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CORPORATIONS AND PARTNERSHIPS

by

David Simon Sokolow*

I. PARTNERSHIPS

A. Rights of Partners

In Shindler v. Harris, the court held that a joint venturer was not entitled to recover from his coventurers the value of his interest in the venture under section 42 of the Texas Uniform Partnership Act (TUPA).

In March 1973, a joint venture formed by the parties purchased a tract of land and gave the seller several lien notes as partial payment. The venturers orally agreed that they would periodically contribute money in proportion to their ownership interests to pay off the notes, cover operating expenses, and purchase additional land. In September 1973, they reduced their agreement to writing in a detailed joint venture agreement.

On February 20, 1975, three weeks before a payment on one of the notes fell due, the venture's property manager sent a letter to each venturer requesting that he pay his proportionate share of the amount due. H.B. Harris, one of the venturers, had previously informed the other venturers that he would not pay his share of future assessments. When Harris failed to pay his share by the specified date, the manager delivered a written notice to Harris informing him that he had ten days to remedy his default. When Harris failed to do so, the manager reduced Harris's interest in the venture from approximately $776,000 to zero. The written agreement specifically authorized all of the property manager's actions.

The day after Harris's default, one of the other venturers, acting as Harris's attorney-in-fact pursuant to the terms of the joint venture agreement, executed a deed conveying Harris's interest in the venture to a third party. The property was ultimately sold.

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1. 673 S.W.2d 600 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).
2. TEX. REV. CIV. STAT. ANN. art. 6132b, § 42 (Vernon 1970). Although it is possible to distinguish between a joint venture and a partnership, joint ventures are governed by the rules applicable to partners, including partnership statutes. See J. CRANE & A. BROMBERG, LAW OF PARTNERSHIPS § 35, at 192 (1968).
3. 673 S.W.2d at 604.
4. Harris's interest in the venture was conveyed to Mrs. Vivian Smith, the mother-in-law of one of the other venturers. At trial, Harris contended that his coventurers had breached
for a profit, which was apportioned among the remaining venturers. Harris sued to recover the value of his interest in the venture and his proportionate share of the profits. Despite a jury verdict that Harris had abandoned his interest in the venture, the trial court awarded Harris his interest in the venture and land under TUPA section 42. On appeal the court reversed and barred Harris from recovering against his coventurers because he had intentionally relinquished his interest in the venture. The court held that Harris was not entitled to judgment based on TUPA section 42. The court correctly observed that section 42 applies only when the parties have not otherwise agreed on how to settle the account of a partner who withdraws, which the parties did here. Section 42 expressly permits partners to override the settlement provisions set out there by agreeing to settle accounts in some other manner. The court ruled that because the joint venture agreement clearly and unequivocally provided for the forfeiture of Harris's interest in the event of default, Harris could not recover from his coventurers.

The court further reasoned that section 42 did not apply because Harris had neither retired from the venture nor died, but had been expelled by his coventurers. Although section 42 expressly refers only to a partner who "retires or dies," a partner who is expelled should be able to exercise his section 42 option unless he has clearly agreed to forfeit his interest in the partnership. Of course, if he is expelled for breaching the partnership agreement, the remaining partners can maintain a suit against him to recover damages they suffered as a result of his breach.

In Dunn v. Summerville the Texas Supreme Court reiterated the general rule that partners share partnership profits equally even if they have contrib-

their fiduciary duty to him by concealing from him Mrs. Smith's willingness to contribute to the venture in exchange for Harris's interest in the venture. The appellate court, however, found it unnecessary to decide whether the venturers' financing activities constituted a breach of their fiduciary duty to Harris because of the jury findings that those activities did not cause any damage to Harris and that Harris had abandoned his interest in the venture. Id. at 606.

5. Id. at 606-07.
6. Id. at 607-08.
7. Id. at 608; see TEX. REV. CIV. STAT. ANN. art. 6132b, § 42 (Vernon 1970).
8. TEX. REV. CIV. STAT. ANN. art. 6132b, § 42 (Vernon 1970).
9. See 673 S.W.2d at 608-09 (quoting from the joint venture agreement).
10. Id. at 609. In assessing whether forfeiture would be equitable in this case, the court noted that the joint venture agreement also protected a defaulting venturer by providing that the other venturers would not have any recourse against him other than the reduction of his percentage interest in the venture to zero. Id.
11. Id. at 608.
13. Section 42 permits a partner who retires or the legal representative of a partner who dies to elect to receive from the partners who continue the partnership business either the value of the partner's interest in the partnership as of the date of dissolution with interest or the "profits attributable to the use of his right in the property of the dissolved partnership," unless otherwise agreed. Id.
14. Cf. Stone City Attractions, Inc. v. Henderson, 571 S.W.2d 206, 210 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.) (section 42 governs the rights of "outgoing partners" when the partnership business is continued after dissolution).
15. 669 S.W.2d 319 (Tex. 1984) (per curiam).
uted unequal amounts of capital to the partnership, unless they have agreed to split the profits in some other fashion.\textsuperscript{16} Because the two partners in Dunn had not agreed on how to split the profits, the supreme court held that Summerville could recover one-half of the excess draws taken by Dunn, but not the entire difference between their draws as awarded by the lower court.\textsuperscript{17}

B. Intrapartnership Liability for Negligence

Partners owe a fiduciary duty to one another that requires "the utmost degree of good faith and honesty in dealing with one another."\textsuperscript{18} When a partner breaches his fiduciary duty, as by appropriating partnership property and partnership employees for his personal use, he may be held liable to the injured partners.\textsuperscript{19} But what if a partner is simply negligent in conducting partnership affairs? Will he be liable to the other members of the partnership? Surprisingly, virtually no authority on this question exists. In Ferguson v. Williams,\textsuperscript{20} however, the Austin court of appeals held as a matter of law that a partner is not liable to other members of the partnership for negligence in the management or operation of the partnership.\textsuperscript{21}

The court's holding signifies that a person who enters into a partnership assumes the risk that one or more of his partners may be negligent. Such a result makes sense; to hold otherwise would require a partner, in effect, to guarantee his capability as a businessman to the other members of the partnership.\textsuperscript{22}

C. Noncompetition Clauses

In Henshaw v. Kroenecke\textsuperscript{23} the Texas Supreme Court upheld Henshaw's right to recover liquidated damages from his former partner for breach of a noncompetition clause contained in their original partnership agreement.\textsuperscript{24} Before forming the partnership Henshaw operated a sole proprietorship offering management consulting services. Henshaw invited Kroenecke to join his business, and in April 1972 they executed a partnership agreement. That agreement contained a clause providing that Kroenecke would not compete with Henshaw by servicing clients of the partnership for three years after the termination of the agreement. If he did, Kroenecke would have to pay Hen-

\textsuperscript{17} 669 S.W.2d at 319.
\textsuperscript{18} Veale v. Rose, 657 S.W.2d 834, 837 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.) (citing Huffman v. Upchurch, 532 S.W.2d 576, 579 (Tex. 1976); Fitz-Gerald v. Hull, 150 Tex. 39, 49-50, 237 S.W.2d 256, 264 (1951)).
\textsuperscript{19} Veale v. Rose, 657 S.W.2d 834, 837 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.).
\textsuperscript{20} 670 S.W.2d 327 (Tex. App.—Austin 1984, writ ref'd n.r.e.).
\textsuperscript{21} Id. at 331.
\textsuperscript{22} See J. CRANE & A. BROMBERG, supra note 2, § 68, at 395 ("In the absence of special agreement, no partner guarantees his own capacity.").
\textsuperscript{23} 656 S.W.2d 416 (Tex. 1983).
\textsuperscript{24} Id. at 419.
In October 1974, Henshaw and Kroenecke each formed his own professional corporation. By amendment to the partnership agreement, the corporations were substituted as partners for Henshaw and Kroenecke, but the partnership agreement was otherwise ratified and affirmed. At the same time, the corporations executed a new partnership agreement (the 1974 agreement). The 1974 agreement stated that it did not “alter or amend” the original partnership agreement; however, it contained a separate covenant preventing employees of the two corporations from competing with the new partnership. None of the individuals or corporations involved ever signed this covenant. When a dispute arose in 1976, Kroenecke left the firm and took clients with him. After dissolution of the partnership, Henshaw sued Kroenecke to recover liquidated damages for breach of the covenant not to compete contained in the original partnership agreement.

The court of appeals held that only the partnership could enforce the covenant, but the supreme court ruled that Henshaw individually was entitled to the protection of the noncompetition clause.

In the supreme court's view, the covenant constituted an agreement between Kroenecke and Henshaw individually and not between Kroenecke and the partnership. The court reasoned that Henshaw was the business entity both before the partnership began and after it terminated; consequently, Henshaw had a legitimate interest in protecting himself from the possibility that Kroenecke would establish rapport with his clients and take them with him upon termination. Public policy was also a factor in the decision. The court was concerned that if only the partnership could enforce the covenant, the members of a two-man partnership could never enter into an enforceable noncompetition clause; after termination no partnership would remain to enforce the covenant. For these reasons, the court determined that the covenant in the original partnership agreement was reasonable and that Henshaw could enforce it.

Over the objection of two dissenting justices, the court also held that the original partnership agreement, including the covenant, was integrated into

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25. The dispute concerned the original covenant not to compete. Apparently, Kroenecke demanded that the covenant be changed to bind Henshaw as well as himself and that the liquidated damages be fixed in a lump sum. He left a note to that effect for Henshaw, who construed it as a termination of the partnership. See id. at 417-18. For a more detailed discussion of the dispute, see Henshaw v. Kroenecke, 671 S.W.2d 117, 118-19 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.) (on remand).
26. 656 S.W.2d at 418.
27. Id.
28. Id.
29. Id. (citing Hospital Consultants, Inc. v. Potyka, 531 S.W.2d 657, 662 (Tex. Civ. App.—San Antonio 1975, writ ref’d n.r.e.).)
30. 656 S.W.2d at 418.
31. Id. The court also held that the liquidated damages provision was reasonable and enforceable. Id. at 419.
32. Id. at 420-21 (Wallace, J., dissenting). Justice Kilgablin joined in Justice Wallace's dissent.
the 1974 agreement.\textsuperscript{33} Thus, even though the covenant attached to the 1974 agreement had never been signed, the majority concluded that the original covenant continued to bind Kroenecke.\textsuperscript{34}

Although one can quibble with certain aspects of the majority opinion,\textsuperscript{35} the court clearly reaches a sensible result. The majority's reasoning leaves no doubt that the parties designed the noncompetition clause in the original partnership agreement to protect Henshaw against competition from Kroenecke, and the express language of the original covenant reinforces that conclusion.\textsuperscript{36} Furthermore, even if the original covenant was not integrated into the 1974 agreement, as the dissent contended,\textsuperscript{37} the language of the 1974 agreement suggests that the parties intended to supplement, rather than supersede, the original partnership agreement.\textsuperscript{38} Finally, the circumstances surrounding termination of the partnership in 1976\textsuperscript{39} indicate that Kroenecke himself recognized Henshaw's right to enforce the original covenant against him. Overall, in terms of policy, the decision in \textit{Henshaw} encourages the judicious use of reasonable noncompetition clauses.

\section*{D. Assignment of Interest in a Lease}

\textit{Heflin v. Stiles}\textsuperscript{40} involved a landlord-tenant dispute that may have significant ramifications for partnerships that are tenants in Texas. In 1973, Hyden and Stiles, doing business as Hyden-Stiles, G.M.C., Inc., leased a piece of property for a ten-year term from John King. The lease agreement provided that the "Lessee" would not assign the agreement without the written consent of the lessor. Subsequently, Hyden and Stiles sublet the premises to Joe Heflin. Several years later, Heflin purchased the property from King, thereby becoming lessor to Hyden and Stiles under the 1973 lease agreement.\textsuperscript{41} The majority cited language in both the 1974 agreement ("This agreement does not alter or amend [the original partnership agreement] . . .") and the 1974 amendment to the original partnership agreement ("The parties hereby ratify and reaffirm all provisions of [the original partnership agreement] . . .") to support its holding that the original covenant had been integrated into the 1974 agreement. \textit{Id.} at 419. This language, however, failed to convince the dissent that the parties had intended an integration. Justice Wallace stated that integration was permissible only when it is shown that the parties clearly intended an integration or when it is necessary to clarify the meaning of an ambiguous writing. \textit{Id.} at 421 (Wallace, J., dissenting). Because the 1974 agreement, which contained no signed covenant, was clear and unambiguous, and because neither of the parties suggested otherwise, Justice Wallace concluded that no integration had occurred. \textit{Id.}

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\textsuperscript{34} \textit{Id.} at 419.

\textsuperscript{35} Despite the court's statement that Henshaw had "substituted his own personal corporation as a partner," \textit{Id.} at 417, under the original partnership agreement, the court never entertained the possibility that the corporation was the proper plaintiff in this case. Perhaps this issue had not been argued to the court.

\textsuperscript{36} The covenant provided in part: "Kroenecke agrees that upon his voluntary termination of this agreement he will not compete with Henshaw . . ." \textit{Id.} (quoting the partnership agreement) (emphasis added).

\textsuperscript{37} \textit{See id.} at 420-21 (Wallace, J., dissenting). For a discussion of the dissenting opinion, \textit{see supra} note 33.

\textsuperscript{38} The language cited by the majority to show that an integration had occurred, \textit{see supra} note 33, can also be read as evidencing an intent to ensure that the original partnership agreement have continued vitality.

\textsuperscript{39} \textit{See supra} note 25.

\textsuperscript{40} 663 S.W.2d 131 (Tex. App.—Fort Worth 1983, no writ).
while continuing as their sublessee. On August 9, 1978, pursuant to a wind-
ing up of the partnership, Hyden assigned all of his interest in the 1973 lease
to Stiles without obtaining Heflin’s consent, written or otherwise. When
Heflin learned of the assignment, he stopped paying rent under the sublease
and refused to accept rental payments from Stiles. Stiles sued for the back
rent. Heflin counterclaimed for termination of the 1973 lease on the ground
that Hyden’s assignment without consent constituted a breach of the 1973
lease and a violation of Texas landlord and tenant law, article 5237,41 which
also prohibits the assignment of a lease without the lessor’s consent.42

Stiles argued that the purported assignment merely effected a dissolution
of a partnership between co-lessees, as a result of which he had succeeded to
his partner’s interest under the lease. Despite the absence of Texas case law
on point,43 the court rejected Stiles’s interpretation of his written agreement
with Hyden.44 The court characterized the purpose of both the statute and
the similar provision in the lease45 as being solely for the benefit of the land-
lord.46 In the court’s view, both were intended to allow landlords to deter-
mine who would occupy their property and to ensure that landlords would
not have impecunious tenants thrust upon them without their consent.47
The court also quoted language from two contracts cases to the effect that a
party has the right to determine with whom he will contract.48 Without
further explication,49 the court held that the agreement between Hyden and
Stiles was an assignment violating both the lease and the statute.50

On the surface, the court’s decision appears equitable.51 Arguably, it
would have been unfair to Heflin to allow Hyden to substitute Stiles as the
sole lessee without Heflin’s consent, when Heflin had previously been able to

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41. TEX. REV. CIV. STAT. ANN. art. 5237 (Vernon 1962), repealed by Act of June 19,
§ 91.005 (Vernon 1984).
42. The lease went beyond the statute in requiring that the lessor’s consent to any assign-
ment be in writing.
43. See 663 S.W.2d at 134.
44. Id. at 135.
45. See supra note 42.
46. 663 S.W.2d at 134 (citing Fair West Bldg. Corp. v. Trice Floor Coverings, 394 S.W.2d
707, 708 (Tex. Civ. App.—Fort Worth 1965, no writ)).
47. 663 S.W.2d at 134.
48. Id. at 134-35 (quoting Moore v. Mohon, 514 S.W.2d 508, 513 (Tex. Civ. App.—Waco
1974, no writ); Arkansas Valley Smelting Co. v. Belden Mining Co., 127 U.S. 379, 387 (1888)).
49. See infra note 53.
50. 663 S.W.2d at 135.
51. Although the result in Heflin protects lessors from having undesirable lessees foisted
upon them by assignment, certain aspects of this case suggest that Heflin himself may not have
merited such protection. First, Heflin was not the original lessor in the 1973 lease; thus, this
case is not really analogous to the cited cases, in which transferees of contract rights sought to
enforce those rights against a party to the original agreement. Heflin conceivably relied on the
creditworthiness of both Hyden and Stiles when he purchased the property from King in 1977,
but no evidence to that effect was presented. Moreover, Heflin had a strong economic incen-
tive to seek termination of the 1973 lease that derived from his peculiar status as both lessor
and sublessee of the property. As sublessee, Heflin paid Hyden and Stiles $575 per month,
while as lessor of the property he received only $335 per month from them. These facts sug-
ject that Heflin may have been less a victim of an unwanted lessee than a shrewd businessman
with a strong desire to escape from a bad bargain. If so, the court’s solicitude is misplaced.
rely on the “skill, character or credit” of both Hyden and Stiles. Nevertheless, the court’s emphasis on the landlord-tenant aspects of the case undercuts the importance of the fact that Heflin involved a partnership. A hypothetical will help to illustrate the possible consequences of the court’s holding. Assume that a lessor rents property to a partnership composed of thirty individuals and that one of the partners subsequently retires and assigns his interest in the lease to the other members of the firm. Under the rationale of Heflin, the lessor could terminate the lease. One could attempt to distinguish this situation from Heflin on the ground that in the hypothetical the partnership as an entity remained as lessee after the assignment, whereas in Heflin no partnership remained after Hyden had withdrawn. A court might not choose, however, to recognize this distinction. In light of these considerations, the legislature should reconsider the effect of article 5237 on assignments of leases among partners.

E. Formation

In Hasslocher v. Heger the primary issue was whether the parties had formed a joint venture to resell a costly diamond. In February 1977 Heger, a jeweler, apprised Hasslocher that the “North Star Diamond” could be purchased for $300,000. Heger and Hasslocher traveled to Florida where Hasslocher purchased the stone for that amount. One month later, the parties signed a handwritten agreement, drafted by Hasslocher, providing that they would share equally the profits from the resale of the diamond; that Heger would keep the diamond in a safety deposit box while it was in his possession and show it to prospective customers; and that they would sell the diamond for the highest price possible to gain the greatest profit. Initially, Hasslocher kept the diamond in his safe deposit box; later, he moved it to another box, which both parties were authorized to open. On March 6, 1978, Hasslocher moved the stone to yet another safe deposit box; after that, Heger could show the diamond only if Hasslocher or his wife accompanied him. The stone was never sold.

Heger sought a declaratory judgment that he and Hasslocher had formed a joint venture. The jury found in Heger’s favor, but the appellate court reversed.

53. The court did consider a case involving a partnership, Demming v. Republic Nat’l Bank Bldg. Co., 294 S.W.2d 888 (Tex. Civ. App.—Dallas 1956, writ ref’d n.r.e.), but distinguished that case as involving the addition, rather than the removal, of a partner. 663 S.W.2d at 134. The court’s discussion of Demming, however, had no bearing on its ultimate disposition of the instant case.
54. Texas partnership law recognizes a partnership as a distinct legal entity, separate from its partners for most purposes. Haney v. Fenley, Bate, Deaton & Porter, 618 S.W.2d 541, 542 (Tex. 1981).
55. 670 S.W.2d 689 (Tex. App.—San Antonio 1984, writ ref’d n.r.e.).
56. Id. at 691.
57. Heger also brought suit against Hasslocher for breach of contract, specific performance, and attorney’s fees.
58. 670 S.W.2d at 694.
ture\textsuperscript{59} and found that evidence to support three of the four necessary elements was wanting.\textsuperscript{60} First, the court found insufficient evidence of an agreement to share losses.\textsuperscript{61} The written agreement was silent as to the sharing of losses; furthermore, Hasslocher had testified that he expected to bear any losses and that he and Heger had never discussed Heger's paying any part of the loss. Second, the court found some evidence that the parties shared a community of interest in the undertaking, but not enough to support the jury's finding.\textsuperscript{62} Apparently, the court was swayed by Heger's testimony that his objective was to gain prominence as a jeweler as well as to derive a profit.\textsuperscript{63} Finally, the court found little, if any, evidence to support the proposition that the parties had a mutual right of control over the diamond.\textsuperscript{64} Hasslocher's moving the stone to a safe deposit box to which only he had access, his desire to control who saw the stone, and his intention not to sell the stone for a year because of tax considerations demonstrated to the court that Hasslocher alone controlled the diamond.\textsuperscript{65} The court, therefore, held that the parties had not entered into a joint venture and remanded for trial on Heger's other claims.\textsuperscript{66}

The court arguably erred in concluding that the parties shared no community of interest. They clearly had a mutual interest in reselling the diamond

\textsuperscript{59} The four elements of a joint venture are: "(1) a community of interest in the venture, (2) an agreement to share profits, (3) an agreement to share losses, and (4) a mutual right of control or management of the enterprise." Coastal Plains Dev. Corp. v. Micrea, Inc., 572 S.W.2d 285, 287 (Tex. 1978) (citing Brown v. Cole, 155 Tex. 624, 631, 291 S.W.2d 704, 709 (1956); Luling Oil & Gas Co. v. Humble Oil & Ref. Co., 144 Tex. 475, 483-84, 191 S.W.2d 716, 722 (1945); Chandler v. Herndon, 450 S.W.2d 703, 706 (Tex. Civ. App.—Corpus Christi 1970, writ ref'd n.r.e.)).

\textsuperscript{60} 670 S.W.2d at 692.

\textsuperscript{61} Id. at 692-93.

\textsuperscript{62} Id. at 693.

\textsuperscript{63} Id.

\textsuperscript{64} Id. at 693-94.

\textsuperscript{65} Id. at 693.

\textsuperscript{66} See supra note 57. The court also considered the propriety of the special issue on joint venture, which recited as an element of a joint venture an "agreement to share losses, costs or expenses." Id. at 691 (emphasis added). Based on this special issue, the jury found that the parties had indeed entered into a joint venture agreement. Hasslocher contended that the court's framing of this element in the disjunctive made it impossible to determine whether the jury had in fact found "an agreement to share losses," as required by the Texas Supreme Court. See supra note 59. The court acknowledged that the jury had to find that the parties agreed to share the losses, but concluded that the jury could have made such a finding based on the issue submitted. 670 S.W.2d at 692.

Given the disjunctive wording of the issue, however, the jury could have concluded that the parties had entered into a joint venture without finding that they had agreed to share losses. Under the issue submitted, a finding that the parties had agreed to share costs or expenses would have satisfied this element of a joint venture. Although the court noted that the issue had been similarly defined in other cases, id. at 691 (citing Gray v. West, 608 S.W.2d 771, 777 (Tex. Civ. App.—Amarillo 1980, writ ref'd n.r.e.); Heinrich v. Wharton County Livestock, Inc., 557 S.W.2d 830, 833 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.); Patton v. Calloway, 522 S.W.2d 252, 256 (Tex. Civ. App.—El Paso 1975, writ ref'd n.r.e.); Fry v. Shaw, 508 S.W.2d 142, 145 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.)), in none of those cases was the wording of the special issue challenged, as it was here. Despite the court's machinations, 670 S.W.2d at 691-92, the charge as submitted was faulty.
for the greatest possible profit;\(^{67}\) financially, each expected to derive the same benefit from the resale.\(^{68}\) That Heger may have had some additional motivation for participating in the undertaking does not alter that fundamental community of interest. Even so, a contrary finding on this issue would not have changed the result, as two of the other elements of a joint venture were missing.

**F. Interest in Partnership Property**

A partner's interest in partnership property is "personal property for all purposes" under TUPA.\(^ {69} \) Consequently, even for purposes of descent and probate distribution, a deceased partner's interest in partnership realty is treated as personal property under TUPA and, as such, is includable in his Texas taxable estate.\(^ {70} \) In *Humphrey v. Bullock*,\(^ {71} \) however, the decedent's executors contended that Texas common law, rather than TUPA, should apply because the partnership of which the decedent was a partner had been formed before the effective date of TUPA.\(^ {72} \)

As a preliminary matter, the court focused on the partnership interest that passed under the probate laws,\(^ {73} \) rather than on the partnership interest held by the decedent during his lifetime,\(^ {74} \) because inheritance tax is imposed on the right of succession rather than on the property itself.\(^ {75} \) Accordingly, the court sought to ascertain how Texas courts had characterized a partner's interest for probate purposes prior to the adoption of TUPA. The court concluded that Texas common law, in contrast to TUPA,\(^ {76} \) treated real partnership property as realty for probate purposes.\(^ {77} \) Given this disparity in

\(^ {67} \) That interest was manifested in the parties' written agreement. See *supra* text accompanying note 56.

\(^ {68} \) Cf. *Brown v. Cole*, 155 Tex. 624, 642, 291 S.W.2d 704, 716 (1956) (Smith, J., dissenting) (suggesting that when all parties derive a material benefit they have a community of interest).

\(^ {69} \) TEX. REV. CIV. STAT. ANN. art. 6132b, § 26 (Vernon 1970).


\(^ {71} \) 666 S.W.2d 586 (Tex. App.—Austin 1984, writ ref'd n.r.e.).

\(^ {72} \) The executors also contended that the partnership to which the decedent belonged was a mining partnership rather than a general partnership. The distinction is significant because of authority that the assets of a mining partnership should be treated as the partners' individual property. See *id.* at 589 (citing *Munsey v. Mills & Garity*, 115 Tex. 469, 482-86, 283 S.W. 754, 759-61 (1926)). The court concluded, however, that the partnership was a general partnership. 666 S.W.2d at 590. The court determined that the parties intended to form a general partnership based upon a provision in their written agreement that the partnership would terminate on the death of one of the partners. *Id.* at 589-90. A mining partnership does not dissolve on the death of a partner. *Id.* at 590 (citing *Munsey*, 115 Tex. at 484-86, 283 S.W. at 760-61; *W. SUMMERS, THE LAW OF OIL AND GAS §§ 742, 735 (1962)*).

\(^ {73} \) 666 S.W.2d at 589-90 (citing Blodgett v. Silberman, 277 U.S. 1 (1928); *Lynch v. Kentucky Tax Comm'n*, 333 S.W.2d 257 (Ky. 1960); *Perkins v. Oklahoma Tax Comm'n*, 428 P.2d 328 (Okla. 1967)).

\(^ {74} \) In an earlier portion of its opinion, the court concluded that a partner's interest in partnership property during his lifetime was treated as personalty at common law. 666 S.W.2d at 590-91.

\(^ {75} \) *Id.* at 591 (citing *Calvert v. Coke*, 458 S.W.2d 913, 916 (Tex. 1970)).

\(^ {76} \) *Id.*; see *supra* text accompanying note 70.

\(^ {77} \) *Id.* (citing *Miller v. Howell*, 234 S.W.2d 925, 930 (Tex. Civ. App.—Fort Worth 1950),
treatment, the court had to determine whether it should apply TUPA to the instant facts. As the court noted, partnerships formed before the adoption of TUPA are generally subject to its provisions, except where the application of TUPA will "impair the partnership contract or affect any right accrued before the [T]UPA took effect." Because the partnership agreement was silent on how partnership property should descend upon the death of a partner, the court presumably concluded that the change in the law did not interfere with the partnership agreement. Furthermore, because rights acquired by will or inheritance do not vest until a testator's death, and because the decedent did not die until after TUPA was enacted, the court reasoned that no right had vested before TUPA took effect. The court, therefore, ruled that it was proper to treat the decedent's partnership interest for estate tax purposes as personalty in accord with the dictates of TUPA.

G. Venue

Before it was revised in 1983, the Texas venue statute did not expressly provide where venue would lie against a partnership. Courts confronted with this issue had to decide whether a partnership was an association for venue purposes, because the statute did provide where venue would lie against an "association." There were conflicting results, depending upon whether the court viewed a partnership as an entity separate from the partners, or as an aggregate of individuals. If the court viewed the partnership as an entity and thus an association, venue would lie against the partnership; if, however, the court viewed it as an aggregate, venue would not lie.

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79. 666 S.W.2d at 591. The quoted language is based on TUPA § 4(5), TEX. REV. CIV. STAT. ANN. art. 6132b, § 4(5) (Vernon 1970), but differs slightly from the wording of that section. Section 4(5) states that TUPA "shall not be construed so as to impair the obligations of any contract existing when [TUPA] goes into effect, nor to affect any . . . right accrued before [TUPA] takes effect." Id. (emphasis added).

80. 666 S.W.2d at 592.

81. Although the court did not explicitly discuss the significance of the silence of the partnership agreement on the matter of descent, it apparently found no impairment of the partnership contract because of this silence.

82. 666 S.W.2d at 592 (citing TEX. PROB. CODE ANN. § 37 (Vernon Supp. 1982); Casey v. Kelly, 185 S.W.2d 492, 493-94 (Tex. Civ. App.—Fort Worth 1945, writ ref'd)).

83. 666 S.W.2d at 592 (citing Davis v. First Nat'l Bank, 139 Tex. 36, 44-45, 161 S.W.2d 467, 472-73 (1942)).

84. 666 S.W.2d at 592 (citing McCain v. Yost, 155 Tex. 174, 284 S.W.2d 898 (1955)).

85. 666 S.W.2d at 592.


87. Id. art. 1995(23).

against the partnership. By amending the statute expressly to include the word "partnership," the legislature codified the view that a partnership is an entity for venue purposes and relieved the courts of the burden of making this difficult determination.

In *Seidman & Seidman v. Schwartz* the court held that a partnership's choice of venue against a defendant did not preclude a partner who was being sued as a third-party defendant from asserting his right to be sued in his county of residence. The court correctly reasoned that although the partnership as an entity owned the cause of action against Schwartz and could choose where to institute its suit against him, that choice did not abrogate the venue rights of a partner being sued as a third-party defendant in his individual capacity.

**H. Miscellaneous Partnership Cases**

*Lowry v. Crimmins* is apparently the first reported case involving TUPA section 36, which addresses the effect of dissolution on a partner's existing liability for a partnership debt. Unfortunately, the opinion contains only cursory discussion of the statute. The court simply concluded in a footnote that Lowry was not discharged from his liability on a partnership note upon dissolution because he and his partner had never agreed that he would be discharged, as section 36(2) requires.

In *Vick v. George* the procedural posture of the case on appeal required the court to ascertain whether the plaintiff had presented probative evidence of a partnership or joint venture of which Calvin Vick was a member. Vick, however, had apparently represented himself, or had allowed himself to be represented, as a partner in an oil drilling venture to prospective investors in the venture. If such a representation had been made to the investors, Vick would be liable to them as a partner by estoppel under section 16 of TUPA regardless of whether a partnership existed.

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91. 665 S.W.2d 214 (Tex. App.—San Antonio 1984, writ dism'd w.o.j.).
92. The court recognized that a partnership is "an entity legally distinct from its partners for most purposes" under TUPA. *Id.* at 218 (citing Haney v. Fenley, Bate, Deaton & Porter, 618 S.W.2d 541, 542 (Tex. 1981) (per curiam), which in turn cited Bromberg, *Commentary on the Texas Uniform Partnership Act*, 17 TEX. REV. CIV. STAT. ANN. 299, 300 (Vernon 1970)).
93. 665 S.W.2d at 218.
95. TEX. REV. CIV. STAT. ANN. art. 6132b, § 36 (Vernon 1970).
96. 665 S.W.2d at 232 n.4.
98. 671 S.W.2d at 547.
99. *Id.* at 548.
100. TEX. REV. CIV. STAT. ANN. art. 6132b, § 16 (Vernon 1970); see also J. CRANE & A. BROMBERG, supra note 2, § 36, at 200 (joint venture may exist by estoppel).
101. Section 16 provides redress to a person who has given credit to the actual or alleged partnership in reliance on the misrepresentation. TEX. REV. CIV. STAT. ANN. art. 6132b,
not clearly show whether this theory was argued to the court.102

Finally, in *Corinth Joint Venture v. Lomas & Nettleton Financial Corp.*103 the court concluded that a partner had authority to enter into a settlement agreement extending the maturity date of a partnership note, where the agreement effectively preserved the partnership's primary asset from foreclosure.104 The court reasoned that extending the date of a partnership obligation resembled other actions that courts have deemed to be within a partner's authority, including his borrowing money or giving promissory notes on behalf of the partnership.105

II. CORPORATIONS

A. Trust Fund Doctrine

In *Henry I. Siegel Co. v. Holliday*106 the Texas Supreme Court addressed the scope of the trust fund doctrine, which concerns the right of a creditor of a dissolved corporation to recover from those who received the corporation's assets upon dissolution.107 Edna Holliday and Alfred and Barbara Graham were the officers and directors of Holly Gram, Inc., a Texas corporation that operated a shoe store and two dress shops. Siegel sold merchandise on credit to the dress shops. After approximately one year in business, Mrs. Holliday and the Grahams agreed to dissolve the corporation, but to continue the business as separate proprietorships. Mrs. Holliday took the assets and liabilities of the shoe store and the Grahams took those of the dress shops. None of the creditors of the dress shops, including the plaintiff Siegel, were notified of the dissolution. Holly Gram's assets at the time of dissolution were worth $20,000; Mrs. Holliday received assets worth $10,000. After dissolution, Mrs. Holliday paid a total of $26,000 to various Holly Gram creditors, but did not pay Siegel.108

Siegel sued Mrs. Holliday and the Grahams on the Holly Gram debt. Although the Grahams had assumed responsibility for the debt under their agreement with Mrs. Holliday, Siegel argued that Mrs. Holliday was personally liable for the debt based on the trust fund doctrine as embodied in article 6.04(A)(3) of the Texas Business Corporation Act (TBCA).109

§ 16(1) (Vernon 1970). Although the investors in Vick gave money rather than credit to the purported partnership in reliance on the representation that Vick was a partner, there is no policy reason to deny them recovery under section 16. 102. The court cited to TUPA § 16, but never discussed § 16's application to the facts. 671 S.W.2d at 547.

103. 667 S.W.2d 593 (Tex. App.—Dallas 1984, writ dism'd w.o.j.).

104. *Id.* at 597.

105. *Id.* (citing J. CRANE & A. BROMBERG, supra note 2, § 50, at 281). Despite the fact that a judgment implementing certain features of this agreement was later entered, the court held that the partner had not confessed a judgment against the partnership merely by entering into the settlement agreement. 667 S.W.2d at 597; cf. TEX. REV. CIV. STAT. ANN. art. 6132b, § 9(3)(d) (Vernon 1970) (partner cannot confess a judgment against the partnership unless authorized by the other partners or unless the partnership business has been abandoned).

106. 663 S.W.2d 824 (Tex. 1984).


108. Siegel's claim was for $2087.98.

1302—2.07(B) of the Miscellaneous Corporation Laws Act. In essence, Siegel contended that Mrs. Holliday, as a director of the dissolved corporation, was a trustee of the corporation's assets for the benefit of its creditors and thus had a fiduciary duty to see that those assets were applied to the creditors' claims on a pro rata basis. Siegel concluded that Mrs. Holliday was personally liable to it for the full amount of its claim for breaching the duty owed to it as creditor.

A majority of the court rejected Siegel's interpretation of the relevant statutes. The majority construed article 6.04(A)(3) to require that the last board of directors of a dissolved corporation "make a just and equitable distribution of corporate assets to the creditors first and then to the stockholders." For the purpose of deciding this case, the majority assumed that this language required the directors to distribute the corporate assets pro rata to creditors. According to the majority, the trust fund doctrine creates an equitable lien in favor of creditors on any assets that the directors have preferentially transferred, but does not ordinarily provide a basis for imposing personal liability on the directors. The majority recognized, however, that a director may be held personally liable under article 1302—2.07(B) for breach of his duty to make a just and equitable distribution, but only to the extent of the corporate assets that have come into the directors' hands by virtue of the dissolution. The majority therefore concluded that Siegel was not entitled to recover against Mrs. Holliday because she had already paid out sums exceeding the value of corporate assets distributed to the Holly Gram directors.

Justice Ray's dissent characterized this result as patently inequitable because it allows directors of a dissolved corporation:

- to pick and choose among the creditors they wish to pay, secure in the knowledge that creditors who do not receive their pro rata share will have no claim against them individually so long as the directors pay out at least an amount equal to the corporate assets on hand at dissolution.

At the core of the dissent is the notion that directors of a dissolving corpora-

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110. TEX. REV. CIV. STAT. ANN. art. 1302—2.07(B) (Vernon 1980). Article 1302—2.07(B) requires the directors and officers, in winding up corporate affairs, to act as trustees for the benefit of creditors.
111. 663 S.W.2d at 826.
112. Id. at 827.
113. Id. at 826. The court expressly pretermitted the question of whether article 6.04(A)(3) requires a pro rata distribution of assets. The court assumed it did since the issue was not material to the case. Id.
114. Id. at 827-28. A creditor would have to trace the assets and subject them to his claim. He would be unable to claim the assets, however, if they were held by a bona fide purchaser. Id. at 828.
115. Id. at 828; see TEX. REV. CIV. STAT. ANN. art. 1302—2.07(B) (Vernon 1980).
116. 663 S.W.2d at 828.
117. Id. (Ray, J., dissenting).
118. Id.
tion are trustees who are bound as fiduciaries "to administer the corporate assets for the benefit of the creditors","119 as such, they must use reasonable care to pay creditors equally or risk personal liability in excess of the corporate assets distributed to the directors upon dissolution.120

Although the language of article 1302—2.07(B) supports the majority's conclusion,121 the equities weigh heavily in favor of Justice Ray's interpretation. The majority opinion countenances the unequal treatment of corporate creditors. Under the rule adopted in Siegel, creditors who learn of a corporation's dissolution and receive payment from the corporation benefit at the expense of creditors who are unaware of the dissolution, even if there has been no fraud or favoritism in payment.122 This result is particularly unfair to creditors like Siegel who are not informed of the dissolution by the corporation's board of directors as required by statute.123 Furthermore, the majority's concern for the plight of corporate directors seems misplaced. A director ordinarily risks unlimited personal liability for a breach of his fiduciary duty to the corporation and there is no compelling policy reason to constrict that liability in the context of dissolution. Finally, if state law permits the disparate treatment of corporate creditors, the creditors may force the corporation into federal bankruptcy court where equal treatment is assured.124 In light of these considerations, the legislature should amend article 1302—2.07(B) to require that the directors of a dissolved corporation ratably distribute the corporation's assets to its creditors.

B. Piercing the Corporate Veil

Cases involving the doctrine of piercing the corporate veil are susceptible of two generalizations: (1) courts are more likely to pierce the corporate veil when the defendant is a corporation than when it is an individual;125 and (2) courts are more willing to pierce the corporate veil in a tort case than in a breach of contract case.126 In Lucas v. Texas Industries, Inc.,127 however, the Texas Supreme Court refused to hold a parent corporation liable for the tortious act of its subsidiary. A beam manufactured by Texas Structural Products, Inc. (Structural) had injured Randall Lucas. He sued Texas Industries, Inc. (TXI), Structural's corporate parent, to recover for his injuries.

119. Id.
120. Id. at 828-29.
121. See supra note 115 and accompanying text. Justice Ray argued that the language "merely restates the basic principle that in normal circumstances the officers and directors of a dissolved corporation need only ratably distribute the assets at dissolution and nothing more." 663 S.W.2d at 830 (Ray, J., dissenting).
122. Siegel did not allege fraud or favoritism in this instance. 663 S.W.2d at 826.
123. See TEX. BUS. CORP. ACT ANN. art. 6.04(A)(2) (Vernon 1980); 663 S.W.2d at 826.
Lucas presented evidence at trial that TXI and Structural had several common officers and directors, filed a consolidated income tax return, and used the same corporate logo. Lucas further showed that TXI suggested the safety procedures to be used in Structural's plants, loaned Structural money, and delivered the injury-causing beam to the jobsite. He also demonstrated that the Structural officer who had signed a contract related to the job on which Lucas was injured signed on a line labeled "Texas Industries, Inc." Based on this evidence, the trial court held that Structural was the alter ego of TXI and awarded Lucas damages against TXI. The court of appeals affirmed, and TXI appealed.

The Texas Supreme Court initially observed that a parent corporation will not be liable for the obligations of a subsidiary merely because of a unity of financial interest, ownership, and control. Liability will be imposed on the parent only if "the subsidiary is being used as a sham to perpetrate a fraud, to avoid liability, to avoid the effect of a statute, or in other exceptional circumstances." The court then distinguished alter ego cases based on tort claims from those based on contract claims. The court stated that in a tort case like Lucas, "the financial strength or weakness of the corporate tortfeasor is an important consideration." Other language in the opinion suggested, however, that the financial strength or weakness of the subsidiary is virtually the only consideration in assessing whether the corporate veil of the parent should be pierced. The court concluded that no evidence was presented to show "that Structural was undercapitalized or was incapable of paying a possible judgment." The court also concluded that neither the companies' common directors, nor their consolidated tax return, nor their shared logo, nor their intercorporate business transactions "induce[d] Lucas to fall victim to a basically unfair device by which Structural's corporate entity was used to achieve an inequitable result." Although the truth of this conclusion cannot be gainsaid, the court's use of the concept of "inducement" in an alter ego case

128. *Id.* at 493.
131. 27 Tex. Sup. Ct. J. at 492 (citing Torregrossa v. Szelc, 603 S.W.2d 803, 804 (Tex. 1980); Pace Corp. v. Jackson, 155 Tex. 179, 194-95, 284 S.W.2d 340, 351 (1955)).
132. 27 Tex. Sup. Ct. J. at 492 (citing Gentry v. Credit Plan Corp., 528 S.W.2d 571, 573 (Tex. 1975)).
133. The court stated:
If the corporation responsible for the plaintiff's injury is capable of paying a judgment upon proof of liability, then no reason would exist to attempt to pierce the corporate veil and have shareholders pay for the injury. If, however, the corporation sued is not reasonably capitalized in light of the nature and risk of its business, the need might arise to attempt to pierce the corporate veil and hold the parent corporation liable.
134. *Id.* at 493.
135. *Id.* (citing Torregrossa v. Szelc, 603 S.W.2d 803, 804 (Tex. 1980)).
based on a tort claim is inappropriate. Tort victims are rarely induced to be the victim of one tortfeasor rather than another.

As a final matter, the court disapproved of the wording of the special issue on alter ego liability. The special issue asked the jury whether the activities of TXI and Structural had become "so blended that [Structural] for all practical purposes became the alter ego of [TXI]." The court concluded that a blending of activities alone cannot support the imposition of alter ego liability on the parent corporation.

The tone as well as the language of Lucas suggest that it may be more difficult in the future for plaintiffs to recover in tort cases on an alter ego theory than it has been in the past. After Lucas a tort plaintiff will probably be unable to reach the parent corporation's assets if the subsidiary corporation is adequately capitalized.

In Edwards Co. v. Monogram Industries, Inc., discussed in last year's Survey, a Fifth Circuit panel concluded that a creditor may sue a parent corporation for the debts of its subsidiary when the parent uses the subsidiary as a mere conduit. Applying this standard, the panel held Monogram liable for the contractual obligation of its subsidiary. Recently, however, a majority of the Fifth Circuit, sitting en banc, ruled that the panel had applied the wrong legal standard and reversed. The court reviewed at length the decisions of the Texas courts in this area, and held that in order to pierce a parent corporation's corporate veil on a contract claim in Texas, a plaintiff must show either that the parent used the subsidiary for fraud or that some other injustice is present. The court concluded that the plaintiff could not recover from the parent on its contract claim since it had failed to make such a showing.

Judge Jolly, author of the original panel opinion, dissented. He claimed that the majority had not merely interpreted Texas law, but had decided doubtful legal questions that the Texas courts had clearly avoided deciding. Judge Jolly also observed that one could cite the Texas cases in this area as authority for nearly any position advanced on the issue.

Although cases in this area are difficult to reconcile, the majority opinion

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136. Inducement seems more appropriate in a contract context, where the parties are bargaining with one another in an attempt to strike a deal.


138. Id.

139. 700 F.2d 994 (5th Cir. 1983), rev'd en banc, 730 F.2d 977 (5th Cir. 1984).


141. 700 F.2d at 995.

142. 730 F.2d 977 (5th Cir. 1984) (en banc).

143. Id. at 980-83; see, e.g., Gentry v. Credit Plan Corp., 528 S.W.2d 571 (Tex. 1975); Bell Oil & Gas Co. v. Allied Chem. Corp., 431 S.W.2d 336 (Tex. 1968); First Nat'l Bank v. Gamble, 134 Tex. 112, 132 S.W.2d 100 (1939).

144. 730 F.2d at 983-84.

145. Id. at 984. The court also stated in a dictum that the panel had erred in concluding that the subsidiary had no separate existence from the parent. Id. at 984-87.

146. Id. at 987 (Jolly, J., dissenting).

147. Id.
accurately mirrors the unwillingness of the Texas courts to pierce the corporate veil in contracts cases in the absence of fraud or other exceptional circumstances. The language of the majority opinion is perhaps more categorical than Texas decisions in this area, but is entirely consistent with their spirit.

In Sabine Towing & Transportation Co. v. Merit Ventures, Inc. the federal district court permitted the creditor of a bankrupt subsidiary to recover from the parent corporation on a contract debt. Applying fifteen factors developed from existing case law, the court concluded that the subsidiary was not a "full fledged" corporate entity. To avoid fundamental injustice to the creditor, the court pierced the parent's corporate veil. Although the court was not bound by Texas law because it sat as a court of admiralty, the court cited the panel in Edwards on several occasions. Under the stricter standard for alter ego liability in contract cases subsequently adopted in the Fifth Circuit's en banc opinion in Edwards, however, the parent corporation in this case would not have been liable.

In Nelson v. International Paint Co. the plaintiff sought to hold a parent corporation liable on a products liability claim against the subsidiary. Although the parent owned 100% of the subsidiary's stock and had several directors in common with the subsidiary, the Fifth Circuit affirmed the sum-


150. Id. at 1446-48 (citing Andrew Martin Marine Corp. v. Stork-Werkspoor Diesel B.V., 480 F. Supp. 1270, 1276-77 (E.D. La. 1979); Bay Sound Transp. Co. v. United States, 350 F. Supp. 420, 426-27 (S.D. Tex. 1972)). The fifteen factors cited were: (1) common or overlapping stock ownership between the parent and the subsidiary; (2) common or overlapping directors and officers; (3) use of the same corporate office; (4) inadequate capitalization of the subsidiary; (5) financing of the subsidiary by the parent; (6) whether the parent existed solely as a holding company for its subsidiaries; (7) the parent's use of the subsidiary's property and assets as its own; (8) the nature of intercorporate loan transactions; (9) incorporation of the subsidiary being caused by the parent; (10) whether the parent and the subsidiary file consolidated income tax returns; (11) decision-making for the subsidiary by the parent and its principals; (12) whether the directors of the subsidiary act independently in the interest of the subsidiary; (13) the making of contracts between the parent and subsidiary that are more favorable to the parent; (14) observance of formal legal requirements; (15) the existence of fraud, wrongdoing, or injustice to third parties. 575 F. Supp. at 1446-48.

151. 575 F. Supp. at 1448.

152. Id. at 1449.

153. Id. at 1446. The court applied federal common law, rather than the law of any particular state. Id. (citing Talen's Landing Inc. v. M/V Venture, 656 F.2d 1157, 1160 (5th Cir. 1981)).

154. 575 F. Supp. at 1446, 1448; see Edwards Co. v. Monogram Indus., Inc., 713 F.2d 139 (5th Cir. 1983) (panel's denial of rehearing after its initial decision published in 700 F.2d 994 (5th Cir. 1983), rev'd en banc, 730 F.2d 977 (5th Cir. 1984)).

155. 730 F.2d 977 (5th Cir. 1984); see supra notes 142-48 and accompanying text.

156. Some evidence presented at the trial indicated that the initial capitalization of the subsidiary was inadequate to cover the corporation's expected liabilities. 575 F. Supp. at 1447. Other evidence, however, revealed that the subsidiary had enough money during several years of its operation to make loans to sister corporations, id., and to pay off a $1,000,000 bank note, id. at 1445.

157. 734 F.2d 1084 (5th Cir. 1984).
mary judgment in favor of the parent. The parent did not finance the subsidiary, nor did any evidence show that the subsidiary was undercapitalized. The companies kept separate financial records, had separate operating officers, had no mutual employees, maintained their own factories, and secured their own raw materials. Furthermore, the subsidiary paid the parent for any research and development information it received and bore its share of joint advertising expenses. The court thus concluded that the two companies were operated as separate entities and refused to pierce the corporate veil.

C. Procedural Considerations

Pleading

Failure to plead properly may have untoward consequences for both plaintiffs and defendants in suits involving corporations. A corporate officer who is sued in his individual capacity and who fails to make a verified denial of liability in his individual capacity under rule 93(c) runs the risk that a court will find him individually liable even in the absence of a finding that the corporation functioned as his alter ego. In such a case, the court is not required to pierce the corporate veil because the plaintiff has not alleged that the individual defendant was hiding behind one. On the other hand, when individual liability is predicated on an alter ego theory the plaintiff must plead that theory. Regardless of the theory upon which the plaintiff bases his claim, he must prove his right to recover from the defendant in the capacity in which the defendant is sued in order to prevail on the merits.

158. Id. at 1093-94. The court cited Gentry v. Credit Plan Corp., 528 S.W.2d 571, 573 (Tex. 1975), for the proposition that a subsidiary will not be considered the alter ego of its parent "merely because of stock ownership, a duplication of some or all of the directors or officers, or an exercise of the control that stock ownership gives to stockholders." 734 F.2d at 1092.

159. 734 F.2d at 1093.

160. TEX. R. CIV. P. 93(c) (Vernon 1979), amended by and recodified at TEX. R. CIV. P. 93(2) (Supp. 1985).

161. See Kersh & Sons, Inc. v. Texas Employers' Ins. Ass'n, 675 S.W.2d 775, 776 (Tex. App.—Beaumont 1984, no writ) (citing Butler v. Joseph's Wine Shop, Inc., 633 S.W.2d 926, 930 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.); Robertson v. Bland, 517 S.W.2d 676, 680 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ dism'd)). Kersh held that the corporation's officers could be individually liable for premiums due on workers' compensation insurance, even though they had signed the application in their capacity as officers, since they had failed to make a verified denial of individual liability. 675 S.W.2d at 776; see also Duval County Ranch Co. v. Wooldridge, 674 S.W.2d 332, 337 (Tex. App.—Austin 1984, no writ) (also citing Butler).


163. Light v. Wilson, 663 S.W.2d 813, 814 (Tex. 1984). The Texas Supreme Court in Light held that a corporation's sole owner could not be personally liable for the corporation's fraud when the owner did not individually violate the law and the plaintiff had failed to plead the alter ego theory. Id.

164. See id. at 814-15.
Jurisdiction

In Helicopteros Nacionales de Colombia, S.A. v. Hall the United States Supreme Court held that a Colombian corporation was not amenable to the jurisdiction of Texas courts because the corporation's contacts with Texas were insufficient to satisfy the requirements of due process. Defendant Helicol did not have a place of business in Texas and had never been authorized to do business there. Helicol did, however, have numerous contacts with Texas including: sending its chief executive officer to Houston for a contract-negotiating session; accepting into its New York bank account checks drawn on a Texas bank; purchasing more than $4,000,000 worth of equipment from a firm in Texas; and sending personnel to the Texas firm for training. The parties conceded that the plaintiffs' wrongful death action "did not 'arise out of,' and [was] not related to, Helicol's activities in Texas." The only question before the Court, therefore, was whether Helicol's contacts with Texas constituted "the kind of continuous and systematic general business contacts" that would justify the exercise of jurisdiction over Helicol.

The Supreme Court concluded they did not. The executive's single trip to Texas was not continuous and systematic enough contact in the Court's view to support an assertion of jurisdiction. Moreover, the Court observed that the bank on which a check is drawn is ordinarily determined by the unilateral act of the drawer; thus, the Texas checks were not an appropriate consideration in determining whether a drawee had sufficient contacts with a forum to justify the assertion of jurisdiction. Finally, relying on a 1923 precedent, Rosenberg Bros. & Co. v. Curtis Brown Co., the Court determined that Helicol's purchases from the Texas firm and related trips to Texas taken by Helicol's employees were not a sufficient basis to assert jurisdiction.

The Court, therefore, concluded that Helicol was not subject to
suit in Texas courts.\textsuperscript{174} Justice Brennan, in dissent, questioned whether the narrow view of in personam jurisdiction embodied in \textit{Rosenberg} continued to have vitality in light of the trend toward expanding the scope of permissible jurisdiction over non-resident defendants that began with \textit{International Shoe Co. v. Washington} in 1945.\textsuperscript{175} In his view, the exercise of jurisdiction was proper because of Helicol's continuous commercial contacts with Texas.\textsuperscript{176} A noted authority on jurisdictional matters concurs.\textsuperscript{177}

In \textit{C&H Transportation Co. v. Jensen & Reynolds Construction Co.}\textsuperscript{178} the Fifth Circuit held that the exercise of jurisdiction over a California corporation under article 2031b\textsuperscript{179} did not comport with the due process requirement that a defendant have some minimum contacts with the forum state resulting from an affirmative act on its part.\textsuperscript{180} The defendant had contracted to have the plaintiff, a Texas corporation, transport equipment from Louisiana to Washington. The defendant's only contacts with Texas consisted of: a single three-way telephone conference call between defendant's president in Washington and the plaintiff's representatives in Washington and Texas; movement of the equipment through Texas; and defendant's mailing a payment check to plaintiff's office in Dallas. Relying on \textit{Hydrokinetics, Inc. v. Alaska Mechanical, Inc.},\textsuperscript{181} the court concluded that the totality of these contacts—a single telephone call involving Texas, the fortuitous routing of equipment through Texas,\textsuperscript{182} and the mailing of a single payment check to Texas—did not support an inference that the defendant had purposely availed itself of the privilege of conducting business in Texas.\textsuperscript{183} As in \textit{Hydrokinetics}, the significant factor was that only a single, isolated transaction was involved. Assuming that the contract was formed during the conference call,\textsuperscript{184} it is curious that the court did not consider whether the contract had been formed in Texas. Texas state courts and the Fifth Circuit both have considered the place of formation important in assessing whether the exercise of jurisdiction is proper.\textsuperscript{185}

\textsuperscript{174} 104 S. Ct. at 1874, 80 L. Ed. 2d at 414.
\textsuperscript{175} \textit{Id.} at 1875-77, 80 L. Ed. 2d at 415-17 (Brennan, J., dissenting); see \textit{International Shoe Co. v. Washington}, 326 U.S. 310 (1945).
\textsuperscript{176} 104 S. Ct. at 1877, 80 L. Ed. 2d at 417 (Brennan, J., dissenting). Justice Brennan also argued that Helicol was subject to suit in Texas because the plaintiffs' claim was directly and significantly related to Helicol's Texas contacts. \textit{Id.} at 1878, 80 L. Ed. 2d at 418.
\textsuperscript{178} 719 F.2d 1267 (5th Cir. 1983), \textit{cert. denied}, 104 S. Ct. 1930, 80 L. Ed. 2d 475 (1984).
\textsuperscript{180} 719 F.2d at 1269 (citing \textit{Hydrokinetics, Inc. v. Alaska Mechanical, Inc.}, 700 F.2d 1026, 1028 (5th Cir. 1983), \textit{cert. denied}, 104 S. Ct. 2180, 80 L. Ed. 2d 561 (1984); S.W. Offset, Inc. v. Hudco Publishing Co., 622 F.2d 149, 152 (5th Cir. 1980)).
\textsuperscript{181} 700 F.2d 1026 (5th Cir. 1983), \textit{cert. denied}, 104 S. Ct. 2180, 80 L. Ed. 2d 561 (1984).
\textsuperscript{182} The court pointed out that performance of the plaintiff's duty under the contract—delivery of the equipment—was to occur not in Texas, but in the state of Washington. 719 F.2d at 1270.
\textsuperscript{183} \textit{Id.}
\textsuperscript{184} \textit{Id.} at 1269 n.5.
\textsuperscript{185} See, e.g., \textit{Product Promotions, Inc. v. Cousteau}, 495 F.2d 483, 495 (5th Cir. 1974); U-
In *C.W. Brown Machine Shop, Inc. v. Stanley Machinery Co.* the Fort Worth court of appeals held that a Massachusetts corporation did not subject itself to jurisdiction in Texas merely by advertising in national publications distributed in Texas. The court’s opinion tracked the Fifth Circuit’s reasoning in *Loumar, Inc. v. Smith*, which the court characterized as a “strikingly similar” case. Insofar as the nonresident defendant in *Stanley Machinery* had not solicited business in Texas by direct mailings to Texas residents or advertised in Texas publications, its position is analogous to that of the defendant in *Loumar*. The cases are distinguishable, however, in one significant respect. The defendant seller in *Stanley Machinery* had paid freight charges for shipment to Texas. This suggests that performance under the contract—delivery of the goods—was to take place in Texas. In *Loumar* the goods were shipped “F.O.B. Maryland”; thus, delivery was to be in Maryland. The fact that a contract is to be performed in Texas has long been considered significant in assessing whether the assertion of jurisdiction over a nonresident defendant comports with due process. Consequently, one may argue that subjecting the defendant in *Stanley Machinery* to suit in Texas would not have offended “notions of fair play and substantial justice.” The court, however, held otherwise.

In *Stabler v. New York Times Co.* the federal district court rejected the argument that subjecting the New York Times Company to jurisdiction in Texas would chill constitutionally protected speech and violate due process, when the allegedly defamatory article would have a foreseeable adverse effect on the plaintiff’s reputation in Texas. While acknowledging that a court should consider the first amendment rights of a nonresident media

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**References**

2. 670 S.W.2d 791 (Tex. App.—Fort Worth 1984, no writ).
3. Id. at 793-94.
4. 698 F.2d 759 (5th Cir. 1983). In *Loumar* the Fifth Circuit acknowledged that advertising in nationally circulated trade publications might be sufficient to subject a corporate defendant to suit in a state in which the publication circulates. *Id.* at 763 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980)). The court concluded, however, that the Supreme Court in *Woodson* had not held that “advertising reasonably calculated to reach the state would, without more, permit assertion of personal jurisdiction over the advertiser.” 698 F.2d at 764. Furthermore, because the nonresident defendant in *Loumar* had not advertised in Texas telephone directories or local Texas publications, the Fifth Circuit was not constrained by a decision of the Texas Supreme Court upholding the assertion of jurisdiction over a nonresident defendant who had advertised in national publications circulated in Texas as well as in Texas telephone directories. *Id.*; see Siskind v. Villa Foundation, 642 S.W.2d 434, 436-37 (Tex. 1982).
5. 670 S.W.2d at 793.
6. *Id.*
10. *Id.* at 1135 (citing Edwards v. Associated Press, 512 F.2d 258, 263 (5th Cir. 1975); Curtis Publishing Co. v. Golino, 383 F.2d 586, 588 (5th Cir. 1967); Buckley v. New York Times Co., 338 F.2d 470, 472 (5th Cir. 1964)).
defendant in determining whether the exercise of jurisdiction is proper, the court concluded that those rights are not controlling.\textsuperscript{195}

Several cases decided during the survey period involved a default judgment entered against a corporate defendant who had failed to make an appearance. In \textit{Dan Edge Motors, Inc. v. Scott}\textsuperscript{196} Scott filed suit against Dan Edge Motors, Inc., a Texas corporation. A citation was issued to “Dan Edge, Dan Edge Motors, Inc.” and was served by leaving a copy with Edge, the corporation’s president. Although the court recognized that a domestic corporation may be served by delivering the citation to its president,\textsuperscript{197} the court held that the citation was insufficient to confer jurisdiction over the corporation because the citation was not issued in the name of the corporation, but in the name of its agent.\textsuperscript{198}

In \textit{General Office Outfitters, Inc. v. Holt}\textsuperscript{199} the plaintiff had secured a default judgment based on substituted service on the secretary of state under section 2.11(B) of the TBCA.\textsuperscript{200} The plaintiff in her petition alleged that she had used due diligence to serve the corporation’s registered agent and incorporated the affidavit of a deputy constable stating that he had attempted service on the corporation’s registered agent but had been unable to locate the agent at the corporation’s registered address. On appeal, the court held that the affidavit would not support substituted service because it failed to detail the actual diligence the constable had used.\textsuperscript{201}

The Houston court of appeals upheld a default judgment based on substituted service in \textit{Tankard-Smith, Inc. v. Thursby}.\textsuperscript{202} Having tried unsuccessfully to serve in person the corporation’s registered agent at its registered address, the plaintiff made substituted service on the secretary of state. The secretary in turn mailed a copy of plaintiff’s citation to the corporation’s registered address in accordance with section 2.11(B),\textsuperscript{203} but the copy was returned bearing the notation “address insufficient.” The trial court entered a default judgment against the defendant. The defendant argued on appeal that the substituted service was improper because defendant had not received a copy of the citation. The court, however, concluded that the defendant itself was responsible for this situation since it had failed to notify

\begin{footnotesize}
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  \item 195. 569 F. Supp. at 1136. The court in \textit{Stabler} found significant the fact that the \textit{Times} maintained a permanent news bureau in Texas, staffed by two reporters and a secretary, and sold more than one million copies of the newspaper in Texas every year. \textit{Id.} at 1135. The court distinguished New York Times Co. v. Connor, 365 F.2d 567 (5th Cir. 1966), on the ground that the \textit{Times}’s circulation in Texas was much greater in \textit{Stabler} than in \textit{Connor}. 569 F. Supp. at 1135.
  \item 196. 657 S.W.2d 822 (Tex. App.—Texarkana 1983, no writ).
  \item 197. \textit{Id.} at 823 (citing \textbf{TEx. BUS. CORP. ACT ANN.} art. 2.11 (Vernon 1980)).
  \item 198. 657 S.W.2d at 823 (citing Temple Lumber Co. v. McDaniel, 24 S.W.2d 518, 519 (Tex. Civ. App.—Beaumont 1930, no writ)).
  \item 199. 670 S.W.2d 748 (Tex. App.—Dallas 1984, no writ).
  \item 200. \textbf{TEx. BUS. CORP. ACT ANN.} art. 2.11(B) (Vernon 1980).
  \item 201. \textit{Id.} at 749-50. The court suggested that the affidavit should describe each attempt made to serve the agent. \textit{Id.; see} Harrison v. Dallas Court Reporting College, 589 S.W.2d 813, 815 (Tex. Civ. App.—Dallas 1979, no writ) (suggesting in a dictum that an affidavit ought to show how many attempts of service were made and the times at which service was attempted).
  \item 202. 663 S.W.2d 473 (Tex. App.—Houston [14th Dist.] 1983, writ ref’d n.r.e.).
  \item 203. \textbf{TEx. BUS. CORP. ACT ANN.} art. 2.11(B) (Vernon 1980).
\end{itemize}
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the secretary of state of a change in its registered address, as section 8.09 of the TBCA requires.\textsuperscript{204} The court thus affirmed the default judgment.\textsuperscript{205}

Finally, in \textit{Minexa Arizona, Inc. v. Stauch}\textsuperscript{206} an Arizona corporation failed to convince the court that the plaintiffs were required to serve process on the corporation by serving the secretary of state under article 2031b(3).\textsuperscript{207} The plaintiffs' pleadings alleged that the defendant corporation, though not registered to do business in Texas, maintained a regular place of business in Texas. For this reason, the court correctly held that the plaintiffs had properly served the corporation under article 2031b(2)\textsuperscript{208} by leaving a copy of the process with the corporation's vice-president, who was in charge of the corporation's business in Texas at the time of service.\textsuperscript{209}

\textbf{Venue}

One of the more significant changes wrought by the legislature in its 1983 revision of the Texas venue statute was the elimination of interlocutory appeals of venue questions.\textsuperscript{210} The legislature provided, however, that the statutory revisions would not apply to appeals of venue questions "pending" on September 1, 1983, the effective date of the revisions.\textsuperscript{211} In \textit{Grubbs v. Mercantile Texas Corp.}\textsuperscript{212} the court refused to hear an interlocutory venue appeal on the ground that the appeal was not "pending" on September 1, 1983.\textsuperscript{213} A hearing on the corporate defendant's plea of privilege had been held on July 28, 1983, but the order sustaining the plea was not signed until October 3, 1983. The court in \textit{Graue Haws v. Fuller}\textsuperscript{214} reached the same result on similar facts.\textsuperscript{215} Although one may argue that this result is unfair to the plaintiffs because the "rules [were] changed in the middle of the game,"\textsuperscript{216} the courts' interpretation comports with the plain meaning of the

\textsuperscript{204} 663 S.W.2d at 475-76; \textit{Tex. Bus. Corp. Act Ann.} art. 8.09 (Vernon 1980).
\textsuperscript{205} 663 S.W.2d at 476; cf. \textit{Roland Communications, Inc. v. American Communications Corpus Christi, Inc.}, 662 S.W.2d 145 (Tex. App.—Corpus Christi 1983, no writ) (default judgment improper when no showing in the record that the secretary of state had forwarded a copy of process to defendant). In rejecting defendant's claim that the default judgment was void because the form of notice the plaintiff had used did not meet the due process requirements of the federal and state constitutions, the court reasoned that "the failure of the method of service was the result of the [defendant] corporation's own failure to comply with the statutory requirements which are designed to assure it of notice of pending suits." 663 S.W.2d at 476 (citing \textit{TXCN, Inc. v. D/FW Steel Co.}, 632 S.W.2d 706, 708 (Tex. App.—Fort Worth 1982, no writ)).
\textsuperscript{206} 667 S.W.2d 563 (Tex. App.—Dallas 1984, no writ).
\textsuperscript{208} \textit{Id.} art. 2031b(2).
\textsuperscript{209} 667 S.W.2d at 565-66. The plaintiffs failed to allege expressly in their pleadings that their cause of action arose from the defendant's business in Texas, as required by article 2031b(2). \textit{Tex. Rev. Civ. Stat. Ann.} art. 2031b(2) (Vernon 1964 & Supp. 1985). The court, however, concluded that the pleadings were sufficient to give the defendant notice that it was being sued in a Texas court under article 2031b(2). 667 S.W.2d at 566.
\textsuperscript{212} 668 S.W.2d 429 (Tex. App.—Eastland 1984, no writ).
\textsuperscript{213} \textit{Id.} at 430.
\textsuperscript{214} 666 S.W.2d 238 (Tex. App.—El Paso 1984, no writ).
\textsuperscript{215} \textit{Id.} at 239.
\textsuperscript{216} \textit{Id.} (Preslar, C.J., dissenting).
Cases interpreting the repealed venue statute will continue to have vitality in construing analogous sections of the statute as revised. For that reason, several cases decided under the repealed statute during the survey period are worth noting. In *Champlin Petroleum Co. v. Heinz* the court held that a foreign corporation had no “agency or representative” in the county of suit as required by subdivision 27, despite the presence of two employees who took care of the corporation’s oil and gas operations. The employees did not have management discretion or authority to conduct business of any nature with third parties on behalf of the corporation. The corporation, however, owned and operated 37 gas wells in the county of suit, and owned two compressor stations there worth more than $400,000. In light of these facts, it would not have been unfair to allow the suit to proceed. Nevertheless, courts have held that subdivision 27 does not authorize maintenance of a suit in any county where the defendant merely does business. Instead, an agent or representative whose duties involve more than matters of manual or mechanical execution must be present. The court in *Heinz*, therefore, held venue improper.

In *First Gibraltar Mortgage Corp. v. Gibraltar Savings Association* the court held that a plaintiff who brought suit under the Declaratory Judgment Act (DJA) was entitled to venue where he resided under subdivision 23. Although the court held that the showing of a justiciable controversy under the DJA “in and of itself” [meets] the requirements of subdivision 23, the holding should not be construed to mean that a plaintiff who

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217. As the majority in *Graue Haws* observed: “Here, the legislature made one exception to the applicability of the new statute: ‘shall not apply to pending appeals on venue questions.’ To add an additional exception: ‘shall not apply to venue matters in lawsuits pending when the act took effect’ would be repugnant to the statute.” *Id.*


219. 665 S.W.2d 544 (Tex. App.—Corpus Christi 1983, writ ref’d n.r.e.).


221. 665 S.W.2d at 547.

222. The jury found that the defendant’s business “was, in more or less permanent form, actually conducted” in the county of suit. *Id.* at 546. This finding satisfies the test for “agency” set out in *Milligan v. Southern Express, Inc.*, 151 Tex. 315, 322-23, 250 S.W.2d 194, 198 (1952) (“agency” involves a situation in which “the business of the defendant is, in more or less regular and permanent form, actually conducted in the county of suit”).

223. 658 S.W.2d 709 (Tex. App.—Dallas 1983, no writ).

asserts a claim under the DJA need not prove venue facts sufficient to satisfy the requirements of subdivision 23. To the contrary, plaintiff must prove such facts to avail himself of the general exceptions to article 1995.230 The court's language merely signifies that a plaintiff who proves such facts can acquire venue under subdivision 23 even though he seeks no remedy other than a declaratory judgment.231

In Houston Chronicle Publishing Co. v. Stewart232 the court held that a cause of action for libel could be brought against a newspaper corporation in the county where the plaintiff resided at the time the cause of action arose. The court, however, sustained the plea of privilege of corporate officers who were not shown to be personally connected with the publication of the allegedly libelous article on the ground that a corporate officer cannot be held personally liable for corporate wrongs merely by reason of his corporate office.233

D. Nonprofit Corporations

Two recent cases required the courts to interpret the rarely construed Texas Non-Profit Corporation Act (TNPCA).234 In accordance with article 1396-2.09 of the TNPCA,235 the court in Aldrich v. State236 held that the corporation's board of directors lacked the authority to adopt a new set of bylaws because the members of the corporation had not delegated that authority to the board.237 Alternatively, the court held that even if the board had validly adopted new bylaws, the board could not have caused those bylaws to operate retroactively.238 Despite the dearth of authority on the question of retroactivity of bylaws,239 the court's alternative holding is sensible.

In Governing Board v. Pannill240 certain local chapters of the Texas Society of the Daughters of the American Revolution (TSDAR) challenged the sale by the TSDAR, a nonprofit corporation, of a piece of property known as

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230. See Amoco Prod. Co. v. Texas Elec. Serv. Co., 614 S.W.2d 194, 196 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ). Plaintiff in First Gibraltar was entitled under the third clause of subdivision 23 to venue in Dallas County, where it resided at the time the cause of action arose, because it proved that the defendant corporation maintained an agent in Dallas County.

231. See 658 S.W.2d at 711.


233. Id. at 730 (citing Belo v. Fuller, 84 Tex. 450, 452, 19 S.W. 616, 617 (1892); K & G Oil Tool & Serv. Co. v. G & G Fishing Tool Serv., 158 Tex. 594, 596, 314 S.W.2d 782, 793 (1958)).

234. TEX. REV. CIV. STAT. ANN. art. 1396-1.01 to -1.01 (Vernon 1980).

235. Article 1396-2.09 vests in the members of a nonprofit corporation the power to "alter, amend, or repeal the by-laws [of the corporation] or to adopt new by-laws," but allows the members to delegate that power to the board of directors. Id. art. 1396-2.09.

236. 658 S.W.2d 323 (Tex. App.—Tyler 1983, no writ).

237. Id. at 326; see supra note 235.

238. 658 S.W.2d at 326-27. The court found that bylaws are ordinarily limited to future cases and cannot have a retroactive operation. Id. at 327 (citing 18 AM. JUR. 2D Contracts § 168 (1965)).

239. To buttress its conclusion that the bylaws could not be applied retroactively, the court cited only one case, Steger v. Davis, 27 S.W. 1068, 1070 (Tex. Civ. App.—1894, writ ref'd). 658 S.W.2d at 327.

240. 659 S.W.2d 670 (Tex. App.—Beaumont 1983, writ ref'd n.r.e.).
The chapters contended that although the sale had been approved by a majority of the votes actually cast by TSDAR members at the TSDAR State Conference in 1975 (158 in favor, 142 against), the sale had not been approved by a "vote of the majority of the votes entitled to be cast by the members present" as required by article 1396–2.12(A) of the TNPCA. Evidence showed that 342 voting delegates had registered for the conference as of the day preceding the vote, but only 158 voted for the sale. The court, however, held that other evidence enabled the jury reasonably to conclude that 42 of the voting delegates were not present at the session when the motion to sell the Freeman Plantation was actually voted on. Thus, the court concluded that the sale had been approved in accordance with the dictates of article 1396–2.12(A).

The chapters also contended that the sale of the Freeman Plantation was governed by article 1396–5.09(A), which requires that a sale of "all, or substantially all, the property and assets of a corporation" be approved by two-thirds of the members entitled to vote and present at the meeting at which the vote is conducted. Considering the other significant assets owned by the TSDAR, including stocks, bonds, certificates of deposit, and real estate, the court reasoned that the jury could have justifiably concluded that the sale of the Freeman Plantation did not constitute a sale of substantially all of the society's assets. The court rejected the chapters' argument that article 1396–5.09 should be read to govern "the sale of any significant asset unless made for an express purpose of the non-profit corporation." The court found such a reading inconsistent with the language of article 1396–5.09(A).

In a third case involving nonprofit corporations, Texas Farm Bureau v. United States, the Fifth Circuit was called upon to decide whether advances made by one nonprofit corporation to a separate but affiliated nonprofit corporation constituted loans or contributions to capital for tax purposes. The court found this situation analogous to traditional debt-equity cases involving for-profit corporations and their shareholders. Applying a list of objective factors developed by the courts in the context of traditional debt-equity cases, the court concluded that the advances were

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242. 659 S.W.2d at 677. The state historian of the TSDAR testified that to the best of her knowledge, everyone present at the session voted.
244. 659 S.W.2d at 683.
245. Id. at 684 (emphasis deleted).
246. Id. "Any significant asset" is substantially different from "all, or substantially all, the property and assets." See supra text accompanying note 243.
247. 725 F.2d 307 (5th Cir.), reh'g denied, 732 F.2d 437 (5th Cir. 1984) (per curiam).
248. 725 F.2d at 310.
249. Id. at 311 (quoting Estate of Mixon v. United States, 464 F.2d 394, 402 (5th Cir. 1972)). Factors included names given to certificates, presence of fixed maturity, source of payments, right to enforce payment, participation in management, status of contribution in relation to regular corporate creditors, intent of parties, adequate capitalization, source of interest payments, ability to obtain outside loans, extent advances are used to acquire capital assets, and failure of debtor to repay on due date.
contributions to capital rather than loans and, therefore, were not deductible as bad debts.250

E. Rights of a Foreign Corporation to Sue

Article 8.18 of the TBCA bars a foreign corporation that is transacting or has transacted business in Texas without a certificate of authority from maintaining a suit in a Texas court on a cause of action arising out of such business until it has obtained a certificate of authority.251 Article 8.01 provides, however, that this restriction does not apply to a foreign corporation that has merely transacted business in interstate commerce in Texas.252 In Killian v. Trans Union Leasing Corp.253 a Texas couple, acting through an intermediary, leased an irrigation sprinkler system that was installed on their farm in Frio County, Texas. The lessor was Trans Union, a foreign corporation. Subsequently, Killian purchased the farm at a foreclosure sale. When Killian refused to return the irrigation system, Trans Union sued Killian for conversion. Killian contended that Trans Union could not maintain its suit because Trans Union had never obtained a certificate of authority. The court held that Trans Union had simply transacted business in interstate commerce.254 The lease agreement provided that it had been made and accepted in Illinois and provided for payments at Trans Union’s Chicago office. Furthermore, no evidence showed that the Texas company that had arranged the transaction for the couple was acting as an agent of Trans Union. Accordingly, the court concluded that Trans Union could maintain its suit even though it had not obtained a certificate of authority.255

250. 725 F.2d at 314. The court was persuaded that the advances constituted contributions to capital because: (1) the parties had failed to comply with the repayment provision in their agreement concerning the advances; (2) the corporation that had received the advances was thinly capitalized; (3) the complete overlap in the boards of directors of the two corporations had precluded any arm’s-length relationship between them; (4) the advances had been used to cover basic operating costs of the recipient corporation; and (5) the recipient corporation had never made a single interest payment. Id. at 313-14. Because the objective factors pointed overwhelmingly toward a finding that the advances constituted contributions to capital, the court found it unnecessary to consider the parties’ subjective intent. Id. at 312 (citing Estate of Mixon v. United States, 464 F.2d 394, 407 (5th Cir. 1972)) & 314. The court subsequently qualified the relevance of subjective intent in its opinion denying rehearing. See Texas Farm Bureau v. United States, 732 F.2d 437 (5th Cir. 1984) (per curiam).

251. TEX. BUS. CORP. ACT ANN. art. 8.18(A) (Vernon 1980).

252. Article 8.01(B) states that “a foreign corporation shall not be considered to be transacting business in this state, for the purposes of this Act, by reason of carrying on in this state one (1) or more of the following activities: . . . (9) Transacting any business in interstate commerce.” Id. art. 8.01(B)(9).

253. 657 S.W.2d 189 (Tex. App.—San Antonio 1983, writ ref’d n.r.e.).

254. Id. at 191.

255. Id. at 192. The court also determined that the lease agreement was evidence of the couple’s indebtedness. Id. Creating evidence of debt does not constitute transacting business in Texas for purposes of the TBCA. TEX. BUS. CORP. ACT ANN. art. 8.01(B)(7) (Vernon 1980). Consequently, the court held that Trans Union had merely transacted business interstate by entering into the lease. 657 S.W.2d at 192. Because no permit or certificate of authority is required for a foreign corporation to transact interstate business, Trans Union was allowed to bring suit. Id.
F. Miscellaneous Corporate Issues

In *Leck v. Pugh*\(^{256}\), one of two equal shareholders in a Texas corporation sought a court-ordered liquidation of the corporation pursuant to article 7.06 of the TBCA.\(^{257}\) The shareholders had been involved in litigation since 1972 and the corporation had been in receivership since 1979. The court affirmed the order instructing the receiver to liquidate the corporate assets since no plan for remedying the condition that had necessitated the appointment of a receiver had been presented within twelve months after the receiver was appointed.\(^{258}\)

In *De Anda v. De Anda*\(^{259}\), Mr. De Anda endorsed and transferred shares of stock in a Texas state bank to his ex-wife pursuant to a divorce decree, but she failed to notify the bank of the transfer. As a result, the bank continued to pay dividends on the shares to Mr. De Anda. Mrs. De Anda sued her former husband to recover the dividends. Mr. De Anda contended that he was entitled to the dividends because the shares had never been transferred on the books of the bank, as required by state banking law\(^{260}\) and the bank's bylaws. The court observed that the statutory provision requiring a stock transfer to be recorded on the bank corporation's books was intended to protect the bank from suit by the transferee in cases like this one, and did not invalidate the transfer of stock as between Mr. and Mrs. De Anda.\(^{261}\) The court concluded that Mrs. De Anda was entitled to the dividends issued on the disputed shares since the transfer was valid.\(^{262}\)

The validity of a stock transfer was also at issue in *Estate of Bridges v. Mosebrook*.\(^{263}\) At the request of W.L. Bridges, Sr., Agri-Place, Inc., a closely held corporation, issued stock certificates in the names of individuals to whom Bridges intended to make a gift of the stock.\(^{264}\) Bridges later handed the donees their respective stock certificates and told them that the stock belonged to them, adding that he would retain possession of the stock certificates. The beneficiaries of the will of Bridges' second wife asserted that the gifts had not been consummated because the donor had neither relinquished control over the certificates nor properly delivered them to the donees.\(^{265}\) Recognizing that what constitutes delivery will depend on the

\(^{256}\) 676 S.W.2d 180 (Tex. App.—Waco 1984, no writ).

\(^{257}\) *TEX. BUS. CORP. ACT ANN.* art. 7.06(A)(3) (Vernon 1980). Article 7.06(A)(3) allows a district court to order a liquidation if a corporation is in receivership and no plan for remedying the condition requiring appointment of a receiver has been presented within 12 months after the appointment of the receiver. *Id.*

\(^{258}\) 676 S.W.2d at 181.

\(^{259}\) 662 S.W.2d 107 (Tex. App.—San Antonio 1983, no writ).

\(^{260}\) See *TEX. REV. CIV. STAT. ANN.* art. 342—401 (Vernon 1973).

\(^{261}\) 662 S.W.2d at 109 (quoting *Cooper v. Citizens Nat'l Bank*, 267 S.W.2d 848, 853 (Tex. Civ. App.—Waco 1954, writ ref'd n.r.e.)).

\(^{262}\) 662 S.W.2d at 109.

\(^{263}\) 662 S.W.2d 116 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.).

\(^{264}\) Bridges conveyed a farm to his brother-in-law who conveyed the property in turn to a newly formed, closely held corporation. Stock issued to the brother-in-law was cancelled and 20,000 shares were issued to members of Bridges' family and relatives of his second wife. None of the stock was issued in Bridges' name.

\(^{265}\) 662 S.W.2d at 121.
circumstances of the case, the court concluded that the gift transfers had been completed.

The beneficiaries in Mosebrook also argued that the shares of stock had not actually been issued because they were not signed by the president or vice-president of the corporation, as required by article 2.19 of the TBCA. The court, however, rejected that argument as well. Stating that “a stock certificate is not the actual ownership of a corporation,” the court construed article 2.19 as simply affording the owner of stock a right to demand that the corporation provide the signatures omitted from the certificates. The provision does not, the court reasoned, require the signatures as a condition precedent to issuance of stock.

In Duncan v. Lichtenberger two of the three shareholders in a closely held corporation sued Duncan, the corporation's president and remaining shareholder. The suit alleged two independent causes of action, one based on fraud and the other based on Duncan's breach of fiduciary duty. The jury found that Duncan had not committed fraud, but that he had breached his fiduciary duty to the other shareholders. On appeal, Duncan contended that the plaintiffs were not entitled to recover on their fiduciary duty claim since they had failed to prove fraud. The court rejected this contention, however, stating that it could find no authority for the proposition that a cause of action based on breach of fiduciary duty requires an element of fraud. The court, therefore, affirmed the trial court's judgment awarding the plaintiffs restoration of the consideration that they had paid to Duncan for their shares of stock in the corporation.

In Ratner v. Sioux Natural Gas Corp. the Grant Company sued two individuals, Elliot Powers and J.F. Freel, and two corporations, Sioux Natural Gas Corporation (SNGC) and Sioux Pipeline Corporation (SPC), for fraud. Powers and Freel were the directors, officers, and sole shareholders of both corporations. After a jury verdict in Grant's favor, the trial court held

266. Id. (citing Webb v. Webb, 184 S.W.2d 153, 156-57 (Tex. Civ. App.—Eastland 1944, writ ref'd)).
267. 662 S.W.2d at 121.
268. TEX. BUS. CORP. ACT ANN. art. 2.19(A) (Vernon 1980). Article 2.19(A) provides that a corporation shall deliver stock certificates to shareholders that are signed by "the president or a vice president and either the secretary or assistant secretary or such officer or officers" as the corporation's bylaws prescribe. Id.
269. 662 S.W.2d at 121. The court recognized that complete ownership of stock does not even require a certificate to be issued. Id. at 120 (citing Yeaman v. Galveston City Co., 106 Tex. 389, 398, 167 S.W. 710, 720 (1914)).
270. 662 S.W.2d at 121.
271. 671 S.W.2d 948 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.).
272. Duncan took control of a corporation formed by conveyances from a limited partnership and proceeded to fire his previous partners. The cause of action focused on their exclusion from management of the corporation.
273. 671 S.W.2d at 954. The court did, however, cite one authority for the proposition that the existence of fraud is not required for a breach of fiduciary duty to occur. Id. at 954 n.1 (citing F. O'NEAL, OPPRESSION OF MINORITY SHAREHOLDERS §§ 7.13, 9.04 (1975)).
274. 671 S.W.2d at 954. The court had previously noted that equitable relief is available for a breach of fiduciary duty in Texas. Id. at 952 (citing International Bankers Life Ins. Co. v. Holloway, 368 S.W.2d 567 (Tex. 1963)).
275. 719 F.2d 801 (5th Cir. 1983).
the four defendants jointly and severally liable to Grant for $11,900,000 in actual damages and $1,100,000 in punitive damages, plus prejudgment interest.\(^{276}\) Shortly before the Fifth Circuit heard oral argument on appeal, Powers and Freél settled with Grant; the settlement agreement, however, provided that the judgment would remain in effect against SNGC and SPC.

The issue before the Fifth Circuit in *Ratner* was the effect of the settlement on the nonsettling corporate tortfeasors. The court initially recognized that under Texas law an injured party must apply any amount received in settlement from one defendant against the amount to be recovered from the other defendants in order to prevent a windfall to the plaintiff.\(^ {277}\) The court acknowledged, however, that "the rationale of the 'one satisfaction' rule is usually inapposite to punitive damages."\(^ {278}\) The Court nevertheless held that because all four defendants had been found jointly liable for both actual and punitive damages, the amount Grant received from Powers and Freél should be credited against the entire judgment, including punitive damages.\(^ {279}\)

### III. Securities

#### A. Insider Trading Sanctions Act

The major development in federal securities law during the survey period was the passage of the Insider Trading Sanctions Act of 1984 (the Act).\(^ {280}\) Insider trading involves the purchase or sale of securities based upon inside information unavailable to the investing public. According to the legislative history of the Act, insider trading "undermin[es] the public's expectations of honest and fair securities markets where all participants play by the same rules."\(^ {281}\) Congress observed that the remedies available to the Securities and Exchange Commission were insufficient to deter many potential violators from trading on the basis of inside information.\(^ {282}\) To curb the increasingly widespread incidence of insider trading,\(^ {283}\) Congress passed the Insider Trading Sanctions Act of 1984.

\(^ {276}\) The final judgment was for $18,385,307.80.
\(^ {277}\) 719 F.2d at 803 (quoting Gill v. United States, 429 F.2d 1072, 1079 (5th Cir. 1970)).
\(^ {278}\) 719 F.2d at 804.
\(^ {279}\) *Id.* at 805. The court distinguished two cases holding that amounts received in settlement should not be credited against awards of punitive damages, on the ground that in those cases the punitive damages were not common to all of the defendants. *Id.* at 804 (distinguishing *Howard v. General Cable Corp.*, 674 F.2d 351, 358 (5th Cir. 1982); *Hill v. Budget Fin. & Thrift Co.*, 383 S.W.2d 79, 81-82 (Tex. Civ. App.—Dallas 1964, no writ)).
\(^ {282}\) *Id.* at 7, reprinted in *1984 U.S. CODE CONG. & AD. NEWS* 2274, 2280. Prior to the passage of the Act, the primary remedies available to the SEC were an injunction against further violations of the securities laws and disgorgement of illicitly obtained profits. *Id.*
\(^ {283}\) See *id.* at 5, reprinted in *1984 U.S. CODE CONG. & AD. NEWS* 2274, 2278. In one instance, for example, the SEC alleged that an individual had purchased about $3000 in call options of a corporation that was subject to a takeover proposal. The individual realized approximately $430,000 in 48 hours. *Wall St. J.*, Mar. 2, 1984, at 1, col. 6.
At the core of the Act is a provision that gives the Securities and Exchange Commission the authority to bring suit for a civil penalty in a federal district court against a person who purchases or sells securities "while in possession of material nonpublic information," or a person "aiding and abetting" such a purchase or sale. The size of the penalty is left to the discretion of the court, but it may not exceed three times the profit gained or loss avoided as a consequence of the prohibited transaction. A five-year statute of limitations applies. The Act also raises the maximum criminal penalty for violations from $10,000 to $100,000.

The aiding and abetting provision is intended to snag the "tipper" who communicates inside information to other persons who trade on the basis of that information, even though the tipper himself may not trade on the basis of it. One who does not communicate material nonpublic information cannot be held liable as an aider or abetter; thus, broker-dealers who merely execute trades for their customers who are trading unlawfully are excluded from the coverage of the Act. The Act also excludes liability based solely on the doctrine of respondeat superior. Curiously, the Act contains no definition of "insider trading." Congress apparently believed that the caselaw pertaining to insider trading was sufficiently well-developed to provide the courts with adequate guidance in construing the Act.

B. Sale of Business Doctrine

In 1983 the Fifth Circuit joined the Second and Fourth Circuits in rejecting the "sale of business" doctrine, which holds that a transfer of all the stock in a corporation is not within the purview of the federal securities laws. In the 1984 case of *Siebel v. Scott* the Fifth Circuit clarified its
In *Siebel* all the limited partners in a cable television system sold their interests in the limited partnership to Jim Scott and Associates (JSA), the general partner. The limited partners later sued JSA for fraud in connection with the sale under section 10(b) of the Securities Exchange Act of 1934 and rule 10b-5. JSA contended that the transaction did not involve the sale of securities because the net effect of the sale was a transfer to JSA of all the business assets of the cable television system rather than any interest that could be characterized as a “security.” The Fifth Circuit disagreed. The court acknowledged that the partnership interests were not securities in JSA’s hands. The court held, however, that the limited partners’ interests were securities in the hands of the sellers. The court thus concluded that the sellers could maintain their suit under the Exchange Act. The court observed that the sale of business doctrine, even in circuits where it has been endorsed, is implicated only when the interest transferred takes a traditional form such as ordinary corporate stock; therefore, the doctrine would not have applied in *Siebel* in any event, because the interest took the form of an investment contract. The United States Supreme Court has granted writs of certiorari in two cases to resolve the conflict among the circuits concerning the “sale of business” doctrine.

### C. Texas Securities Act

Several cases construing the Texas Securities Act (TSA) are worthy of note. In *Weisz v. Spindletop Oil & Gas Co.*, the court held that an action by the state for the appointment of a receiver did not toll the statute of limitations with respect to private claims based on purported violations of the TSA. The court cited two cases, including one from the Texas Supreme Court, to support the proposition that the TSA’s three-year statute

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296. 725 F.2d 995 (5th Cir. 1984).
299. 725 F.2d at 999.
300. Id.
301. Id.; see King v. Winkler, 673 F.2d 342 (11th Cir. 1982); Frederiksen v. Poloway, 637 F.2d 1147 (7th Cir.), cert. denied, 451 U.S. 1017 (1981); Chandler v. Kew, Inc., 691 F.2d 443 (10th Cir. 1977) (opinion ordered published 1982).
302. 725 F.2d at 999. The characterization of an interest as a security varies with the relationship of its holder to the venture. An investment contract is only a security if the holder is relying on the managerial skills of others to generate his profit. If the holder is relying on his own entrepreneurial talents to generate his profit, his interest does not fall within the coverage of the securities laws. *Id.*; see SEC v. Howey Co., 328 U.S. 293 (1946) (test for determining if investment contract exists is whether scheme involves investment in common enterprise with profits derived solely from efforts of others).
305. 664 S.W.2d 423 (Tex. App.—Corpus Christi 1983, no writ).
306. Id. at 425.
of limitations should be rigorously enforced.\textsuperscript{307}

In \textit{Jones v. Latham}\textsuperscript{308} the court of appeals held that the state securities commissioner was entitled to an order requiring a securities dealer to produce certain business records pursuant to an administrative subpoena.\textsuperscript{309} The dealer argued that the order was appropriate only if the commissioner could prove that he was unable to perform his duties without the subpoena, but the court rejected that standard.\textsuperscript{310} The court stated that section 3 of the TSA\textsuperscript{311} authorizes the commissioner to inspect and copy the records of dealers to prevent or detect a violation of the Act.\textsuperscript{312} On that basis, the court of appeals upheld the lower court's order.\textsuperscript{313}

In \textit{Star Supply Co. v. Jones}\textsuperscript{314} the court held that a broker who had agreed to find a buyer for a Texas corporation was not required to register as a securities broker in order to effectuate the sale of the corporation.\textsuperscript{315} The court reasoned that since all the corporate stock was transferred, the transaction did not constitute a sale of securities as contemplated by the TSA.\textsuperscript{316} Although the court purported to look to federal court decisions to interpret the TSA,\textsuperscript{317} it neglected to look closely enough. In essence, the court treated the transaction as the sale of a business rather than the sale of securities. The court, however, failed to recognize that the Fifth Circuit had repudiated the sale of business doctrine under federal securities law.\textsuperscript{318}

\textbf{D. Texas Securities Board}

During the survey period the Texas State Securities Board adopted a new set of rules\textsuperscript{319} governing the registration in Texas of securities previously registered with the Securities and Exchange Commission pursuant to the SEC's "shelf registration" provision, rule 415.\textsuperscript{320} The board also adopted new rules governing the procedure to be used in contested cases\textsuperscript{321} and adopted a sixty-day time limit for the filing of a complaint challenging denial

\textsuperscript{307} Id. (citing Dillon v. Lintz, 582 S.W.2d 394, 397 (Tex. 1979); Stone v. Enstam, 541 S.W.2d 473, 477 (Tex. Civ. App.—Dallas 1976, no writ)).

\textsuperscript{308} 671 S.W.2d 612 (Tex. App.—Eastland 1984, writ ref'd n.r.e.).

\textsuperscript{309} Id. at 614.

\textsuperscript{310} Id.

\textsuperscript{311} TEX. REV. CIV. STAT. ANN. art. 581—3 (Vernon 1964).

\textsuperscript{312} 671 S.W.2d at 614.

\textsuperscript{313} Id. The court also rejected the dealer's argument that his business records were privileged under the fifth amendment. \textit{Id.} at 615 (citing United States v. Doe, 104 S. Ct. 1237, 1239, 79 L. Ed. 2d 552, 559 (1984)).

\textsuperscript{314} 665 S.W.2d 194 (Tex. App.—San Antonio 1984, no writ).

\textsuperscript{315} Id. at 196.

\textsuperscript{316} Id.

\textsuperscript{317} Id. (citing Searsy v. Commercial Trading Corp., 560 S.W.2d 637, 640 (Tex. 1977)).

\textsuperscript{318} \textit{See} Daily v. Morgan, 701 F.2d 496 (5th Cir. 1983); \textit{see also supra} notes 296-303 and accompanying text (discussion of recent case clarifying the circuit's position).


\textsuperscript{320} 17 C.F.R. § 230.415 (1984). The SEC has now adopted rule 415 on a permanent basis.

of a permit for the sale of securities. In a third development of note, the board adopted a rule exempting from the TSA registration requirements and the TSA dealer registration requirements the offer, sale, or distribution of securities under employee plans.

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322. Id. at 2773 (codified at 7 TEX. ADMIN. CODE § 105.3).
324. Id art. 581—12 (Vernon 1964).