. STAT. ANN. art. 6132b, § 35 (Vernon 1970).

45. 571 S.W.2d 206 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.).

46. 573 S.W.2d 267 (Tex. Civ. App.—Waco 1978, no writ).

47. *Tigrett v. Pointer*, 580 S.W.2d 375 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.); *William B. Roberts, Inc. v. McDrilling Co.*, 579 S.W.2d 335 (Tex. Civ. App.—Corpus Christi 1979, no writ); *Mortgage & Trust, Inc. v. Bonner & Co.*, 572 S.W.2d 344 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.). One federal case also involved piercing the corporate veil issues. *Walker v. Newgent*, 583 F.2d 163 (5th Cir. 1978).

48. *Tigrett v. Pointer*, 580 S.W.2d 375 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.); see text accompanying notes 57-62 *infra*.

49. The two leading cases most often cited are *Gentry v. Credit Plan Corp.*, 528 S.W.2d 571 (Tex. 1975), and *Bell Oil & Gas Co. v. Allied Chem. Corp.*, 431 S.W.2d 336 (Tex. 1968).

troublesome area.⁵⁰

*Mortgage & Trust, Inc. v. Bonner & Co.*⁵¹ is a straightforward case that well illustrates the Texas approach. The issue was whether two corporations should be treated as "alter egos" of each other so that a mechanic's lien on all the property of one was also a lien on the property of the other. The two corporations had the same office address and the same directors and officers, there were some financial transactions between them, and the names were similar. In other respects, however, the two corporations appeared to be distinct: for example, one was closely held while the other had approximately 3,800 shareholders. Finally, the transactions did not appear to be fraudulent or to cause injustice; no such claim was raised in the pleadings. Not surprisingly, the court of civil appeals reversed the trial court's conclusion that the two corporations were alter egos. The court's general discussion of the criteria for corporate liability is worth citing at length:

As a general rule, two or more corporations are separate and distinct legal entities, and the separate identity of each will not be disregarded in order to impose liability on one corporation for the acts of another corporation merely because of: a) overlapping stock ownership; b) a duplication of some or all of the directors or officers; or c) an exercise of the control that stock ownership gives to stockholders. *Gentry v. Credit Plan Corporation of Houston*, 528 S.W.2d 571, 573 (Tex. Sup. 1975). In some circumstances, however, the one corporation may be regarded as the "alter ego" of another where management and operations are assimilated to the extent that the subsidiary is simply a name or a conduit through which the parent conducts its business. . . . The corporate entity may thus be disregarded where it is used as a cloak or cover for fraud or illegality of operations. . . . Accordingly, the "alter ego" theory, or other similar theories, will not be utilized to disregard the corporate entity unless: 1) it is made to appear that there is such a unity that the separateness of the corporation has ceased to exist; and 2) the facts are such that an adherence to the fiction of the separate existence of the particular corporation would, under the particular circumstances, sanction fraud or promote injustice.⁵²

Perhaps the most interesting issue in these cases is raised by *William B. Roberts, Inc. v. McDrilling Co.*,⁵³ involving an attempt to hold the sole shareholder liable for a debt of the corporation. Roberts, the sole shareholder, was placed on the witness stand and was questioned by the plaintiff's attorney:

50. Mr. Justice Cardozo's famous but unfortunate dictum that the doctrine of piercing the corporate veil is wrapped in the "mists of metaphor," *Berkey v. Third Ave. Ry.*, 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926), probably explains the conceptual difficulties under which courts have long labored in this area. After all, if a jurist as prestigious as Cardozo proclaims that the area is unprincipled, it must be so. See generally Hamilton, *The Corporate Entity*, 49 TEXAS L. REV. 979 (1971).

51. 572 S.W.2d 344 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

52. *Id.* at 348-49 (some citations omitted).

53. 579 S.W.2d 335 (Tex. Civ. App.—Corpus Christi 1979, no writ).

- Q. Do you consider yourself personally responsible for the contracts of the corporation which are made?
- A. I feel like the corporation stands on its own. I do sign as chief executive officer.
- Q. Do you consider yourself personally responsible for the dealings that the corporation makes through you?
- A. I feel like that I am, yes.

* * * * *

- Q. Do you believe when people deal with you and you put your William B. Roberts, Inc. down on the contract and they are dealing with you, do you believe because of your control of this corporation that you are personally liable for the obligations that you have contracted on behalf of this corporation, do you believe that?
- A. I believe that.
- Q. Is that your position?
- A. Yes.⁵⁴

The plaintiff argued that this testimony constituted a judicial admission that an alter ego relationship existed. This argument failed, however, when the court concluded that the testimony was not clear and unequivocal.⁵⁵ The court also concluded that given the facts there was no justification for piercing the corporate veil; the court further suggested that it would pierce the corporate veil "only under compelling circumstances," since such action "thereby destroy[s] an important fiction under which so much of the business of the country is conducted."⁵⁶

The one case that held a shareholder liable for corporate obligations is *Tigrett v. Pointer*.⁵⁷ Pointer was in the real estate business through his corporation, Heritage Building Corporation. The corporation had equity capital of \$1,000; over the years the business was financed by informal advances made by Pointer. These amounts were reflected on the books as a "loan account," but were never evidenced by notes; no security was obtained or interest payments made. On April 30, 1974, when the ledger account showed a balance of over \$480,000 owed to Pointer (and six days after service of process in plaintiff's suit), entries were made in the books showing that all the assets of the corporation were transferred at book value to Pointer in reduction of the debt owed to him. Corresponding entries were made in Pointer's personal books and, on the same day, book entries were made showing Pointer's transfer of the same assets to another wholly owned corporation, the Heritage Corporation. As in the case of

54. *Id.* at 344.

55. *United States Fidelity & Guar. Co. v. Carr*, 242 S.W.2d 224 (Tex. Civ. App.—San Antonio 1951, writ ref'd), sets forth five requirements for a judicial admission: (1) the statement must be made during a judicial proceeding; (2) the statement must be contrary to an essential fact or defense asserted by the person giving the testimony; (3) the statement must be deliberate, clear, and unequivocal; (4) giving conclusive effect to the statement must be consistent with the public policy upon which the rule is based; and (5) the statement must not be destructive of the opposing party's theory of recovery.

56. 579 S.W.2d at 345.

57. 580 S.W.2d 375 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

many complex transactions, these transfers were not made cleanly. Deeds were not executed for several days; some property was transferred directly from Heritage Building Company to the Heritage Corporation; new stationery was printed, but the name on the office door was never changed; and so forth. Further, the old corporation did not completely shut down operations: Pointer transferred some cash to it from time to time, and in at least one year its records showed a profit. The source of this profit is not clear from the court's opinion, but the dissenting opinion states that the bulk of it represented gain from the sale of an apartment house that had been transferred to Pointer and Heritage Corporation and then transferred back; the reason for these transfers is also unclear.⁵⁸ Also, franchise taxes were paid regularly for the old corporation, and apparently the financial records and corporate books of Heritage Building Company were duly maintained.

The transfer from the Heritage Building Company to Pointer and the Heritage Corporation, as an abstract matter, might be analyzed in various ways:

1. If Pointer's "loan" is really a form of capital contribution, the distribution of assets to him may be a fraud on creditors under common law principles.⁵⁹ In effect, the transaction constitutes an irregular distribution of assets to a shareholder without making provision for the corporation's debts.
2. If Pointer's "loan" is recognized as a debt on a parity with the plaintiff's, repayment of Pointer's debt rather than the plaintiff's might be a breach of fiduciary duty, a species of self-dealing,⁶⁰ since Pointer elected to repay his own loan first.
3. If Pointer's "loan" is recognized as a debt on a parity with the plaintiff's, but the corporation is insolvent, Texas's ubiquitous "trust fund" doctrine might come into play to set aside the preference given to Pointer.⁶¹ This doctrine provides that the assets of an insolvent and inactive corporation become a "trust fund" for all creditors and the directors become "trustees" for all the creditors.⁶²
4. The various corporations and Pointer individually might be consid-

58. When asked why he structured the transaction this way, Pointer responded "I was trying to get money in there to pay those bills with." *Id.* at 390. While the dissent quotes this remark to show that the Heritage Building Corporation was a continuing corporation after the October 1974 transaction, it also cuts the other way, since it virtually admits that Pointer transferred assets *out* of the corporation, leaving significant unpaid indebtedness.

59. "This court has held that a corporation cannot disable itself from responding for its debts by distributing its assets among its shareholders and leaving without remedy those having valid claims. In such a case, we have held that a creditor injured by such distribution of assets may proceed by an appropriate suit against such stockholders, to enforce the payment of its claim against the corporation." *A.R. Clark Inv. Co. v. Green*, 375 S.W.2d 425, 437 (Tex. 1964).

60. *See* Annot., 56 A.L.R.3d 212 (1974).

61. *Fagan v. LaGloria Oil & Gas Co.*, 494 S.W.2d 624 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ), *discussed in* Lebowitz, *Recent Developments in Texas Corporation Law—Part I*, 28 Sw. L.J. 641, 757-61 (1974).

62. *See* 20 R. HAMILTON, *supra* note 28, § 734.

ered "alter egos;" if so each becomes liable for plaintiff's claim under a "piercing the corporate veil" theory.

While the last theory, the one adopted by the court, seems inherently the least plausible, there were procedural and substantive problems with each of the others. For example, neither the trust fund doctrine nor a breach of fiduciary duties was pleaded and, as the dissent points out, it is not at all clear whether the trust fund doctrine should be applied to an active corporation such as was involved here. There was also a trial court finding that the April 30, 1974, transfers were made without any intent to defraud, to evade a legal obligation, to protect a claim, or to justify a wrong.

On the facts, strong equities favor the plaintiff. After all, the plaintiff originally had a claim against a corporation with substantial assets; then, the assets of the corporation but not its liabilities were transferred to a new corporation under the same owners, and the old corporation no longer had sufficient assets to discharge its liabilities. The fact that the transfers were effected by book entries reducing some questionable "loans" by the principal shareholder should not hide the true nature of the transaction.

Given these circumstances it is not surprising that the court of civil appeals reversed and rendered for the plaintiff; its opinion is a confusing one that talks about various doctrines but applies an "alter ego" principle. One judge dissented, pointing out quite correctly the logical flaws in the majority opinion. The supreme court dismissed the writ, "no reversible error," thereby not giving precedential value to the lower court opinion.

*Walker v. Newgent*⁶³ is a diversity case arising in the Southern District of Texas. Plaintiff sought to obtain jurisdiction in that district over Adam Opel AG (Opel) in a suit based on an accident in Germany. Opel is a German corporation with no place of business in the United States; it is, however, a wholly owned subsidiary of General Motors, and some of the cars it manufactures are distributed in the United States, including Texas, by other subsidiaries of General Motors. The plaintiff argued that the relationship between General Motors and Opel was such that General Motors' business in Texas could be imputed to the subsidiary under *Reul v. Sahara Hotel*.⁶⁴ Pointing out that most cases involved the converse situation, that is attempts to hold a parent corporation liable based on the Texas-related activities of a subsidiary, the court concluded that, on the facts, the degree of control was not great enough to justify exercise of jurisdiction over Opel.⁶⁵

Article 12.14 of the Texas Franchise Tax Act. Article 12.14 of the Texas Franchise Tax Act⁶⁶ imposes personal liability for corporate obligations on certain officers of corporations whose charters have been forfeited for non-payment of franchise taxes. Prior to its amendment in 1977, the test of

63. 583 F.2d 163 (5th Cir. 1978).

64. 372 F. Supp. 995 (S.D. Tex. 1974).

65. This conclusion was based on a mixture of common law, statutory, and constitutional reasons. 583 F.2d at 166-68.

66. TEX. TAX.-GEN. ANN. art. 12.14 (Vernon 1969).

liability under article 12.14 was whether the post-forfeiture debt was created or incurred "with [the officer's] knowledge, approval and consent."⁶⁷ One case⁶⁸ arising under this statute during the survey period upheld a jury verdict that the defendant did not have the requisite knowledge. The court further rejected the argument that the sole shareholder was personally liable because forfeiture under article 12.14 had caused a dissolution and had vested the assets and liabilities in the shareholder. The conclusion that "forfeiture" does not equal "dissolution" is based on the reinstatement provisions of the Franchise Tax Act,⁶⁹ prior case law reached the same result.⁷⁰

Due Process in Private Associations. Two cases arising during the survey period raise basic questions about the judicial reviewability of decisions by private associations. *Adams v. American Quarter Horse Association*⁷¹ involved the refusal of the association to register a filly, an essential step if the animal is to become breeding stock. *NAACP of Houston Metropolitan Council v. NAACP*⁷² involved the removal of the executive secretary of the Houston Metropolitan Council of NAACP by the national office. Both of these cases involved judicial review of private organizations' discretionary decisions that had significant impact upon individual members of the organization. If these had been governmental organizations the procedural rules would be established by constitutional and statutory provisions. Clearly, a different kind of standard must be applied when reviewing a decision by a private organization.

Both organizations had adopted rules that describe in greater or lesser detail the substantive standards to be applied and procedures to be followed in resolving disputes. In addition, however, Texas law recognizes that such organizations must follow "traditional notions of due process,"⁷³ or "elemental due process."⁷⁴ This requirement is particularly important in organizations such as the quarterhorse association whose bylaws do not describe specific procedures. The "essential elements" of due process, the Texas court stated, "are notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case" and "a fair hearing after due notice by procedure analogous to judicial proceed-

67. In 1977 this test was changed to "(1) over his objection, or (2) without his knowledge, if the exercise of reasonable diligence to acquaint himself with the affairs of the corporation would not have revealed the intention to create the debt," and it was made clear that this was an affirmative defense to be established by the defendants. *Id.* art. 12.14(3) (Vernon Supp. 1980), as amended by 1977 Tex. Gen. Laws, ch. 671, § 1, at 1692.

68. *Longoria v. Atlantic Gulf Enterprises, Inc.*, 572 S.W.2d 71 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

69. TEX. TAX.-GEN. ANN. art. 12.17 (Vernon 1969).

70. *McGown v. Kittel*, 480 S.W.2d 47 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.).

71. 583 S.W.2d 828 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.).

72. 460 F. Supp. 583 (S.D. Tex. 1978).

73. 583 S.W.2d at 834.

74. 460 F. Supp. at 589.

ings.”⁷⁵ Presumably, the decision must also have some rational relationship with the policies of the association and not constitute “unfair discrimination.”⁷⁶ Both courts concluded that these procedural requirements had been met by the associations and declined to interfere with their decisions.

Authority of Officers. Litigation continues to arise in Texas relating to the implied authority of officers. The legal literature has pointed out that Texas case law presents essentially inconsistent principles as to this issue.⁷⁷ The principal case during the survey period involving this question, *Retama Manor Nursing Centers, Inc. v. Cole*,⁷⁸ does little to clear up the confusion, and indeed may make matters worse. In *Retama* the president (and a member of the board of directors) entered into a substantial but oral construction contract without any express authority from the board. The court stated that holding the office of president of a corporation “does not give [a person] power to bind the corporation except as to routine matters arising in the ordinary course of business.”⁷⁹ However, the court also held that authority “may at times be inferred from the circumstances surrounding the acts” and that “the silence of the board of directors and their acquiescence in the transactions which preceded and followed the oral contracts [are] sufficient evidence of apparent authority.”⁸⁰ Even though there is nothing in the appellate court’s opinion to indicate that the board was aware of the president’s activities, or even who the members of the board were, the court concluded that the directors “made no effort to stop these activities but actually sat by and received the benefits of Cole’s knowledge in preparing the . . . site for construction.”⁸¹

It is probably wise to give corporate officers greater implied authority than some of the Texas case law suggests. The basic problem with the reasoning in *Retama*, however, is that it broadens inherent authority by indirection and the use of a fiction: the same argument based on silence and acquiescence could be employed in almost every case in which the board is not consulted about a transaction. The portions of the opinion quoted above also reflect confusion between actual and apparent authority; if there is implied or actual acquiescence, the authority granted is actual rather than apparent. The confusion arises from the fact that the same conduct, in this case silence, may often be cited to support findings of either actual or apparent authority. It should also be observed that to the extent there is approving silence combined with a receipt of benefits, the concepts of “ratification” or “estoppel” perhaps fit more closely than “ap-

75. 583 S.W.2d at 834.

76. *Id.* at 837.

77. See 20 R. HAMILTON, *supra* note 28, § 585.

78. 582 S.W.2d 196 (Tex. Civ. App.—Corpus Christi 1979, writ ref’d n.r.e.).

79. *Id.* at 201.

80. *Id.*

81. *Id.*

parent authority."⁸²

Finally, in a case that has been to the Amarillo court of appeals three times and on which the Texas Supreme Court has written twice,⁸³ it was established that a corporation cannot be assessed exemplary damages in the absence of a finding of malicious or willful conduct by some corporate officer or director.⁸⁴

Jurisdiction and Venue. Numerically, the largest number of cases involving corporations that arose during the survey period related to questions of venue or jurisdiction. Most of these cases, however, routinely applied established principles to various factual situations. For example, four cases⁸⁵ involved the issue of whether a foreign corporation was amenable to service of process under the Texas long arm statute.⁸⁶ These cases applied a two-fold test: (1) Is the nonresident defendant amenable to process under the long arm statute? (2) Is the exercise of personal jurisdiction consistent with the requirements of due process?⁸⁷

Another case involved article 2029⁸⁸ of the Texas statutes, a procedural statute that dates back to 1854. It authorizes service of the citation upon "the President, Vice President, Secretary, Cashier, Assistant Cashier, or

82. For a general discussion of the closely related doctrines of estoppel, ratification, and actual and apparent authority, see 20 R. HAMILTON, *supra* note 28, § 586.

83. *Maxey v. Texas Commerce Bank*, 571 S.W.2d 39 (Tex. Civ. App.—Amarillo 1978), *writ ref'd n.r.e. per curiam*, 580 S.W.2d 340 (Tex. 1979); *Maxey v. Citizens Nat'l Bank*, 489 S.W.2d 697 (Tex. Civ. App.—Amarillo 1972), *rev'd*, 507 S.W.2d 722 (Tex. 1974); *Citizens Nat'l Bank v. Maxey*, 461 S.W.2d 138 (Tex. Civ. App.—Amarillo 1970, *writ ref'd n.r.e.*).

84. *Maxey v. Texas Commerce Bank*, 571 S.W.2d 39, 49-50 (Tex. Civ. App.—Amarillo 1978), *writ ref'd n.r.e. per curiam*, 580 S.W.2d 340 (Tex. 1979). On the other hand, a corporation may be liable for civil penalties for violating an injunction because of acts by agents within the scope of their authority and for the benefit of the corporation even though the corporation formally instructs the agents to obey the injunction. *Medical Slenderizing, Inc. v. State*, 579 S.W.2d 569 (Tex. Civ. App.—Tyler 1979, *writ ref'd n.r.e.*).

85. *Docutel Corp. v. Matra*, 464 F. Supp. 1209 (N.D. Tex. 1979) (French corporation amenable to suit for breach of contract in Texas where contract was negotiated in Texas, representatives visit Texas, the product sold is to be manufactured in Texas, and defendant had dealings with other computer-related Texas corporations; second French corporation also amenable to suit by reason of "continuous and substantial" contacts in state even though cause of action does not arise from these contacts); *Michigan Gen. Corp. v. Mod-U-Kraf Homes, Inc.*, 582 S.W.2d 594 (Tex. Civ. App.—Dallas 1979, *writ ref'd n.r.e.*) (suit for breach of merger agreement; Virginia corporation held amenable to suit when agreement was substantially negotiated in Texas, was partially performed in Texas, defendant's representatives were physically in Texas on three occasions to negotiate agreement, and the registration expenses sued for were expended in Texas); *Computer Synergy Corp. v. Business Sys. Prods., Inc.*, 582 S.W.2d 573 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ) (foreign corporation not amenable to suit in Texas where only contacts were the shipment of goods FOB California into Texas and the mailing of checks in Texas to the defendant in California); *Motiograph, Inc. v. Check-Out Sys., Inc.*, 573 S.W.2d 606 (Tex. Civ. App.—Eastland 1978, *writ ref'd*) (South Carolina corporation held amenable to suit in Texas where it purchased products from Texas corporation and sent three employees to Texas for technical training).

86. TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964 & Supp. 1980).

87. This analysis is based on the Texas Supreme Court's holding in *U-Anchor Advertising, Inc. v. Burt*, 553 S.W.2d 760 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978), and was approved by that court through its refusal of a writ of error in *Motiograph, Inc. v. Check-Out Sys., Inc.*, 573 S.W.2d 606 (Tex. Civ. App.—Eastland 1978, *writ ref'd*).

88. TEX. REV. CIV. STAT. ANN. art. 2029 (Vernon 1964).

Treasurer" of any "incorporated company." The plaintiff sought to invoke this article to justify service on a foreign corporation that was not qualified to transact business in Texas by serving the president, who happened to be in Dallas for a boat show.⁸⁹ No effort was made to comply with the Texas long arm statute. The attempt failed, however, and the court held that the exclusive method of serving unqualified corporations is article 2031b.⁹⁰ Earlier holdings had made it clear that the Texas Business Corporation Act provides the exclusive manner of serving domestic corporations and foreign corporations that had qualified to transact business in Texas.⁹¹ This case, therefore, clearly indicates that article 2029 is obsolete. In a somewhat related case, the court held that a suit to recover the civil penalty set forth in article 8.18C⁹² for transacting business in Texas without a license could be recovered only in an independent suit with service of process under the long arm statute, and could not be recovered through a show-cause order in an earlier proceeding that had led to an injunction prohibiting the transaction of business without a license.⁹³ The show cause order is served, of course, only on the attorneys in the earlier injunction proceeding, while service under the long arm statute involves the mailing of the citation to the defendant itself.

Another case arising during the survey period involved the issue whether a minor defect in the service of process on a corporation was sufficient to set aside a default judgment.⁹⁴ The citation stated it was served by delivery to "H. H. Michener, President" of the defendant. The president was actually named "H. M. Michener." The default judgment was nevertheless upheld, in part on the theory that service on a corporate "president" satisfies article 2.11 of the Business Corporation Act without more,⁹⁵ so that it is unnecessary to include the president's name.⁹⁶ As a result, misnaming the president did not invalidate the service.

The most important venue decision arising during the survey period is *Lubbock Manufacturing Co. v. Sames*,⁹⁷ which held that venue was proper under subdivision 23 of the venue statute⁹⁸ in a products liability case in

89. *Mills v. Stinger Boats, Inc.*, 580 S.W.2d 106 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.).

90. *Id.* at 108; see TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964).

91. TEX. BUS. CORP. ACT ANN. art. 2.11 (Vernon 1956) governs the service of process on domestic corporations. See *Ponca Wholesale Mercantile Co. v. Alley*, 378 S.W.2d 129 (Tex. Civ. App.—Amarillo 1964, writ ref'd n.r.e.). TEX. BUS. CORP. ACT ANN. art. 8.10 (Vernon 1956) or TEX. REV. CIV. STAT. ANN. art. 2029 (Vernon 1964) governs the service of process on foreign corporations that have qualified to transact business in Texas.

92. TEX. BUS. CORP. ACT ANN. art. 8.18C (Vernon 1956).

93. *Cine-Matics, Inc. v. State*, 578 S.W.2d 530 (Tex. Civ. App.—Austin 1979, no writ).

94. *NRTRX Corp. v. Story*, 582 S.W.2d 225 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.).

95. See TEX. BUS. CORP. ACT ANN. art. 2.11 (Vernon 1956).

96. As an alternative ground, the court noted that the defendant admitted it had received the process, and that the default had occurred because defendant's insurance agent failed to forward it to defendant's attorneys. 582 S.W.2d at 227.

97. 575 S.W.2d 588 (Tex. Civ. App.—Beaumont 1978), *rev'd*, 23 Tex. Sup. Ct. J. 28 (Oct. 20, 1979).

98. TEX. REV. CIV. STAT. ANN. art. 1995(23) (Vernon 1964).

the county where the injury occurred. One justice dissented, however, and the Texas Supreme Court granted a writ of error and reversed in a five-to-four decision filed shortly after the end of the survey period.⁹⁹ Two other interesting venue cases arose during the survey period. *Rouse v. Shell Oil Co.*¹⁰⁰ involved the question whether Shell maintained an "agent or representative" in Lavaca County for purposes of paragraph 27 of the venue statute¹⁰¹ through the activities of Didner, a production foreman in charge of the Sheridan Production Unit. Although Didner conducted most of his Shell business from his Colorado County office, he periodically drove to the seven production units that compose the Sheridan Unit. These seven units are located in six different counties, and Didner testified that he tried "to make all the leases in the field in a given month or something" although not on any regular basis. Didner also travelled to particular field locations for some "special types of operations."¹⁰² The court concluded that Didner's activities did not involve an "agency or representative" in Lavaca County since that term relates to "duties or obligations . . . having something to do with the corporate affairs of the principal, and must be more than matters of manual or mechanical execution. The term connotes some discretionary power conferred upon the employee."¹⁰³ Even if Didner's responsibilities met this test, the court concluded, suit would be authorized only in Colorado County where he maintained his office and not in the various surrounding counties that he visited periodically.

*Amoco Production Co. v. Arendale*¹⁰⁴ rejected an argument that the disparate treatment of foreign and domestic corporations for venue purposes¹⁰⁵ is inconsistent with the provision of the Texas Business Corporation Act that states that a qualified foreign corporation "shall . . . enjoy the same, but no greater, rights and privileges as a domestic corporation."¹⁰⁶ This clause, the court stated involves parity only "in various business dealings and thus had no effect on the venue statutes."¹⁰⁷

Receiverships. Two cases involving the drastic remedy of receivership arose during the survey period, both concerning petitions by the State of Texas. In *Covington Knox, Inc. v. State*¹⁰⁸ the court upheld the appointment of a receiver for a brokerage firm that was involved in a scandal relating to investments by the University of Houston. The size of the University's claim coupled with the defendant's misuse of funds cited in the court's opinion make this appear to be a classic case for the remedy of receivership.

99. 23 Tex. Sup. Ct. J. 28 (Oct. 20, 1979).

100. 577 S.W.2d 787 (Tex. Civ. App.—Corpus Christi 1979, writ dismissed).

101. TEX. REV. CIV. STAT. ANN. art. 1995(27) (Vernon 1964).

102. 577 S.W.2d at 789.

103. *Id.*

104. 581 S.W.2d 755 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).

105. See 20 R. HAMILTON, *supra* note 28, § 982.

106. TEX. BUS. CORP. ACT ANN. art. 8.02 (Vernon Supp. 1980).

107. 581 S.W.2d at 757.

108. 577 S.W.2d 323 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).

The same cannot be said for *Theatres of America, Inc. v. State*.¹⁰⁹ The State obtained an ex parte receivership order against a corporation that was showing allegedly pornographic films. The ostensible justification for the receivership was the failure to qualify to transact business and to pay franchise taxes. After the state court ordered the ex parte receivership, suit was brought in federal court to enjoin claimed violations of first amendment rights; a permanent injunction against the receivership was entered after an evidentiary hearing upon a finding that the "court is strongly of the opinion that the actions of the State in having the receiver appointed and in shutting down the Mini-View Theater and bookstore were done in bad faith and for the purpose of harassing Plaintiffs and suppressing their constitutionally-protected conduct."¹¹⁰ This finding was based in part on the fact that suit was brought by the Organized Crime Division of the Office of Attorney General rather than the Taxation Division, which ordinarily brings suits for unpaid franchise taxes. The case was then returned to the state court, and the trial judge, responding to the federal restraining order, dismissed the receivership but taxed one half of the costs against the defendant. The theater complained that this taxation of costs constituted an abuse of discretion and argued that all costs of this unconstitutional proceeding should be assessed against the party that brought it. The Tyler court of civil appeals agreed and ordered that all costs be assessed against the State of Texas.

*Miscellaneous. Varon v. Richardson Professional Properties, Inc.*¹¹¹ involves the recurring question whether a lease was entered into solely by a corporation or whether the individual actually signing the lease was also personally liable. The circumstances surrounding the execution were unusually ambiguous:

The lease as originally executed named defendant Harold H. Varon as lessee in the opening paragraph and, at the end, was signed by Harold H. Varon as lessee. Later a line was drawn through Varon's name in the opening paragraph and "Richardson Clinical Laboratory" was written above it. The word "Inc." does not appear, nor is there any other indication that the lessee was a corporation. Immediately beside these words appear the initials of the persons who signed the lease and also a date more than two months later than the other date in the document. No change was made with respect to the signature of "Harold H. Varon" at the end of the document.

The lessor brought the suit against "Dr. Harold H. Varon d/b/a/ Richardson Clinical Laboratory." Varon's answer denied liability in the capacity in which he was sued . . .¹¹²

Varon filed an affidavit in response to the lessor's motion for summary judgment stating that he understood, and he believed the lessor understood, that only the corporation ("Richardson Chemical Laboratory, Inc.")

109. 577 S.W.2d 542 (Tex. Civ. App.—Tyler 1979, no writ).

110. *Id.* at 545. Apparently none of the federal court opinions are reported.

111. 583 S.W.2d 917 (Tex. Civ. App.—Dallas 1979, no writ).

112. *Id.* at 918.

was to be responsible for the lease obligations. This affidavit was held to be insufficient to avoid summary judgment, a result that is not surprising considering the manner of execution. It should be clear that this kind of litigation is completely avoidable with minimal precautions.¹¹³

In *Huddleston v. Western National Bank*¹¹⁴ the court upheld, over numerous procedural and substantive objections, the disqualification of a plaintiff shareholder in a derivative action. The grounds for disqualification were that the plaintiff had been president of the bank when the alleged misconduct occurred, and that after filing the suit he offered to compromise or dismiss it by selling his stock to the eighty percent owner who was also named as a defendant. On these bare facts it is not possible to determine the reasonableness of the court's conclusion since the opinion does not state whether there are other members of the class who might serve as plaintiffs. If there are, the conclusion of the court seems reasonable because, as it points out, then the disqualified plaintiff shareholder is likely to be named as a defendant by the other plaintiffs.

Finally, *Henry S. Miller Co. v. Treo Enterprises*¹¹⁵ held that a corporation that is not registered as a real estate broker cannot sue for a commission even though all persons who dealt with the purchaser were registered agents or brokers. This conclusion seems squarely based on the language of the Real Estate License Act,¹¹⁶ and the Texas Supreme Court affirmed on the ground that "substantial compliance" with that Act is insufficient.¹¹⁷

III. SECURITIES REGULATION

Other than the amendment to the Texas Securities Act discussed earlier,¹¹⁸ most of the developments in securities regulation during the survey period were at the federal level. Only one state appellate opinion¹¹⁹ relating to the Texas Securities Act appeared during the survey period, and that involved the routine application of the exemption for isolated dealings by owners of oil, gas, and mineral interests.

The United States Supreme Court decided several important cases during the survey period. The Fifth Circuit decision in *Great Western United*

113. See 20 R. HAMILTON, *supra* note 28, § 588.

114. 577 S.W.2d 778 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.).

115. 573 S.W.2d 553 (Tex. Civ. App.—Texarkana 1978), *aff'd*, 585 S.W.2d 674 (Tex. 1979).

116. TEX. REV. CIV. STAT. ANN. art. 6573a, § 20(a) (Vernon Supp. 1980).

117. The Texas Supreme Court relied on a decision, *Coastal Plains Dev. Corp. v. Micrea*, 553 S.W.2d 816 (Tex. Civ. App.—Beaumont 1977), *rev'd*, 572 S.W.2d 285 (Tex. 1978), that was sharply criticized in last year's *Survey* article because of its apparent complete misunderstanding of partnership law. See Aldave, *supra* note 6, at 240-41. In the course of this discussion Professor Aldave speculates that perhaps the *Micrea* decision can be explained by "a policy of strict enforcement of the Real Estate License Act." This speculation seems at least partially confirmed by the court's handling of *Micrea* in the principal case.

118. See text accompanying notes 19-20 *supra*.

119. *Ginther v. Taub*, 570 S.W.2d 516 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.);

Corp. v. Kidwell,¹²⁰ holding that state tender offer statutes were preempted by the Williams Act,¹²¹ was reversed without reaching the merits.¹²² In another important case, the Court gave apparent blessing to the idea that discontinuance of derivative suits falls within the "business judgment" rule so long as the directors voting to discontinue are independent and not involved in the transactions in question.¹²³ Additionally, in a series of opinions extending into the 1980 term, the Court has continued to cut back on implied causes of action for violations of various provisions of federal statutes.¹²⁴

The Fifth Circuit refused to extend the antifraud provisions of the Securities Act of 1933¹²⁵ and the Securities Exchange Act of 1934¹²⁶ to a transaction in which a bank advanced \$2,250,000 to a corporation in exchange for a promissory note secured by a pledge of 2,250,000 shares of newly created preferred stock that were irregularly issued and worthless.¹²⁷ Relying on Fifth Circuit precedents, the court held that the pledge was not a "purchase"¹²⁸ and that the note was not a "security,"¹²⁹ thereby destroying all bases of federal jurisdiction.

In a complex rule 10b-5 case¹³⁰ the United States District Court for the Northern District of Texas noted that the motion for summary judgment "requires this court to determine whether the pleadings . . . fall within [the] apparently contracting boundaries for federal judicial roles. It requires a judgment not only that a retrenchment has been plainly signaled, but also where today that moving line is 'properly' drawn."¹³¹ Except for one rather minor count under rule 10b-5, claiming that it was misleading to refer to a dividend restriction without adding that it was not a "true bar," the court decided that the pleadings did not set forth claims falling within the "retrenched" federal jurisdiction.¹³²

It is always desirable (but not always possible) to end these *Annual*

120. 577 F.2d 1256 (5th Cir. 1978), *discussed in* Aldave, *supra* note 6, at 263.

121. 15 U.S.C. §§ 781-78n (1976).

122. *Leroy v. Great W. United Corp.*, 99 S. Ct. 2710, 61 L. Ed. 2d 464 (1979).

123. *Burks v. Lasker*, 99 S. Ct. 1831, 61 L. Ed. 2d 307 (1979).

124. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 100 S. Ct. 242, 62 L. Ed. 2d 146 (1979) (limiting plaintiff's cause of action to one for rescission under § 215 of the Investor Advisors Act of 1940, 15 U.S.C. § 80b-15 (1976)); *Touche Ross & Co. v. Redington*, 99 S. Ct. 2479, 61 L. Ed. 2d 82 (1979) (no cause of action against broker under § 17 of the 1934 Act). *See Cannon v. University of Chicago*, 99 S. Ct. 1946, 1953-64, 60 L. Ed. 2d 560, 571-82 (1979).

125. 15 U.S.C. § 77q(a) (1976) (§ 17(a) of the original act).

126. 15 U.S.C. § 78j(b) (1976) (§ 10(b) of the 1933 Act and rule 10b-5, 17 C.F.R. § 240.10b-5 (1979) promulgated thereunder).

127. *National Bank of Commerce v. All American Assurance Co.*, 583 F.2d 1295 (5th Cir. 1978).

128. *See Reid v. Hughes*, 578 F.2d 634 (5th Cir. 1978); *McClure v. First Nat'l Bank*, 497 F.2d 490 (5th Cir. 1974), *cert. denied*, 420 U.S. 930 (1975); *Herpich v. Wallace*, 430 F.2d 792 (5th Cir. 1970).

129. *See McClure v. First Nat'l Bank*, 497 F.2d 490 (5th Cir. 1974), *cert. denied*, 420 U.S. 930 (1975); *Bellah v. First Nat'l Bank*, 495 F.2d 1109 (5th Cir. 1974).

130. *Hundahl v. United Benefit Life Ins. Co.*, 465 F. Supp. 1349 (N.D. Tex. 1979).

131. *Id.* at 1352.

132. *Id.* at 1365.

Surveys on a positive and favorable note. During the current survey period the Securities and Exchange Commission has continued the trend begun during the last survey period¹³³ of materially reducing the cost of raising of capital by small concerns and simplifying the disposition of restricted stock by persons who are "locked in."¹³⁴ In particular, a new, simplified registration form, S-18, may be used by nonreporting companies selling publicly less than \$5,000,000 of securities.¹³⁵ Moreover, a new rule materially increasing the number of public offers that may be made without registration under the 1933 Act was proposed during the survey period,¹³⁶ and was acted upon early in 1980.¹³⁷

133. See Aldave, *supra* note 6, at 262-63.

134. These actions include relaxed holding period requirements for certain purposes under rules 144 and 148, SEC Release No. 33-6032, 17 C.F.R. §§ 230.144, .148 (1979), and the wider use of a preliminary offering circular under Regulation A, SEC Release No. 33-6075, 44 Fed. Reg. 33,362 (1979).

135. SEC Release No. 33-6049, 44 Fed. Reg. 21,562 (1979).

136. Proposed Rule 242, SEC Release No. 33-6121, 44 Fed. Reg. 54,258 (1979).

137. SEC Rule No. 33,6180, 45 Fed. Reg. 6362 (1980).

