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Partnerships

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PARTNERSHIPS

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I. INTRODUCTION

WE present a variety pack of cases decided during the Survey period—one involving the quality of service required to impose liability on a general partner in a suit against a partnership (only the second Texas appellate decision on the issue), a bankruptcy case that offered a veritable primer on several Texas partnership law issues, some veil-piercing (a notion that causes shivers in business lawyers!) cases, a *reverse* veil-piercing case, and reminder "entity theory" case. As has been our practice in recent years, we have included limited liability companies in our coverage.[1]

A. HOW TO SUE A GENERAL PARTNER

1. KAO Holdings, L.P. v. Young[2]

This case involved the quality of service of legal process required to impose liability on a general partner for a limited partnership obligation. An elementary rule of partnerships is that general partners of a limited partnership are jointly and severally liable for the partnership's debts and obligations.[3] Such partners can be sued directly for that liability and to enforce a judgment obtained against the partnership.[4] The better and more economical practice is to name the partnership and all of the re-

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1. In fact, because the Texas franchise tax laws changed in 2005, mostly removing the advantage that limited partnerships had over limited liability companies (the former is now subject to the "margins tax," the successor to the franchise tax that previously applied to LLCs but not to partnerships), we expect the volume of LLC cases to increase in the coming years.

2. KAO Holdings, L.P. v. Young, 214 S.W.3d 504 (Tex. App.—Houston [14th Dist.] 2006, pet. granted), *aff'd as modified* by 2008 WL 2404971 (Tex. Jun. 13, 2008).

3. General partners in a limited partnership have the same liabilities to third parties as a partner in a general partnership. Texas Revised Limited Partnership Act, TEX. REV. CIV. STAT. ANN. art. 6132a, § 4.03(b) (Vernon Supp. 2008) (art. 6132a et seq. hereinafter collectively referred to as the "TRLPA"). Such partners have joint and several liability for all debts and obligations of the partnership. Texas Revised Partnership Act, TEX. REV. CIV. STAT. ANN. art. 6132b, § 3.04 (Vernon Supp. 2008) (art. 6132b et seq. hereinafter collectively referred to as the "TRPA").

4. TRPA, *supra* note 3, § 3.05.

sponsible partners as defendants in the same lawsuit.[5] But what happens if no partners are named as defendants, but one or more actually receives process served against the partnership? That is what this case is about.

There are several applicable statutory and common law rules: (1) "*except as otherwise expressly provided by law*, a judgment may not be entered against anyone who has not been named as a defendant and served with process;"[6] (2) in a suit against a partnership, citation may be served on any general partner;[7] (3) a judgment against a partnership is not, alone, a judgment against a partner; however, "a judgment may be entered against *a partner who has been served with process* in a suit against the partnership;"[8] (4) "[c]itation served on one member of a partnership authorizes a judgment against the partnership and the partner actually served;"[9] (5) section 13.03 of the Texas Revised Limited Partnership Act ("TRLPA") provides that the Texas Revised Partnership Act ("TRPA") applies to limited partnerships on matters not covered by the TRLPA;[10] and (6) a general partner of a limited partnership has the same liabilities to those outside the partnership as does a partner in a general partnership.[11]

The Houston Fourteenth Court of Appeals used this last authority as the jumping off point for its decision, stating that "[i]t logically follows that in a suit against a limited partnership, as in this case, a judgment entered against the limited partnership, although it is not itself a judgment against a general partner, may also be entered against a general partner who was served with process."[12]

The court invoked *Fincher* to support its decision, calling it the "only Texas appeals court decision that has addressed this issue . . . ."[13] *Fincher* interpreted TRPA section 3.05(c) and Texas Civil Practice and Remedies Code section 17.022" to mean that a partner served with process in a suit against the partnership could be held individually liable "even though he was not named or served individually with process as a defendant in the suit . . . ."[14] We wrote about *Fincher* in this journal in 1993, which the

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5. Following that best practice would have avoided this litigation, too.

6. *KAO Holdings*, 214 S.W.3d at 507 (citing TEX. R. CIV. P. 124 (Vernon 2005), and Werner v. Colwell, 909 S.W.2d 866, 869 (Tex. 1995)) (emphasis added).

7. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 17.022 (Vernon 1997) (the "TCPRC"), and TRLPA, *supra* note 3, at § 1.08(a)).

8. TRPA, *supra* note 3, at § 3.05 (emphasis added). *See KAO Holdings*, 214 S.W.3d at 508-09 n.10 (explaining why this TRPA provision applies to a limited partnership) (emphasis added).

9. TEX. CIV. PRAC. & REM. CODE § 17.022 (Vernon 2008).

10. *KAO Holdings*, 214 S.W.3d at 508 n.6. This is sometimes referred to as the "linkage" section because it "links" the two partnership statutes in the manner indicated.

11. As noted above in footnote 3, this is joint and several liability for the debts and obligations of the partnership. TRLPA, *supra* note 3, at § 4.03(b); TRPA, *supra* note 3, at § 3.04.

12. *KAO Holdings*, 214 S.W.3d at 508 n.6 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 17.022 (Vernon 1997) and Fincher v. B & D Air Conditioning & Heating Co., 816 S.W.2d 509, 512 (Tex. App.—Houston [1st Dist.] 1991, writ denied)).

13. *Id.* at 508 n.6 (citing *Fincher*, 816 S.W.2d at 512-13).

14. *Id.*

court cited in a footnote.[15] There, we said:

> Even though a partner is jointly and severally liable for, and therefore can be sued on, liabilities established by judgments against the partnership, the assets of the partner can be reached only when there is a judgment against the partner, individually. Therefore, the court's interpretation of Section 17.022 of the Civil Practice and Remedies Code was important in determining whether a new, separate suit against the individual partner was required. The court held that when Fincher received actual service as general partner for Yellow Ribbon, even in his capacity as trustee, Fincher was also before the trial court as a general partner. Therefore, a judgment establishing partnership liability was also a judgment against the partner individually.[16]

Here the court agreed with the analysis in *Fincher*, essentially finding that a general partner knows that it has joint and several liability for the obligations of a partnership and that merely being served with citation in a lawsuit *against the partnership*, whether or not the general partner is named individually as a defendant, puts that general partner on notice of a claim that could result in its having liability.[17] The end result was a judgment finding liability on both the partnership and the served but unnamed partner.[18]

What does that mean? It means that a separate lawsuit against a general partner relating to partnership liability is unnecessary when the general partner receives a copy of the lawsuit. On the other hand, if there were other general partners who were not served, then a separate lawsuit against them would be required to recover from them individually for their partnership liability. That liability does not have to be re-established, but a separate lawsuit would be required to pursue the individual assets of those liable partners.

The court bolstered its conclusion by pointing to section 152.306(a) of the Texas Business Organizations Code ("TBOC"),[19] and to the Texas Supreme Court's refusal to review *Fincher*. Further, the court invoked the Texas common law principle that where a statute is "interpreted by a court of last resort and reenacted without substantial change, the Legislature is presumed to have been familiar with that interpretation and to have adopted it."[20] Perhaps because there was a dissent in the case, the court punctuated its conclusion: "Under these circumstances, we have no legal authority, rationale, or other proper basis to depart from the inter-

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15. *See id.* at 509 n.7.

16. Steven A. Waters & Felicity A. Fowler, *Partnerships*, 46 SMU L. REV. 1631, 1645 (1993) (footnotes omitted).

17. *KAO Holdings*, 214 S.W.3d at 508-09.

18. *Id.*

19. TEX. BUS. ORGS. CODE ANN. § 152.306(a) (Vernon Supp. 2008) (the same as TRPA, *supra* note 3, at § 3.05(c), though now two sentences instead of one).

20. *KAO Holdings*, 214 S.W.3d at 509 (citing Tex. Dep't of Protective and Regulatory Servs. v. Mega Childcare, Inc., 145 S.W.3d 170, 176 (Tex. 2004)).

pretation in *Fincher*."[21]

The dissent was a vigorous one. In fact, the dissenting opinion was almost twice as long as the majority opinion and is an interesting read. Mainly, the dissent seemed to be offended by a result that sustained a *default judgment* against a defendant who was not specifically *named as a defendant* and served as part of that individual claim.[22] The dissent repeatedly cited *Texas Natural Resource Conservation Commission. v. Sierra Club*[23] for the proposition that "service of citation" is a term of art describing service addressed to a person that informs the person that he has been sued and "commands [the person] to appear and answer the opposing party's claims."[24] Though reciting that "a judgment may be entered against a partner who has been served with process in a suit against the partnership,"[25] the dissent goes further and reads section 17.022 to allow the following: "[I]f a partner is served with citation *informing the partner that he has been sued*, then service of citation is not also necessary as to the partnership."[26] But, TRPA section 3.05(c)[27] does not require that a partner be directly so informed—the scheme there is that service of citation on a partnership is effected by serving a general partner; therefore, you get a "two-fer," because the partnership and any partner served with that citation are considered to be before the court. The dissent appears not to disagree with the notion that serving a general partner with a suit against the partnership is effective. Rather, the dissent argued that a suit naming the general partner is effective against the partnership when the suit merely names the general partner.[28] The problem is that notion does not work under TRPA section 3.05(c), which requires "a suit against the partnership."[29]

Although the dissent worked hard to cite a variety of authorities, both within and outside Texas, mainly, the dissent seemingly could not suffer the idea of a *default judgment* against a partner who had not been "hit over the head" with the fact that it, individually, could be responsible for the claims made in the lawsuit.[30]

As noted, the best practice is to name the partnership and all liable partners as party defendants in the lawsuit.

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21. *KAO Holdings*, 214 S.W.3d at 509.

22. *Id.* at 510.

23. 70 S.W.3d 809, 813 (Tex. 2002).

24. *KAO Holdings*, 214 S.W.3d at 514.

25. TEX. CIV. PRAC. & REM. CODE ANN. § 17.022 (Vernon 2008).

26. *KAO Holdings*, 214 S.W.3d at 514 (emphasis added).

27. *See* TRPA, *supra* note 3, at § 3.05(c).

28. TEX. CIV. PRAC. & REM. CODE ANN. § 17.022 (Vernon 2008), taken alone, could be read that way.

29. TRPA, *supra* note 3, at § 3.05(c).

30. One of the opinion's headings was a dead giveaway of Justice Frost's feelings: "*Does article 6132b-3.05(c) of the Texas Revised Civil Statutes allow a plaintiff to obtain a default judgment against a nonparty on an unpleaded claim?*" *KAO Holdings*, 214 S.W.3d at 515.

B. Oral Partnerships

1. *In re Wilson*[31]

This was a bankruptcy adversary proceeding that included a claim of breach of fiduciary duty. Whether that claim could be sustained depended on whether there was a basis for it, which the court tied to finding a partnership.[32]

There was no written partnership agreement to guide the court, forcing an analysis of the relevant statutory provision that bears on the existence (or not) of a partnership, TRPA section 2.02.[33] The court found enough evidence of the existence of a partnership to deny the defendants' summary judgment motion.[34]

The defendants argued that an oral partnership could not be enforced because of the statute of frauds.[35] The court dispatched that argument, on the basis that oral partnerships are valid in Texas[36] and, more importantly, it found no evidence that the partnership could not "be performed within a year."[37]

C. Duties Owed By Partners

1. *In re Kilroy*[38]

This is the first of two bankruptcy cases involving Mr. Kilroy that are discussed in this Survey article. The reader should note that the two cases, though both styled "*In re Kilroy*," involve separate plaintiff parties, distinct questions of fact and law, and Texas and Delaware law.

The first issue in this case was whether Guerriero had standing to bring suit on behalf of a limited liability company ("LLC"), W & L, that was the general partner of a limited partnership, Aegis. If Guerriero was a

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31. *In re* Wilson, 355 B.R. 600 (Bankr. S.D. Tex. 2006).

32. Apparently, the court found no evidence of any other relational basis for such a duty to arise.

33. *Wilson*, 355 B.R. at 604-05; TRPA, *supra* note 3, at § 2.02.

34. Essentially, the court relied on the testimony of the other party "that there was an understanding that a partnership was created," which the court said created a material issue of fact for trial, rendering the matter unsuitable for summary judgment. *Wilson*, 355 B.R. at 605-07.

35. *Wilson*, 355 B.R. at 605; *see* Tex. Bus. & Com. Code Ann. § 26.01 (Vernon Supp. 2008).

36. *Wilson*, 355 B.R. at 605. Interestingly, the court offered no support for that statement. It could have cited the following: "'Partnership agreement' means any agreement, written or *oral*, of the partners concerning a partnership." TRPA, *supra* note 3, at §1.01(12) (emphasis added)

37. *Wilson*, 355 B.R. at 605 (citing Niday v. Niday, 643 S.W.2d 919 (Tex. 1982)). Under Texas law, the general rule is that where the parties have not fixed a time for performance and the contracted issue does not explicitly state that it cannot be performed within one year, then the contract does not fall within the statute of frauds. *Niday*, S.W.2d at 920 (citing Miller v. Riata Cadillac Co., 517 S.W.2d 773, 776 (Tex. 1974). Additionally, "where the agreement, either by its terms or by the nature of the required acts, cannot be completed within one year, it falls within the statute and must therefore be in writing." *Niday*, 643 S.W.2d at 920 (citing Hall v. Hall, 308 S.W.2d 12 (1957)).

38. *In re* Kilroy, 354 B.R. 476 (S.D. Tex. 2006).

member of the LLC, then, under Delaware law,[39] Guerriero would have standing to bring that lawsuit.[40] In this procedural context—a motion to dismiss for failure to state a remediable claim—the court indulged all testimony and facts in favor of the party seeking to act (Guerriero), found determinative fact issues to be disputed, and refused to grant the motion.[41]

The more interesting parts of the case included a bankruptcy issue that depended on finding a fiduciary duty. Under United States Bankruptcy Code § 523(a)(4), a discharge that otherwise disposes of the debtor's obligations to third parties does not discharge debts based on "fraud or defalcation while acting in a fiduciary capacity . . . ."[42] Determining whether a fiduciary relationship existed required the court to examine both state and federal law.[43] Looking to Delaware law, the court found that, because Kilroy was the majority owner of the LLC that was the general partner of the limited partnership at issue, Kilroy owed fiduciary duties to Guerriero—a minority owner of the limited partner.[44] The court invoked analogous Delaware corporate law that a majority shareholder is a *controlling* shareholder, and that *control* is the key to finding a fiduciary relationship (in fact, even without the majority ownership, control would carry the day).[45] The court found Kilroy's control to be sufficient to support an assertion that § 523(a)(4) applied.[46]

2. *In re Leal*[47]

This case involved cross-suits brought by two partners in a general partnership, each alleging a variety of bad acts by the other party, including waste of business assets, breach of fiduciary duty, conversion, fraud, and unfair competition.[48]

The Southern District of Texas bankruptcy court offered a primer on Texas partnership law, after finding that the matter was governed by the

39. Delaware law was applied in this case because the Texas Business Corporation Act provides that the law of the entity's place of incorporation or formation governs. *See* TEX. BUS. CORP. ACT ANN. § 8.02 (Vernon 2003).

40. Suit may be brought by a member if a manager or member with authority refuses to do so or if an effort to cause them to do so is unlikely to succeed. *Kilroy*, 354 B.R. at 486-87 (citing DEL. CODE ANN. tit. 6, §18-1001 (2005)).

41. *Id.* at 487.

42. *Id.* at 492 (citing 11 U.S.C. § 523(a)(4) (2006)).

43. The scope of the duty was a matter of federal law, but "whether or not a trust obligation exists" depended in large measure on state law. *Kilroy*, 354 B.R. at 493 (citing LSP Inv. P'ship v. Bennett (*In re Bennett*), 989 F.2d 779, 784 (5th Cir. 1993)).

44. *Kilroy*, 354 B.R. at 493.

45. *Id.* at 493 (citing Lewis v. Knutson, 699 F.2d 230, 235 (5th Cir. 1983)). Note that the other *Kilroy* case discussed in this article confronts a similar "fiduciary capacity" question in connection with a § 523(a)(4) claim, and invokes the same state/federal analysis. However, in that case, the plaintiffs argued that the LLC should be disregarded altogether on veil-piercing grounds. Consequently, the only entity pertinent to the discussion was the Texas limited partnership and, therefore, the court in that case applied Texas law for the state-law portion of the state/federal analysis of fiduciary capacity.

46. *Kilroy*, 354 B.R. at 493.

47. 360 B.R. 231 (S.D. Tex. 2007)

48. *Id.* at 237.

TRPA.[49] The primer included citations to TRPA section 1.03,[50] section 3.01,[51] sections 4.01(d) and 4.03(b),[52] section 3.02(a),[53] sections 2.06 and 8.02,[54] sections 6.01(a) and 6.01(b),[55] section 8.01,[56] section 4.04,[57] section 2.06(a),[58] section 7.01(a),[59] sections 6.02(a) and 7.01(b),[60] section 8.02,[61] section 8.06,[62] sections 1.01(2) and 4.01(a),[63] and section 4.01(b).[64]

There was no written partnership agreement in this case. And the oral understandings apparently were skimpy, too—each party was a fifty percent partner, Mokhabery was to provide start-up capital, and Leal was to handle the day-to-day business matters. Among the things on which the

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49. The court noted the existence of the Texas Business Organizations Code, but correctly stated that it did not apply here because this partnership was formed before January 1, 2006. *Leal*, 360 B.R. at 235 n.1.

50. *See* TRPA, *supra* note 3, at § 1.03. The TRPA governs the relationship between the partners unless their partnership agreement provides otherwise. *Id.*

51. *See id.* § 3.01. Noting that a partnership has the same powers as an individual or a corporation to do the things necessary to carry on its business. *Id.*

52. *See id.* §§ 4.01(d); 4.03(b). Each partner has equal rights to participate in the management of the business, unless they otherwise agree. *Id.*

53. *See id.* § 3.02(a). Each partner is an agent of the partnership for the purpose of carrying on its business, and the act of each binds the others, unless the partner has no actual authority. *Id.*

54. *See id.* §§ 2.06, 8.02. Unless the partners have agreed that a partnership is for a term or particular undertaking, it is a partnership "at will." *Id.*

55. *See id.* § 6.01(a)-(b). A partner ceases to be a partner on the occurrence of an event of withdrawal of that partner, some of which require winding-up and others do not. *Id.* As the court noted, one that does not is a partner's giving notice to the partnership that it is withdrawing as a partner. *Leal*, 360 B.R. at 235 (citing TRPA, *supra* note 3, at § 6.01(b)(1)).

56. *See* TRPA, *supra* note 3, at § 8.01. This section outlines events that require winding-up of a partnership, including "the express will of a majority-in-interest of the partners, the entry of certain judicial decrees, and a request for winding-up the partnership from a partner, ..." *Leal*, 360 B.R. at 235 (citing TRPA, *supra* note 3, at § 8.01).

57. *See* TRPA, *supra* note 3, at § 4.04. This section sets forth the duties owed by partners to one another and to the partnership. In referring to this section, the court said that the partners owe "fiduciary duties as a matter of law, including a duty of loyalty and care." *Leal*, 360 B.R. at 235 (citing both TRPA, *supra* note 3, at § 4.04; Ins. Co. of N. Am. v. Morris, 981 S.W.2d 667, 674 (Tex. 1998)). However, under the TRPA partners expressly (emphasized by the Bar Committee Comments quoted there) do not owe fiduciary duties, as such. *See* TRPA, *supra* note 3, at § 4.04.

58. *See* TRPA, *supra* note 3, at § 2.06(a). This section allows partners to continue the partnership on the occurrence of an event of withdrawal affecting one of them. *Id.*

59. *See id.* § 7.01(a). This section says that if no event requiring a winding-up occurs within 60 days after the event of withdrawal affecting the partner, then the partner is entitled to have its partnership interest redeemed (that is, bought) by the partnership. *Id.*

60. *See id.* § 7.01(b). This section identifies the redemption price as the fair value of the partner's interest as of the date of the partner's withdrawal, if the partner's withdrawal is not wrongful. *Id.*

61. *See id.* § 8.02. When an event of winding-up occurs, the partnership continues until that winding-up is completed, after which the partnership is terminated. *Id.*

62. *See id.* § 8.06. On winding-up, partnership assets are first applied to discharge any outstanding debts and liabilities, with any surplus being paid to partners who have positive capital account balances. *Id.*

63. *See id.* §§ 1.01(2), 4.01(a). A partner's capital account balance is determined by crediting any contributions made by or profits allocated to the partner, and reduced by any losses allocated to or distributions of property made to the partner. *Id.*

64. *See id.* § 4.01(b). Unless the partners agree otherwise, each partner is responsible for a partnership's losses in the same proportion that it shares the partnership's profits. *Id.*

partners had not agreed was a partnership term or whether any specific or specified events would require winding-up and termination. Accordingly, the court concluded that "the partnership was at the will of each partner."[65]

Drawing from its primer, the court reiterated its view that the partners owed to one another and to the partnership fiduciary duties, including the duties of loyalty and care.[66] While the partners do, indeed, owe to each other and to the partnership the duties of *loyalty* and *care*, as well as the obligation to exercise those duties in good faith,[67] the duties were not intended to be the same as those owed by a "pure" fiduciary, such as a trustee. The State Bar Committee that drafted the TRPA made this very clear in its comments, saying:

> This section defines partner duties and implies that they are not to be expanded by loose use of "fiduciary" concepts from other contexts or by the rhetoric of some prior cases. Similarly, subsection (f) [of this section] specifically states that a partner as such is not a trustee and is not held to the same standards as a trustee, thus further attempting to restrict reliance on the unfortunate language of prior law. The term "fiduciary" is inappropriate when used to describe the duties of a partner because a partner, unlike a true trustee, may legitimately pursue the partner's own self interest and not solely the interest of fellow partners or the partnership.[68]

Nevertheless, the Texas Supreme Court has implied that the duties owed by partners under the TRPA have not changed, at least in some contexts.[69] One bankruptcy case did go into considerable detail on this subject, citing the Bar Committee legislative history quoted above. The issue there, like here, was whether there were "sufficient" fiduciary-like duties involved to implicate 11 U.S.C. § 523(a)(4).[70]

The court set the stage for the rest of its discussion when it said: "After reviewing all the evidence, it is clear that this dispute arose because neither Leal nor Mokhabery took his fiduciary duty seriously."[71] In fact, the court was pretty disgusted: "The conduct of both parties is inexcusable, however the conduct of Leal is much more atrocious."[72]

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65. *Leal*, 360 B.R. at 236.

66. *Id.*

67. TRPA, *supra* note 3, at § 4.04(d).

68. *See* TRPA, *supra* note 3, at § 4.04, Comment of Bar Committee 1993.

69. *See* M.R. Champion, Inc. v. Mizell, 904 S.W.2d 617, 618 (Tex. 1995). That case was governed by the predecessor to the TRPA, but the supreme court said in dicta that a partner's fiduciary duties under that predecessor statute have remained the same under the TRPA: "Partners owe each other and their partnership a duty *in the nature of* a fiduciary duty in the conduct and winding up of partnership business, and are liable for a breach of that duty." *M.R. Champion*, 904 S.W.2d at 618 (citing TRPA, *supra* note 3, at §§ 4.04, 4.05).

70. *See In re* Gupta, 394 F.3d 347, 351 (5th Circuit 2004). For this purpose, the "trustee" level fiduciary duties were not required.

71. *Leal*, 360 B.R. at 237.

72. *Id.* at 242.

The opinion had a good discussion of the rules that apply when one partner withdraws from a two-person partnership: (i) the withdrawing partner's only right was to have his interest redeemed,[73] (ii) the withdrawal caused an event requiring a winding up (because a partnership must have two partners, and there would be only one remaining after the withdrawal),[74] (iii) the sole remaining partner had the authority to wind up the business of the partnership, which includes satisfying partnership debts from the proceeds of liquidating partnership assets, and continuing as a partner until winding up was completed and the partnership's legal existence terminated,[75] and (iv) the withdrawing partner, though he had no interest in partnership property and owed no fiduciary duties because he was no longer a partner, did owe duties to the partnership as a former agent of the partnership after the agency was terminated.[76] The court ordered Leal, the withdrawing partner, to pay the partnership, with interest, for the value of his misuse of partnership assets, and ordered Mokhabery, the remaining partner, to repay to the partnership unauthorized withdrawals taken by him.[77] What a mess!

D. Piercing The Veil

1. *In re JNS Aviation, Part I*[78]

This case is short on substance relevant to this discussion, but it does elucidate to some degree the nature of a veil-piercing claim under Texas law.[79] It also is the precursor to the next case discussed in this Survey article. It therefore merits at least a passing mention.

The two issues in this case germane to veil-piercing are (1) whether a veil-piercing claim is required to be litigated in the same lawsuit as the underlying cause of action to which it relates[80] and (2) whether veil-piercing is a cause of action that rightfully belongs to the bankruptcy estate of the entity whose veil is to be pierced.[81]

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73. *Id.* at 240. Instead, Leal took partnership assets and used them in a new business, which the court found to constitute conversion.

74. *Id.*

75. *Id.* at 243. The court chastised this partner for starting and running a competing business before he had completed the winding up of this partnership, as required by the TRPA. So, even though the other partner, Leal, withdrew and took partnership assets to begin a new business, that did not excuse Mokhabery from his "remaining-partner" winding up duties. *Id.* at 242-43.

76. *Id.* at 241.

77. *Id.* at 243.

78. *In re* JNS Aviation, 350 B.R. 283 (N.D. Tex. 2006).

79. For purposes of this case, the court did not need to, and did not, decide the ultimate merits of the plaintiff's veil-piercing claim. To reach its conclusion regarding the bankruptcy trustee's proposed settlement of claims, the court needed only to dispose of certain preliminary questions, such as whether a veil-piercing claim must be litigated with the substantive cause of action that gave rise to the underlying liability, and whether a veil-piercing claim is personal to the plaintiff/creditor or, instead, a cause of action belonging to the bankruptcy estate.

80. *JNS Aviation*, 350 B.R. at 289.

81. *Id.* at 290. This is itself an interesting concept—normally, one worries about a third party piercing the veil and getting to the entity's owners; here, for the entity itself (in

On the first issue, the Northern District of Texas bankruptcy court found ample authority for the proposition that veil-piercing can be raised to hold third parties liable on a debt established by an earlier judgment.[82] It follows, then, that a veil-piercing claim need not relate only to those substantive causes of action that are raised in the same case.[83] Similarly, recovery under veil-piercing theories was also not limited to that available under same-case substantive causes of action.[84]

On the second issue, the court was not as decisive, probably because it did not have to be to reach and support its ultimate holding in the case.[85] After discussing at length three Fifth Circuit cases,[86] the court reached the conclusion that "veil piercing theories are arguably property of the bankruptcy estate and thus the Trustee is responsible for administering such asset."[87]

2. *In re JNS Aviation, Part II*[88]

This case involved a claim based on veil-piercing theories against the principals of a defunct limited liability company and other business entities owned by the principals.

Texas courts apply to limited liability companies the same state law principles for piercing the corporate veil that are applied to corporations.[89] The starting point of any analysis of potential liability under veil-piercing theories is section 21.223 of the TBOC, which states, in pertinent part: "A holder of shares . . . may not be held liable to the corporation or its obligees with respect to . . . any contractual obligation of the corporation or any matter relating to or arising from the obligation on the basis that the holder . . . was the alter ego of the corporation or on the basis of

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bankruptcy) to pursue those same owners who gave birth to it . . . well, that's just interesting.

82. *Id.* at 289 (citing Matthews Const. Co., Inc. v. Rosen, 796 S.W.2d 692 (Tex. 1990)).

83. In so finding, the court rejected an argument advanced by the bankruptcy trustee—no doubt with the strong support of the defendants—that, because veil-piercing is "remedial in nature and must be tied to a substantive cause of action," and because the substantive causes of action at issue in the case were already adequately addressed in the trustee's proposed settlement, the veil-piercing claim added no additional value. *Id.* at 288.

84. *Id.* at 288-90. The "substantive" causes of action in this case were claims of fraudulent transfer and breach of fiduciary duty. The plaintiff argued successfully that the veil-piercing claim was tied not only to the fraudulent transfer and breach of fiduciary duty claims, but also to a previous breach of contract claim that had been reduced to a judgment in plaintiff's favor.

85. The court held that the trustee's proposed settlement did not adequately resolve the veil-piercing claims and therefore could not be approved in its entirety. *Id.* at 292-94.

86. *In re* Acquisitions, Inc., 817 F.2d 1142, 1152 (5th Cir. 1987) (holding that alter ego—a veil-piercing theory—is a "right of action" belonging to the debtor and is the property of the estate); *In re* MortgageAmerica Corp., 714 F.2d 1266 (5th Cir. 1983); *Matter of Educators Group Health Trust*, 25 F.3d 1281, 1284 (5th Cir.1994) ("If a cause of action alleges only indirect harm to a creditor [(i.e., an injury which derives from harm to the debtor)], and the debtor could have raised a claim for its direct injury under the applicable law, then the cause of action belongs to the estate.").

87. *JNS Aviation*, 350 B.R. at 292.

88. *In re* JNS Aviation, 376 B.R. 500 (N.D. Tex. 2007).

89. *Id.* at 526 (citing McCarthy v. Wani Venture, A.S., 251 S.W.3d 573, 589 (Tex. App.—Houston [1st Dist.] 2007, pet. denied)).

actual or constructive fraud, a sham to perpetrate a fraud, or other similar theory."[90] Subsection (b) of section 21.223 goes on to say that subsection (a)(2), which contains the language quoted above, "does not prevent or limit the liability of a holder . . . if the obligee demonstrates that the holder . . . caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the holder."[91]

After quoting the above statutory standard, the court reviewed Texas Supreme Court[92] and the Fifth Circuit[93] authority applicable to veil-piercing. The structure of the court's opinion seems to suggest, though the court did not explicitly state, that the referenced case law on veil-piercing has not been rendered moot by the Texas legislature's subsequent exposition on the veil-piercing doctrine. Instead, the implication is that the strands of veil-piercing recognized judicially can be relied on to advance a veil-piercing theory, but that ultimately the requirements of the statute—such as findings of actual fraud and direct personal benefit—have to be satisfied for such theories to prevail.[94]

In assessing whether the facts of the case fall under any of the recognized veil-piercing theories, the court referred primarily to the three strands of corporate disregard expounded by the Fifth Circuit, namely: "(1) the alter ego prong; (2) use of the corporate form as an illegal purpose . . .; and (3) sham to perpetrate a fraud."[95]

Plaintiff Nick Corp. alleged, and the court agreed, that the principals of JNS Aviation depleted the assets of the company and filed bankruptcy to avoid liability for a previous default judgment obtained against JNS Aviation by Nick Corp.[96] The court found that the facts did not support the first two strands of corporate disregard—alter ego[97] and illegal pur-

90. *Id.* (citing TEX. BUS. ORGS. CODE ANN. § 21.223 (Vernon 2006)).

91. *Id.* at 526-27 (citing TEX. BUS. ORGS. CODE ANN. § 21.223(b) (Vernon 2006)).

92. In explaining the Texas Supreme Court standard, the circuit court noted that, under Texas law, the corporate veil should be pierced when the corporate form has been used as part of a basically unfair device to achieve an inequitable result. "Specifically, we disregard the corporate fiction: (1) when the fiction is used as a means of perpetrating fraud; (2) where a corporation is organized and operated as a mere tool or business conduit of another corporation; (3) where the corporate fiction is resorted to as a means of evading an existing legal obligation; (4) where the corporate fiction is employed to achieve or perpetrate monopoly; (5) where the corporate fiction is used to circumvent a statute; and (6) where the corporate fiction is relied upon as a protection of crime or to justify wrong." *JNS Aviation*, 376 B.R. at 527 (quoting Castleberry v. Branscum, 721 S.W.2d 270, 271-72 (Tex. 1986)). In a footnote, the Texas Supreme Court added a seventh ground for veil-piercing—inadequate capitalization. *Castleberry*, 721 S.W.2d at 272 n.3.

93. *See* Gibraltar Sav. v. LDBrinkman Corp., 860 F.2d 1275 (5th Cir. 1988).

94. *JNS Aviation*, 376 B.R. at 530-31.

95. *Id.* at 527 (citing *Gibraltar*, 860 F.2d at 1287-90).

96. *Id.* at 530.

97. *Id.* at 529-30. The court equates the alter ego prong (the Fifth Circuit's parlance) with single business enterprise theory of corporate disregard (the Texas Supreme Court's usage), explaining that it is "an equitable doctrine applied to reflect partnership type principles when corporations integrate their resources and operations to achieve a common business purpose." *Id.* at 528 (citing 15 TEX. JUR. 3D CORPORATIONS § 173 (2007)). The court found that, while the entities in question were operated for a common business pur-

pose[98]—but did satisfy the third—sham to commit a fraud.[99]

"Sham to commit a fraud" is the broadest strand of veil-piercing—the catchall.[100] The emphasis is on "whether honoring legal independence would result in 'inequity' or 'injustice.'"[101] The typical fact pattern of such a sham involves a closely-held corporation that owes unwanted obligations and whose owners syphon off corporate assets to hinder the corporation's ability to pay its debts.[102] That is precisely what happened with this limited liability company.[103]

But did the sham constitute an actual fraud for the personal benefit of the defendants?[104] "Actual fraud occurs when (i) a party conceals or fails to disclose a material fact within the knowledge of that party; (ii) the party knows that the other party is ignorant of the fact and does not have an equal opportunity to discover the truth; (iii) the party intends the other party to take some action by concealing or failing to disclose the fact; and (iv) the other party suffers injury as a result of acting without knowledge of the undisclosed fact."[105]

The court found that all elements of fraud were present here. The company and its principals allowed Nick Corp. to take a default judgment against the company, then transferred all of the company's assets (but not the liability of the default judgment) to a new entity and failed to inform Nick Corp.—which was by then a judgment creditor—of the formation of, and transfer of assets to, the new entity.[106]

That the fraud was for the personal benefit of the defendants also was clear. No other shareholders (members) besides the defendants existed. Accordingly, they had no other interest to serve. In fact, their actions showed they desired to continue operations in a new entity unencumbered by the previous default judgment "for their own personal bene-

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pose, the entities did not operate at the same time, and therefore did not justify a finding of alter ego. *Id.* at 530.

98. "The illegal purpose doctrine [relates] . . . to the use of a corporate form as a technique for avoiding legal limitations upon natural persons or corporations." *Aviation*, 376 B.R. at 530 (citing 15 TEX. JUR. 3D CORPORATIONS § 174 (2007)). The focus of the illegal purpose doctrine is on legal obligations to the state, and it was not clear to the court that the legal obligation at issue in this case (that is, an existing civil judgment) was the type of legal obligation contemplated by the courts under this strand of the veil-piercing theory. *Id.* (citing *Gibraltar*, 860 F.2d at 1288).

99. *Id.*

100. *Id.* at 528. "Neither intentional fraud nor intent to defraud need be shown to satisfy this strand." *Id.* (citing *Gibraltar*, 860 F.2d at 1289).

101. *Id.* (citing *Gibraltar*, 860 F.2d at 1289).

102. *Id.* at 529 (citing *Castleberry*, 721 S.W.2d at 275).

103. *Id.* at 530 ("The court is satisfied that the overriding purpose of closing down JNS Aviation and continuing operations under [another entity's] shield was to isolate Nick Corp.'s Default Judgment in a worthless shell.").

104. *Id.* Puzzlingly, the court did not cite Texas Business Organization Code section 21.223 in connection with this inquiry, which the court acknowledged, "must be resolved under the umbrella of the veil-piercing claims." *Id.*

105. *Id.* (citing Bradford v. Vento, 48 S.W.3d 749, 754-55 (Tex. 2001)).

106. *Id.* at 531. "A company that ceases operations, liquidates, and closes down has a duty to advise its outstanding creditors of such facts." *Id.* (citing Texas Limited Liability Company Act, TEX. REV. CIV. STAT. ANN. Art. 1528n, art. 6.05(2) (Vernon Supp. 2008)).

fit."[107] Just reciting these facts suggests that the result was an easy one for the court to reach.

3. *In re Moore*[108]

This case involved a claim based on the theory of "*reverse* corporate veil piercing," the notion of an entity's assets being available to satisfy liabilities of individuals who treated the entity as their alter ego.[109] The opinion's chief value is in its rather thorough exposition of the doctrines of veil-piercing and reverse veil-piercing, particularly its frank critique of the "thin roots" of reverse veil-piercing in Texas jurisprudence[110] and the "scant" and "spotty" authority that has given rise to its assertion.[111]

Neither the Texas legislature nor the Texas Supreme Court has clearly adopted reverse veil-piercing as a legal principle, and the Texas and Fifth Circuit courts that have recognized the principle have not established guidelines or limits for its use.[112] That troubled this court for at least two reasons. First, it seemed to the court that reverse veil-piercing "has evolved and become accepted into the mainstream, starkly during a time when the Texas Legislature is limiting the availability of traditional veil piercing."[113] Second, the court "fears that parties and courts may be expanding their view of the availability of the reverse veil-piercing remedy, without meaningfully considering all of the due process rights of the pre-existing creditors of the corporation that may be affected."[114]

The court therefore adopted the view advanced by courts in some other circuits that "reverse veil piercing should only be applied when it is clear that it will not prejudice non-culpable shareholders or other stakeholders (such as creditors) of a corporation."[115] However, the court stopped

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107. *Id.*
108. *In re* Moore, 379 B.R. 284 (N.D. Tex. 2007).
109. *Id.* at 292.
110. *Id.* at 289.
111. *Id.* at 292-93.
112. *Id.* at 294-95.
113. *Id.* at 294 n.6. The court cites three distinct times that the Texas legislature has revised article 2.21 of the Texas Business Corporations Act to limit the availability of the alter ego doctrine. *Id.* at 291 (citing 1989 Tex. Gen. Laws Serv., 974 § 1 (West); 1993 Tex. Gen. Laws, 446 § 2.05 (West); 1997 Tex. Gen. Law, 1522, § 7 (West)).
114. *Moore*, 379 B.R. at 295. The court notes that, while reverse veil-piercing might have straightforward application in the context of a small, wholly-owned corporation, there could be unintended consequences when the remedy is applied broadly in commercial litigation contexts. *Id.* For example, the court envisioned "a creditor who loaned money to an individual, with only the legitimate expectation of being able to reach the individual's *assets*—including perhaps his stock in a corporation—is suddenly attempting to reach the assets of the corporation that might have its own significant creditors." *Id.* As further reason for caution, the court noted another potential side effect of the expansive application of reverse veil-piercing: "The remedy arguably perverts established Bankruptcy Code priorities and state law creditor rights provisions, by putting creditors of an individual shareholder on a parity with creditors of the corporation (when logic suggests they should, at best, merely step into the shoes of the individual shareholder vis-a-vis the corporation—not share pari passu with the corporation's preexisting creditors)." *Id.*
115. *Id.* at 295-96 (citing Stoebner v. Lingenfelter, 115 F.3d 576, 579-80 (8th Cir. 1997); Scholes v. Lehmann, 56 F.3d 750, 758 (7th Cir. 1995); Cascade Energy & Metals Corp. v. Banks, 896 F.2d 1557, 1575 (10th Cir. 1990)).

short of saying that, *per se*, reverse veil-piercing cannot be invoked to make claims on an entity's assets if the entity has non-culpable stakeholders.[116]

Particular facts of this case highlight an additional wrinkle in the reverse veil-piercing doctrine.[117] The culpable individual, Mr. Moore, did not actually own an equity interest in the corporation or the limited liability company that were his alleged alter egos. Though he exercised total control over the corporation and, for a time, substantial control over the limited liability company, Mr. Moore (who was saddled with significant debts) was careful to establish ownership of the corporation as his wife's separate property. Similarly, the equity interest in the limited liability company was actually a fifty percent stake held by his wife's corporation, not by Mr. Moore.[118] These facts alone, however, were insufficient to justify summary judgment in favor of the corporation and the limited liability company. "[W]hile there must be an ownership interest between an individual and the corporation whose separateness is sought to be disregarded," the court found, "it is possible that such ownership might exist indirectly or implicitly—such as where the actual record holder of the shares of the corporation holds them as a sham for the individual."[119]

A concluding thought—reverse veil-piercing, while clearly judicially recognized in some form, is fraught with uncertainty and potential pitfalls. It plays a useful role in disregarding the corporate fiction to prevent the use of business entities by the unscrupulous to shield personal assets from those creditors who would not otherwise have an adequate remedy. On the other hand, if it is applied too liberally, it can undermine expectations that are founded on long-standing principles of law. This seems like an area ripe for attention from the Texas Supreme Court or the Texas legislature.

4. *In re Kilroy*[120]

This case, a ruling on a motion to dismiss for failure to state a claim, addresses two exceptions to discharge of a debt in bankruptcy.[121] Each of

116. *Id.* at 296. The court acknowledged that logic would suggest that other stakeholders surely would be prejudiced by the imposition of reverse veil-piercing. However, showing great judicial restraint, the court concluded that "evidence, not logic, is necessary on this point." *Id.* at 297.

117. The application of the law to the facts in this case should be understood in the context of the case's procedural posture. Because the case is a ruling on the defendants' motion for summary judgment, all facts are viewed in a light most favorable to the creditor plaintiff who is invoking the remedy of reverse veil-piercing.

118. *Id.* at 286-88.

119. *Id.* at 296 (citing Zahra Spiritual Trust v. United States, 910 F.2d 240 (5th Cir.1990)).

120. *In re* Kilroy, 357 B.R. 411 (S.D. Tex. 2006). This is the second *Kilroy* case.

121. The two exceptions to discharge urged by the plaintiffs are found in 11 U.S.C. § 523(a)(2)(A) (2000 & Supp. 2005) and 11 U.S.C. § 523(a)(4) (2000). Section 523(a)(2)(A) provides, in pertinent part: "A discharge under section 727 . . . does not discharge an individual debtor from any debt . . . to the extent obtained by . . . a false representation, or actual fraud." Section 523(a)(4) exempts from discharge "any debt . . .

the invoked exceptions to discharge in this case rested, in part, on a claim that falls within the scope of this Survey article.[122] One hinged on a veil-piercing claim and the other on a claim involving the breach by a putative general partner of a fiduciary duty owed to limited partners.[123]

The plaintiffs in this case were individual investors in a limited partnership, Aegis 2000, whose sole purpose was to invest in an LLC, Final Arrangements.[124] In their first claim, the plaintiffs argued that they decided to invest based on fraudulent statements and misrepresentations made by Final Arrangements and its agent, and that those communications should, on veil-piercing grounds, be attributed to the defendant, Mr. Kilroy, an owner of the company.[125]

In determining whether the plaintiffs' pleadings were sufficient on the veil-piercing question, the Texas choice of law statute dictated the application of Delaware law—the law of Final Arrangements' state of formation.[126] Under Delaware law, the corporate veil can be pierced where an entity is found to be the alter ego of its shareholder.[127] In this instance, the court found that alter ego could be established either by collateral estoppel—recognizing a previous court's finding of alter ego—or by satisfying the alter ego analysis under Delaware law.[128] An exposition of the doctrine of collateral estoppel is beyond the scope of this article, but we offer a brief synopsis of some of the salient points of the alter ego theory under Delaware law.

Certain fundamental similarities can be found between Delaware and Texas law regarding corporate veil-piercing. Delaware courts, like their Texas counterparts, look not only to threshold indicators of alter ego, such as abandonment of corporate formalities or abuse of the corporate form, but also focus on the net effect of the dominant shareholder's misbehavior on the corporation and others.[129] Giving a flavor of Delaware and Second Circuit precedent on the subject, the court found that veil-piercing must be justified by additional, more egregious circumstances, such as: (1) an "overall element of injustice or unfairness;"[130] or (2) that the corporation was a sham, existing for "no other purpose than as a vehicle for fraud;"[131] or (3) that the entity was the subject of "exclusive domi-

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for fraud or defalcation while acting in a fiduciary capacity." The latter is discussed with the first *Kilroy* case, *supra* notes 38-46 and corresponding text.

122. While the court's opinion must be understood in the context of its procedural posture—all allegations being accepted in the light most favorable to the plaintiffs—the discussion of what must be alleged (and subsequently proved) to establish the claims at issue justifies its inclusion here.

123. *Kilroy*, 357 B.R. at 423, 430-31.

124. *Id.* at 417, 421.

125. *Id.* at 422-24.

126. *Id.* at 425 (citing Alberto v. Diversified Group, Inc., 55 F.3d 201, 203 (5th Cir. 1995) and TEX. BUS. CORP. ACT. ANN. art. 8.02 (Vernon 2003)).

127. *Id.* (citing Geyer v. Ingersoll Publ'ns Co., 61 A.2d 784, 793 (Del. Ch. 1992)).

128. *Id.*

129. *Id.* at 428 (citing *Alberto*, 55 F.3d at 205).

130. *Id.* (quoting Fletcher v. Atex, Inc., 68 F.3d 1451, 1457 (2nd Cir.1995)).

131. *Id.* (quoting Wallace v. Wood, 752 A.2d 1175, 1184 (Del. Ch. 1999)).

nation or control" and had lost "its own legal or independent significance."[132]

This case also highlights an important difference between Delaware and Texas case law. While a number of Texas courts—though not the Texas Supreme Court or the Texas legislature—have held that corporate veil-piercing principles apply to both corporations and Limited Liability Corporations without distinction,[133] "[t]here is a dearth of Delaware case law on the issue of whether an LLC's corporate veil may be pierced."[134] The court's holding in this case, that veil-piercing could be applied to LLCs, was based on a single Delaware case that endorsed LLC veil-piercing in theory.[135]

As part of their second cause of action, the plaintiffs alleged, under 11 U.S.C. § 523(a)(4), that Mr. Kilroy committed fraud and defalcation while acting in a fiduciary capacity.[136] The "fiduciary capacity" in this instance was that of putative managing partner of Aegis 2000,[137] and the question before the court was whether a managing partner stands in a fiduciary capacity to limited partners as that concept is narrowly defined in the context of 11 U.S.C. § 523(a)(4) claims.[138] The court explained that finding the answer is a two-step process involving both federal and state law.[139] Federal law dictates the scope of the concept of fiduciary, but "state law is important in determining whether or not a trust obligation exists."[140] Under Texas law, a managing partner "stands in the same fiduciary capacity to the limited partners as a trustee stands to the beneficiaries of the trust,"[141] the court found, and the fiduciary duty owed to the limited partners is "sufficient . . . to satisfy the requirements of section 523(a)(4)."[142]

132. *Id.* at 428-29 (quoting *Wallace*, 752 A.2d at 1184).

133. *See supra* note 89.

134. *Kilroy*, 357 B.R. at 430.

135. *Id.* (citing Trs. of the Vill. of Arden v. Unity Constr. Co., No. C.A. 15025, 2000 WL 130627, at *3-4 (Del. Ch. Jan. 26, 2000)).

136. *Id.* at 432. The same issue, but involving different entities, is discussed regarding the first *Kilroy* case, *supra* 38-46 and corresponding text.

137. The record managing partner of Aegis 2000 was Aegis Asset Management, Inc. (Aegis Asset), of which Mr. Kilroy was the sole owner and manager. The plaintiffs asserted, ostensibly on veil-piercing grounds, that Mr. Kilroy was, in effect, the managing partner of Aegis 2000. *Id.* at 421, 430.

138. *Id.* at 432 (quoting LSP Inv. P'ship v. Bennett, 989 F.2d 779, 784 (5th Cir. 1993)).

139. *Id.* at 432 (citing Clarendon Nat'l Ins. Co. v. Barrett, 156 B.R. 529, 533 (Bankr. N.D. Tex. 1993)).

140. *Id.* (quoting *Bennett,* 989 F.2d at 784).

141. *Id.* at 433 (quoting Watson v. Ltd. Partners of WCKT, Ltd., 570 S.W.2d 179, 182 (Tex. App.—Austin 1978, writ ref'd n.r.e.)). *But see* the discussion, *supra* in the text at footnotes 66-68.

142. *Id.* (quoting *Bennett*, 989 F.2d at 787).

E. The Entity Theory

1. *Peoples Bank v. Bryan Brothers Cattle Co.*[143]

This Fifth Circuit case involves Mississippi law and, consequently, logically falls outside the ambit of this publication. In addition, the issue in the case is not monumental. However, the case allows us to issue a reminder that seemed worthy enough to cover.

The issue here, whether the seller of cattle had "rights in collateral" sufficient to grant a lien to a bank, turned on whether the relationship among several people constituted a partnership, an LLC, or neither.[144] The partnership/LLC principle in the case is that a partnership or an LLC is a separate entity.[145] If the relevant assets are owned by a partnership or an LLC, then the partners or members do not have rights in those assets/collateral sufficient to grant a lien to secure their *individual* debts.[146]

The rest of the case was not jurisprudentially significant, and mostly reflected the procedural posture of the case. The district court granted a summary judgment based on its finding that cattle were owned by an LLC.[147] The Fifth Circuit decided that there was insufficient evidence to support a summary judgment for either party—it found enough evidence of the existence of a partnership to raise a fact issue that precluded summary judgment that there was not one, and inadequate evidence of the existence of a limited liability company to support the lower court's summary judgment that there was one, and it reversed and remanded the case to the district court.[148]

F. Conclusion

The cases decided during the Survey period mostly are not remarkable for their partnership law contributions. A few things stand out: (i) courts are loathe to eliminate "fiduciary" from the lexicon, notwithstanding the legislature's admonitions in 1983, (ii) the liability shield offered by some entities is not absolute in the face of particularly egregious conduct, and (iii) we are at the beginning of a period that should prove fertile for limited liability cases decided under Texas law.

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143. People Bank v. Bryan Bros. Cattle Co., 504 F.3d 549 (5th Cir. 2007).

144. *Peoples Bank*, 504 F.3d at 553-55.

145. *Id.* at 553.

146. *Id.* at 554; *see also* TRPA, *supra* note 3, at § 2.01 ("A partnership is an entity distinct from its partners."); TRPA, *supra* note 3, at § 5.01 ("A partner is not a co-owner of partnership property and does not have an interest that can be transferred, either voluntarily or involuntarily, in partnership property.").

147. *Id.* at 558.

148. *Id.* at 558-60. The ultimate issue was whether a person who bought the cattle from seller or two banks with pre-existing security interests in seller's property had greater rights in the cattle. *Id.*