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Partnership Law

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I. INTRODUCTION

During the Survey period, courts handed down a number of cases that highlighted the risk of unintended consequences arising from the drafting of certain provisions of partnership and limited liability company agreements. For example, courts considered the ramifications of a partnership's broadly-drafted purpose clause, and the extent to which such clause could affect a general partner's liability. In other cases, the courts' willingness to give great weight to the terms in partnership and LLC agreements underscored the need for careful drafting of such agreements. And in the context of attorney's fees, courts highlighted the need for legislative action to clarify whether LLCs should be treated in the same manner as corporations. This article is divided into six main sections that explore

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recent decisions encompassing the following topics: (II) creation of a partnership; (III) fiduciary duties; (IV) direct versus derivative claims; (V) alter-ego doctrine; (VI) purpose clauses; and (VII) attorneys' fees.

II. CREATION OF A PARTNERSHIP

A. *Shafipour v. Rischon Development Corporation*

The Eastland Court of Appeals rendered an opinion on the existence of a partnership in the absence of a written agreement.[1] In August 2005, Nassir Shafipour (Shafipour), president of NMV, Inc. (NMV), met with John L. Hawkins (Hawkins), owner and president of Rischon Development Corporation (Rischon), to discuss the development of a tract of raw land owned by NMV. Hawkins proposed at the meeting that NMV would sell the property to Rischon for the price of $480,000.00, and that Rischon would then obtain all necessary zoning variances, secure construction financing, and coordinate the eventual development and construction of duplex residences on the tract.[2] Once it completed the residences, Rischon would market and sell the individual units with profits to be split between Rischon and NMV.[3]

Hawkins asserted that he left the meeting with an understanding that Rischon and Shafipour would jointly develop NMV's property. Shafipour, according to Hawkins, said at the meeting that the development proposal was a "good idea" and that Shafipour was "ready to do it."[4] Shafipour, however, disputed Hawkins's recollection of the conversation. According to Shafipour's son, who was also present at the meeting, Shafipour does not understand English well, and Shafipour's son had to translate the conversations with Hawkins and the document contents for his father. Shafipour's son claimed that Shafipour had him tell Hawkins not to "waste our time" with the detailed development proposal since the property was only for sale. Shafipour also testified that he rejected Rischon's proposal.[5] The parties agreed, however, that no written agreement was executed at the meeting.[6]

In September 2005, Hawkins sent NMV a letter in which Hawkins outlined the details of the proposal and the anticipated net profits of the project. Neither Shafipour nor NMV replied to the letter, and Shafipour denied ever receiving it.[7] Hawkins later prepared a draft of a sales contract for the sale of the tract by NMV to Rischon and forwarded the draft to Shafipour in December 2005 or January 2006. Shafipour did not sign this contract or any other written agreement with Rischon in connection

1. Shafipour v. Rischon Dev. Corp., No. 11-13-00212-CV, 2015 WL 3454219, at *2 (Tex. App.—Eastland May 29, 2015, pet. denied) (mem. op.).
2. *Id.* at *1.
3. *Id.*
4. *Id.* at *2.
5. *Id.*
6. *Id.*
7. *Id.*

with the proposed sale and development of NMV's property.[8] Hawkins stated that, although nothing was "solidified," he was working towards formalizing an agreement with NMV during this period and expected a written development or partnership agreement would be executed once the project was "really moving."[9]

Despite the absence of any formal contract or written agreement, Hawkins pressed forward with the project by submitting preliminary plans to the city and negotiating with a neighboring landowner for the purchase of a strip of property that Hawkins believed was necessary to complete the development.[10] Hawkins stated that he spent hundreds of hours working on the project, and he expected to be paid for his services.[11] NMV later sold the property as an undeveloped parcel to a third party.[12]

Rischon sued Shafipour, in Shafipour's individual capacity under various theories of recovery, including breach of partnership and breach of fiduciary duty. The jury found in favor of Rischon at trial, awarding Rischon compensation for services rendered to Shafipour and additional damages for Rischon's out-of-pocket costs and attorney's fees.[13] On appeal, Shafipour argued that the evidence was factually insufficient to support the trial court's finding that a partnership had been created between Shafipour and Rischon. Shafipour further argued that, since no enforceable agreement existed, he owed no fiduciary duty to Rischon and therefore he could not have breached any such fiduciary duty.[14]

The court of appeals analyzed the issue of the existence of a partnership between Rischon and Shafipour.[15] Justice Willson noted that the Texas Revised Partnership Act (TRPA) was in effect at the time of the events that formed the basis of the lawsuit, and its provisions govern whether a partnership was created in this case.[16] Under the applicable statute, five factors are used to determine whether a partnership exists by written or oral agreement:

> (1) receipt or right to receive a share of profits of the business;
> (2) expression of an intent to be partners in the business;
> (3) participation or the right to participate in control of the business;
> (4) sharing or agreeing to share:
>   (A) losses of the business; or
>   (B) liability for claims by third-parties against the business; and
> (5) contributing or agreeing to contribute money or property to the business.[17]

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8. *Id.*
9. *Id.*
10. *Id.* The court of appeals, however, noted that the referenced transaction was not ultimately consummated. *Id.* at *6.
11. *Id.* at *3.
12. *Id.*
13. *Id.* at *1.
14. *Id.* at *6.
15. *See id.* at *6–9.
16. *Id.* at *6 n.10.
17. *Id.* at *6 (quoting TEX. REV. CIV. STAT. ANN. art. 2 § 6132b-2.03(a) (expired Jan. 1, 2010) (commonly known as the Texas Revised Partnership Act (TRPA))). The court of

The court of appeals noted that the test is applied by looking at a totality of the circumstances as it relates to the statutory factors, with the first and third factors carrying the greatest weight.[18]

The court of appeals held that "there [was] no evidence that Rischon partnered with Shafipour, individually."[19] Since no partnership existed, Shafipour neither owed a fiduciary duty to Rischon nor could have breached his fiduciary duty.[20] In its analysis of the first factor under the TRPA test for a partnership's existence, the court of appeals noted that some evidence existed that Rischon and NMV's representative may have intended to share profits, citing Hawkins' proposed split of any net profits at his initial meeting with Shafipour in August 2005.[21] Justice Willson, however, agreed with Shafipour that Rischon presented no evidence that Rischon and Shafipour, in Shafipour's individual capacity, had agreed to receive a share of any profits.[22] The split of the net profits laid out by Hawkins at the meeting was proposed to be between Rischon and NMV, not Rischon and Shafipour.[23]

In its analysis of the second factor, the court of appeals looked at the speech, writing, and conduct of Hawkins and Rischon to evaluate whether the parties intended to be partners.[24] Justice Willson highlighted Hawkins's statement that nothing was "solidified" and his expectation of formalizing the partnership once the venture was "really moving."[25] Despite the uncertain language of Hawkins' testimony, Justice Willson stated that there may have been evidence suggesting Rischon intended to partner with NMV.[26] The court of appeals, however, held that Rischon had introduced no evidence that Rischon intended to partner with Shafipour individually, nor was any evidence introduced showing that Shafipour, as an individual, intended to partner with Rischon.[27]

In examining the third and fourth factors, the court of appeals looked to the details of Hawkins' proposal for the sale and development of the property.[28] The court of appeals gave significant weight to Rischon's insistence at the initial meeting on NMV's sale of the land to Rischon as a condition to the commencement of work, which indicated that Rischon would have control over both the property and the development work

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appeals noted that the list of factors set forth in the TRPA for determining whether a partnership has been created are the same factors set forth in the current governing statute under § 152.052 of the Texas Business Organizations Code. *See id.*; *see also* Tex. Bus. Orgs. Code Ann. § 152.052(a) (2013).

18. *Shafipour*, 2015 WL 3454219, at *6 (citing Ingram v. Deere, 288 S.W.3d 886, 891 (Tex. 2009)).
19. *Id.* at *7.
20. *Id.* at *6.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at *7.
25. *Id.*
26. *Id.*
27. *Id.* at *6–7.
28. *See id.*

during the project.[29] As a result, the court of appeals found that the third factor was not supported by the evidence.[30] Justice Willson concluded that there was no evidence that Rischon and Shafipour intended to share of control of the business.[31] Further, the court of appeals found that no evidence was introduced by Rischon relating to the fourth factor's analysis of whether the parties intended to share the losses of the business.[32]

In its application of the fifth factor, the court of appeals disagreed with Rischon's assertion that Shafipour had agreed to contribute the land into the alleged partnership.[33] Justice Willson noted that the proposal involved the sale of the land by NMV to Rischon, not the partnership, and there was no mention of any contribution to the partnership by Shafipour of his interest in NMV.[34] Nor did the court of appeals find any evidence to support a finding that Rischon had contributed to the alleged partnership.[35] Because there was no evidence that either party had "contributed money or property into the alleged partnership," the court of appeals held that Rischon's arguments for support under the fifth factor failed.[36]

The court of appeals held that none of the five factors for the TRPA test had been satisfied for the existence of a partnership between Rischon and Shafipour.[37] Since no partnership existed, the court of appeals further held that the evidence was legally insufficient for the jury to award damages under breach of partnership.[38] The court of appeals also held that there was insufficient evidence to support a judgment for breach of fiduciary duty, or under any other theory of liability asserted by Rischon.[39] The judgment of the trial court was reversed and rendered judgment that Rischon take nothing.[40]

This case emphasizes the necessity of executing a written partnership agreement to confirm the existence of a partnership and establish the parties subject to the agreement.[41] In the absence of a written agreement, this case further stresses the importance of establishing the nature of the party, whether as an individual or as an agent of an organization, with whom a partnership is contemplated before any agreement is reached.[42]

29. *Id.* at *6. The court of appeals further noted that Hawkins had complete control over the work performed in anticipation of the development, such as attempting to secure variances and permits. *Id.* The court of appeals also pointed out that the progress reports on such work, allegedly sent by Hawkins to Shafipour detailing the progress of these various projects, did not indicate joint control, because any role Shafipour may have had in these tasks was passive in nature. *Id.*
30. *Id.* at *6–7.
31. *Id.*
32. *Id.* at *7.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* (citing Ingram v. Deere, 288 S.W.3d 886, 899 (Tex. 2009)).
37. *Id.*
38. *Id.* at *6, *7, *10.
39. *Id.* at *10.
40. *Id.*
41. *See id.* at *6–7.
42. *See id.*

As the court of appeals noted, there was some evidence that Rischon had intended to enter into a partnership with NMV.[43] Rischon, however, asserted that the partnership had instead been formed with Shafipour individually, and the court found that no evidence had been presented which could support a finding of the existence of a partnership between Rischon and Shafipour.[44] If Rischon had pled its claims against NMV instead of Shafipour, it is possible the court of appeals would have reached a different conclusion since evidence existed supporting at least two of the factors under the TRPA test between those parties.[45] It is unclear, however, if this would have been a viable strategy since there is no mention of the status of NMV or whether it retained any assets following the sale of the property.[46]

B. *Derrick Petroleum Services v. PLS, Inc.*

The U.S. District Court for the Southern District of Texas examined whether a partnership was created in the absence of a written joint venture agreement by evaluating the course of conduct of the parties during the five-year term of a fully-executed memorandum of understanding (MOU).[47] In this case, Derrick Petroleum Services (Derrick) and PLS, Inc. (PLS) disputed the ownership rights of the jointly branded Derrick/PLS Oil & Gas Mergers & Acquisitions Database (Derrick/PLS Database). In the first phase, the district court considered the ownership of the Derrick/PLS Database and whether the MOU had expired at the end of its term.[48] PLS asserted that a partnership had been formed and, as a result, that PLS owned a fifty percent interest in the Derrick/PLS Database and the parties' obligations to each other continued following the expiration of the MOU.[49]

Derrick is an oil and gas research company that was founded as a partnership in India in 2006. In 2007, Derrick launched a database (Derrick Database), which included reports and analyses covering European and North American oil and gas transactions. Derrick, however, had limited success marketing the Derrick Database and entered into negotiations with PLS in 2009 to market the Derrick Database in North America.[50] "PLS provides information relating to the oil and gas industry, including a multiple listing of oil and gas properties for sale, [and] marketing and advisory services."[51] On October 3, 2009, Derrick and PLS executed the MOU following edits and revisions proposed by both parties during

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43. *Id.* at *6.
44. *Id.* at *7.
45. *See id.* at *6–7.
46. *See id.*
47. Derrick Petroleum Servs. v. PLS, Inc., No. H-14-1520, 2014 WL 7447229, at *6–11 (S.D. Tex. Dec. 31, 2014) (mem. op.).
48. *Id.* at *1, *19.
49. *Id.* at *1.
50. *Id.* at *4
51. *Id.* (noting that PLS also had developed a proprietary database of North American oil and gas transactions dating back to 1979).

negotiations.[52]

The MOU provided for a term of five years during which the parties would develop and market a jointly branded Derrick/PLS Database. The Derrick/PLS Database contained the same content as the original version Derrick Database plus additional content added by Derrick during the term of the MOU.[53] The MOU contemplated the execution of a written joint venture agreement for the project, but the negotiation of this agreement stalled, and parties never executed this agreement. The parties, however, did refer to the project as a "partnership" in the MOU.[54] "Emails to potential and existing customers also referred to Derrick and PLS as partners in providing the [Derrick/PLS Database]."[55]

Under the terms of the MOU, Derrick's role was to develop and monitor the Derrick/PLS Database, and PLS's role was to market the Derrick/PLS Database in North America.[56] During the term of the MOU, Derrick added 10,000 new entries into the Derrick/PLS Database. PLS periodically sent suggestions for additional entries, but Derrick conducted the analysis of those suggestions and made the final decisions on whether to include those entries in the Derrick/PLS Database. Ultimately, the entries suggested by PLS comprised less than two percent of the content of the Derrick/PLS Database by the time of the trial.[57] With regard to marketing, "PLS had executive discretion to decide which businesses to contact . . . and how to price the subscriptions" to the Derrick/PLS Database."[58]

The parties were each to receive one-half of the gross revenue derived from the subscriptions for the Derrick/PLS Database. All of the costs involved with the development and monitoring of the Derrick/PLS Database's content were borne by Derrick, and all of the costs involved in marketing and administering the subscriptions were borne by PLS.[59] Each month, PLS collected the revenue from subscriptions and sent a wire transfer to Derrick for half of the gross amount. On rare occasions, "PLS deducted certain expenses from Derrick's share of the revenue before wiring the distribution."[60] Derrick, however, protested in response to these deductions on the basis that the MOU required a distribution from the gross amount, placing the responsibility on the parties to net out their own respective costs and expenses.[61] The parties did not share information about expenses or calculate whether the project as a whole experienced a profit or loss in any given month. If one parties' share of the

52. *Id.*
53. *Id.* at *5.
54. *Id.*
55. *Id.* at *6.
56. *Id.*
57. *Id.* at *7. The total entries suggested by PLS which were ultimately included in the Branded Database numbered 1,434. *Id.*
58. *Id.* at *15.
59. *Id.* at *6.
60. *Id.* at *8.
61. *Id.*

revenue was less than its costs and expenses, that party would suffer the full amount of that loss under the MOU.[62]

PLS provided the limited right of a license to use PLS's brand and corporate name in connection with the Derrick/PLS Database under the MOU, but the MOU did not expressly address the ownership of the Derrick/PLS Database.[63] There is no language stating that either party contributed unfettered rights to its intellectual property. The agreement, however, did include an "exit mechanism" clause, which stated that "if Derrick prematurely exited the MOU, it would have to give PLS a copy of the [Derrick/PLS] Database" for its continued use.[64]

The district court examined whether a partnership existed between Derrick and PLS under the TRPA test. While applying the five factors of the totality of circumstances test, the district court pointed out that the existence or absence of no single factor is determinative under the test.[65]

In its examination of the first factor, the district court differentiated between sharing revenue and sharing profits.[66] The parties never calculated the profits of the unified business. Instead, PLS distributed the gross revenue in accordance with the MOU, and the parties were responsible for deducting their own expenses from their share of the gross revenue. Since no allocations were made for the expenses of the business as a whole, and instead, were made separately by each party with no accounting for the profitability of the unified enterprise, the district court found that there was no sharing of profits.[67]

The district court analyzed the second factor by highlighting the language used by the parties in the MOU.[68] Although the mere use of "joint venture partners" in the agreement was not necessarily indicative that the parties intended to be in a partnership, the district court emphasized "the business expertise of the PLS and Derrick representatives who signed the MOU."[69] Those same representatives included that specific language in a document and intended the language to be legally significant.[70] Consequently, the district court noted that there is some evidence that the partners intended to create a partnership.[71] The district court, however, also noted that the parties' actions may also be indicative of their intent to form a partnership.[72] In this case, Derrick and PLS took the required steps to jointly brand and market the Derrick/PLS Database, but they failed to take any further actions, such as opening a bank account or filing taxes under the name of the partnership, which would have evidenced an

62. *Id.* at *9.
63. *Id.* at *5.
64. *Id.* at *10.
65. *Id.*; *see also* Tex. Bus. Orgs. Code Ann. § 152.052(a) (2013).
66. *Derrick Petroleum Servs.*, 2014 WL 7447229, at *13.
67. *Id.*
68. *Id.* at *14.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*

intent to form a partnership.[73] For this reason, the district court noted that the evidence of intent by the parties to form a partnership was limited.[74]

In analyzing the third factor, the district court placed significant weight on the existence of shared responsibilities to determine the whether a right to participate in the control of a shared business existed.[75] Derrick and PLS operated in silos under the MOU, with each party exercising executive control over its sphere of responsibilities. The district court noted that, although PLS had input in Derrick's development of the Derrick/PLS Database, input did not equate to control.[76] The district court found that Derrick and PLS had no shared responsibilities and instead operated as separate businesses, and neither party had the authority to make binding decisions within the other's sphere of responsibility.[77] As a result, the district court held that there was no shared control over a single, united business entity.[78]

Regarding the fourth factor, the MOU stated that each party would bear losses, in their entirety, only within their respective spheres.[79] Additionally, the district court noted that, under the subscription agreements, only PLS was liable to third parties.[80] Since there was neither an agreement to share net losses of the united venture, nor joint liability for third party claims against the business, the district court held that the parties did not agree to share any losses or liability.[81]

In its analysis of the fifth and final factor, the district court looked to PLS's assertions that (1) PLS had contributed a license to its brand to the alleged partnership; and (2) Derrick contributed the Derrick Database (which was later converted into the Derrick/PLS Database) to the alleged partnership.[82] The district court noted that, because the property at issue for both parties was intellectual property, the contribution of that property must be in writing.[83] The MOU addressed PLS's provision of a license for branding and its corporate name. But according to the district court, the language did not suggest that PLS intended to convey an ownership interest in this intellectual property.[84] Instead, the district court found that the intent was to "'furnish,' rather than 'convey ownership of'" the license for branding and use of PLS's corporate name.[85] Furthermore, the MOU did not explicitly address the ownership of the Derrick/

73. *Id.*
74. *Id.*
75. *Id.* at *15.
76. *Id.*
77. *Id.* at *15–16.
78. *Id.*
79. *Id.* at *16.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at *17 (citing 17 U.S.C. § 204(b) (2012)).
84. *Id.*
85. *Id.*

PLS Database or the contribution of the Derrick Database, and Derrick maintained control over the Branded Database during the term of the MOU.[86] Because neither the MOU nor any other agreements expressly relinquished Derrick's ownership rights, the district court found that Derrick had not contributed the Derrick Database or the Derrick/PLS Database into the alleged partnership.[87] The district court also noted that existence of the "exit mechanism," which required Derrick to provide PLS with a copy of the Derrick/PLS Database in the event Derrick exited the MOU early, indicated that Derrick had not contributed ownership of the Derrick/PLS Database to the business.[88] If ownership was indeed shared, the district court stated that this provision would be unnecessary since PLS would already jointly own the property.[89] Because neither party had contributed the intellectual property asserted by PLS to the alleged partnership, the district court held that PLS had only contributed the use of a limited license to its brand and that Derrick's contribution was limited to access and use of the Derrick Database for the marketing and development of the Derrick/PLS Database.[90] Further, because neither party made additional expansive contributions, the district court held that there was some—though limited—evidence of contribution of property to the alleged partnership.[91]

Ultimately, the district court found limited support for only two factors under the TRPA test: the intent by the parties to form a partnership and the parties' contribution of property to the partnership.[92] Citing the limited extent of these two factors and an absence of the remaining three factors, the district court held that Derrick and PLS had not entered into a partnership.[93] The district court further held that the term of the MOU ended on its expiration date, and that the parties' business relationship ended on that same day.[94]

This case, like *Shafipour*, stresses the importance of executing a written partnership agreement.[95] If PLS had insisted upon the execution of a formal written partnership agreement, this case would have likely had a different outcome. Businesspersons in Texas should insist on formalizing an intended partnership in a written agreement executed by the parties. Additionally, in the absence of a written partnership agreement, this case emphasizes the importance of establishing the operation of a single business when asserting the creation of a partnership.[96] Although there was

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86. *Id.*
87. *Id.* at *18.
88. *Id.* at *10.
89. *Id.*
90. *Id.* at *17–18.
91. *Id.*
92. *Id.* at *18.
93. *Id.*
94. *Id.*
95. *See id.*; Shafipour v. Rischon Dev. Corp., No. 11-13-00212-CV, 2015 WL 3454219, at *6–7 (Tex. App.—Eastland May 29, 2015, pet. denied) (mem. op.).
96. *See Derrick Petroleum Servs.*, 2014 WL 7447229, at *15–16.

evidence that the parties had intended to enter into a partnership and that each had contributed a limited amount of property to that enterprise, the absence of a single, unified operation eventually doomed PLS's arguments claiming the existence of a partnership.[97]

III. FIDUCIARY DUTIES

In *Plano AMI, L.P. v. Cruz*, the Dallas Court of Appeals explored whether a limited partner's consent to and participation in the decision to dissolve a partnership could waive a breach of fiduciary duty owed by another limited partner who controlled the day-to-day activities of the partnership.[98] Dr. Erwin Cruz (Cruz) participated in two partnerships in the Dallas area which operated in the medical imaging field.[99] One of the partnerships, NDMI, was dissolved and eventually shut down in 2010, and Cruz was expelled from the other partnership without compensation for his shares. Cruz sued his former business associates (NDMI Defendants), including Mehrdad Ghani (Ghani), for conversion, breaches of fiduciary duty, and other wrongful conduct and won a $4.7 million verdict at trial.[100]

In 2002, Cruz, Ghani, Mark Mendez (Mendez), MCG Group, Inc., and other physician limited partner investors formed NDMI to operate as a medical imaging business in the same building as Cruz's medical office.[101] Cruz, Ghani and Mendez each had a particular role in the enterprise: Cruz pursued patient referrals through relationships with his medical colleagues, while Ghani and Mendez handled financial, technical and other matters. Mendez was later expelled from the partnership, and his interest was split evenly between Ghani and Cruz.[102]

Ghani managed the day-to-day activities of the imaging center from its inception until its dissolution, except during a one-year hiatus in 2006 when NDMI used the services of a management company.[103] In spring 2007, NDMI was marketed for sale at a price of $5.9 million, but it failed to attract a purchaser, and the broker's contract was terminated in September 2008. By that time, tensions were evident between Cruz and Ghani over Ghani's control of the business. Although NDMI was profitable, partnership distribution had stopped and Ghani told Cruz that the business was in danger due to a drop in referrals and reimbursements.[104]

Cruz and Ghani, as directors of NDMI's general partner, adopted a resolution in December 2008 to wind up NDMI.[105] The resolution also

97. *See id.*
98. Plano AMI, L.P. v. Cruz, No. 05-12-01480-CV, 2015 WL 128592, at *4 (Tex. App.—Dallas Jan. 9, 2015, no pet.) (mem. op.).
99. *Id.* at *1.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at *2.
104. *Id.*
105. *Id.* at *3.

authorized Ghani to oversee the dissolution process. Cruz, as the secretary, signed the minutes of the meeting, while Cruz and Ghani, as partners of NDMI, both signed a consent to the dissolution. Cruz later approached Ghani to recommend the inclusion of another doctor, Reza Nabavi (Nabavi), in the partnership.[106] Cruz saw Nabavi's clinics as a source of new referrals. Ghani, however, explained that it was too late since the dissolution process was already underway. But shortly after NDMI shut down in 2010, Cruz learned that Ghani had formed a new venture with Nabavi and sold NDMI's equipment to that new venture.[107] Moreover, Cruz also noticed that the partnership distributions during the wind down period also did not closely mirror NDMI's net income during that same period.[108] At trial, the trial court found in favor of Cruz on a claim for breach of fiduciary duty by Ghani in the dissolution of NDMI.[109]

One of the issues brought by the NDMI Defendants on appeal involved the damages awarded for breach of fiduciary duty in connection with NDMI's dissolution.[110] The trial court had granted an instructed verdict that the evidence was factually insufficient to support an affirmative defense of waiver to any breach of fiduciary duty relating to NDMI's dissolution, and the issue was not presented to the jury for its consideration in the jury charge.[111] NDMI asserted that this ruling was in error and that the trial court should have been allowed to consider whether Cruz had waived any breach of fiduciary duty because of his consent to the dissolution.[112]

To begin its analysis, the court of appeals recognized that waiver is present under Texas law when a party intentionally relinquishes a known right or the party's conduct is inconsistent with claiming that particular right.[113] The three elements of waiver are: (1) "an existing right"; (2) "knowledge, whether actual or constructive, or the existence of the right"; and (3) "an actual intent to relinquish the right."[114] Ghani argued that Cruz engaged in intentional conduct inconsistent with claiming any right by Cruz to protest the dissolution of NDMI.[115]

The court of appeals emphasized the contents of the notice of the special meeting, which authorized the dissolution of NDMI and the minutes from a meeting of NDMI's general partner.[116] Those documents were

106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at *1, *3.
110. *Id.* at *4.
111. *Id.*
112. *Id.*
113. *Id.* at *5 (citing Jernigan v. Langley, 111 S.W.3d 153, 156 (Tex. 2003); Furmanite Worldwide, Inc. v. NextCorp, Ltd., 339 S.W.3d 326, 333–34 (Tex. App.—Dallas 2011, no pet.)).
114. *Id.* at *5.
115. *Id.*
116. *Id.*

signed by Cruz and discussed the decision to wind down NDMI in detail. Coupled with the evidence that Cruz had signed a consent authorizing the dissolution, testimony that Cruz had "went along with" the dissolution decision, and other evidence that showed Cruz's participation in the decision to wind down NDMI, the court of appeals found that there was an issue of fact as to whether Cruz had waived his right to complain about the dissolution of NDMI.[117] Ghani also produced evidence that Cruz had knowledge of NDMI's bleak survival prospects due to a decline in referring physicians and other factors. The court of appeals highlighted an email from Cruz to another physician in 2008 discussing the challenging legislative environment for the business.[118]

The court of appeals held that, because "more than a scintilla of probative evidence" existed in support of the Ghani's affirmative defense of waiver, the trial court erred in granting an instructed verdict on the issue and the jury should have been allowed to consider whether Cruz's actions waived any breach of fiduciary duty in connection with NDMI's dissolution.[119] The court of appeals further held that the error was harmful and remanded the case for further proceedings.[120]

This case illustrates the importance of a partner affirming in writing, whether in the consent to dissolution or by a separate instrument, that any claims to violations of fiduciary duty are not waived during the dissolution of a partnership.[121] The court of appeals did not analyze the merits of the breach of fiduciary duty claims, but its holding that a partner may be found to have waived any breach of fiduciary duty during the winding down of a business should operate as a red flag for investors to protect themselves as arrangements are being made to dissolve a business.[122]

IV. DIRECT VERSUS DERIVATIVE CLAIMS

In *In re Margaux City Lights Partners Ltd.*, the U.S. Bankruptcy Court for the Northern District of Texas examined claims from a lawsuit, the filing of which predated a settlement hearing relating to the dissolution and liquidation of a limited partnership, to determine if those claims were direct and may be pursued by the plaintiffs or the claims were derivative and may only be pursued or released by the partnership's liquidating plan agent (Plan Agent).[123] Margaux City Lights Partners, Ltd. (MCL) was a limited partnership, which invested in undeveloped real estate near downtown Dallas, Texas. In 2010, the existing general partner withdrew and Malouf Interests, Inc. (Malouf) was appointed in its place.[124] Two

117. *Id.*
118. *Id.*
119. *Id.* at *6.
120. *Id.* at *6, *10.
121. *See id.* at *5–6.
122. *See id.* at *6.
123. *In re* Margaux City Lights Partners Ltd,. No. 12-35828-BJH, 2014 WL 6674922, at *2 (Bankr. N.D. Tex. Nov. 24, 2014).
124. *Id.* at *1.

limited partners of MCL, the Elana Spitzberg Trust and JRR Ventures, Ltd. (Plaintiffs) sued Malouf, Matthew Malouf, and Minerva Partners Ltd. (Defendant Parties) in 2011, alleging fifteen separate causes of action against the Defendant Parties. Each claim was initially brought individually by the Plaintiffs and derivatively on MCL's behalf.[125] But shortly before a hearing in November 2014—a hearing requested by the Plan Agent for the court's approval of a settlement plan by and between the Plan Agent and the Defendant Parties—the Plaintiffs amended their petition to narrow the counts from fifteen to eight to supposedly remove the derivative claims from the petition.[126] The Plaintiffs alleged, among other things, that the Defendant Parties made representations and took actions in breach of MCL's limited partnership agreement (LPA) and their fiduciary duties owed to the Plaintiffs; and fraudulently induced the Plaintiffs to enter into the LPA and to participate in the removal of the prior general partner of MCL.[127]

In its analysis of the Plaintiffs' claims, the bankruptcy court focused on the nature of the alleged damages.[128] Alleged damages to limited partners, which are not separate from the direct injury to the partnership, including a loss in the value of the partnership, are derivative claims under Texas law.[129] With three exceptions, the bankruptcy court found that the Plaintiffs' claims were derivative because the only alleged injuries under those claims were inflicted upon MCL, and the Plaintiffs' only alleged harm was the resultant diminution in value of their limited partnership interests.[130] In nearly all instances, the Plaintiffs failed to plead that their claims related to a direct injury, rather than an injury suffered through MCL.[131] The bankruptcy court held that these claims were derivative and could only be pursued or released by the Plan Agent on behalf of MCL.[132]

Two exceptions, which the bankruptcy court held to be direct claims, related to the Plaintiff's potential tax liability.[133] In these claims, Plaintiffs alleged that the Defendant Parties "failed to timely provide tax returns, tax information, and other information to the Plaintiffs," and this failure prevented the Plaintiffs from timely filing their own tax returns.[134] According to the amended petition, the Defendant Parties also allegedly moved certain property between MCL and a third party entity, which may have caused errors in the Plaintiffs' tax returns for that year.[135] The

125. *Id.* at *1–2.
126. *Id.* at *2.
127. *Id.*
128. *Id.* at *6.
129. *Id.* at *7 (citing Moore v. Simon Ener., Inc., 919 F. Supp. 1007, 1011 (N.D. Tex. 1995)).
130. *Id.* at *8–9.
131. *Id.*
132. *Id.* at *8, *16.
133. *Id.* at *8–9.
134. *Id.* at *8.
135. *Id.*

bankruptcy court found that any resultant damages from such actions would be individual to the Plaintiffs and not dependent on any damage to MCL.[136] These claims were held to be direct claims and could be pursued by the Plaintiffs against the Defendant Parties.[137]

The third exception concerned one of the claims asserted by the Plaintiffs of fraudulent inducement.[138] The Plaintiffs alleged that the Defendant Parties fraudulently induced their entry into the LPA, which included the Plaintiffs' initial investment in MCL.[139] The bankruptcy court distinguished between alleged misrepresentations made after an investment in a partnership, which may diminish the value of a limited partner's investment, and misrepresentations made before an investment, which induced a limited partner to initially invest in the partnership.[140] The bankruptcy court held that the alleged fraudulent inducement in an initial investment by the Plaintiffs involved a direct injury to the Plaintiffs and did not depend on any damages suffered by MCL.[141] The bankruptcy court explained that any injury caused by these alleged misrepresentations was not suffered by MCL through Plaintiffs' investment.[142] Instead, any harm caused by these actions would be limited to the Plaintiffs.[143]

Additionally, Plaintiffs asserted claims for conspiracy and exemplary damages based on the other claims in the amended petition. The bankruptcy court held that claims for conspiracy and exemplary damages were linked to the underlying tort claim.[144] If the underlying tort claim had been found to be derivative, then those claims were the "property of the MCL estate and could only be pursued or released by the Plan Agent."[145] If the underlying tort claims were direct, then the conspiracy and exemplary damage claims linked to those alleged actions were also direct in nature.[146] The only conspiracy and exemplary damage claims, which the bankruptcy court found to be direct, were those linked to the claims for tax liability and fraudulent inducement.[147]

This case illustrates the potential unintended consequences of a lack of specificity in pleadings. Here, the bankruptcy court required the Plaintiffs to plead specific damages suffered by a limited partner plaintiff outside of those injuries suffered directly by the partnership.[148] Nearly all of the Plaintiffs' claims in *In re Margaux City Lights Partners, Ltd.* were held to be facially insufficient to establish individual injury, and in most cases the

136. *Id.*
137. *Id.* at *8–9.
138. *Id.* at *11–12.
139. *Id.*
140. *Id.* at *12.
141. *Id.* at *12–13.
142. *Id.* at *13.
143. *Id.*
144. *Id.* at *14.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at *16–17.

only alleged damages were the result of a diminution in the value of the Plaintiffs' partnership interests.[149] Many of the claims examined by the bankruptcy court were found to be vague, perhaps in hopes that the courts would look to all potential injuries suffered under the stated causes of action.[150] Claims should instead be pled with specificity and allege injuries outside of a loss in the investment value of the partnership interest in order to preserve a suing limited partner's right to proceed directly against a defendant.

V. ALTER-EGO DOCTRINE

A. *Fiduciary Network, LLC v. Buehler*

The U.S. District Court for the Northern District of Texas rendered an opinion highlighting the importance of carefully drafting the management provisions of partnership agreements and observing corporate formalities in complex organizational structures involving multiple layers of subsidiary entities.[151] In *Fiduciary Network, LLC v. Buehler*, the district court held that Plaintiff Fiduciary Network, LLC (Fiduciary Network) had made a sufficient preliminary showing of "overlap" between a foreign corporation and its subsidiary limited partnership to allow the plaintiff to pursue an "alter ego" theory of personal jurisdiction.[152] Using the alter ego theory, Fiduciary Network sought to impute the corporation's Texas contacts to the subsidiary limited partnership and thereby hale the limited partnership into a Texas court.[153] The case serves as an example of the unintended consequences that may arise from the authority provisions in partnership agreements, and provides guidance on how to conduct business through a network of subsidiary entities.

Fiduciary Network sued a Pennsylvania limited partnership (the Partnership) that provides investment and wealth management advice, its corporate parent (the Corporate Parent) that operates as a CPA firm, and the Chairman of the Corporate Parent, alleging that the Partnership hired a former employee of Fiduciary Network in violation of a non-compete agreement.[154] In response to a motion to dismiss for lack of personal jurisdiction, Fiduciary Network argued in favor of personal jurisdiction on a number of grounds, including (1) the fact that the Corporate Parent filed a registration to do business in Texas with the Texas Secretary of State;[155] (2) the extent of the Corporate Parent's commercial activity in Texas;[156] and (3) the Fiduciary Network's contention that the alter-ego doctrine would permit the exercise of personal jurisdiction over the subsidiary

149. *Id.*
150. *See id.*
151. Fiduciary Network, LLC v. Buehler, No. 3:15-cv-0808, 2015 WL 2165953, at *8–9 (N.D. Tex. May 8, 2015).
152. *Id.* at *10.
153. *Id.* at *8–9.
154. *Id.* at *1.
155. *Id.* at *5.
156. *Id.* at *6.

Partnership based on the Corporate Parent's contacts with Texas.[157]

The district court rejected Fiduciary Network's argument that the Corporate Parent's registration to do business in Texas was in itself sufficient to establish the minimum contacts necessary to exercise personal jurisdiction over the defendants.[158] The district court also rejected the Fiduciary Network's second contention that a theory of "registration plus commercial activity" could be sufficient to justify the exercise of personal jurisdiction.[159] The district court, however, held that Fiduciary Network had met its burden of making a "preliminary showing" that the court could properly exercise personal jurisdiction over the Partnership based on the Parent Corporation's commercial contacts with Texas, and therefore that further discovery on the issue of personal jurisdiction was warranted.[160]

The district court also accepted the Fiduciary Network's argument that the minimum contacts of the Parent Corporation could be imputed to the Partnership through the alter-ego doctrine.[161] In making this finding, the district court held that, in order to exercise personal jurisdiction over the defendant based on the contacts of the Parent Corporation, the Parent Corporation must show that "the degree of control the parent exercises must be greater than that normally associated with common ownership and directorship; the evidence must show that the two entities cease to be separate so that the corporate fiction should be disregarded to prevent fraud or injustice."[162] The district court referenced five factors that must be evaluated in making this determination:

> (1) the amount of stock owned by the parent of the subsidiary; (2) whether the entities have separate headquarters, directors, and officers; (3) whether corporate formalities are observed; (4) whether the entities maintain separate accounting systems; and (5) whether the parent exercises complete control over the subsidiary's general policies or daily activities.[163]

In holding that Fiduciary Network had made a sufficient preliminary showing that the Partnership was an alter-ego of the Corporate Parent, the district court noted that the shareholders of the Corporate Parent established the Partnership, that the partners and members of the Partnership were the same as the Corporate Parent, and that the Chairman of the Corporate Parent had influence over the hiring decisions of the Partnership.[164]

This opinion is significant for the guidance it provides to drafters of partnership agreements and those responsible for ensuring that corporate

157. *Id.* at *8.
158. *Id.* at *5.
159. *Id.* at *6–7.
160. *Id.* at *10.
161. *Id.*
162. *Id.* at *8.
163. *Id.* at *9 (quoting Freudensprung v. Offshore Tech. Servs., 379 F.3d 327, 346 (5th Cir. 2004)).
164. *Id.* at *9–10.

formalities are observed, from the formation of each applicable entity through the consummation of every transaction. While common ownership and control is permissible and efficient when properly implemented, this convenience must be supported by careful drafting of the organizational documents for all entities in the organizational structure, and by a diligent application of corporate formalities: maintenance of separate corporate minutes for each entity, well-drafted corporate resolutions properly authorizing all company action, and strict adherence to the company management provisions in the partnership agreement.[165] Failure to properly draft and comply with the provisions of corporate organizational documents in a complex organizational structure may lead to unintended consequences, including, in a worst-case scenario, a court's consolidation of the individual corporate entities into one, creating the risk that upstream shareholders could be subject to personal jurisdiction in unanticipated venues.[166]

B. *Copeland v. D & J Construction LLC*

In *Copeland v. D & J Construction LLC*, the U.S. District Court for the Northern District of Texas handed down a decision that provides guidance on the issue of veil piercing in the context of limited liability companies.[167] Plaintiff Bruce Copeland (Copeland) performed business management and consulting services to the defendant D&J Construction, LLC (DJ LLC). After completing the work, DJ LLC and individual defendants Johnny, Darrell and Ethel Gray (the Individual Defendants) refused to pay Copeland for his services, and waged a smear campaign against Copeland, maligning his name and reputation with clients and vendors across the industry.[168] Copeland filed a suit against DJ LLC and the Individual Defendants, alleging slander, libel, intentional infliction of emotional distress, and a number of quasi-contract claims. DJ LLC and the Individual Defendants moved to dismiss the Individual Defendants from the suit, citing the general rule under the Texas Business Organization Code (TBOC) that members and managers of a Texas limited liability company are not liable for the debts, obligations or liabilities of such entity.[169] In response, Copeland argued that the Individual Defendants may be held liable under the corporate veil doctrine because DJ LLC was

165. *See id.*
166. *See id.* at *10.
167. Copeland v. D & J Constr. LLC, No. 3:13-CV-4432-N-BH, 2015 WL 512590, at *3–6 (N.D. Tex. Feb. 6, 2015).
168. *Id.* at *1.
169. *Id.* at *2. Section 21.223(b) of the Texas Business Organizations provides:

> [Texas law] does not prevent or limit the liability of a holder, beneficial owner, subscriber, or affiliate if the obligee demonstrates that the holder, beneficial owner, subscriber, or affiliate caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the holder, beneficial owner, subscriber, or affiliate.

Id. at *4 (quoting Tex. Bus. Orgs. Code Ann. § 21.223(b) (2013)).

the alter ego of one of the Individual Defendants, and the defendants were "operating a sham and committing fraud upon the public."[170]

The district court performed an analysis of the two factors set forth in § 21.223 of the Texas Business Organizations Code that must be shown before a member of a limited liability company may be held liable for the entity's obligations: (1) that the member caused the limited liability company "to be used for the purpose of perpetrating an actual fraud" on the holder of an obligation of the limited liability company; and (2) that such fraud was perpetrated "primarily for the direct personal benefit" of the member.[171]

As to the "actual fraud" factor of the analysis, the district court stated that in order to pierce the corporate veil, "the plaintiff must prove dishonesty of purpose or intent to deceive."[172] Furthermore, "the actual fraud must have related specifically to the contract at issue."[173] The district court held that the plaintiff alleged facts sufficient to support a finding that the Individual Defendants had the intent to deceive and therefore perpetrated an actual fraud, because their business plan had been to receive payment for services rendered by third parties, and thereafter to refuse payment to the third party service providers.[174]

As to the "direct personal benefit" factor of the analysis, the district court also found that Copeland alleged sufficient facts, noting Copeland's allegation that one of the Individual Defendants, Johnny Gray, was the sole member of DJ LLC, and furthermore that he used company debit cards to pay for personal expenses.[175] The district court accepted these factors as evidence that the entity was a mere front used by the Individual Defendant in question to perpetrate an actual fraud for his own benefit.[176] While this case is a particularly blatant example of an abuse of the limited liability company form, it serves as useful guidance as to how courts will interpret § 21.223 of the Texas Business Organizations Code in deciding whether to pierce the veil of a limited liability company and impose liability on a member.

VI. PURPOSE CLAUSES

The Corpus Christi Court of Appeals recently decided a case that highlights the unexpected consequences that a broadly drafted purpose clause in an entity's operating agreement can have in expanding the scope of an

170. *Id.* at *3.
171. *Id.* at *4 (quoting TEX. BUS. ORGS. CODE ANN. § 21.223(b)).
172. *Id.* (quoting Allied Chem. Carriers, Inc. v. Nat'l Biofuels LP, No. H-10-1109, 2011 WL 2672512, at *3 (S.D. Tex. July 7, 2011)).
173. *Id.* (quoting *Allied Chem. Carriers, Inc.*, 2011 WL 2672512, at *3).
174. *Id.*
175. *Id.* at *5. The district court also noted Copeland's contention that the Individual Defendant failed to obtain the required liability insurance for DJ LLC, and that this lack of formality is additional evidence of DJ LLC's status as "a mere front for [Individual Defendants]." *Id.*
176. *Id.*

entity's liability for the actions of a member or limited partner.[177] In *Doctors Hospital at Renaissance, Ltd. v. Andrade*, the court of appeals addressed the question of "whether a limited partnership that owns a hospital, or its general partner, may be held vicariously liable for the negligence of a doctor who is a limited partner in the partnership."[178] Appellees Jesus Jaime Andrade and Jessica Andrade (the Andrades) alleged that their doctor, Rodolfo Lozano (Doctor Lozano), negligently delivered their daughter Julianna, resulting in permanent injury to the child. Citing the doctrine of vicarious liability, the Andrades later added as additional defendants the limited partnership that owned the hospital at which the child was born and of which Doctor Lozano was a limited partner (the Hospital LP), and the limited liability company that served as the general partner of Hospital LP (GP LLC).[179]

The Hospital LP and GP LLC moved for summary judgment on the grounds that Doctor Lozano was acting outside of the scope of the purpose of the partnership at the time of the alleged negligence.[180] The court of appeals disagreed, however, finding that the purpose clauses of the Hospital LP partnership agreement and the GP LLC operating agreement were so broadly drafted that it precluded a finding as a matter of law that Doctor Lozano was acting outside of the scope of the purpose of these entities.[181] The court of appeals then applied the same logic to its analysis of the purpose clause in GP LLC's operating agreement, which read as follows:

> 3.01 The Limited Liability Company shall have the powers provided for a corporation under the Texas Business Corporation Act and a limited partnership under the Texas Revised Limited Partnership Act.
>
> 3.02 The purpose for which this limited liability company is organized is to transact any and all lawful business for which limited liability companies may be organized under the laws of Texas, including, but not limited to, the following:
>
> a. To carry on any business or any other legal or lawful activity allowed by law;
>
> b. To acquire, own, use, convey, and otherwise dispose of and deal in real or personal property or any interest therein;
>
> c. To manufacture, buy, sell, and generally deal in goods, wares and merchandise of every class and description;
>
> d. To buy, rent, sell, manufacture, produce, assemble, distribute, repair, and service any and all products or services in which the company desires to engage;

177. Doctors Hosp. at Renaissance v. Andrade, No. 13-15-00046-CV, 2015 WL 3799425, at *1 (Tex. App.—Corpus Christi June 18, 2015), *rev'd*, No. 15-0563, 2016 WL 3157535, at *1 (Tex. May 27, 2016).

178. *Id.*.

179. *Id.*

180. *Id.*

181. *Id.* at *7.

e. To do such other acts as are incidental to the foregoing or desirable in order to accomplish the purpose for which the company was formed; and

f. To have and exercise all rights and powers that are now or may hereafter be granted to a limited liability company by law.

3.03 The foregoing shall be construed as objects, purposes and powers, and enumeration thereof shall not be held to limit or restrict in any manner the powers hereafter conferred on this limited liability company by the laws of the State of Texas.

3.04 The company may, in its Regulations, confer powers, not in conflict with law, on its Managers and Members in addition to the foregoing and in addition to the powers and authorities expressly conferred on them by statute.[182]

Thus, the purpose clause of GP LLC's operating agreement was very broad and could not be said as a matter of law to exclude the practice of medicine (or any other business activity, for that matter) from the universe of GP LLC's permissible business activities.[183] Drafters of partnership agreements often choose to grant broad discretion to the general partner, imparting a greater degree of flexibility to the general partner in managing the partnership's business without necessitating an amendment to the operating agreement for future business activities.[184] But as this case demonstrates, an unintended consequence of this strategy may be to expose the general partner to greater liability for the acts of limited partners of the partnership.[185] Therefore, this case serves as a reminder that drafters of partnership agreements must be mindful not only of the benefits of granting broad discretion to the general partner in an entity's purpose clause, but also that the purpose clause should be conceived of as part of a broader allocation of authority and control among the general partner and the limited partners that may be structured in such a way as to manage liability within acceptable limits.

VII. ATTORNEYS' FEES

In *Hoffman v. L&M Arts*, the U.S. District Court for the Northern District of Texas interpreted the fee-shifting provisions of the Texas Civil Practice and Remedies Code § 38.001 to exclude recovery of attorneys' fees by a prevailing claimant from a limited liability company.[186] The case arose from an alleged breach of a confidentiality agreement between Marguerite Hoffman, noted Dallas resident and patroness of the arts, against L&M Arts (L&M), Sotheby's auction house, and others.[187] Hoffman once owned Mark Rothko's 1961 abstract oil painting, Untitled.[188]

182. *Id.* at *8 n.5.
183. *Id.* at *7.
184. *See id.* at *4.
185. *See id.* at *7–8.
186. Hoffman v. L & M Arts, No. 3:10-CV-0953-D, 2015 WL 1000838, at *1 (N.D. Tex. Mar. 6, 2015).
187. Hoffman v. L & M Arts, 774 F. Supp. 2d 826, 830 (N.D. Tex. 2011).
188. *Id.* at 829.

Hoffman's ownership of the Rothko painting was well known, because the painting had been part of a special art exhibition at the Dallas Museum of Art that featured numerous works of art from the Hoffman family's private collection. After the death of Robert Hoffman, Marguerite's husband and founder of the National Lampoon, the Hoffman family faced financial uncertainty and decided to sell the Rothko painting.[189] Hoffman opted for a private, confidential sale to avoid the embarrassment of publicly disclosing the family's decision to sell the painting, even though the publicity surrounding a public auction would have generated a significantly higher sale price.[190] L&M, a Delaware limited liability company, acted as agent for Hoffman, and the Rothko painting was quietly sold to an undisclosed buyer. The terms of the sale included a $17.6 million dollar selling price, a $500,000 anonymous contribution to the Dallas Museum of Art, and various confidentiality requirements.[191]

Three years after the sale, the undisclosed buyer (now known to be wealthy Mexican financier David Martinez) sold the Rothko painting at a public auction at Sotheby's in New York for $31.4 million—a profit of over $12 million.[192] Hoffman sued Martinez and L&M for breach of the confidentiality provisions of the contract of sale. Hoffman also sued Sotheby's for tortious interference with contract, alleging that the auction house had encouraged Martinez to break the confidentiality provisions of the Hoffman agreement in order to auction a big-name painting like the 1961 Rothko.[193]

After obtaining a judgment in the amount of $500,000 against L&M, Hoffman sought to recover attorneys' fees from L&M under Texas Civil Practice and Remedies Code § 38.001.[194] L&M argued that § 38.001 does not permit recovery of attorneys' fees from a limited liability company, but only from an individual or corporation.[195] The district court agreed, basing its decision on an analysis of the legislative intent behind § 38.001 and the plain meaning of "individual" and "corporation" contained in the statute and elsewhere under Texas law.[196] The district court ultimately concluded that a "person"—including an individual, partnership, limited liability company, and corporation—could recover fees only from an individual person or a corporation but that a limited liability company did not

189. *Id.*

190. *Id.*

191. *Id.* at 830. The confidentiality requirements were extensive, and included a prohibition on hanging the Rothko painting for six months after the sale, and the exertion of "maximum efforts" on the part of all parties to keep all aspects of the sale secret for an indefinite period of time. *Id.*

192. *Id.*

193. *Id.* at 831.

194. Hoffman v. L & M Arts, No. 3:10-CV-0953-D, 2015 WL 1000838, at *4 (N.D. Tex. Mar. 6, 2015).

195. *Id.* at *7. Texas Civil Practice and Remedies Code § 38.001 provides that "[a] *person* may recover reasonable attorney's fees *from an individual or corporation*, in addition to the amount of a valid claim and costs, if the claim is for . . . an oral or written contract." TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (West 2015) (emphasis added).

196. *Hoffman*, 2015 WL 1000838, at *4–5.

qualify either as an individual or a corporation.[197]

The Texas Supreme Court has not yet weighed in on the scope of § 38.001, which provides for the recovery of attorney's fees, and a recent bill in the Texas legislature designed to expand the scope of § 38.001 to include LLCs died in committee. Until further action is taken to broaden the scope of § 38.001, it will remain especially important for drafters of contracts, which include limited liability companies or limited partnerships as a party, to include fee-shifting provisions that fully and accurately reflect the intent of the parties.

VIII. CONCLUSION

On the whole, the cases from this Survey period reflect the recurring theme of unintended consequences arising from the provisions of LLC and partnership agreements, and highlight steps that attorneys can take to minimize uncertainty through careful drafting and corporate governance. First, attorneys must exercise the utmost care at the drafting stage of partnership and LLC agreements in order to manage clients' risk and liability. Provisions that are often considered "boilerplate" must be considered as part of the overall structure of the partnership to minimize the risk of unintended consequences for a client's business. Further, attorneys must consider and account for ambiguities in the TBOC that may affect their clients' rights and remedies in the event of litigation. Lastly, these cases demonstrate the importance of conducting business in a manner that is consistent with the provisions of the operating agreement and with Texas law, thereby ensuring that the corporate form will be respected in the event of litigation.

197. *Id.* at *7.