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# Texas Business Organization and Commercial Law - Two Centuries of Development

Alan R. Bromberg

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# TEXAS BUSINESS ORGANIZATION AND COMMERCIAL LAW—TWO CENTURIES OF DEVELOPMENT\*

*Alan R. Bromberg\*\**

FOR JOSEPH WEBB M<sup>C</sup>KNIGHT, HISTORIAN AND WRITER  
OF LEGISLATION.

**T**HESSE two of my colleague's many illustrious roles inspired this effort to record a history of business legislation in Texas.

This selective survey focuses on four periods in Texas history: early (1830s-1840s), middle (late 19th-early 20th century) and later (1950s-1980s and 1980s-2001) . It concentrates on corporate, partnership and securities aspects of business and commercial law, and treats incidentally some related aspects that were important in particular periods.

Business and commercial law in Texas has been made primarily in two places: the Legislature and the law offices. The courts have had a lesser role in making it, though they have had some role in unmaking it. So, little will be said about the courts. What goes on in law offices is hard to trace, especially in past periods, so relatively little will be said about that. This leaves constitutions and statutes as our principal subject.

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1. AN AGRICULTURAL, SPARSELY SETTLED LAND  
BECOMES A REPUBLIC, THEN A STATE, AND APPROACHES  
BUSINESS WITH A MIXTURE OF HOSTILITY, CAUTION AND  
AMBITION (1830s-1840s)<sup>1</sup>

With a struggle for independence achieved in 1836 there is little commercial activity except farming and ranching. The businesses that exist are mostly one-owner operations. There is not much need for large pools of capital except for public or quasi public works.

The case law of the period is overwhelmingly procedural. Apart from some land transactions and some promissory notes, business matters and business organizations are conspicuously absent from the early court reports.<sup>2</sup>

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1. In 1836, Texas population was probably 35,000 to 50,000. Later population figures are given in n. 37 below.

2. This statement is based on a review of 1 Dallam, containing Texas Supreme Court cases from 1840 to 1844.

## 1.1 BANKING AND MONEY

Texas shared the hostility to banks and paper money—particularly paper money issued by private banks, i.e. promissory notes theoretically payable in hard money (gold or silver)—that was characteristic of this period of hard money scarcity and paper money proliferation and fluctuation. The hostility was most manifest in President Andrew Jackson's veto of the extension of the Second Bank of the United States in 1832. The hostility intensified in the panic of 1837 when all banks in the U.S. suspended payment in hard money on their paper money circulating notes and more than 600 banks failed.<sup>3</sup> So it is no surprise that the Texas Constitution of 1845 proclaimed: "No corporate body shall hereafter be created, renewed or extended, with banking or discounting privileges"<sup>4</sup> and "The Legislature shall prohibit by law individuals from issuing bills, checks, promissory notes or other paper to circulate as money."<sup>5</sup> The Legislature solicitously carried out this hard currency, anti bank mandate with increasingly severe sanctions,<sup>6</sup> All Gammel citations are to bottom page numbers. and the Attorney General enforced them against at least one leading citizen.<sup>7</sup>

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3. See, e.g., R. McGRANE, *THE PANIC OF 1837, SOME FINANCIAL PROBLEMS OF THE JACKSONIAN ERA* (1924).

4. Tex. Const. art. VII, § 30 (1845). The same language is in Tex. Const. art. VII § 30 (1861) and Tex. Const. art. VII § 30 (1866).

5. Tex. Const. art. VII, § 32 (1836). The same language appears in Tex. Const. art. VII, § 32 (1861) and Tex. Const. art. VII, § 32 (1866).

6. Act of Dec. 14, 1837, 1 H. GAMMEL, *LAWS OF TEXAS* 1389 (1898) (prohibiting issuance of printed or lithographed notes by individuals or corporations; \$5-\$50 fine); Act of Feb. 5, 1844, 2 H. GAMMEL, *LAWS OF TEXAS* 1031 (1898) (suppression of private banking; repeal of all prior authorizations to issue bills and notes to circulate as money; \$500 fine, 2-13 months prison); Act of Apr. 7, 1846, 2 H. GAMMEL, *LAWS OF TEXAS* 1359 (1898) (prohibiting issuance of notes by individuals to circulate as money; \$10-\$50 fine for each note); Act of Mar. 20, 1848, 3 H. GAMMEL, *LAWS OF TEXAS* 234 (1898) (suppression of illegal banking; prohibiting issuance of notes by corporations, companies, and associations to circulate as money; prohibiting banking or discounting privileges without authority of law; \$2,000-\$5,000 fine; officers personally liable if not paid; each month, each note a separate offense). A prosecution under the 1848 Act is discussed in n. 7 below and accompanying text.

7. Criminal fines were affirmed against Samuel M. Williams, one of Stephen F. Austin's principal aides in the colonization of Texas. *Williams v. State*, 23 Tex. 264 (1859), a prosecution under the 1848 Act cited in n. 6 above. Williams circulated \$1 demand notes of The Commercial and Agricultural Bank at Galveston, of which he was president. He claimed they were legal by virtue of Decree No. 308 of Apr. 30, 1835, J. KIMBALL, *LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS* 296 (1839), establishing the Bank. The court found, in effect, that conditions precedent to the corporate existence of the bank were not satisfied—and therefore no rights to issue notes vested—before private banking was suppressed by the 1844 Act cited in n. 6 above. The conditions included subscription (properly secured by real estate) for 3,000 shares of \$100, collection of \$100,000, and some kind of commissioner's report. The court reinforced its view that there were conditions precedent to the creation of the bank by noting the passive and instrumental language of the decree: "It is hereby granted, that a bank be established. . . . Samuel M. Williams, as empresario, shall take the proper measures for the establishment thereof." 23 Tex. 283. This did not constitute Williams a corporation or "corporator" but only gave him authority to take steps to form a corporation. Later corporate charters were more explicit in their granting language, although there were variations as noted below.

Negotiable instruments were recognized by common law. Legislation made protest and notice of nonpayment unnecessary and allowed an assignee of a nonnegotiable instrument to sue on it.<sup>8</sup>

## 1.2 CORPORATIONS

Nonbanking corporations were regarded with somewhat less hostility than banks. But they were viewed with suspicion as having power and privilege inconsistent with egalitarian principles.<sup>9</sup> So their creation and regulation were tightly reserved to the Legislature by the early Constitutions from 1845 to 1866. Moreover, these Constitutions kept corporations on a leash after they were created: "No private corporation shall be created unless the bill creating it shall be passed by two thirds of both Houses of the Legislature; and two thirds of the Legislature shall have power to revoke and repeal all private corporations by making compensation for their franchises."<sup>10</sup> Thus one did not simply file articles of incorporation with a state official to create a corporation. One had to persuade two thirds of each side of the Legislature to pass—and the Governor to sign—a law creating the corporation.

Few private corporations<sup>11</sup> were created by the Legislature, and they were mostly limited in purpose, capitalization, duration, and sometimes in land ownership. (Land was, of course, the principal source of livelihood and form of wealth.) Corporate structure, governance and operations were prescribed in considerable but highly variant detail. The corporations were notably lacking in flexibility to modify any of those attributes. A few were given authority to increase their capitalization (within limits) or to renew their charters. Otherwise they could only return to the Legislature for amendment.

The capitalizations of some of the companies appear large, especially when multiplied many times (perhaps 20 or more) to translate to present dollars. But this is at least partly illusory since only a small fraction of the capital (often 10%) had to be paid in before beginning operations. Stock was typically sold on subscriptions payable in installments, and it seems likely that many of the installments were never collected.

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8. Act of Jan. 25, 1840, 2 H. GAMMEL, LAWS OF TEXAS 318 (1898). See also Act of Mar. 20, 1848, 3 H. GAMMEL, LAWS OF TEXAS 187 (1898) (liability of drawer and acceptor may be fixed without protest and notice). The four pages on Negotiable Instruments in O. HARTLEY, DIGEST OF THE LAWS OF TEXAS 770-74 (1850) contrast sharply with the 12 pages on Negroes, i.e. slavery, which follow, *id.* at 774-786.

9. See generally J. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION 13-57 (1970).

10. Tex. Const. art. VII, § 31 (1845). The same language appears in Tex. Const. art. VII, § 31 (1861); Tex. Const. art. VII, § 31 (1866). The 1836 Constitution merely gave the Legislature the power "to grant charters of incorporation." Tex. Const. art. II, § 3 (1836). Some earlier charters explicitly reserved the right to buy back corporate franchises, e.g. The Colorado Navigation Company, nn. 17- 18 below and accompanying text.

11. Incorporation of cities was common, e.g., Act of Dec. 14, 1937, 1 H. GAMMEL, LAWS OF TEXAS 1379 (1898) (San Antonio).

A number of the corporations were intended to develop infrastructure: roads, canals, harbors, railroads. These commonly had explicit or implicit monopoly and power of eminent domain. Tax and regulatory provisions are sprinkled among the charters.

Some of today's familiar features are present in each of the early corporations, but there is little consistency in the features the Legislature gave them. One has proxy voting, another has quorum requirements, a third prescribes the method of transfer of shares, a fourth has authority to make bylaws, a fifth has stockholder inspection rights, a sixth has dividend requirements and limitations. They rarely have the same duration or renewal option. It's as though no drafter of a charter saw or read any prior charter.

Nor is there consistency in the language the Legislature used to create corporations.<sup>12</sup> But the language generally reflects the 19th century concept that a corporation is a group of individuals and their successors with certain collective powers and attributes.<sup>13</sup> This contrasts with the present concept of a corporation as an independent entity with powers and attributes largely or wholly unrelated to individuals.

None of the early charters mention limited liability of shareholders, which was apparently left to the uncertainties of the common law.<sup>14</sup>

The first corporation to be chartered by the Republic of Texas was a partial exception to the limitations just described: a grandiose conglomerate. Two individuals in 1836 were "ordained, constituted, and declared to be a body corporate and politic" by the name of The Texas Rail Road, Navigation and Banking Company. The company had authority to connect the Rio Grande and Sabine Rivers—the western and eastern boundaries of the present state, more than 400 miles apart at their nearest—by means of internal navigation and railroads. And it had authority to exercise banking privileges (including two bank branches with the possibility of more by future legislation).<sup>15</sup> The pre-1836 Commercial and Agricul-

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12. The importance of the creating language is exemplified by *Williams v. State*, 23 Tex. 264 (1859), discussed in n. 7 above.

13. Dean Hildebrand so noted while questioning—as late as 1942—whether there could be a one man (i.e. one shareholder) corporation. 1 I. HILDEBRAND, *LAW OF TEXAS CORPORATIONS* 160 (1942); see also *id.* at 22-23.

14. See, e.g., *Walker v. Lewis*, 49 Tex. 123 (1878) (charter provision that no stockholder shall be liable for corporate debt for more than the amount of stock subscribed by him is declaratory of the common law rule).

15. Act of Dec. 16, 1836, 1 H. GAMMEL, *LAWS OF TEXAS* 1188 (1898). The constitutional ban on banking was nine years in the future. The next railroad was the Galveston and Brazos Railroad which also had turnpike powers and an authorized capital of \$500,000 (5,000 shares of \$100, of which \$20 was to be paid on subscription). The charter would forfeit if 10 miles of rail or turnpike were not completed in four years. Act of May 24, 1838, 1 H. GAMMEL, *LAWS OF TEXAS* 1507 (1898).

There was at least one pre 1836 private "company" from the time Texas was part of Mexico and the state of Coahuila and Texas. The Coahuila Manufacturing Co was created for manufacturing cotton and woolen stuffs in Monclova. Governor's Decree No. 160 of Oct. 1, 1830, 1 H. GAMMEL, *LAWS OF TEXAS* 277 (1898). It was to have "active capital" of not more than \$1,000,000 divided into 2,000 shares of \$500, each with one vote. But, in anticipation of some modern efforts to prevent takeovers, no person might have more than

tural Bank is discussed in n. 7 above. The company was authorized to raise capital of \$5 million (50,000 shares of \$100); this could be increased to \$10 million by paying the state a hefty \$100,000 "bonus." Banking could not start until the company had \$1 million capital paid in specie (hard money). There was a usury limit: 10% maximum interest on loans and discounts. When the bank started operating, the company was to pay \$25,000 in gold or silver to the state, plus 2.5% of its net profits from canals and railroads. If the \$25,000 was not paid within 18 months, the charter forfeited. The company's discounting (lending) was limited to three times its paid in capital and the bills it issued (which could not be smaller than \$5) would bear interest at 10% if not redeemed in gold or silver promptly on presentation. It was to give free transportation to government soldiers and munitions. The company had basic corporate powers, e.g., to sue and be sued, to own real and personal property, and—significantly in those days—to have a seal. The company had the somewhat obscure "full power to borrow money upon the faith of this charter." And it had the power of eminent domain for its canals and rail lines. Its directors were authorized to make bylaws. It had continual succession up to a 49 year life (subject to the forfeiture noted above), renewable for another 49 years on payment of \$500,000 in gold or silver plus 5% of net profits from canals and railroads. An amount equal to 1% of the company's dividends was to be paid to the state. A government commissioner was to report annually on the company. We've been unable to learn what, if anything, became of this ambitious company.

The next few corporate charters were for colleges, without stock and apparently nonprofit, but with no limitations on their duration.<sup>16</sup> They were followed by business enterprises more modest than The Texas Rail Road Navigation and Banking Company. The Legislature in 1837 "established a company" (without designating individuals) named the Colorado Navigation Company for "clearing out a channel susceptible of navigation by steam boats or other craft for the Colorado river."<sup>17</sup> The Caney Navigation Company was chartered on the same terms as the Colorado Navigation Company except that its authorized capital was only \$50,000. Act of May 11, 1838, 1 H. Gammel, *Laws of Texas* 1478 (1898). Its authorized capital was \$125,000 (increasable to \$250,000), divided into \$100

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50 votes, regardless of number of shares owned. Although that provision seems to impose no limit on the number of shares a person could own, another section states that, after "the company is established," a person could not increase his holding by more than one share. After 1,000 shares were subscribed, the empresario (organizer) was to call a meeting to elect a president and seven directors for one year terms. Only Mexicans could own shares. Agents had to be bonded for faithful discharge of their duties, and the president and directors were personally liable for injury to the corporation from failing to have agents bonded. A usury limit of 5% was set on loans made by the company. It had a 30 year duration and a 20 year exemption from taxes.

16. Act of June 5, 1837, 1 H. GAMMEL, *LAWS OF TEXAS* 1295 (1898) (Independence Academy and University of San Augustine; the trustees of each incorporated as "a body politic"); Act of June 5, 1837, 1 H. GAMMEL, *LAWS OF TEXAS* 1296 (1898) (Washington College; the trustees incorporated as "a body corporate and politic").

17. Act of Dec. 14, 1837, 1 H. GAMMEL, *LAWS OF TEXAS* 1371-75 (1898).

shares. Commissioners were designated by name to open subscription books at specified places for 20 days, to reduce the largest subscriptions in a prescribed manner if the total exceeded \$125,000, and to reopen the books if the total was less than \$125,000. 5% was to be paid at time of subscription, and the rest on call of the company's directors but not more than \$25 a share (25%) at any one time. Directors could forfeit shares for nonpayment of a call. Basic corporate powers, including the purchase and sale of land, were granted. But land ownership was restricted in multiple ways. The corporation could not "hold more land than may be necessary to carry into effect the objects of this act;" "none of the funds of said corporation shall be used in purchasing lands." But, somewhat inconsistently, "all lands owned by the corporation shall be sold within five years." (Similar restrictions persisted until 1981.) Five directors (each required to own at least five shares) were to be elected annually at Matagorda by plurality of shareholders casting one vote per share, in person or by proxy. The directors were to elect a president. There is a reference to "rules and ordinances of this company" without specification whether they were to be adopted by the shareholders or the directors. Work on the river channel was to begin within nine months. If the channel was not sufficient for steam boats 50 miles upriver from Matagorda in four years, the charter would forfeit. If the channel was sufficient, the company could set and charge tolls. But, in a mandate that foreshadowed later prohibitions on price favoritism in transportation, tolls could be charged only "upon terms of equality to all persons who may wish to navigate the river." In a final restriction, the company was warned not to use any of its capital "except for the removal of obstructions in the river and the navigation of the same," on pain of forfeiture of its charter. Since nothing was said about duration of the corporation, it was apparently perpetual, subject to the forfeitures already mentioned. A supplementary statute specified that the state could purchase or annul the charter, on completion of the contemplated work, by paying the verified cost of the work plus 10%.<sup>18</sup>

Eight individuals were constituted "a body politic and corporate" in 1837 under the name The Texas Steam Mill Company "to operate by steam power or otherwise a saw mill, a grist mill, a planeing mill, a lathe and shingle mill, and any machinery necessary in carrying on such other manufacturing or mechanical business as they shall determine to prosecute; also to prepare materials and erect public and private buildings, stores and offices upon contract."<sup>19</sup> Similar were the Neches Steam Mill Company (\$20,000 capital, increasable to \$50,000; 20 year life),<sup>20</sup> and the Bastrop Steam Mill Company (\$10,000 capital, increasable to \$25,000; 30 year life).<sup>21</sup> The authorized capital was \$30,000 actually paid in, which

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18. Act of Dec. 27, 1837, 1 H. GAMMEL, LAWS OF TEXAS 1453 (1898).

19. Act of Dec. 16, 1837, 1 H. GAMMEL, LAWS OF TEXAS 1418 (1898).

20. Act of Dec. 21, 1838, 2 H. GAMMEL, LAWS OF TEXAS 13 (1898).

21. Act of Dec. 24, 1838, 2 H. GAMMEL, LAWS OF TEXAS 27 (1898).



might be raised to \$50,000 after the first year. The business was to be managed by at least three directors, to be elected by shareholders for one year terms. Directors were to elect a president, secretary and treasurer, to fill vacancies among directors, call stock subscriptions in installments, and to sell publicly stock on which calls were not paid. Quorums were set at a majority for directors and a majority of those present for stockholders. Stockholders had one vote per share, and the right to inspect the company's books of account. The directors were to order a statement of accounts "as often as once a year." Stock was personal property, transferable only on the company books. The company had a lien on stock for a holder's debt to the company. The company was given a 10 year life.

The first insurance company dates from 1837. Nine individuals were "incorporated and created a body politic and corporate" named The Brazoria Insurance Company to write marine and fire insurance.<sup>22</sup> The company was further broadly authorized to buy and sell real and personal property, lend money at interest of 10% or less, and "do all those things which an individual citizen may do in conformity with the law"—but not to engage in banking or circulate notes of the character of bank bills. The authorized capital was \$200,000 (2,000 shares of \$100),<sup>23</sup> to be paid in installments on call of the directors. Directors could forfeit shares for nonpayment of a call. All the shares had to be subscribed, and 10% paid in, before business began. Shares were transferable according to rules made by the president and directors. The nine named individuals were designated as initial directors. Nine directors were to be elected on the first Monday of each January by shareholders who had held their shares for three months. Proxy voting was permitted. The directors were to elect a president. Three directors were a quorum. The directors every six or 12 months were to pay the shareholders a dividend of so much of the profits "as in their discretion they shall deem safe and proper" and pay 1% of that amount (or of the profits; the statute is not clear on this) to Brazoria County for river improvements. The company was given a 30 year life.

As elsewhere in the U.S., railroads were eagerly sought as superior means of transportation, especially for opening up areas for settlement and for moving cattle and crops to markets. In addition to subsidies given in specific corporate charters, an 1854 law granted railroads 16 sections of land for each mile of railroad constructed.<sup>24</sup>

Given the importance of railroads, the sizable amount of capital needed for their construction, and the proliferation of locally promoted short lines, it is not surprising that a considerable amount of corporate law evolved from the railroads. The first approach to a codification of

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22. Act of Dec. 18, 1837, 1 H. GAMMEL, LAWS OF TEXAS 1422 (1898).

23. The authorized capital could be increased, by the president and directors with consent of a majority of the stockholders, in an amount "not exceeding. . . five thousand dollars" on payment of a bonus of \$5,000 to Brazoria County. Since this makes no sense, the first \$5,000 may be a typographical error for \$50,000 or a larger number.

24. Act of Jan. 30, 1854, 3 H. GAMMEL, LAWS OF TEXAS 1455 (1898).

corporate law was an 1853 statute applying to all railroads. Among other things, it required a principal corporate office (at which process could be served) and annual reports to the state,<sup>25</sup> authorized legislative examination of the corporate books,<sup>26</sup> and made directors personally liable for corporate debts if they paid dividends which made the corporation insolvent.<sup>27</sup> This was mixed with mandates for railroad operation, such as requiring that freight cars be in front of passenger cars,<sup>28</sup> and that locomotives have (and use at specified times) steam whistles or 30 pound bells.<sup>29</sup> An 1857 law called for the keeping of stock books at the principal office, open to stockholder inspection,<sup>30</sup> the holding of directors' meetings there,<sup>31</sup> and the making of bylaws by a 2/3ds stockholder vote, with proxy voting permitted.<sup>32</sup> A majority of the directors had to be Texas residents.<sup>33</sup>

### 1.3 PARTNERSHIPS

General partnerships, in which all partners were personally liable for partnership obligations, were recognized as a matter of common law, and apparently rather widely used.<sup>34</sup>

The sole general statutory authorization for business organizations was an elaborate 1846 provision for limited partnerships in any business except banking or insurance.<sup>35</sup> It was modeled on the law of Eastern states<sup>36</sup> and was probably prompted by local merchants' or manufacturers' desire for Eastern financial backing that was not available as straight loans. The Act provided the only widely available protection from personal liability. Only special partners (as limited partners were called) enjoyed the protection. General partners (and there had to be at least one) were personally liable for partnership debts. But the special partners' protection was fragile by modern standards and the required organizational structure was rigid. Contributions had to be paid in cash and could not be withdrawn until dissolution. (This reflected a common 19th century idea that capital was something fixed rather than money to be spent or invested.) Interest could be paid special partners on their contributions so long as the original contributions remained intact as capital of the firm. Profits (if any remained after payment of interest) could be paid special

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25. Act of Feb. 7, 1853, 3 H. GAMMEL, LAWS OF TEXAS, at §§ 4, 13 1339 (1898).

26. *Id.* § 23.

27. *Id.* § 2.

28. *Id.* § 12.

29. *Id.* § 13.

30. Act of Dec. 19, 1857, 4 H. GAMMEL, LAWS OF TEXAS at § 2 897 (1898).

31. *Id.*

32. *Id.* § 4.

33. *Id.* § 3.

34. *See, e.g.,* McKinney & Williams v Bradbury, Dallam 441 (Tex. 1841); Crozier, Rhea & Co. v. Kirker, 4 Tex. 252, (1849); Eakin v. Shumaker, 12 Tex. 51 (1854); Saunders v. Duval's Adm'r, 19 Tex. 407 (1857).

35. Act of May 12, 1846, 2 H. GAMMEL, LAWS OF TEXAS 1585 (1898).

36. Although there are differences in language and arrangement, the Texas statute is very close in substance to the first U.S. limited partnership statute, 1822 N.Y. Laws 259-61.

partners subject to the same restriction. Filing a certificate with the county clerk and six weeks publication of its terms were required to form a limited partnership. Any falsity in the certificate made special partners liable as general partners for the partnership's engagements. Any change in business, capital, or partners' names or shares dissolved the limited partnership and converted it to a general partnership (with special partners liable as general partners) unless it was refiled and republished with the new terms. Any continuation beyond the term of existence specified in the certificate similarly converted the firm to a general partnership unless it was refiled and republished with a new term. Four weeks published notice was required for voluntary dissolution. Special partners could "examine into the state and progress of the partnership concerns and . . . advise as to their management." But only the general partners were authorized to transact business for the firm. They were accountable to each other and to the limited partners in law and equity. Suits relating to the partnership business could be brought by or against the general partners as if there were no special partners. Preferential transfers in or in anticipation of insolvency were declared void; the sanctions included general partner liability for a violating special partner.

#### 1.4 BANKRUPTCY

Many early Texas settlers are thought to have come, at least partly, to escape their creditors farther North and East. So it is not surprising to find a tradition of debtor protection. An 1841 bankruptcy law implemented the tradition, allowing generous exemptions (including a 50 acre homestead) and discharge from further liability.<sup>37</sup> The tradition was somewhat at odds with the creditor protecting pressures for personal liability reflected in the strict limited partnership law and in the difficulties of obtaining a corporate charter. The bankruptcy law served as a safety valve.

#### 1.5 SECURITIES

There was no securities law in the modern sense. There were only limits, set in individual charters, on the amounts of securities that corporations could issue.

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37. Act of Jan. 19, 1841, 2 H. GAMMEL, LAWS OF TEXAS 502 (1898). The 50 acre (or \$500 town lot) homestead had been defined and sheltered from creditors in Act of Jan. 26, 1839, 2 H. GAMMEL, LAWS OF TEXAS 125 (1898). The homestead was expanded to 200 acres (or \$5,000 town lot) in Act of Aug. 15, 1870, 6 H. GAMMEL, LAWS OF TEXAS 301 (1898). Even earlier, before the Republic of Texas, lands acquired under colonization laws were not subject to payment of prior debts, and colonists were not to be sued on prior debts until they had held their lands 12 years. Act of Jan. 13, 1829, Congress of the State of Coahuila and Texas, 1 H. GAMMEL, LAWS OF TEXAS 220 (1898).

## 2. A GROWING STATE ENCOURAGES SOME ASPECTS OF BUSINESS AND REJECTS OTHERS (1860s-1910s)

Moving past joining the U.S. in 1845 and the Civil War, we consider only a few of the legal developments in this period of rapid expansion of farming and ranching after the Reconstruction Era, gradual expansion of finance and industry, steady growth of rail and road communication,<sup>38</sup> relatively fast urbanization and population growth,<sup>39</sup> and sudden intensification after the Spindletop oil discovery in 1901.

### 2.1 BANKING

The constitutional prohibition on incorporated banks continued from 1845 through 1904 except for a brief hiatus in 1869-1876.<sup>40</sup> Private unin-

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38. Texas railroad mileage was:

1853	20
1860	404
1870	591
1880	3,026
1890	8,667
1900	9,838
1910	13,819
1915	15,635
1930	16,900
1940	16,235
1950	15,555
1960	14,477
1970	13,545
1980	13,075
1990	11,541
1998	11,383

Source, Texas Almanac 544 (1978-79); *Id.* 604 (2000-2001) (operated mileage for 1980 and later).

39. See generally, J. SPRATT, THE ROAD TO SPINDLETOP: ECONOMIC CHANGE IN TEXAS, 1875-1901 (1970). State population figures are revealing:

	Total (000)	Urban (000)
1850	212	8
1860	604*	26
1870	818	54
1880	1,591	147
1890	2,235	349
1900	3,048	520
1910	3,896	938
1920	4,663	1,512
1930	5,824	2,339
1940	6,414	2,911
1950	7,711	4,612
1960	9,579	7,186
1970	11,196	8,920
1980	14,228	N.A.
1990	16,986	N.A.
1998	19,759	N.A.

Source: Texas Almanac 338 (1984-85); *Id.* 285 (2000-2001) \*(182,921 slaves of total 604,215).

40. Tex. Const. art. 16, § 16 (1876); earlier provisions are cited *supra* n.4 above. A. Thomas & A. Thomas, *Interpretive Commentary*, 3 Tex. Const. 171-73 (Vernon 1955); M<sup>c</sup>

corporated banks, often offshoots of mercantile firms, in varying degrees supplied the need for deposit, credit and payment facilities. The prohibition finally ended in 1904 when the Legislature was empowered by the Constitution to authorize incorporation of banks by general laws rather than by legislative charter. All banks' authorized capital had to be subscribed and paid in full in cash, and they were not to engage in business at more than one place, i.e. no branch banking.<sup>41</sup> The Legislature passed the first general incorporation law for banks in 1905<sup>42</sup> and many banks were formed. The ban on branch banking, though circumvented in many ways, has remained a controversial part of Texas law until 1986 when the Legislature was permitted to relax it.<sup>43</sup> Federal law in 1864-65 provided for the creation of national banks and virtually eliminated paper money issued by state banks.

## 2.2 CORPORATIONS

In 1874 Texas joined the trend toward business incorporation by general law, i.e. by filing incorporation documents with a state official rather than by having the Legislature enact a special statute for each corporation. The trend began in the U.S. almost a century earlier and became widespread in the later 1800s.<sup>44</sup> Two factors contributed to the trend. One was recognition of the utility of the business corporation as a capital gathering device to finance large scale, capital intensive enterprise, and of the importance of ready availability of the device. The other factor was recognition of the potential—all too often realized—for corruption and bribery in the legislative grant of special charters.

Efforts to shift to incorporation by general laws began in 1871 with Democratic prodding of the Republican controlled Legislature. The 1869 Reconstruction Constitution then in force said nothing about corporations and thus would have permitted general incorporation statutes. But the first two efforts failed because of ineptitude or, as the Democrats charged, from sabotage.<sup>45</sup> The first bill lacked an enacting clause.<sup>46</sup> The second purported to but did not reenact the first.<sup>47</sup> Only the third, after

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Knight, *Tracings of Texas Legal History: Breaking Ties and Borrowing Traditions*, CENTENNIAL HISTORY OF THE TEXAS BAR 1882-1982 at 264 (1981).

41. Tex. Const. art. 16, § 16 (as amended 1904).

42. 1905 Tex. Laws 489.

43. Tex. Const. art. 16 § 16 (as amended Nov. 4, 1986): "Except as may be permitted by the Legislature . . . a state bank shall not be authorized to engage in business at more than one place which shall be designated in its charter." The amendment was implemented, in convoluted fashion, by 1985 Tex. Laws 2d C.S. ch. 13 § 1, later TEX. REV. CIV. STAT. ANN. art. 342-903 (Vernon Supp. 1993), finally repealed by 1995 Tex. Laws ch. 914 § 26(1).

44. H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS 25-26 (3d ed. 1983) and references there. The Texas Law was modeled on Kansas's, according to *Ramsey v. Tod*, 69 S.W. 135 (1902).

45. A. THOMAS & A. THOMAS, INTERPRETIVE COMMENTARY, 2 Tex. Const. 705-05 (Vernon 1955).

46. Act of Dec. 2, 1871, 7 H. GAMMEL, LAWS OF TEXAS 68 (1898).

47. Act of Apr. 23, 1873, 7 H. GAMMEL, LAWS OF TEXAS 494 (1898).

Democrats gained control of the Legislature, was properly passed.<sup>48</sup>

The 1876 Constitution confirmed that “No private corporation shall be created except by general laws”<sup>49</sup> and added that the laws should “provide fully for the adequate protection of the public and of the individual stockholders.”<sup>50</sup> The Constitution specifically mandated one form of that protection by outlawing watered stock (and bonds): “No corporation shall issue stock or bonds except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void.”<sup>51</sup>

The 1874 Act divided private corporations into three kinds: religious, charitable, and “for profit.” Listing profit corporations last suggests they were still not very important or desirable in the minds of the legislators.

Corporations could be created under the 1874 Act only for a limited list of 27 designated purposes or groups of purposes.<sup>52</sup> The first listed purposes were religious or charitable. Many of the rest were for quasi public improvements: bridges, ferries, stage coach lines, sewers, water and gas supply, etc. Fewer than half were for businesses now regarded as typically private: land subdivision and sale, printing and publishing, building construction, hotel establishment and maintenance, “the transportation of goods, wares and merchandise or any valuable thing,” and “the transaction of any manufacturing, mining, mechanical or chemical business.”<sup>53</sup> The statute preceded the list of purposes with the language “The purposes for which corporations. . . may be formed are.”<sup>54</sup> It did not say that a corporation could be organized only for one of the designated purposes or groups of purposes, but the courts so construed it, relying on the section of the statute specifying that the charter should set forth “the purpose”<sup>55</sup> for which the corporation was formed.<sup>56</sup>

Finally a corporation could be organized for “any other purpose intended for mutual profit or benefit not otherwise especially provided for, and not inconsistent with the Constitution and laws of this State.” This uncharacteristically broad language was broadly interpreted to allow a corporation for buying and selling real estate, livestock, bonds, securities and other properties for its own account and for commission.<sup>57</sup> Presumably the language would have permitted almost any other purpose. But it had disappeared from the statute books by 1895.<sup>58</sup> However, successive

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48. Act of Apr. 23, 1874, 8 H. GAMMEL, LAWS OF TEXAS 122 (1898) (hereafter “1874 Act”).

49. Tex. Const. art. 12, § 1 (1876).

50. Tex. Const. art. 12, § 2 (1876).

51. Tex. Const. art. 12, § 6 (1876).

52. 1874 Act § 5.

53. 1874 Act § 6.

54. *Id.*

55. *Id.*

56. Ramsey v. Tod, 69 S.W. 135 (1902).

57. Nat'l Bank of Jefferson v. Texas Inv. Co., 12 S.W. 101 (1889).

58. It was omitted from 1895 Tex. Gen. Laws ch. 130, 10 H. GAMMEL, LAWS OF TEXAS 1242 (1898) which amended 1874 Act § 5 and was codified as TEX. REV. STAT. § 642 (1895). By this time the number of authorized purposes had increased to 55.

amendments brought the list of permitted purposes from 27 to more than 100 (many of them multiple)<sup>59</sup> before particular corporate purposes were abandoned in 1955.

The distrust of corporations in 1874 was manifest in ways other than their limited purposes. Their life was limited to 20 years.<sup>60</sup> And they were prohibited from employing their "stock, means, assets, or other property, directly or indirectly, for any other purpose whatever, than to accomplish the legitimate objects of the creation."<sup>61</sup> Fundamental changes, such as amendment of the charter or consolidation with another corporation, required unanimous consent of shareholders unless explicitly authorized by statute.<sup>62</sup> (This is another reflection of the concept of a corporation as a group of individuals rather an independent entity.) Amendments had to be "germain" to the corporation's purposes. Consolidation was authorized a decade later, apparently only for charitable corporations whose charters had expired,<sup>63</sup> but a similar provision was treated, without analysis, as applicable to business corporations.<sup>64</sup> There was no provision for merger of one corporation into another.

Basic corporate powers were granted by the 1874 Act: to sue and defend, have a seal, buy and sell real and personal property, appoint and remove officers and agents, make bylaws and contracts, change (by stockholder vote) the number of directors (between 3 and 13), and borrow money (up to the amount of their capital stock).<sup>65</sup>

There was no limit on the amount of capital stock that could be specified in the charter, and no requirement that any particular proportion of it be subscribed or paid in.<sup>66</sup> "[W]e find no provision in the law making the existence of the corporation dependent upon the subscription to its stock or the payments therefore."<sup>67</sup> The latter was perceived to be too liberal; 1897 and 1901 amendments required 50% subscription and 10% pay-in before issuance of a charter;<sup>68</sup> 1907 amendments required 100%

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59. TEX. REV. CIV. STAT. ANN. art. 1302 (Vernon 1945).

60. 1874 Act § 11.

61. 1874 Act § 23.

62. *Bonnet v. First Nat'l Bank*, 60 S.W. 325 (Tex. Civ. App. 1900) (dictum that fundamental change without statutory authorization is violation of contract rights of nonassenting shareholder).

63. Act of Apr. 2, 1883, 9 H. GAMMEL, LAWS OF TEXAS 404 (1898).

64. *Tex. Seed & Floral Co. v. Chicago Set & Seed Co.*, 187 S.W. 747 (Tex. Civ. App.—Amarillo 1916, refused) (new corporation, issuing its shares to shareholders of two old corporations which gratuitously transferred their assets to new corporation, was liable for obligations of old corporation).

65. 1874 Act §§ 11, 13. Corporate conveyances of land could be recorded if signed by the president, sealed and acknowledged. 1874 Act § 33. Corporate records were competent evidence if signed by the president and secretary and sealed. 1874 Act § 34.

66. 1874 Act § 14 contemplates an indefinite time for keeping subscription books open. Section 21 authorizes the directors to dispose of capital stock "at any time remaining unsubscribed."

67. *Nat'l Bank*, 12 S.W. at 104.

68. Act of May 7, 1897, 10 H. GAMMEL, LAWS OF TEXAS 1242 (1898); 1901 Tex. Gen. Laws 18.

subscription and 50% pay-in.<sup>69</sup> Capital stock could be increased up to double on majority stockholder vote.<sup>70</sup> Stock was personalty, transferable only on the corporate books in accordance with the bylaws.<sup>71</sup> Limited liability was explicitly granted: a stockholder was not “liable to pay the debts of the corporation beyond the amount unpaid on his stock.”<sup>72</sup>

Corporations could be formed by any three persons (including two Texas citizens) filing with the Secretary of State a charter including name, address, purpose, term, names and addresses of initial directors, amount of capital stock, and number of shares.<sup>73</sup> Corporations were required “to commence active operations” within three years after filing their charters, or their charters would forfeit.<sup>74</sup>

Directors were to be elected annually by stockholders, fill vacancies, elect one of themselves president, elect other officers, transact the corporate business and manage its affairs, and collect its stock subscriptions; a majority of the directors constituted a quorum.<sup>75</sup> Directors could make bylaws but a majority vote of shareholders could change them.<sup>76</sup> Directors were to keep books and records; stockholders were entitled to inspect them. On requirement of 1/3 of the stockholders, directors were to present written reports “of the situation and amount of business of the corporation, and declare and make such dividends of the profits from the business of the corporation as they shall deem expedient, or as the bylaws may prescribe.”<sup>77</sup> If directors knowingly paid a dividend while the corporation was insolvent, or that would make it insolvent, they became personally liable—to the extent of the dividend—for existing corporate debts and future debts contracted while they continued in office.<sup>78</sup>

Special empowering and regulating provisions—reminiscent of the previous legislative charters—were added for nine particular kinds of companies including macadam and plank roads, telegraphs, and cemeteries.<sup>79</sup>

Foreign corporations were first required in 1887 to obtain a permit to do business in Texas.<sup>80</sup> But the law was unconstitutional because—in a provision apparently copied from Iowa—it forfeited the permit of a corporation which removed to federal court a suit filed against it in state court.<sup>81</sup> An 1889 law cured that defect.<sup>82</sup>

A great leap forward in the liberation of women occurred in 1887 when women were allowed to be incorporators, officers, directors and share-

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69. 1901 Tex. Gen. Laws 309.

70. 1874 Act § 12.

71. 1874 Act § 24.

72. 1874 Act § 41.

73. 1874 Act § 6.

74. 1874 Act § 36.

75. 1874 Act §§ 15, 16, 21, 25.

76. 1874 Act § 17.

77. 1874 Act § 21.

78. 1874 Act § 28.

79. 1874 Act §§ 42-81.

80. Act of Apr. 2, 1887, 9 H. GAMMEL, LAWS OF TEXAS 914 (1898).

81. *Tex. Land & Mortgage Co. v. Worsham*, 13 S.W. 384 (1890).

82. Act of Apr. 3, 1889, 9 H. GAMMEL, LAWS OF TEXAS 1115 (1898).



holders—but only of certain nonprofit corporations: charitable, educational, missionary, literary, scientific, library, painting, music and fine arts but not churches.<sup>83</sup>

### 2.3 PARTNERSHIPS

There was no significant change in partnership law in this period. Business trusts (also known as Massachusetts trusts), which had been rather widely used—partly in hopes of avoiding federal corporate income tax—were held to be partnerships so that beneficiaries were liable for debts of the trust.<sup>84</sup> The court stressed that limited liability in a noncorporate organization could be achieved only through the limited partnership statutes.

### 2.4 BANKRUPTCY

Federal bankruptcy law preempted state law—as to discharge of debtors from further liability—from 1898, although state law of fraudulent conveyances and assignment for benefit of creditors survived.

### 2.5 ANTITRUST AND REGULATION

The Populist sentiment abroad in the land inspired Texas to adopt one of the earliest antitrust laws a year before the federal Sherman Anti Trust Act of 1890.<sup>85</sup> The Texas Act defined a trust as a combination to restrict trade, reduce production, prevent competition, or raise, lower or fix prices. Without explicitly outlawing or prohibiting trusts, it prescribed various sanctions for them, including fines, prison sentences, voidness of contracts and forfeiture of corporate charters.<sup>86</sup> Much of this law is still on the books.<sup>87</sup> Even before the antitrust statute was enacted, Attorney General James S. Hogg had obtained an injunction against the Texas Traffic Association, an organization of nine railroads with contractual power to set freight and passenger rates binding on the members.<sup>88</sup> The antitrust laws were enforced with some vigor in this period. The most famous example resulted in the Waters-Pierce Oil Company (a part of the Rockefeller controlled Standard Oil Company) paying a \$1.8 million fine in cash to the State.<sup>89</sup>

Another Populist product was the Railroad Commission, created in

83. Act of Apr. 2, 1887, 9 H. GAMMEL, LAWS OF TEXAS 901 (1898). See generally Amsler, *The Status of Married Women in the Texas Business Association*, 43 TEXAS L. REV. 669 (1965).

84. *Thompson v. Schmitt*, 274 S.W. 554 (1925), noted 39 Harv. L. Rev. 276 (1925). See generally Hildebrand, *The Massachusetts Trust*, 1 TEXAS L. REV. 127 (1923); *Liability of the Trustees, Property and Shareholders of a Massachusetts Trust*, 2 TEXAS L. REV. 139 (1924); *Massachusetts Trust—a Sequel*, 4 TEXAS L. REV. 57 (1925).

85. 26 Stat. 209 (1890).

86. Act of Mar. 30, 1889, H. GAMMEL, LAWS OF TEXAS 1169 (1898).

87. See Tex. Bus. & Comm. Code §§ 15.01-15.26.

88. *Gulf C. S. & F. Ry. v. State*, 10 S.W. 81 (1888).

89. Colorful accounts, complete with pictures of the payment, include Jackson, *Waters-Pierce Cases—Another Visit*, 38 TEX. BAR J. 529 (1975); Wallace, *Waters-Pierce Oil Com-*

1891 under the leadership of Hogg who was then Governor.<sup>90</sup> The Commission was to regulate the railroads, by this time viewed as powerful and corrupt, bloated with watered stock and bonds, badly managed and, above all as gouging most shippers while giving rebates to some.<sup>91</sup> The Legislature charged the Commission particularly to prevent discrimination and extortion by the railroads, and to set reasonable freight and passenger rates.<sup>92</sup> The Commission survives today, although its far more important function has become the regulation of oil and gas.

## 2.6 SECURITIES

Texas developed or attracted its share of those who sought to get rich quick by appealing to others who sought to get rich quick through land, oil, corporate stock or other interests. The greedy or crooked sold to the greedy or gullible. We have already noted the constitutional prohibition on watered stock and bonds.<sup>93</sup> An 1893 statute that was narrowly focused on railroads imposed a number of anti watering restrictions that suggest the constitution was being widely ignored. A railroad's bonds each had to be registered with the Secretary of State and were limited, in total, to the value of the railroad's property or (with Railroad Commission permission) to 150% of that value. The Company secretary had to file with the Railroad Commission for each stock certificate a statement that proper consideration had been received for it. Total stock could not exceed the value of the railway property.<sup>94</sup>

The state's first relatively broad "blue sky law" regulating sale of corporate stock was enacted in 1913, according to its emergency clause, because "numerous corporations. . .are selling. . .stocks throughout this State, many of which are worthless, and. . .the people of this State are being imposed upon by unscrupulous persons selling such worthless stocks."<sup>95</sup> Its main targets were apparently mineral, land and town site companies. Principal abuses at which it aimed were excessive promotion (free or cheap stock for the organizers) and excessive commissions (to sellers). In passing the statute, Texas was following closely on the heels of Midwest states, led by Kansas.<sup>96</sup>

The 1913 statute had rudiments of securities registration (with permits issued on a vague fairness standard discretionarily applied), agent regis-

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*pany Case Revisited*, 24 TEX. BAR J. 221 (1961); Sanford, *Texas Million Dollar Anti-Trust Suit*, 11 TEX. BAR J. 167 (1948).

90. Family tradition has it that my grandfather, proprietor of I. G. Bromberg & Co., the general store of Mineola, Texas, sold Hogg—on credit—the suit in which he began campaigning for election.

91. See generally J. STOVER, *AMERICAN RAILROADS* 104-42 (1961).

92. 1891 Tex. Laws ch. 51, 10 H. GAMMEL, *LAWS OF TEXAS* 55 (1898). The origins and limited accomplishments of the Commission are discussed in J. SPRATT, *THE ROAD TO SPINDLETOP: ECONOMIC CHANGE IN TEXAS, 1875-1901* 210-27 (1970).

93. See *supra* text accompanying note 49.

94. Act of Apr. 8, 1893, 10 H. GAMMEL, *LAWS OF TEXAS* 486 (1898).

95. 1912 Tex. Gen. Laws 66, 71.

96. 1911 Kan. Laws ch. 133 was the first relatively comprehensive securities statute.

tration, exemptions, criminal and civil liability and other enforcement mechanisms, fraud prevention and other investor protections which persist today in greatly refined form. The paternalistic pattern of state determination of which securities investors may buy survived through most of the 20<sup>th</sup> century.

The statute was detailed but muddled. It applied—subject to exemptions noted below—to existing corporations increasing their capital stock, to proposed corporations selling stock and paying commissions (or promotion), and, somewhat redundantly, to proposed corporations with land or mineral assets, and to town site corporations. These corporations, or their promoters, were to file with a state official (the Commissioner of Insurance and Banking for corporations under his jurisdiction, the Secretary of State for other corporations) a statement of their plans to sell stock (including price, commissions and promotion) and to organize their corporations. Land or mineral companies were to state the facts on which they based their estimate of actual value of their assets. They were to furnish other information necessary or proper concerning the sale of the stock. The official could employ experts—presumably to verify value or other information in the statements—at the expense of proposed corporations. The official could also examine a corporation's books and investigate it at the corporation's expense. A town site company was to file its town site plans and advertising and could not be chartered unless the Secretary of State was satisfied that the business would be “honestly and fairly conducted both to the corporation and to the public.”

The official would issue a permit for the stock sale if he found that the sale would be “fairly and honestly conducted” and the commissions and expenses would not exceed 15%. Suit could be brought to compel issuance of a permit if refused. The official could cancel a permit, after notice and opportunity, for noncompliance with the statute. Suit could be brought to reinstate. No standards are set out for either kind of suit.

Commissions and expenses were to be disclosed to prospective investors in the company's subscription lists and contracts. A surety bond of \$1,000 to \$100,000 but not more than 10% of the proposed stock sale was required, payable to the official, conditioned on truth of the statement and sale of the stock in compliance with the statute. Buyers “by reason of any misrepresentation of any material fact concerning such stock” could sue on the bond. But no right to sue the seller is mentioned. Names and addresses of all corporate officers, agents and employees were to be filed with the official.

Companies were to keep records of their stock sales and stockholders. Sale proceeds were to be deposited in a bank and refunded if a proposed corporation was not organized in two years, unless the state official extended the time. Foreign corporations (except lenders and some insurance companies) were denied permits unless their stock was at least 50% subscribed and paid in. Foreign corporations were required to consent to service of process. Selling or offering stock of a profit corporation with-

out compliance with the statute could bring a fine of \$25-\$2,000 and one year in jail.

Corporations exempt from the statute were national and Texas banks, railroads, and interurban and street railways. The bank and railroad exemptions probably reflect the lobbying power of those industries, although the exemptions were undoubtedly rationalized on the ground of extensive administrative regulation of the two industries. In view of the boom and bust history of those industries, both before and after this period, there is irony in their exemptions.

Transactions exempt from the statute were sales to 25 or fewer bona fide buyers, resales by bona fide buyers not acting for the issuing corporation, and sales by bona fide stock brokers of stock previously bought by bona fide buyers.

A 1919 statute created a powerful private cause of action for material false representations and false promises in real estate transactions and—apparently incidentally—stock transactions.<sup>97</sup> The victim could recover the difference between the value as represented (or as if the promise had been kept) and the value as delivered, i.e. benefit of the bargain damages. All persons making or benefiting from the false representation or promise were jointly and severally liable. And those acting willfully or knowingly were liable for exemplary damages up to double the amount of actual damages.

## 2.7 COMMERCIAL LAW

In the last decade of the 19th century and the early decades of the 20th, substantial efforts were made to codify commercial law and make it uniform across the U.S. Texas joined those efforts very slowly, adopting the 1896 Uniform Negotiable Instruments Law in 1919,<sup>98</sup> the 1906 Uniform Warehouse Receipts Act in 1919,<sup>99</sup> the 1909 Uniform Stock Transfer Act in 1943,<sup>100</sup> and the 1933 Uniform Trust Receipts Act in 1959,<sup>101</sup> and Texas did not adopt a number of related uniform acts, such as bills of lading, fraudulent conveyances and chattel mortgages.

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97. 1919 Tex. Laws 77. The emergency clause refers only to land, reciting “that there are now in this State a number of fraudulent land schemes, and that a great number of citizens of this State have been defrauded thereby, and that there is now no comprehensive law protecting [them] from being defrauded by false representations and promises.” *Id.* § 4. In part the statute codified the common law of fraud. The present version is TEX. BUS. & COMM. CODE art. 27.01.

98. 1919 Tex. Gen. Laws 190.

99. 1919 Tex. Gen. Laws 215.

100. 1943 Tex. Gen. Laws 722.

101. 1959 Tex. Laws 652.

### 3. A RAPIDLY EXPANDING AND INDUSTRIALIZING ECONOMY FURTHER ENCOURAGES BUSINESS BUT CONTINUES TO RESTRICT SOME ASPECTS (1950S-1980S)

The memory of East Texas oil prosperity is lost after the Depression. World War II brings defense industry and mobilization. . Public ownership of corporations spreads. In this and the next era we can identify many of the persons and institutions responsible for changes in Texas law. The rest of this article is somewhat fuller than the first part. But it is not a detailed analysis or even a complete summary of every statute. Rather it is an effort to identify significant stages and developments over a two-decade span. More detailed accounts of legislation as well as case law for this period can be found in the Annual Surveys of Texas Law from the 1970 on in the *Southwestern Law Journal* and *SMU Law Review*.

#### 3.1 BANKING

While state banking law continues to exist, and to proliferate,<sup>102</sup> banking law was increasingly federal, administered by the Federal Reserve Board, the Federal Deposit Insurance Corporation and the Comptroller of the Currency. We make no attempt to cover it here.<sup>103</sup>

#### 3.2 CORPORATIONS

A major development in Texas business law was the Texas Business Corporation Act of 1955 (TBCA), a comprehensive and relatively flexible statute filling many gaps in the 1874 Corporation law (and its successive amendments) and relieving many of the serious rigidities imposed by that Law. These rigidities became increasingly burdensome as ownership of corporate shares became widespread. Many of the shortcomings of Texas corporate law had been noted by Dean Ira P. Hildebrand in his 1942 treatise.<sup>104</sup> Many were discovered by Prof. Edmund O. Belsheim in trying to teach Texas corporate law while visiting at Austin from Nebraska. His 1949 call for reform<sup>105</sup> helped galvanize and guide the reshapers of Texas corporate law. But the driving force was Paul Carrington of the Dallas Bar. He had served on the American Bar Association Committee that revised the Model Business Corporation Act (which was based on the Illinois Business Corporation Act of 1933). He persuaded the State Bar of Texas to form a Committee on Revision of Corporate Laws in 1950 and was its chairman. Initial members were Adrian F. Levy, Sr. of Galveston, Lewis Scott Wilkerson, Assistant Secretary of State, and three professors: E. W. Bailey of the University of Texas, J. Leon Lebowitz of Baylor, and Talbot Rain of Southern Methodist. Early additions to the Committee included Peyton B. Randolph of Plainview

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102. See generally TEX. FINANCE CODE §§ 31.001-59.310.

103. See, e.g., J. NORTON, BANKING LAW MANUAL ch. 3 (1983).

104. I. HILDEBRAND, THE LAW OF TEXAS CORPORATIONS (4 vols. 1942).

105. \_\_\_\_\_ Belsheim, *The Need for Revising the Texas Corporation Statutes*, 27 TEXAS L. REV. 659 (1949).

and Prof. Margaret Amsler of Baylor. Working from the Model Act, the Committee prepared and published an exposure draft and request for comments in 1951,<sup>106</sup> received numerous comments, and made responsive modifications and refinements. These were given further public exposure.<sup>107</sup> The statute was introduced in the 1953 Legislature and reported favorably—but loaded with 65 amendments—by a House Committee too late in the session to be acted on.<sup>108</sup> The primary point of controversy was a proposal that a 2/3ds (rather than 4/5ths) vote of stockholders would suffice for merger, consolidation, asset sale and dissolution.

With the addition of George Slover, Jr. of Dallas and Robert S. Trotti of the Attorney General's Office to the Committee in 1953, some further modifications were made and the statute passed with little further change in 1955.<sup>109</sup> Among highly important provisions differing from the 1874 Act, it authorized multiple corporate purposes,<sup>110</sup> perpetual duration,<sup>111</sup> repurchases of a corporation's own shares,<sup>112</sup> redemption of shares,<sup>113</sup> different classes of shares (including shares whose terms could be fixed by directors),<sup>114</sup> restrictions on share transfers,<sup>115</sup> classification (staggering) of directors,<sup>116</sup> executive committees of directors,<sup>117</sup> actions by unanimous shareholder consent without a meeting,<sup>118</sup> appraisal rights for shareholders dissenting from mergers and certain other corporate actions,<sup>119</sup> and major actions on approval of directors and 4/5ths shareholder vote: merger, consolidation, asset sales and dissolution.<sup>120</sup> The Act

106. 14 TEX. B. J. 219 (May 1951).

107. E.g., *Symposium on the Proposed Business Corporation Act*, 4 BAYLOR L. REV. 405 (1952). One of the symposium articles traces the history of Texas corporate law and the development of the proposed Act. Carrington, *History of the Proposed Texas Business Corporation Act*, 4 BAYLOR L. REV. 428 (1952).

108. A brief summary of the early development of the Act is Carrington, *Revision of Corporation Laws*, 17 TEX. B. J. 381 (1954). The 1953 bill was H.B. 27, 53d Leg. Reg. Sess. (1953). Files of the SMU members of the Committee from 1950 on are in the Underwood Law Library at SMU.

109. *Tex. Bus. Corp. Act* (1955). The emergency clause, with the inimitable sweep of Paul Carrington's style, refers to the incompleteness, inconsistency, and uncertainty of existing law; the need for clarification; the modern laws of other states; and the loss of Texas enterprise and tax revenue because of incorporation in other states. *Id.* art. 11.01.

110. *Tex. Bus. Corp. Act* art. 2.01 (1955). At the same time it did away with the restricted list of statutory purposes which had grown to more than 100 by 1955. The 1955 Act required purposes to be stated fully in the charter. Later amendment eliminated this requirement and made it sufficient for the charter to state that a corporation was organized "for the transaction of and all lawful business." *Tex. Bus. Corp. Act* art. 3.02A(3) (Vernon 1987 Supp.); see also *id.* art. 2.01. See generally Michael A. Schaeftler, *The Purpose Clause in the Certificate of Incorporation: A Clause in Search of a Purpose*, 58 ST. JOHN'S L. REV. 476 (1984), reprinted 28 *Corp. Prac. Commentator* 297 (1986).

111. *Tex. Bus. Corp. Act* (1955) art. 3.02A(2).

112. *Id.* art. 2.03.

113. *Id.* arts. 4.08-4.10.

114. *Id.* arts. 2.12-2.13.

115. *Id.* art. 2.22.

116. *Id.* art. 2.33.

117. *Id.* art. 2.36.

118. *Id.* art. 9.10A.

119. *Id.* arts. 5.11-5.13.

120. *Id.* arts. 4.02, 4.03, 5.03, 5.10.

abolished (with minor exceptions) the ultra vires doctrine which had hampered corporations with single or narrow purposes.<sup>121</sup> The Act provided cumulative voting of shares (a proportional representation device) unless denied in the charter.<sup>122</sup> It made the directors' (or shareholders') determination of the value of property received for shares conclusive in the absence of fraud.<sup>123</sup> It set detailed limits on the payment of dividends and other distributions.<sup>124</sup>

The 1955 TBCA had a 5-year transition period in which it did not apply to preexisting corporations unless they adopted it.<sup>125</sup> Institutes were held to publicize the Act and assist lawyers in dealing with it.<sup>126</sup>

Despite the TBCA's advances, Texas was regarded even by many Texas lawyers as less attractive than Delaware as a place to incorporate, particularly as to loans to and indemnification of officers and directors, shareholder appraisal rights, and certain shareholder vote requirements.

The TBCA continued to serve well<sup>127</sup> partly because it was well drafted initially and partly because it has had the continuing attention of the Corporations Committee of the State Bar. The Committee watched for problems in the Act and served as a clearing house for problems discovered by others. It proposed amendments to solve problems which seemed worthy of legislative action. The Committee has written substantially all of the amendments since 1955 as well as comments—published in Vernon's Texas Annotated Texas Statutes—on the original Act and amendments. The comments explain the provisions, advise on their use, and reveal their drafters' intent.<sup>128</sup> They serve as an unofficial legislative history that is valuable in a state where official legislative history was rarely substantive or easily accessible.

A Non-Profit Corporation Act,<sup>129</sup> passed in 1959, was parallel in structure to the TBCA and was also the product of the Bar's Corporations Committee. Prof. Margaret Amsler of Baylor headed this effort.<sup>130</sup>

121. *Id.* art. 2.04.

122. *Id.* art. 2.29D.

123. *Id.* art. 2.16C.

124. *Id.* arts. 2.38-2.40.

125. *Id.* § 9.14B.

126. E.g., Proceedings, Texas Business Corporation Act Institute (Nov. 10-11, 1955), reprinted in 3A TEX. REV. CIV. STAT. ANN. 443 (Vernon 1956). Educational efforts dealing with later amendments included Bromberg, *Corporate Organizational Documents and Securities—Forms and Comments*, 28 SW. L.J. 874 (1974), reprinted in State Bar of Texas, PRACTICE SKILLS COURSE (1975) and in 18 CORP. PRAC. COMMENTATOR 1 and 137 (1976); Alan R. Bromberg, *Corporate Organizational Documents and Securities—Forms and Comments Revised*, 30 SW. L.J. 961 (1976).

127. A 10th anniversary evaluation is Carrington, *The Texas Business Corporation Act As Enacted and Ten Years Later*, 43 TEXAS L. REV. 609 (1965).

128. Other educational efforts of the Committee are cited in nn. 101-02, 121 above and accompanying text.

129. 1959 Tex. Laws 286, now, with amendments, TEX. REV. CIV. STAT. ANN. arts. 1396-1.01 - 1396-11.01.

130. See Margaret H. Amsler, *The Texas Non-Profit Corporation Act: Past, Present and Prospective*, 10 BAYLOR L. REV. 307 (1958). My followup helped users of the Act, Alan R. Bromberg, *Non-Profit Corporations: Organizational Problems and Tax Exemptions*, 17 BAYLOR L. REV. 125 (1965).

## 3.3 PARTNERSHIPS

Paul Carrington's work on the Business Corporations Act was an inspiration to many of us. As an associate in the law firm he headed, I had a minor hand in the original TBCA. Shortly after I joined the SMU law faculty in 1956, I became a member of the State Bar Corporations Committee and have participated in its activities since then. My early teaching and writing focused partly on general partnerships, then entirely a matter of case law. This work led me to see problems there similar to those in corporations, and to propose a similar solution based on the 1914 Uniform Partnership Act.<sup>131</sup> Paul Carrington's support was instrumental in John Jackson's appointment of a Dallas Bar Committee in 1959 to study and refine that proposal. I chaired that Committee which studied the Uniform Act over the course of a year and made some modifications, particularly to adapt to Texas community property concepts. The Committee's bill was published for comment,<sup>132</sup> sponsored by the State Bar, and enacted with few amendments in 1961.<sup>133</sup> The main changes accomplished by the Act included preponderant treatment of the partnership as an entity (rather than as an aggregate of individuals), clearer rules for determining the existence of a partnership when disputed, clarification of the very limited rights of partners in specific partnership property, establishment of priority of partnership creditors in partnership assets, creation of a charging order for a partner's individual creditor against his or her interest in the partnership, authorization of a partnership to acquire and dispose of any estate in real property, specification of rights of partners inter se, clarification of the grounds and consequences of dissolution and authority for the partners to agree that death would not dissolve.<sup>134</sup> The Act codified the fiduciary obligations of partners which were already well developed in case law.<sup>135</sup> Bar Committee members provided guidance for users.<sup>136</sup>

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131. Byron D. Sher & Alan R. Bromberg, *Texas Partnership Law in the 20th Century—Why Texas Should Adopt the Uniform Partnership Act*, 12 Sw. L.J. 263 (1958).

132. Bromberg, *The Proposed Uniform Partnership Act*, 14 Sw. L.J. 437 (1960).

133. 1961 Tex. Laws 289, codified as TEX. REV. CIV. STAT. ANN. art. 6132b (Vernon 1962) later replaced by TRPA discussed in Part 4.3(2) below. The changes made in the Legislature, and the reasons for them, are detailed in Alan R. Bromberg, *Texas Uniform Partnership Act—The Enacted Version*, 15 Sw. L.J. 386 (1961).

134. See generally, Alan R. Bromberg, *Partnership Dissolution—Causes, Consequences, and Cures*, 43 TEXAS L. REV. 631 (1965).

135. E.g., *Johnson v. Peckham*, 120 S.W.2d 786 (1938). Much of Texas fiduciary law developed in cases of sharp trading among partners or joint venturers in the oil and gas industry. Examples besides *Johnson v. Peckham* include *Huffington v. Upchurch*, 532 S.W.2d 576 (Tex. 1976); *Smith v. Bolin*, 271 S.W.2d 93 (1954), on remand, 294 S.W.2d 280 (Tex. Civ. App.—Ft. Worth 1956, writ refused n.r.e.); *Fitz-Gerald v. Hull*, 237 S.W.2d 256 (1951); *MacDonald v. Folett*, 180 S.W.2d 334 (Tex. 1944). On fiduciary duty in corporations, see e.g., *Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567 (Tex. 1963).

136. Alan R. Bromberg & Joseph M. Stuhl, *A Suggested Form of Partnership Agreement for Use under Texas Uniform Partnership Act*, 24 TEX. BAR J. 933 (1961), modified and reprinted, inter alia, in ALAN R. BROMBERG, CRANE & BROMBERG ON PARTNERSHIP 597 (1968), in 19 ROBERT HAMILTON, TEXAS PRACTICE, BUSINESS ORGANIZATIONS 85 (1973), and in F. ELLIOTT & HAL M. BATEMAN, 8A WEST'S TEXAS FORMS—BUSINESS ENTERPRISES: PARTNERSHIPS AND UNINCORPORATED ASSOCIATIONS 37 (1980); Alan R.



The partnership statute served well, partly because it leaves the partners almost complete freedom to determine by agreement the structure of their firm and their relations to one another. A national move began to revise the 1914 Uniform Partnership Act, in part along lines developed in Texas.<sup>137</sup>

Prof. Arthur L. Harding of SMU is credited with pointing out the need for a more usable limited partnership law, especially in oil and gas drilling activity. The 1916 Uniform Limited Partnership Act was passed in Texas in 1955,<sup>138</sup> replacing the 1846 statute discussed above. The later Act gave limited partners better protection against liability. It rejected the concept that limited partners were in essence general partners but shielded from liability only by strict compliance with prescribed formalities of organization and operation. Substantial compliance with formalities became sufficient. Limited partners' contributions could be in property as well as cash. Restrictions on distribution of profits and return of contributions were eased. But the Act adhered to the basic concept that a limited partner taking part in control of the partnership business loses limited liability.

A Partnership Committee of the State Bar was formed in 1974. I have been a member since its inception, and chaired it in 1979-81. It became the monitor and modifier of the partnership statutes as the Corporations Committee was of the corporation statutes. One of its first projects was to clarify the uncertain status of limited partnerships formed in other states but doing business in Texas. A 1977 amendment drafted largely by George W. Coleman of the Dallas Bar and me provided for voluntary qualification as a foreign limited partnership; qualification would assure that internal affairs and liabilities of limited partners would be governed by the laws of the jurisdiction in which the partnership was formed.<sup>139</sup>

The Texas Supreme Court in its famous 1975 Delaney opinion manifested 19th century hostility to limited liability by calling for strict compliance with the limited partnership act and holding that limited partners would be personally liable for partnership debts if they took part in control of the partnership business in the capacity as officers and directors of the corporate general partner.<sup>140</sup> The court effectively disregarded the separate entity of the corporation. And, more seriously, the court raised, but did not decide, the question whether a corporation could be the sole general partner of a limited partnership. Virtually all corporate lawyers

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Bromberg, *Source and Comments*, 17 TEX. REV. CIV. STAT. ANN. 234 (Vernon 1962); Alan R. Bromberg, *Partnership Dissolution—Causes, Consequences and Cures*, 43 TEXAS L. REV. 631 (1965), modified and reprinted in 7 LAW OFFICE ECONOMICS AND MANAGEMENT 27 and 159 (1966); ALAN R. BROMBERG, CRANE & BROMBERG ON PARTNERSHIP (1968).

137. UPA REVISION SUBCOMM. OF ABA PARTNERSHIP COMM., CORP., BANK. & BUS. LAW SECTION, *Should the Uniform Partnership Act Be Revised?* (Apr. 1986).

138. 1955 Tex. Laws 471 codified as TEX. REV. CIV. STAT. ANN. art. 6132a (Vernon 1970), later replaced by TRLPA discussed in Part. 4.3(1) below.

139. 1977 Tex. Laws 1107, now TEX. REV. CIV. STAT. ANN. art. 6132a § 32 (Vernon Supp 1987). The same amendment authorized limited partners to sign by power of attorney, now *id.* § 33.

140. *Delaney v. Fidelity Lease Ltd*, 526 S.W.2d 543 (Tex. 1975).

thought it plain that both partnership and corporate law expressly permitted corporate general partners, and corporate general partners were widely used. Seizing on the mention of the issue in Delaney and a 1945 public policy statement of the Supreme Court that had been flatly contradicted by later legislation, the Attorney General opined in 1978 that a corporation could not be the sole general partner of a limited partnership.<sup>141</sup> An immediate outcry, including sharp criticism by law professors at SMU, Texas Tech and Austin,<sup>142</sup> led to withdrawal of that part of the opinion within a week.<sup>143</sup>

The same Attorney General's Opinion concluded that unanimous consent of partners was necessary for various actions including dissolution, asset sale, and amendment of the partnership agreement. This too provoked outcry,<sup>144</sup> and concession of error by the Attorney General.<sup>145</sup> To put these and related problems to rest the State Bar Partnership Committee wrote and procured passage of amendments in 1979 authorizing corporations (and partnerships, trusts, estates and others) to be general or limited partners,<sup>146</sup> and permitting nonunanimous votes as provided in the partnership certificate.<sup>147</sup> The amendments also shielded limited partners from personal liability in a variety of situations including acting as officers or directors of corporate general partners and voting on dissolution, amendment, asset sale and other important matters.<sup>148</sup> And even if they took part in control, they would be liable only to a creditor reasonably believing them to be general partners. Thus were the Delaney and Attorney General's views rejected in favor of flexibility and limited partner protection.<sup>149</sup>

The Bar Partnership Committee provided comments on the 1977 and 1979 amendments,<sup>150</sup> as well as a heavily annotated model form of lim-

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141. Op. Att'y Gen. Tex. H-1229 (Aug. 16, 1978).

142. The professors' letter of Aug. 22, 1978 to the Attorney General was published later in Bromberg, Bateman, Hamilton, Lebowitz and Winship, *Corporate General Partners*, 16 BULL. OF SEC. ON CORP., BANK. & BUS. LAW 24 (No. 1, Sept. 1978).

143. Op. Att'y Gen. Tex. H-1229a (Aug. 23, 1978).

144. E.g., Bromberg, Bateman, Hamilton, Lebowitz and Winship, *UNANIMITY REQUIREMENTS IN LIMITED PARTNERSHIPS*, 16 BULL. OF SEC. ON CORP., BANK. & BUS. LAW 3 (No. 2, Dec. 1978).

145. Op. Att'y Gen. Tex. H-1321 (Dec. 29, 1978) (unanimity "is not necessarily required").

146. 1979 Tex. Laws 1781 §§ 2 and 5, codified as TEX. REV. CIV. STAT. ANN. arts. 6132b § 6-A and art. 6132a § 2-A (Vernon Supp. 1980), later replaced by TEX. REV. CIV. STAT. ANN. arts. 6132b §§ 2.01(a), 1.01(14) and art. 6132a-1 § 1.02(6) and (12) (Vernon Supp. 2001).

147. 1979 Tex. Laws ch. 723 § 3, codified as TEX. REV. CIV. STAT. ANN. arts. 6132a § 10(b) (Vernon Supp. 1987), later art. 6132a-1 § 3.03(b)(8)(H) (Vernon Supp. 2001).

148. 1979 Tex. Laws 1781 § 2, codified as TEX. REV. CIV. STAT. ANN. arts. 6132b § 8 (Vernon Supp. 1980), later TEX. REV. CIV. STAT. ANN. art. 6132a-1 § 3.03(b) (Vernon Supp. 2001).

149. The policy issues are well discussed in George Coleman & David A. Weatherbie, *Special Problems in Limited Partnership Planning*, 30 Sw. L.J. 887 (1976).

150. 17 TEX. REV. CIV. STAT. ANN. 13-15, 18 (Vernon Supp. 1987).

ited partnership agreement.<sup>151</sup>

### 3.4 SECURITIES

The federal Securities Act of 1933 and Securities Exchange Act of 1934 have dominated securities law since their enactment. But they expressly preserved state jurisdiction. So state law continued to be important, especially in states like Texas which required securities to meet a government-tested "fairness" or "merit" standard rather than letting investors make their own decisions on fully disclosed information about the security.

The 1913 Texas Securities Act mentioned above was tightened somewhat by its 1923 replacement, which was notable for raising the criminal penalties for certain securities violation to 10 years in prison.<sup>152</sup> A more comprehensive law was passed in 1935,<sup>153</sup> probably inspired by the speculations and misfortunes of the 1920s and the federal laws of 1933 and 1934 they elicited. The 1935 Texas law broadened the state official's discretion to grant (or deny) a permit to sell securities by adding the famous "fair, just and equitable" test.<sup>154</sup> The law required registration of securities dealers and agents (salespeople).<sup>155</sup> Many exemptions were added, among them bona fide reorganizations, mergers, trust companies, and

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151. Partnership Law Committee, *Limited Partnership: Model Agreement and Certificate With Commentaries*, 26 S. TEX. L.J. 25 (1985).

152. 1923 Tex. Gen. Laws 114. The 10 year penalties are in §§ 12, 14, and 17. Other changes included broadening the coverage to embrace interests in joint stock associations and other noncorporate organizations. The standard for granting a permit was amplified to include a requirement "that values warrant" the permit. *Id.* § 5. But there was relaxation in an important respect: the limit on expenses and promotion was raised from 15% to 20% and "stock issued for property or other things of its equivalent value shall not be classed as promotion stock, the values at which such property is accepted to be approved by the Secretary of State." *Id.* Escrow of sale proceeds, secured by a bond of the promoters, was authorized in some situations. *Id.* § 6. Offers were more explicitly regulated. *Id.* § 9. Cooperation with federal authorities was authorized. *Id.* § 10. Mergers had to be approved by the Secretary of State and a majority of the stockholders. *Id.* §§ 11-12. Dividends "out of any funds other than the actual earnings" were outlawed. *Id.* §§ 13-14. Ten year prison sentences were prescribed for most violations, *Id.* §§ 12, 14, 17, 19. Newspapers were prohibited from carrying advertisements for securities that lacked permits; sanctions were \$100-\$1,000 and 10 days - 6 months jail. *Id.* § 18. The Secretary of State was to publish at least quarterly a summary of permit applications and his finding as to each concern "whether such concern was solvent and whether . . . it was or is fraudulent. . . to secure for the benefit of the people the utmost publicity respecting the affairs of concerns whose stock is obtainable by them." *Id.* § 21. New exemptions included building and loan corporations and "solvent going concern[s] for a period of two years." *Id.* §§ 20, 6a. The munificent sum of \$7,500 was appropriated to carry out the purposes of the Act for the first year. *Id.* § 25. The emergency clause sounded a familiar theme of victimization of local citizens and a new theme of victimization of out of state citizens by Texas promoters: "Texas has in recent years been flooded with worthless securities, issued and sold by irresponsible parties to the people of this State, resulting in great loss to investors, especially wage earners, a class least able to stand such losses, and . . . many companies have organized and made their domicile, or home office in this State, and sold worthless securities through the mails and otherwise, to people in other states by reason of inadequate laws in this State." *Id.* § 29.

153. 1935 Tex. Gen. Laws 255.

154. *Id.* § 8.

155. *Id.* §§ 12-15.

companies listed on the major stock exchanges.<sup>156</sup> Until 1941<sup>157</sup> the Securities Act contained no provision for private actions for violation, although common law and other statutory private causes of action were available.

Enforcement of the 1935 Act may have been lax. The trust company exemption became a major loophole after it was construed to include any company organized with trust powers.<sup>158</sup> Since corporations with trust powers could then be readily organized with minimum capital and without the supervision accorded bank-type trust companies, hundreds organized and sold widely their securities without permits. The scandals that followed when many of them proved worthless prompted the 1955 Texas Securities Act.<sup>159</sup> The Act was drafted with input from a newly appointed State Bar Committee on Securities and Investment Banking, initially chaired by Talbot Rain of Dallas and including William H. Tinsley of Dallas. The Act deleted the trust company exemption.<sup>160</sup> A 1957 Act<sup>161</sup> was similar but removed securities from the jurisdiction of the Secretary of State and created a separate State Securities Board and Securities Commissioner to administer the Act.<sup>162</sup> The first Commissioner was William M. King, who previously served in the FBI and the Texas Attorney General's Office. He was brought in as, and served as, a vigorous enforcer and strict construer for more than a decade. Much of the enforcement was through the criminal laws, a tradition that continues today. Texas is thought to have more criminal convictions for securities violations than the rest of the states combined. In the 1957 Act criminal penalties were down to \$1,000 and two years prison.<sup>163</sup>

The 1957 Act also covered securities of insurance companies, which had been exempt under the 1935 Act<sup>164</sup> and were another source of scandal. Principal innovations of the 1957 Act<sup>165</sup> (compared to 1935) included registration by coordination for securities also registered with the federal SEC,<sup>166</sup> registration by notification for securities of well established companies with specified levels of earnings,<sup>167</sup> requirement of the use of a full

156. *Id.* §§ 3(f), (g), (o), 23(f).

157. 1941 Tex. Gen. Laws 593.

158. *Carney v. Sam Houston Underwriters, Inc.*, 272 S.W.2d 942 (Tex. Civ. App.—Austin, error ref. n.r.e.).

159. 1955 Tex. Laws 322.

160. The background and content of the 1955 Act, with particular reference to the trust company exemption, are explained in Tinsley, *The Texas Securities Act*, 18 TEX. B. J. 275 (1955).

161. 1957 Tex. Laws 575 now, with amendments, TEX. REV. CIV. STAT. arts. 581-1 - 581-39 (Vernon 1964 & Supp. 1987).

162. *Id.* §§ 2-3.

163. 1957 Tex. Laws 598 § 29.

164. 1935 Tex. Laws 255, 172-72, § 23(g).

165. See generally Julian M. Meer, *The Texas Securities Act—1957 Model: Facelift or Forward Look?*, 36 TEXAS L. REV. 429 (1958).

166. 1957 Tex. Laws § 7C. This was taken from Uniform Securities Act § 303 (1956) with the addition of Texas' "fair, just and equitable standard."

167. *Id.* § 7B.

disclosure prospectus in most offerings,<sup>168</sup> permission to use preliminary prospectuses encouraged by federal law,<sup>169</sup> extension of the "fair, just and equitable" requirement to the price paid by promoters or founders when less than the price charged the public,<sup>170</sup> exemption of unsolicited purchase orders,<sup>171</sup> exemption of sales where total securities holders (or partners) would not exceed 35,<sup>172</sup> and exemption of secondary trading in securities already outstanding.<sup>173</sup>

The 1957 Act proved troublesome in many respects. Some of the problems were caused by misinterpretation by the courts, and required legislative or administrative correction. A ruling that "person" did not include "corporation,"<sup>174</sup> so that the corporations were free of the Act, was soon reversed but called for an amendment to be sure.<sup>175</sup> A ruling that a "brochure" used to sell stock was "advertising" that would destroy the private offering exemption<sup>176</sup> was effectively reversed by administrative interpretation.<sup>177</sup> A ruling that commissions could not be collected by an unregistered person on an exempt transaction<sup>178</sup> required a statutory reaffirmation of the plain meaning to the contrary.<sup>179</sup>

Other amendments stemmed from perceived needs: for a small offering exemption for interests in oil and gas properties,<sup>180</sup> for an expanded small offering exemption after a company acquired 35 shareholders,<sup>181</sup> for rule making authority in the State Securities Board,<sup>182</sup> for authority to put

168. *Id.* § 9C.

169. *Id.* § 22.

170. *Id.* § 10A.

171. *Id.* § 5P.

172. *Id.* § 5.I. A similar exemption for oil and gas interests was added as § 5Q of the Act by 1959 Tex. Laws 147.

173. *Id.* § 5.O.

174. *Dempsey-Tegeler & Co. v. Flowers*, 465 S.W.2d 208 (Tex. Civ. App.—Beaumont 1971), rev'd 472 S.W.2d 112 (Tex. 1971). The earlier decision was criticized in J. Leon Lebowitz, *Corporations*, 26 Sw. L.J. 86, 112-21 (1972).

175. 1971 Tex. Laws 1085 § 1, now § 4B of the Act. The emergency clause disavowed the earlier Dempsey opinion and confirmed that the Legislature's intent was always to include "corporation" in "person" for civil liability. *Id.* § 2. However, corporations remain excluded from the criminal provisions of § 29 of the Act by the last sentence of § 4B.

176. *Tumblewood Bowling Corp. v. Matisse*, 388 S.W.2d 479 (Tex. Civ. App.—Beaumont, error ref. n.r.e.), criticized in Alan R. Bromberg, *Texas Exemptions for Small Offerings of Corporate Securities—The Prohibition on Advertisements*, 20 Sw. L.J. 239 (1966).

177. The interpretation is now 7 TEX. ADMIN. CODE § 109.13(b), 3A CCH Blue Sky L. Rep. ¶ 55,563(b).

178. *Rowland Corp. v. Integrated Sys. Technology, Inc.*, 488 S.W.2d 133 (Tex. Civ. App.—Waco 1971, writ ref. n.r.e.), criticized in Alan R. Bromberg, *Collectibility of Commissions on Exempt Transactions in Securities*, 11 Bull. of Sec. on Corp., Bank. & Bus. Law (State Bar of Tex.) 3 (No. 1, Oct 1973) and in J. Leon Lebowitz, *Recent Developments in Texas Corporation Law*, 28 Sw. L.J. 823, 864-67 (1974).

179. 1975 Tex. Laws 199 § 3, amending § 34 of the Act.

180. 1959 Tex. Laws 147, now TEX. REV. CIV. STAT. ANN. art. 581-5Q (Vernon Supp. 1987).

181. 1963 Tex. Laws 473 § 4, adding § 5.I(c) to the Act, permitting sales for up to 15 buyers every 12 months. See Alan R. Bromberg, *Texas Exemptions for Small Offerings of Corporate Securities*, 18 Sw. L.J. 537 (1964).

182. 1975 Tex. Laws 204 § 2, now, with amendments, TEX. REV. CIV. STAT. ANN. art. 581-28-1 (Vernon Supp. 2001).

fraudulent dealers into receivership,<sup>183</sup> for clearer civil liabilities and statutes of limitations,<sup>184</sup> for stiffer criminal penalties,<sup>185</sup> and for clearer rules on when and how offers might be made.<sup>186</sup>

The Texas Securities Act remained seriously flawed. It contains some miserable drafting—including twisted and imprecise definitions, inconsistent language in related sections, redundancies and 500-word sentences. It had inadequate exemptions for investor resale of securities.<sup>187</sup> It literally makes a dealer—subject to registration requirements<sup>188</sup>—of everyone who buys or sells a security, including ordinary investors.<sup>189</sup> Its statutes of limitations for private suits for fraud (generally three years from discovery with a five year cutoff)<sup>190</sup> or for failure to register (three years)<sup>191</sup> are among the longest in the nation, giving investors unjustifiable opportunities to speculate on the success of a company (or the market for its securities) and then sue for refund if they are disappointed.

The most serious drawback of the Securities Act is the requirement that the Commissioner find that plan of business of the issuer and the price of a security are “fair, just and equitable” before the security can be registered for public sale.<sup>192</sup> This “merit” standard is vague, paternalistic, interferes with market access by honest businesses needing capital, limits choice by investors and requires superhuman wisdom and judgment to exercise properly the broad discretion it grants the Commissioner. The standard has been interpreted, among other things, to set a number of arbitrary limits (e.g., on compensation, minimum investment by promot-

183. 1975 Tex. Laws 206 § 4, now TEX. REV. CIV. STAT. ANN. art. 581-25-1 (Vernon Supp. 2001).

184. 1963 Tex. Laws 478 § 12, amending § 33 of the Act; 1977 Tex. Laws 344 § 1, amending § 33 of the Act. Before the 1963 amendment, § 33 provided merely that sales in violation of the Act were “voidable” without distinguishing among possible violations. The 1963 and 1977 amendments specified the violations giving rise to liability (including fraud in purchase as well as in sale), prescribed the measure of liability, and extended liability to controlling persons and aiders of violators. They authorized the shortening of statute of limitations by making a rescission offer. Fuller discussions will be found in Hal M. Bate-man, *Securities Litigation: The 1977 Modernization of Section 33 of the Texas Securities Act*, 15 HOUSTON L. REV. 839 (1978); ALAN R. BROMBERG, CIVIL LIABILITY UNDER TEXAS SECURITIES ACT § 33 (1977) and *Related Claims*, 32 SW. L.J. 867 (1978); Claude P. Bordwine, *Civil Remedies Under the Texas Securities Act*, 8 HOUSTON L. REV. 657 (1971); Julian M. Meer, *A New Look at the Texas Securities Act*, 43 TEXAS L. REV. 680 (1965).

185. The sanctions of 2 years and \$1,000 in the 1957 Act, n.158 above, were increased to: 10 years and \$5,000 for most violations in 1961 Tex. Laws. 1047, and to 10 years (not less than 2 years) and \$5,000 for fraud violations involving less than \$10,000 and 20 years (not less than 2 years) and \$10,000 for fraud violations involving \$10,000 or more in 1983 Tex. Laws 2711, now TEX. REV. CIV. STAT. ANN. art. 581-29C (Vernon Supp. 2001).

186. 1979 Tex. Laws 357 § 5, now TEX. REV. CIV. STAT. ANN. art. 581-22 (Vernon Supp. 2001).

187. TEX. REV. CIV. STAT. ANN. arts. 581-5C(1) and 581-5.O (Vernon Supp. 2001).

188. TEX. REV. CIV. STAT. ANN. art. 581-12 (Vernon Supp. 2001).

189. TEX. REV. CIV. STAT. ANN. art. 581-4C (Vernon Supp.2001).

190. TEX. REV. CIV. STAT. ANN. art. 581-33H(2) (Vernon Supp. 2001).

191. TEX. REV. CIV. STAT. ANN. art. 581-33H, I (Vernon Supp. 2001).

192. TEX. REV. CIV. STAT. ANN. art. 581-10A (Vernon Supp. 2001). Similar language appears in *id.* art. 581-7C(2) with a slightly different burden of proof; the Commissioner may deny registration if she finds that the registrant has not proved “fair, just and equitable.” There seems to be no practical difference in application.

ers, maximum numbers of options), to inhibit certain kinds of actions (such as loans to officers), to influence (i.e. reduce) the price at which a security can be sold, and to require escrow and possible cancellation of previously issued securities.<sup>193</sup> These are inappropriate kinds of actions for a government agency to take. They have a particularly chilling impact on new, small or speculative enterprises. This was especially unfortunate as Texas turned to high technology—often developed in new companies—to stimulate an economy that lagged badly with the drop in oil and gas prices.

The merit standards are hotly debated.<sup>194</sup> But it was widely agreed that their application had made Texas the most difficult state in the U.S. in which to register securities for public sale.<sup>195</sup>

The State Bar Securities Committee tried unsuccessfully in 1969, 1983 and 1985 to modernize and clarify the Securities Act and delete or limit the merit standard.<sup>196</sup> Leaders of the Bar forces included Charles H. Still, John E. Dees, Jr. and me. Leaders of the opposition were former Securities Commissioners William M. King and Roy Mouer. The 1985 proposal passed the House, where Rep. Steve Wolens sponsored it, by a margin of almost four to one. A head count indicated a majority for it in the Senate, where Sen. Ray Farrabee sponsored it, after it had been favorably reported by Committee. But the Bill was caught in a cross fire between the American Stock Exchange and the National Association of Securities Dealers over exemption for securities listed in the NASD's Automated Quotations system. As a result, it never mustered the two thirds vote necessary to bring it onto the Senate floor. However, these efforts led to two amendments which softened somewhat the harshness of the merit standard. One states the general purpose of the Securities Act to be "to pro-

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193. See, e.g., State Secs. Bd., 7 TEX. ADMIN. CODE § 113.3, 3A CCH Blue Sky L. Rep. ¶ 55,583. The specific requirements were later amended except for particular kinds of offerings, mainly limited partnerships. See State Secs. Bd., 7 TEX. ADMIN. CODE § 113.2, 3A CCH Blue Sky L. Rep. ¶ 55,590B and references there.

194. See, e.g., Ernest W. Walker & Beverly B. Hadaway, *An Investigation of the Efficacy of the Merit Standards of the Securities Act of the State of Texas* (June 5, 1981), substantially reprinted as Ernest W. Walker & Beverly B. Hadaway, *Merit Standards Revisited: An Empirical Analysis of the Efficacy of Texas Merit Standards*, 7 J. CORP. L. 651 (1982)(defending); Hal M. Bateman, *Statement Concerning "Full Disclosure" Securities Registration in Texas*, 20 BULL. OF SEC. ON CORP. BANK. & BUS. LAW (State Bar of Texas) 4 (No. 1, Oct. 1982) (attacking). On similar issue not limited to Texas, see Conrad G. Goodkind, *Is There Merit in the Merit Requirements?*, 1976 WIS. L. REV. 79 (defending); Rutherford B. Campbell, *An Open Attack on the Nonsense of Blue Sky Regulation*, 10 J. CORP. L. 553 (1985) (attacking); Mark A. Sargent, *Blue Sky Law—The Challenge to Merit Regulation—Part I*, 12 SEC. REG. L.J. 276 (1984),—Part II, *id.* 367 (1985) (balanced); American Bar Assoc., Ad Hoc Subcomm. on Merit Regulation, *Report on State Merit Regulation of Securities Offerings*, 41 BUS. LAW. 785 (1986) (balanced).

195. This is the view of virtually every securities lawyer I have ever talked to. It is also the finding of a statistical survey of securities lawyers. Jay T. Brandi, *Securities Practitioners and Blue Sky Laws: A Survey of Comments and a Ranking of States by Stringency of Regulation*, 10 J. CORP. L. 689 (1985).

196. The 1969 and 1983 proposals are described in some detail in Alan R. Bromberg, *The Proposed Texas Uniform Securities Act*, 31 TEX. BAR J. 1030 (1968) and Alan R. Bromberg, *Texas Securities Act*, 46 TEX. BAR J. 36 (1983).

tect investors and consistent with that purpose, to encourage capital formation, job formation, and free and competitive securities markets and to minimize regulatory burdens on issuers and persons subject to this Act, especially small businesses.”<sup>197</sup> The other allows the Commissioner allows to “waive or relax any restriction or requirement in the [State Securities] Board’s rules that, in his opinion, is unnecessary for the protection of investors in a particular case.”<sup>198</sup>

The Board used its rule making power to liberalize small offering exemptions substantially and to coordinate them partially with federal exemptions.<sup>199</sup>

### 3.5 COMMERCIAL LAW

In 1967 Texas thoroughly modernized its commercial law by adopting<sup>200</sup> the 1962 version of the Uniform Commercial Code. This replaced the Negotiable Instruments Law, the Uniform Stock Transfer, Trust Receipts and Warehouse Receipts Acts, and various chattel mortgage and conditional sales laws. Along with the Texas Business Corporation Act, the UCC is in the top rank of changes in Texas corporate and commercial law during this period. Much of the impetus for the UCC came from banks and other lenders.

## 4. THE ECONOMY HAS PROBLEMS BUT RECOVERS AND FURTHER ENCOURAGES BUSINESS AND LOOSENS CONSTRAINTS (1980s-2001)

There were bad years. Oil prices declined. Banks and savings and loan associations made too many bad loans and were taken over by the government or were merged with out-of-state institutions. The real estate values inflated by bad loans collapsed. But population increases and high technology provided uplift.

These two decades included hundreds of changes in the business entity laws. Much of the legislation discussed here and in the previous section originated from the corporation, partnership and securities committees of the State Bar Business Law Section and their offshoot committees on limited liability companies and on non-profit corporations. Members of those committees typically appeared at hearings on the Bills. After the State Bar decided that Sections and their committees should not appear before the Legislature as Bar representatives, the Texas Business Law

197. 1983 Tex. Laws 2716 § 3, now TEX. REV. CIV. STAT. art. 581-10-1 (Vernon Supp. 2001).

198. 1983 Tex. Laws 2716 § 4, now TEX. REV. CIV. STAT. art. 581-10D (Vernon Supp. 2001).

199. State Secs. Bd., 7 TEX. ADMIN. CODE § 109.13, 3A CCH Blue Sky L. Rep. ¶55,563. The main—and very important—Texas deviation from federal law is the requirement that a nonaccredited investor be sophisticated or that the investment be suitable for the investor. *Id.* § 109.13(k)(8)

200. 1967 Tex. Laws ch. 785, p. 2343, now (with amendments), TEX. BUS. & COMM. CODE §§ 1.101-11.108 (Vernon 1968 and Supp. 2001).



Foundation was created in 1988 to support business legislation, particularly that stemming from the Bar committees.<sup>201</sup> Business legislation of the 1980s and 1990s was written in the context of increasing takeovers of one company by another and extensive litigation against directors.

#### 4.1 CORPORATIONS

The American Bar Association's Committee on Corporate Laws prepared a revised Model Business Corporation Act (1985) with Prof. Robert W. Hamilton of the University of Texas as Reporter. The Model Act and its later changes were studied by and had influences on the Texas drafters. The same was true of the frequently amended Delaware General Corporation Law.

The TBCA continued to serve well. Its flexibility increased by a number of amendments including authorization of rights, options and convertibles,<sup>202</sup> voting agreements,<sup>203</sup> other committees of directors,<sup>204</sup> one-person boards of directors,<sup>205</sup> actions by directors by unanimous consent without a meeting,<sup>206</sup> telephone meetings of shareholders, directors and committees,<sup>207</sup> one incorporator (rather than three),<sup>208</sup> charter amendment without shareholder or director action in bankruptcy reorganization,<sup>209</sup> and extremely flexible provisions for close corporations.<sup>210</sup> The shareholder vote for merger, consolidation, asset sale and dissolution has been reduced from 4/5ths to 2/3d and may be reduced by charter provision to a simple majority.<sup>211</sup> The 19th century restrictions on corporate ownership of land were finally repealed in 1981.<sup>212</sup>

The 1981 Close Corporation Law added flexibility for closely-held and informally run companies by allowing their shareholder agreements to override the usual rigidities of corporate director-officer-shareholder division of roles.<sup>213</sup>

1983 saw the first of several amendments to expand, set standards for and clarify corporate power to indemnify, advance expenses to and buy

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201. See Alan R. Bromberg, Byron F. Egan, Dan L. Nicewander & Robert S. Trotti, *The Role of the Business Law Section and the Texas Business Law Foundation in the Development of Texas Business Law*, 31 BULL. BUS. LAW. SEC. (State Bar of Texas) 2 (No. 2, June 1994).

202. TEX. BUS. CORP. ACT art. 2.14-1.

203. *Id.* art. 2.30B.

204. *Id.* art. 2.36.

205. *Id.* art. 2.32.

206. *Id.* art. 9.10B.

207. *Id.* art. 9.10B, C.

208. *Id.* art. 3.01.

209. *Id.* art. 4.14.

210. *Id.* arts. 12.01-12.54.

211. *Id.* arts. 5.03, 5.10, 6.03, 9.08.

212. 1981 Tex. Laws 848 § 34, repealing what was then TEX. REV. CIV. STAT. ANN. arts. 1302-4.01 - 1302-4.07 (Vernon 1980) generally prohibiting a corporation to buy land "unless... necessary to enable such corporation to do business in this State", permitting "town lot corporations" (those buying, subdividing and selling land in incorporated cities or within two miles of their boundaries), and authorizing escheat of lands held in violation.

213. 1981 Tex. Laws. ch. 818 adding TEX. BUS. CORP. ACT §§ 12.01-12.54.

insurance for directors and officers sued because of their corporate role.<sup>214</sup>

Business corporations and other types of organizations under a variety of statutes were allowed in 1987 by the Miscellaneous Corporation Laws Act to shield their directors from personal liability to their corporations, shareholders or members by amending their articles of incorporation. The immunity was for their acts or omissions in their director capacities. But it did not apply if they were found liable for breach of their loyalty duty, intentional misconduct of knowing violation of law, receipt of improper personal benefit, or an act for which a statute expressly provided liability.<sup>215</sup>

The year 1987 was also the time for dropping cumbersome earned surplus, capital surplus and reduction surplus tests for allowable dividends to shareholders and repurchases of shares. The new test permitted distributions—defined to include dividends and repurchases<sup>216</sup> – from surplus unless the distribution would leave the corporation insolvent.<sup>217</sup> Surplus remained defined as net assets minus stated capital.<sup>218</sup> But net assets could be determined on a variety of bases including consolidated financial statements, tax-basis financial statements, fair valuation or information from any other method that is reasonable in the circumstances.<sup>219</sup> Dennis Anderson chaired the Bar Committee at this period and was principally responsible for this change.

A contemporaneous amendment resolved indirectly the uncertainty whether a sale consisted of substantially all the assets and therefore required a shareholder vote. Since sales made in the regular course of business did not require shareholder vote, the amendment declared a sale to be in the regular course of business if the corporation directly or indirectly continued to engage in one or more businesses or applied a portion of the sale consideration to the conduct of a business.<sup>220</sup>

The first of several efforts to protect shareholders against piercing the corporate veil occurred in 1989. The impetus was the Castleberry case.<sup>221</sup> There the court used very broad language to allow shareholder liability for corporate contracts if the corporation was used as a sham to perpetrate a fraud, stating that constructive fraud would suffice if injustice would otherwise occur. An amendment in a separate Bill responded specifically to that language by denying shareholder liability for contracts of the corporation on the basis of actual or constructive fraud or sham to perpetrate a fraud unless the plaintiff demonstrated that the shareholder

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214. 1983 Tex. Laws 3143-50 adding TEX. BUS. CORP. ACT art 2.02-1

215. 1987 Tex. Laws ch. 424 § 1 adding TEX. REV. CIV. STAT. ANN. art. 1306-7.06 (Vernon Supp. 2001). The article was later amended to include other entities.

216. 1987 Tex. Laws 205 amending TEX. BUS. CORP. ACT art. 1.02(18).

217. 1987 Tex. Laws. 212-13 amending TEX. BUS. CORP. ACT art. 2.38.

218. 212. TEX. BUS. CORP. ACT art. 1.02(12).

219. 1987 Tex. Laws 214 adding TEX. BUS. CORP. ACT art. 2.38-3.

220. 1987 Tex. Laws 221 adding TEX. BUS. CORP. ACT art. 5.09B. My recollection is that Michael M. Boone devised this approach.

221. Castleberry v. Brancsum, 721 S.W.2d 270 (Tex. 1986).

caused the corporation to be used for the purpose of perpetrating and did actually perpetrate an actual fraud on the plaintiff primarily for the direct personal benefit of the shareholder.<sup>222</sup> That Bill countered another veil-piercing theory by denying shareholder liability for a corporate contractual obligation because of failure to observe corporate formalities.<sup>223</sup> The 1993 amendment rejected alter ego as a basis for piercing the corporate veil and purported to bar all other piercing theories by stating that liability under this TBCA section "is exclusive and preempts any other shareholder liability" for a corporate obligation.<sup>224</sup>

A radical form of merger arrived on the scene in 1989. In it a corporation could be divided and two or more corporations could merge and two or more could survive.<sup>225</sup> Even Delaware had no such statute. Domestic corporations could merge with existing or newly created domestic or foreign corporations. If two or more corporations survived, assets and liabilities could be allocated among them according to the merger plan.<sup>226</sup> So could responsibility for paying dissenting shareholders.<sup>227</sup> This made it possible to allocate assets to one entity and liabilities to another with benefit to the former and harm to the latter.

Also novel was the share exchange by which one corporation could acquire the shares of one or more other entities as subsidiaries with approval of the directors and shareholders of each entity.<sup>228</sup> A merger or share exchange required a two thirds approval of the shareholders entitled to vote in each corporation.<sup>229</sup> If the plan made specified changes in a class of securities, such as altering its preferences or relative rights, the transaction required also a two-thirds approval of that class.<sup>230</sup> Shareholder vote of a corporation was not required in a merger if the corporation was the sole survivor, its articles of incorporation and rights of prior shareholders remained the same and its shares were not increased by more than 20% in the merger.<sup>231</sup> This was a simplified way of acquiring a subsidiary.

The right to dissent from a merger or share exchange—and to receive fair value for shares – was denied to publicly held shares (those with at least 2,000 holders) or publicly traded shares (those on a national securities exchange) who received publicly held or publicly traded shares in the

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222. 1989 Tex. Laws 974 amending TEX. BUS. CORP. ACT art. 2.21A(2).

223. 1989 Tex. Laws. 974-75 amending TEX. BUS. CORP. ACT art. 2.21A(3). Another Bill at the same session rejected failure to follow formalities as a basis for piercing. 1989 Tex. Laws 3617 amending TEX. BUS. CORP. ACT art. 2.21A(2).

224. 1993 Tex. Laws 446 amending TEX. BUS. CORP. ACT art. 2.21A and B.

225. 1989 Tex. Laws. 3629-30 amending TEX. BUS. CORP. ACT art. 5.01. J. Patrick Garrett was the proponent and probable author.

226. 1989 Tex. Laws. 3629-30, 3625-36 amending TEX. BUS. CORP. ACT arts. 5.01B(2)(a), (c), 5.06A(2), (3).

227. 1989 Tex. Laws. 3629-30 amending TEX. BUS. CORP. ACT art. 5.01B(2)(b).

228. 1989 Tex. Laws. 3632-32 amending TEX. BUS. CORP. ACT art. 5.02. The rarely used section for consolidations was replaced by this article.

229. 1989 Tex. Laws. 3632-33 adding TEX. BUS. CORP. ACT art. 5.03E.

230. 1989 Tex. Laws. 3633 adding TEX. BUS. CORP. ACT art. 5.03F.

231. 1989 Tex. Laws. 3633 adding TEX. BUS. CORP. ACT art. 5.03G.

transaction.<sup>232</sup> The right of shareholders to act without a meeting by unanimous consent was expanded—if the articles so stated—to include acting by the consent (either majority or two thirds) that would be required at a meeting.<sup>233</sup> As a protection against surprise takeovers by this method, the necessary signatures had to be obtained, and the consent filed with the corporation, within 60 days of the first signature.<sup>234</sup>

Other 1989 amendments eased the grant of stock options by allowing them to be issued by the board of directors without consideration if the board found that it was in the interest of the company.<sup>235</sup> A statute of limitations was added to suits for violation of preemptive rights: the shorter of one year from notice to the shareholders whose right was violation or four years from the issuance of the violating shares.<sup>236</sup> Corporations received flexibility to reduce quorum requirements for shareholder meetings to as little as one third,<sup>237</sup> to set action as a majority of those entitled to vote, those entitled and present, or those entitled and voting,<sup>238</sup> and to change statutory shareholder voting requirements from majority of all shareholders to majority of those entitled to vote.<sup>239</sup> Voting agreements could include the corporation as a party (and thereby give it standing to enforce) and shares could be voted as specified in the agreement rather than only as a block.<sup>240</sup> More realistically, the corporation was described as managed under the direction of the board of directors rather than as managed by the board.<sup>241</sup> A class of shares could elect its own directors and only holders of that class could remove those directors.<sup>242</sup>

In an effort to harmonize the law of different forms of organization, the Business Corporation Act was designated as the supplemental law for other kinds of organization whose statutes had no provisions on matters covered by TBCA.<sup>243</sup> This was intended to cover a variety of entities like professional associations, professional corporations and limited liability companies. Many of these already specified the TBCA as their supplemental law. However non-profit corporations were kept distinct.

1991 witnessed a number of revisions adding flexibility to financing and capital structure. Corporations were able by provision in their charters (articles of incorporation) to issue not only classes of shares but to divide classes into series<sup>244</sup> and to make shares exchangeable at the corporation

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232. 1989 Tex. Laws. 3637-38 adding TEX. BUS. CORP. ACT art. 5.11B.

233. 1989 Tex. Laws. 3643 amending TEX. BUS. CORP. ACT art. 9.10A(1).

234. 1989 Tex. Laws. 3643 amending TEX. BUS. CORP. ACT art. 9.10A(2).

235. 1989 Tex. Laws. 3616 amending TEX. BUS. CORP. ACT art. 2.14-1A.

236. 1989 Tex. Laws. 3618-19 amending TEX. BUS. CORP. ACT art. 2-22-1,

237. 1989 Tex. Laws. 3621 amending TEX. BUS. CORP. ACT art. 2.28A.

238. 1989 Tex. Laws. 3621-22 amending TEX. BUS. CORP. ACT arts. 2.28B for non-elections, 2.28C for elections.

239. 1989 Tex. Laws. 3622 amending TEX. BUS. CORP. ACT art. 2.28D.

240. 1989 Tex. Laws. 3623-24 amending TEX. BUS. CORP. ACT art. 2.30B.

241. 1989 Tex. Laws. 3624 amending TEX. BUS. CORP. ACT art. 2.31.

242. 1989 Tex. Laws. 3624-25 amending TEX. BUS. CORP. ACT art. 2.32.

243. 1989 Tex. Laws. 3644-45 amending TEX. BUS. CORP. ACT art. 9.14.

244. 1991 Tex. Laws 3161 amending TEX. BUS. CORP. ACT art. 2.12A.

or holder's option not only into the corporation's other shares or property but also for another entity's securities or property.<sup>245</sup> And they could do the same by action of their directors if the charter so permitted.<sup>246</sup> Directors elected by a particular class or series could be given more or less than one vote on specified matters if the charter so stated.<sup>247</sup> Subject to an ancient constitutional limitation—whose repeal was proposed—corporations were permitted in 1991 to issue shares for promissory notes and contracts for services to be performed. That limitation, in the 1876 ban on issuing stock except for money paid, labor done or property actually received<sup>248</sup> inhibited late 20th century forms of financing. It was repealed in 1993.<sup>249</sup> In concluding whether distributions could be made to shareholders, directors might base their determination on forward looking information relating to future economic performance, condition or liquidity that was reasonable in the circumstances.<sup>250</sup> Directors were protected from liability for improper distributions if they relied with good faith and ordinary care on opinions or reports of officers, employees, board committees, or on lawyers, public accountants, investment bankers or other persons as to matters reasonably believed to be within their professional or expert competence.<sup>251</sup> Officers were similarly protected in discharging their duties or powers.<sup>252</sup>

The notion that the corporate charter is a contract enforceable by shareholders was at least partially negated by specifying that a shareholder has no vested property right resulting from any provision in the charter.<sup>253</sup>

The right of all shareholders to vote on a merger was curtailed. Voting was restricted to only those shares entitled to vote by the terms of their shares set by the charter or the board.<sup>254</sup>

A dissolved corporation acquired the opportunity to shorten the standard 3-year post-dissolution in which claims against it must be brought. The corporation could notify someone having or asserting an existing claim to present the claim in writing by a date at least 120 days after the notice. Failure to present the claim by that date would extinguish it. Presentation of the claim and rejection by the corporation would extinguish the claim unless suit was filed within 120 days after the rejection.<sup>255</sup>

1993 amendments to the Texas Non-Profit Corporation Act paralleled

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245. 1991 Tex. Laws 3161-62 amending TEX. BUS. CORP. ACT art. 2.12B.

246. 1991 Tex. Laws 3162 amending TEX. BUS. CORP. ACT art. 2.13.

247. 1991 Tex. Laws 3167 amending TEX. BUS. CORP. ACT art. 2.32A.

248. See *supra* text accompanying note 49.

249. Tex. Const. art. 12, § 6 repealed by vote at Nov.2,1993 pursuant to 1993 Tex. Laws 5576, H.J.R. No. 57

250. 1991 Tex. Laws 3169 amending TEX. BUS. CORP. ACT art. 2.38-3A(4).

251. 240. 1991 Tex. Laws 3169-70 amending TEX. BUS. CORP. ACT art. 2.41D.

252. 1991 Tex. Laws 3170 amending TEX. BUS. CORP. ACT art. 2.42C.

253. 1991 Tex. Laws 3170-73 amending TEX. BUS. CORP. ACT art. 4.01B.

254. 1991 Tex. Laws 3181-82 amending TEX. BUS. CORP. ACT art. 5.10A(4).

255. 244. 1991 Tex. Laws 3189 adding TEX. BUS. CORP. ACT art. 7.12D.

many of those made to the TBCA since 1959.<sup>256</sup> But care was taken, partly at the insistence of the Attorney General's office, not to impair the charitable character of those organizations that had it, or the exemption from federal income tax of those who had that.

In 1995 BOB III (Business Organizations Bill III) was the third in the sequence of Bills to amend the TBCA and other business organization statutes supported by the Texas Business Law Foundation. It passed the House but died in the Senate where it reached the intent calendar only on the last day of the session. However, the useful Texas Unincorporated Nonprofit Association Act (TUUNA) entered the black statutes. Following a national uniform model, it established basic principles for a non-profit association to be recognized as a legal entity distinct from its members, including ability to hold land, ability to sue and defend, nonliability of members as such for torts or contracts of the association, ability of members to sue the organization and vice versa, and access of members to the association's books and records.<sup>257</sup>

BOB III, rechristened BOB IV, achieved passage in 1997, making significant changes in corporation, partnership and LLC statutes. The changes were mostly toward increased flexibility of structure and management. But shareholder rights and protections were significantly reduced in the process.<sup>258</sup>

Shareholder derivative suits in 1997 met obstacles almost impossible to overcome. The prospective plaintiff must make demand on the corporation stating his claim with particularity and requesting the corporation to take suitable action.<sup>259</sup> He must then wait 90 days before suing unless he can show irreparable injury to the corporation or his demand is rejected.<sup>260</sup> Discovery is stayed while the corporation actively reviews the allegations in good faith, with provisions for 60-day renewals.<sup>261</sup> The court must dismiss the suit if the board or committee determines in good faith, after a reasonable inquiry and based on factors it deems appropriate, that continuation of the suit is not in the best interests of the corporation.<sup>262</sup> There is no provision for the court to review the plaintiff's substantive claims or the reviewers' reasons. In determining whether the stated requirements have been met, the burden is on the plaintiff shareholder if a majority of the board is disinterested and independent.<sup>263</sup> Otherwise the burden is on the corporation but if the corporation presents prima facie evidence that the directors on an appointed commit-

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256. 1993 Tex. Laws ch. 733, pp. 2873-94.

257. 1995 Tex. Laws 4567-70 adding TEX. REV. CIV. STAT. ANN. art.1396-70.01.

258. The fullest description of the changes and their rationale is Curtis W. Huff, *The New Business Organizations Laws: Changes Made in the 7th Legislature to Address Modern Business Practices*, 34 TEX. J. BUS. LAW 1 (Summer 1997).

259. 1997 Tex. Laws 1541 adding TEX. BUS. CORP. ACT art. 5.14C.

260. 1997 Tex. Laws 1541 adding TEX. BUS. CORP. ACT art. 5.14C.

261. 1997 Tex. Laws 1541 adding TEX. BUS. CORP. ACT art. 5.14D.

262. 1997 Tex. Laws 1541-42 adding TEX. BUS. CORP. ACT art. 5.14F.

263. 1997 Tex. Laws 1541 adding TEX. BUS. CORP. ACT art. 5.14F(1).

tee are independent and disinterested, the burden is on the plaintiff.<sup>264</sup> If suit is filed after demand rejection, plaintiff must allege with particularity facts showing, among other things, that the rejection was not made in good faith, after reasonable inquiry.<sup>265</sup> A dismissal determination must be made by one of (1) a majority vote of independent and disinterested directors present at a board meeting with interested directors absent if the independent and disinterested directors constitute a quorum,<sup>266</sup> (2) a majority vote of a committee of two or more independent and disinterested directors appointed by a majority vote of one or more independent and disinterested directors present at a board meeting, whether or not they are a quorum,<sup>267</sup> or (3) a panel of one or more independent and disinterested persons appointed by the court on motion of the corporation and found by the court to be disinterested, independent and qualified to make determinations about the suit.<sup>268</sup>

Crucial to the derivative suit provisions are the meaning of disinterested and independent. Disinterested is defined largely by negatives to which there are further negatives. For example, a director is not disinterested if she is materially involved in the challenged conduct and does not have otherwise have a material interest in the outcome of the challenged conduct but she is not considered materially involved in conduct solely because she is named as a defendant in a derivative suit as a person who engaged in the challenged conduct.<sup>269</sup> A person is independent if she is disinterested and she is not an associate or member of the immediate family of a party to the transaction in question or of a person engaged in the conduct in question.<sup>270</sup> Additionally she, her associates and her immediate family must not have a relationship with a party to the transaction or a person who engaged in the conduct which could reasonably be expected materially or adversely to affect her judgment with respect to the disposition of the derivative claim.<sup>271</sup> She must not be shown to be under controlling influence of a party to the transaction or the person engaged in the conduct.<sup>272</sup> But neither of those two negatives apply solely because she is nominated or elected as a director by persons interested in the transaction or who engaged in the conduct or because of certain other factors or relationships.<sup>273</sup>

There are further obstacles to derivative suits. Settlement or discontinuance requires court approval; the court may require notice to affected shareholders if it determines the settlement or discontinuance would sub-

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264. 1997 Tex. Laws 1542-42 adding TEX. BUS. CORP. ACT art. 5.14F(2).

265. 1997 Tex. Laws 1542 adding TEX. BUS. CORP. ACT art. 5.14G.

266. 1997 Tex. Laws 1542 adding TEX. BUS. CORP. ACT art. 5.14H(1).

267. 1997 Tex. Laws 1542 adding TEX. BUS. CORP. ACT art. 5.14H(2).

268. 1997 Tex. Laws 1542 adding TEX. BUS. CORP. ACT art. 5.14H(3).

269. 1997 Tex. Laws 1517 adding TEX. BUS. CORP. ACT art. 1.02(12)(f)(i).

270. 1997 Tex. Laws 1518 adding TEX. BUS. CORP. ACT art. 1.02(15)(a), (b).

271. 1997 Tex. Laws 1518 adding TEX. BUS. CORP. ACT art. 1.02(15)(c).

272. 1997 Tex. Laws 1518 adding TEX. BUS. CORP. ACT art. 1.02(15)(d).

273. *Id.*

stantially affect their interests.<sup>274</sup> The court may order the corporation to pay plaintiff's expenses and legal fees if it finds substantial benefit to the corporation from the suit.<sup>275</sup> Or it may order plaintiff to pay the corporation's expenses and legal fees if it finds that suit was without reasonable cause or for an improper purpose.<sup>276</sup> And it may order a party to pay the expenses and legal fees of any party (including the corporation) if it finds that a pleading or motion was not well grounded in fact after reasonable inquiry, was not warranted by existing law or good faith argument for extension or reversal, or was interposed for an improper purpose.<sup>277</sup> A derivative suit in the right of a foreign corporation, though governed by its home state law as to internal affairs, would be subject to the procedural requirements of discovery stay, court approval of settlement or discontinuance and orders to pay fees and legal expenses.<sup>278</sup> Closely held corporations escaped most of these obstacles but still faced court approval of settlement or discontinuance and orders to pay fees and legal expenses.<sup>279</sup> These were corporations with fewer than 35 shareholders and no stock exchange listing or regular over the counter quotations.<sup>280</sup>

The derivative litigation section resembles the one in the Model Business Corporation Act and was primarily the work of Curtis W. Huff who chaired the State Bar Corporation Law Committee during its drafting. When we presented the Bill to the Legislature, I left it to Curtis to talk about derivative suits. Since the derivative suit is the only practical way of enforcing fiduciary duty, the restrictions on the suit effectively reduce the scope of fiduciary duty in corporations.

In a sharp departure from the concept that all shares of a class have the same rights, different holders of the same class of shares could be treated differently in a merger or share exchange.<sup>281</sup> But they were granted appraisal rights if that occurred.<sup>282</sup> A corporation could be converted into a holding company by a merger with or into a wholly owned subsidiary without a shareholder vote if share rights, charter, bylaws and directors remained the same except for a required addition to the charter of the surviving corporation specifying shareholder votes in all situations where they would have been required in the original corporation.<sup>283</sup> Dissent-appraisal rights in mergers were denied to holders of shares listed on the NASDAQ Stock Market or designated as national market securities on an NASD quotation system if shareholders of the same class or series

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274. 1997 Tex. Laws 1542 adding TEX. BUS. CORP. ACT art. 5.14I.

275. 1997 Tex. Laws 1542 adding TEX. BUS. CORP. ACT arts. 5.14J(1)(a), 5.14J(2).

276. 1997 Tex. Laws 1542 adding TEX. BUS. CORP. ACT arts. 5.14J(1)(b), 5.14J(2).

277. 1997 Tex. Laws 1542 adding TEX. BUS. CORP. ACT arts. 5.14J(1)(c), 5.14J(2).

278. 1997 Tex. Laws 1543 adding TEX. BUS. CORP. ACT art. 5.14K.

279. 1997 Tex. Laws 1543 adding TEX. BUS. CORP. ACT art. 5.14L.

280. 1997 Tex. Laws 1543 adding TEX. BUS. CORP. ACT art. 5.14L.

281. 1997 Tex. Laws 1533-35 amending TEX. BUS. CORP. ACT arts. 5.01B(3), 5.02B(3).

282. 1997 Tex. Laws 1540 amending TEX. BUS. CORP. ACT art. 5.11B(2). This result is not immediately apparent on reading 5.11B(2). If the shareholder does receive different consideration, the 5.11 denial of dissent is inapplicable and the 5.11A right to dissent does apply.

283. 1997 Tex. Laws 1536 adding TEX. BUS. CORP. ACT art. 5.03H.



received the same consideration (other than cash for fractional shares) and received only NASDAQ Stock Market or NASD national market securities.<sup>284</sup> Prior law did not include NASDAQ or NASD national market securities. Shareholder dissent rights in a sale of assets were denied to shareholders who lacked the right to vote on the sale.<sup>285</sup>

Corporations obtained new authority to convert—with the shareholder vote needed for a merger—to a domestic or foreign corporation or other entity such as a partnership or LLC.<sup>286</sup> Shareholders acquired interests in the new entity as specified in the plan of conversion<sup>287</sup> and were protected from becoming personally liable for new entity obligations without their consent.<sup>288</sup> Dissent and appraisal rights were the same as in a merger.<sup>289</sup> As noted later, similar conversion provisions were given to general and limited partnerships and limited liability companies. Conversion treated the new entity as a continuation of the old one<sup>290</sup> and allowed transformation of an entity without the formality of conveyance of assets or the complexity of mergers. Representatives of the plaintiffs bar were suspicious that liabilities could somehow be eliminated by conversion but the statutes specified continuation of existing liabilities in the new entity.<sup>291</sup>

Corporations and other entities were granted new flexibility to deal with 90%-owned entities by merging into one or more of them, merging one or more of them into itself or merging itself and any one or more of them into any one or more of them.<sup>292</sup> No shareholder, owner or member vote was needed if the parent entity survived.<sup>293</sup> No shareholder vote was needed in a corporation that was a party to a merger agreement but not a party to the merger.<sup>294</sup> This applied to triangular merger or reorganization plan by which a company merged with a subsidiary of a corporation pursuant to an agreement among all three companies.

An anti-takeover Business Combination Law<sup>295</sup> similar to Delaware's was added to the TBCA in 1997 on the persuasiveness and persistence of Byron F. Egan. In essence it delayed for three years any corporation's merger, asset sale or similar transaction with a person who became a 20% shareholder (or that person's affiliate) without permission of the corporation's board of directors.<sup>296</sup> There was an exception if the transaction was approved by at least two thirds of shares not owned by 20% share-

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284. 1997 Tex. Laws 1540 amending TEX. BUS. CORP. ACT art. 5.11B.

285. 1997 Tex. Laws 1540 amending TEX. BUS. CORP. ACT art. 5.11A(2).

286. 1997 Tex. Laws 1546-47 adding TEX. BUS. CORP. ACT art. 5.17.

287. 1997 Tex. Laws 15449-50 adding TEX. BUS. CORP. ACT art. 5.20A(6).

288. 1997 Tex. Laws 1546 adding TEX. BUS. CORP. ACT art. 5.17A(4).

289. 1997 Tex. Laws 1548-49 amending TEX. BUS. CORP. ACT art. 5.20A(9).

290. 1997 Tex. Laws 1548 adding TEX. BUS. CORP. ACT art. 5.20A(1).

291. 1997 Tex. Laws 1548 adding TEX. BUS. CORP. ACT art. 5.20A(3).

292. 1997 Tex. Laws 1544 amending TEX. BUS. CORP. ACT art. 5.16A.

293. *Id.*

294. 1997 Tex. Laws 1535 amending TEX. BUS. CORP. ACT art. 5.03A.

295. 1997 Tex. Laws 1556-59 adding TEX. BUS. CORP. ACT arts. 13.01-13.08.

296. 1997 Tex. Laws 1558 adding TEX. BUS. CORP. ACT art. 13.03A(1).

holder.<sup>297</sup> Directors, in considering the best interests of the corporation, could consider both the long term and short term interests of the corporation including the possibility that those interests might be best served by continued independence of the corporation.<sup>298</sup> Another anti-takeover amendment required cause for removal of directors on a classified board.<sup>299</sup>

Among numerous other changes, shareholder approval was measured by a majority of shares entitled to vote that either voted or expressly abstained. Thus broker non-votes—shares held in street name by brokers that abstained because they could not vote without owner instruction—would not increase the number of votes needed for approval.<sup>300</sup> A further effort to avoid piercing the corporate veil extended protection beyond shareholders to affiliates of shareholders or of the corporation,<sup>301</sup> and to tort-type claims “relating to or arising from” contractual obligations.<sup>302</sup> Failure to follow corporate formalities was denied as a basis for holding shareholders liable for any corporate obligation, not just for corporate contractual obligations.<sup>303</sup>

Power-altering shareholder agreements of the kind that had previously been permitted only for close corporations<sup>304</sup> were allowed for all for corporations whose shares were not publicly traded if unanimously approved by shareholders. These agreements could, among other things, restrict the discretion or power of the board of directors, eliminate the board and permit shareholder management, prescribe who should be directors or officers and their compensation, govern distributions, allocate voting power of shares and directors, set terms of conflict of interest transactions and specify various means of dissolution.<sup>305</sup> Conflict of interest transactions—between the corporation and its director or officers—if otherwise valid—were validated if approved by disinterested directors or board committee after disclosure of material facts, if approved by shareholders after disclosure of material facts, or if fair to the corporation.<sup>306</sup> Under prior law, conflict transactions were not void or voidable merely because the officer or director participated in their approval if there was disinterested or shareholder approval or fairness. As noted earlier in connection with derivative suits, “disinterested” has a special statutory definition. The companion word “independent” is not used in the validation section.

Professional corporation shareholders as such were relieved of duty to supervise corporate officers or employee in performance of their duties and were declared to have no greater liability than shareholders of other

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297. 1997 Tex. Laws 1558 adding TEX. BUS. CORP. ACT art. 13.03A(2).

298. 1997 Tex. Laws 1559 adding TEX. BUS. CORP. ACT art. 13.06.

299. 1997 Tex. Laws 1526 amending TEX. BUS. CORP. ACT art. 2.32C.

300. 1997 Tex. Laws 1523 amending TEX. BUS. CORP. ACT art. 2.28B.

301. 1997 Tex. Laws 1522 amending TEX. BUS. CORP. ACT art. 2.21A.

302. 1997 Tex. Laws 1522 amending TEX. BUS. CORP. ACT art. 2.21A(2).

303. 1997 Tex. Laws 1522-23 amending TEX. BUS. CORP. ACT art. 2.21A(3).

304. TEX. BUS. CORP. ACT art. 12.32.

305. 1997 Tex. Laws 1524-26 adding TEX. BUS. CORP. ACT art. 2.30-1.

306. 1997 Tex. Laws 1527 amending TEX. BUS. CORP. ACT art. 2.35-1.

business corporations.<sup>307</sup>

A little-used species of business organization revived in 1983 and 1989. The Texas Real Estate Investment Trust Act was passed in 1961<sup>308</sup> to accommodate organizations which had special federal income tax benefits. Amendments<sup>309</sup> completely recast it in a pattern very close to the Business Corporation Act.

One of the themes of business legislation in the last two decades of the 20th century was to harmonize the several kinds of structures by eliminating historical differences that made sense when the structures were first authorized. A comprehensive and brilliant job of this was headed by Daryl Robertson. It resulted in a massive Bill that failed to pass in 1999 and again in 2001,<sup>310</sup> partly because of its sheer length (and resulting uncertainty about just what was in it) and partly because of opposition from the plaintiffs' bar.

#### 4.2 LIMITED LIABILITY COMPANIES (LLCs)

Limited Liability Companies ("LLCs") came into Texas law in 1991 by the passage of a complete statute patterned partly on the TBCA and otherwise on TRLPA's limited partnership features designed to achieve taxation as a partnership rather than a corporation.<sup>311</sup> Matters not covered by the statute were governed by the TBCA and the Miscellaneous Corporation Laws Act.<sup>312</sup> Texas was among the first to authorize this potentially attractive form of organization, Although Wyoming and Florida were the first, the Texas law followed Colorado's statute more closely. To permit greater contractual flexibility, the LLC Act contained no fiduciary duty provisions. LLCs were subjected to corporate franchise tax<sup>313</sup> as a result of a fiscal note from the Legislative Budget Board stating that substantial state revenue would otherwise be lost. For this reason limited partnerships (which are not subject to franchise tax) continue to be used for many businesses that could benefit from the more flexible LLC structures. 1993 amendments authorized professional LLCs for doctors and others.<sup>314</sup> 1997 amendments freed LLCs from TBCA-type limitations on indemnification and insurance of directors and officers<sup>315</sup> and made clear that any otherwise existing fiduciary or other duties could be expanded or restricted by the regulations.<sup>316</sup> LLCs acquired new flexibility by adding that various regulatory provisions various regulatory provisions which

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307. 1991 Tex. Laws 3217 amending TEX. REV. CIV. STAT. ANN. Art. 1528e § 5.

308. 1961 Tex. Laws ch. 384.

309. 1989 Tex. Laws 3652-62 ch. 801 §§ 67-77 with later amendments by 1995 Tex. Laws ch. 234 § 1.

310. H.B. 2681, 76th Leg. (1999); H.B. 327, 77th Leg. (2001).

311. 1991 Tex. Laws 3192-3216 adding TEX. REV. CIV. STAT. ANN. art. 1528n.

312. 1991 Tex. Laws 3215 adding TEX. REV. CIV. STAT. ANN. art.1528n art. 8.12.

313. 1991 Tex. Laws 3218 amending TEX. REV. CIV. STAT. ANN. Tax Code § 17.001.

314. 1993 Tex. Laws 430-48 adding TEX. REV. CIV. STAT. ANN. art.1528n art.11.01-11.07.

315. 1997 Tex. Laws 1565 amending TEX. REV. CIV. STAT. art. 1528n art. 2.20A.

316. 1997 Tex. Laws 1565 adding TEX. REV. CIV. STAT. art. 1528n art. 2.20B.

could be altered by the charter could also be altered by the regulations. LLCs also took on new conformity with corporations by a number of amendments mimicking TBCA sections, including authority for conversion to other forms of entity.<sup>317</sup>

### 4.3 PARTNERSHIPS

#### (1) *Limited Partnerships*

The Texas Revised Limited Partnership act (TRLPA) became law in 1987. This modernization of the prior statute was the work of the Bar Partnership Committee. It had two major aims. One was to accommodate the complexity of limited partnerships that evolved while so many were being used for tax-oriented deals. The other major aim was to give limited partner investors increased protection. In both these aims the Act drew heavily from the then recently revised Uniform Limited Partnership Act<sup>318</sup> and Delaware's statute,<sup>319</sup> as noted by the State Bar Partnership Committee which drafted the statute and supplied comments on each section.<sup>320</sup> Following the pattern set by the Texas Business Corporation Act, the partnership statute was to become effective five years later unless adopted sooner by a firm desiring its benefits.<sup>321</sup>

Flexibility came primarily by giving the partnership agreement even more the pivotal role in a partnership in carefully graded ways. The stress on the agreement as the governing document diminished the role of the limited partnership certificate as a publicly filed document whose content was greatly reduced. The agreement directly governs matters like rights of and restrictions on general partners<sup>322</sup> and admissions of limited partners.<sup>323</sup> A number of issues are governed by statute unless otherwise provided in the partnership agreement, e.g., assignability of partnership interests,<sup>324</sup> nondissolution by assignment of an interest,<sup>325</sup> enforceability of limited partner contributions,<sup>326</sup> and release of obligation to make contributions or return improper distributions.<sup>327</sup> The partnership agreement can be oral,<sup>328</sup> as it is in many informal partnerships. Some important matters are governed only by a *written* agreement: allocation of profits and losses,<sup>329</sup> sharing of distributions,<sup>330</sup> creation of classes or groups of

317. 1997 Tex. Laws 1373 adding TEX. REV. CIV. STAT. art. 1518n art. 10.08.

318. 6A UNIF. STATE LAWS ANN. 1-304 (1985).

319. 6 DEL. CODE ANN. §§ 17-101 - 17-1108 (1985).

320. 17 TEX. REV. CIV. STAT. ANN. 12 et seq. (Vernon Supp. 2001).

321. 1987 Tex. Laws 120-21 adding TEX. REV. CIV. STAT. ANN. Art. 6132a-1 § 13.02. .

322. 1987 Tex. Laws 107 adding TEX. REV. CIV. STAT. ANN. Art. 6132a-1 § 4.03(a).

323. 1987 Tex. Laws 103 adding TEX. REV. CIV. STAT. ANN. Art. 6132a-1 § 3.01(b).

324. 1987 Tex. Laws 110 adding TEX. REV. CIV. STAT. ANN. Art. 6132a-1 § 7.02(a)(1).

325. 1987 Tex. Laws 110 adding TEX. REV. CIV. STAT. ANN. Art. 6132a-1 § 7.02(a)(2).

326. 1987 Tex. Laws 107-08 adding TEX. REV. CIV. STAT. ANN. Art. 6132a-1 § 5.02(b).

327. 1987 Tex. Laws 108 adding TEX. REV. CIV. STAT. ANN. Art. 6132a-1 § 5.02(d).

328. 1987 Tex. Laws 92 adding TEX. REV. CIV. STAT. ANN. Art. 6132a-1 § 1.02(9).

329. 1987 Tex. Laws 108 adding TEX. REV. CIV. STAT. ANN. Art. 6132a-1 § 5.03.

330. 1987 Tex. Laws 108 adding TEX. REV. CIV. STAT. ANN. Art. 6132a-1 § 5.04.

partners with different rights,<sup>331</sup> indemnification of general partners,<sup>332</sup> admission of general partners<sup>333</sup> and withdrawal rights of limited partners.<sup>334</sup> Without a written agreement, the statute controls those matters. The partnership agreement can be amended by whatever provisions it has for amendment, or if there are none, by unanimous consent. Flexibility came also by permitting limited partnerships to merge with one or more domestic or foreign limited partnerships—later expanded to include other entities such as corporations or limited liability companies.<sup>335</sup>

Protection for limited partners arrived by statutory authority to bring derivative suits,<sup>336</sup> e.g., against general partners for violation of fiduciary duty. This authority lacked the statutory obstacles later applied to corporate derivative suits.<sup>337</sup> Limited partners were allowed expanded powers, if the partnership agreement so provided, to monitor the general partner's management, by voting on borrowing, sale of assets, removal and replacement of the general partner and various other actions of the general partner.<sup>338</sup> They could enjoy these powers without becoming liable for partnership obligations they would otherwise incur by participating in control of the firm.<sup>339</sup> If a limited partner did participate in control, as more narrowly defined, she was liable only to third parties doing business with the partnership reasonably believing, based on the limited partner's conduct, that the limited partner was a general partner.<sup>340</sup> A limited partner who also lent money to the partnership could take a security interest.<sup>341</sup>

Flexibility for limited partners came by allowing them to make their required contributions not only in cash but also in property, services, promissory notes or promises of future cash or property.<sup>342</sup>

The entity character of general partnerships was already recognized.<sup>343</sup> The 1987 act made it even more pronounced, more corporate-like, for limited partnerships. Limited partners are, with rare exceptions, not liable for partnership obligations.<sup>344</sup> Neither kind of partner has rights in

331. 1987 Tex. Laws 103, 107 adding TEX. REV. CIV. STAT. ANN. Art, 6132a-1 §§ 3.02, 4.05.

332. 1987 Tex. Laws 117 adding TEX. REV. CIV. STAT. ANN. Art, 6132a-1 § 11.02.

333. 1987 Tex. Laws 106 adding TEX. REV. CIV. STAT. ANN. Art, 6132a-1 § 4.01(a).

334. 1987 Tex. Laws 109 adding TEX. REV. CIV. STAT. ANN. Art, 6132a-1 § 6.03.

335. 1987 Tex. Laws 101-02 adding TEX. REV. CIV. STAT. ANN. Art, 6132a-1 § 2.11. Later amendments included radical mergers and interest exchanges like those for corporations. 1991 Tex. Laws 322-26 amending TEX. REV. CIV. STAT. ANN. Art, 6132a-1 § 2.11 and adding § 2.11(h).

336. 1987 Tex. Laws 115-16 adding TEX. REV. CIV. STAT. ANN. Art, 6132a-1 §§ 10.01-10.05.

337. See *supra* text accompanying notes 253-72.

338. 1987 Tex. Laws 103-04 adding TEX. REV. CIV. STAT. ANN. Art, 6132a-1 § 3.03(b).

339. 1987 Tex. Laws 103-04 adding TEX. REV. CIV. STAT. ANN. Art, 6132a-1 § 3.03(b).

340. 1987 Tex. Laws 103 adding TEX. REV. CIV. STAT. ANN. Art, 6132a-1 § 3.03(a).

341. 1987 Tex. Laws 97 adding TEX. REV. CIV. STAT. ANN. Art, 6132a-1 § 1.10.

342. 1987 Tex. Laws 107-08 adding TEX. REV. CIV. STAT. ANN. Art, 6132a-1 §§ 1.02(2), 5.01, 5.02.

343. *Haney v. Henley, Bate, Deaton & Porter*, 618 S.W.2d 541 (Tex. 1981).

344. 1987 Tex. Laws 103 adding TEX. REV. CIV. STAT. ANN. Art, 6132a-1 § 3.01(a).

partnership property.<sup>345</sup> Either kind may do business with the firm as if they were strangers.<sup>346</sup> Judicial process may be served on the firm through a general partner, a registered agent or (in some cases) the Secretary of State.<sup>347</sup> Changes of limited partners and (in some instances) general partners may occur without dissolution of the firm.<sup>348</sup> Reconstitution is permitted after some kinds of dissolution.<sup>349</sup> Indemnification standards for general partners are supplied.<sup>350</sup> Reorganization and mergers are permitted<sup>351</sup>—all very much as in corporations. But the drafters took care not to provide so much “continuity of interest” that the partnership would be treated as a corporation under then prevailing federal income tax law. This was achieved by formally recognizing dissolution<sup>352</sup> on an event of withdrawal of a general partner—broadly defined to include bankruptcy, death and other occurrences<sup>353</sup>—but functionally permitting continuation by reconstitution.<sup>354</sup>

TRLPA was not a complete code of partnership law. Like its predecessor, it relies on—or is linked to—the general partnership statute and common law for matters like fiduciary duty not explicitly covered by TRLPA<sup>355</sup>

Limited partnerships acquired new flexibility with the right to convert into other entities in 1997.<sup>356</sup> Limited partners lost flexibility by deletion of the right to withdraw on 6 months notice if the agreement had no withdrawal provision and no specified time or event for dissolution.<sup>357</sup> Inability of limited partners to withdraw facilitated discounted values of family limited partnerships for federal gift and estate taxes. Estate planners urged this amendment. Some Bar Committee members were concerned about other effects of the resulting lock-in but recognized that withdrawal rights could be included in the partnership agreement if desired.

The check-the-box tax regulations<sup>358</sup> allowed most non-corporate entities to choose whether to be taxed as partnerships or as corporations. This relieved state law from prescribing easy events of dissolution that prior tax regulations required for partnership treatment. Texas responded by denying dissolution on an event of withdrawal of a general partner if the

345. 1987 Tex. Laws 110 adding TEX. REV. CIV. STAT. ANN. Art, 6132a-1 § 7.01.

346. 1987 Tex. Laws 97 adding TEX. REV. CIV. STAT. ANN. Art, 6132a-1 § 1.10.

347. 1987 Tex. Laws 96-97, 115 adding TEX. REV. CIV. STAT. ANN. Art, 6132a-1 §§ 1.08, 9.10.

348. 1987 Tex. Laws 103, 106, 109 110, 111 adding TEX. REV. CIV. STAT. ANN. Art, 6132a-1 §§ 3.01, 4.01, 4.02, 6.03, 7.02, 7.04.

349. 1987 Tex. Laws 112 adding TEX. REV. CIV. STAT. ANN. Art, 6132a-1 § 8.03.

350. 1987 Tex. Laws 116-20 adding TEX. REV. CIV. STAT. ANN. Art, 6132a-1 §§ 11.01-11.20.

351. 1987 Tex. Laws 99-100 , 101,adding TEX. REV. CIV. STAT. ANN. Art, 6132a-1 §§ 2.06, 2.11.

352. 1987 Tex. Laws 110-11 adding TEX. REV. CIV. STAT. ANN. Art, 6132a-1 § 8.01(3).

353. 1987 Tex. Laws 107-08 adding TEX. REV. CIV. STAT. ANN. Art, 6132a-1 § 4.02.

354. 1987 Tex. Laws 112 adding TEX. REV. CIV. STAT. ANN. Art, 6132a-1 § 8.03.

355. 1987 Tex. Laws 121 adding TEX. REV. CIV. STAT. ANN. Art, 6132a-1 § 13.03.

356. 1997 Tex. Laws 1585-88 adding TEX. REV. CIV. STAT. ANN. art. 6132a-1 § 2.15.

357. 1997 Tex. Laws 1589 amending TEX. REV. CIV. STAT. ANN. art. 6132a-1 § 6.03.

358. Income Tax Reg. § 301.7701-3 (1996).

business carried on with a remaining general partner pursuant to the agreement or if the proportion of partners specified by the agreement carried on the business and appointed a new general partner if none was left.<sup>359</sup> That year there were two new grounds for judicial dissolution: economic purpose likely to be unreasonably frustrated or partner's conduct making it not reasonably practicable to carry on the business with that partner.<sup>360</sup>

## (2) *General Partnerships*

Nineteen ninety-one brought the possibility of general partnerships becoming limited liability partnerships (LLPs) as discussed in Part 4.3(3) below. Nineteen ninety-three produced a new statute for general partnerships—Texas Revised Partnership Act (TRPA), designed to modernize the prior statute. TRPA was drafted by the same State Bar Committee that wrote TRLPA. It too drew heavily on Delaware and a Uniform Act. It gave open-ended protection to partners by specifying that a partner *owes* a duty of loyalty and a duty of care, and the duty of loyalty *includes* accounting for personal benefit derived by the partner in the conduct of the partnership or use of partnership property, refraining from dealing adversely to or competing with the partnership<sup>361</sup> The national act is more restrictive in two ways: it states that the *only fiduciary duties* a partner owes are loyalty and care and that the duty of loyalty is *limited to* the actions in the Texas statute.<sup>362</sup> Delaware followed the national act.<sup>363</sup> Thus Texas was left to develop its considerable body of partnership fiduciary law<sup>364</sup> with a statutory overlay of a good faith obligation in performing the specified duties.<sup>365</sup> But it was mandated that a partner's loyalty duty is not as extensive as that of a trustee<sup>366</sup> and that she does not violate the loyalty duty merely because she furthers her own interests.<sup>367</sup> And the Act grants a partner's right to information about the firm only "on request and to the extent just and reasonable."<sup>368</sup>

In 1993 Partners were given some additional protection from liability for partnership obligations. When the partner was liable, a judgment could be collected against his assets only after partnership assets were

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359. 1997 Tex. Laws 1590 amending TEX. REV. CIV. STAT. art. 6132a-1 § 8.01(3).

360. 1997 Tex. Laws 1590 amending TEX. REV. CIV. STAT. art. 6132a-1 §§ 8.02(1), 8.02(2).

361. 1993 Tex. Laws 3898 adding TEX. REV. CIV. STAT. ANN. arts. 6132b-4.04(a), 6132b-4.04(b).

362. Uniform Partnership Act (1996), 6A Unif. Laws Ann. § 4.04(a), 4.04(b)

363. 6 DEL. CODE ANN. § 15-404.

364. *E.g.*, *Huffington v. Upchurch*, 532 S.W.2d 576 (Tex. 1976); *Johnson v. Peckham*, 120 S.W.2d 786 (Tex. 1938); *Crenshaw v. Swenson*, 611 S.W.2d 886 (Tex. Civ. App.—Austin 1980, writ refused n.r.e.); *Johnson v. Buck*, 540 S.W.2d 393 (Tex. Civ. App.—Corpus Christi 1976, writ refused n.r.e.).

365. 1993 Tex. Laws 3898 adding TEX. REV. CIV. STAT. ANN. Arts. 6132b-4.04(d)(1).

366. 1993 Tex. Laws 3898 adding TEX. REV. CIV. STAT. ANN. Art. 6132b-4.04(f).

367. 1993 Tex. Laws 3898 adding TEX. REV. CIV. STAT. ANN. Art. 6132b-4.04(e).

368. 1993 Tex. Laws 3897-98 adding TEX. REV. CIV. STAT. ANN. Art. 6132b-4.03(c).

exhausted.<sup>369</sup> Fiduciary duty in the formation of a partnership was eliminated on the theory that potential partners are then negotiating at arms length. The duty was limited to the operation and liquidation phases of the partnership.<sup>370</sup>

The 1993 statute for the first time explicitly recognized the partnership as an entity<sup>371</sup> and prescribed that partner could sue partnership and vice versa.<sup>372</sup> The Act implied that an accounting is unnecessary to a suit between partners and partnerships.<sup>373</sup> Later amendments made this explicit.<sup>374</sup> The Act retained the prior definition of a partnership as an association of two or more persons to carry on a business for profit but added that the same definition applies to a joint venture, indicating that joint ventures are in law the same as partnerships.<sup>375</sup> Codifying a good deal of case law, the new act specified a number of factors indicating that a relationship is a partnership<sup>376</sup> and a number indicating the opposite.<sup>377</sup> No relative weights attach to the factors but the Bar Committee notes that sharing of profits and of control will probably continue to be the most important.<sup>378</sup> Another first allowed the partners to choose to be governed by the law of any state—for example Delaware—if that state bears a reasonable relation to the partners or the partnership business.<sup>379</sup>

While retaining the primacy of the partnership agreement,<sup>380</sup> the Act spelled out certain provisions that may not be varied by agreement.<sup>381</sup> But it allowed most of them to be modified in prescribed ways. Thus partners may not eliminate the duty of loyalty but may agree that specific activities do not violate the duty if not manifestly unreasonable.<sup>382</sup> They may not eliminate the duty of care or the obligation of good faith but may determine the standards for measuring the performance of the duty or obligation if not manifestly unreasonable.<sup>383</sup> How these limitations will be construed remains to be seen.

TRPA changed the language and consequences of dissolution to give more continuity to the partnership entity. “Dissolution,” which had often been confused with termination, did not appear in the vocabulary of TRPA. “Event of withdrawal” took its place, defined to include a part-

369. 1993 Tex. Laws 3893 adding TEX. REV. CIV. STAT. ANN. Art, 6132b-3.05(d).

370. 1993 Tex. Laws 3898 adding TEX. REV. CIV. STAT. ANN. Art, 6132b-4.04(b)(1), (c).

371. 1993 Tex. Laws 3890 adding TEX. REV. CIV. STAT. ANN. Art, 6132b-2.01.

372. 1993 Tex. Laws 3898 adding TEX. REV. CIV. STAT. ANN. Art, 6132b-4.06.

373. 1993 Tex. Laws 3898-99 adding TEX. REV. CIV. STAT. ANN. Art, 6132b-4.06(b).

374. 1997 Tex. Laws 1596 amending TEX. REV. CIV. STAT. ANN. Art, 6132b-4.06(b).

375. 1993 Tex. Laws 3890 adding TEX. REV. CIV. STAT. ANN. Art, 6132b-2.02(a).

376. 1993 Tex. Laws 3890 adding TEX. REV. CIV. STAT. ANN. Art, 6132b-2.03(a).

377. 1993 Tex. Laws 3890-91 adding TEX. REV. CIV. STAT. ANN. Art, 6132b-2.03(b).

378. Comment of Bar Committee -1993, 17 TEX. REV. CIV. STAT. ANN. 177 (Supp. 2001)

379. 1993 Tex. Laws 3889 adding TEX. REV. CIV. STAT. ANN. Art, 6132b-1.05.

380. 1993 Tex. Laws 3889 adding TEX. REV. CIV. STAT. ANN. Art, 6132b-1.03(a).

381. 1993 Tex. Laws 3889 adding TEX. REV. CIV. STAT. ANN. Art, 6132b-1.03(b).

382. 1993 Tex. Laws 3898 adding TEX. REV. CIV. STAT. ANN. Art, 6132b-1.03(b)(2).

383. 1993 Tex. Laws 3900 adding TEX. REV. CIV. STAT. ANN. Art, 6132b-1.03(b)(3), (b)(4).



ner's "I withdraw" sort of statement and also a partner's death, bankruptcy, expulsion, incapacity and other disabling circumstances.<sup>384</sup> An event of withdrawal typically leads not to winding up and termination of the firm but to buyout (redemption) of the withdrawn partner's interest at fair value<sup>385</sup> and continuation of the firm with the remaining partners. But the event of withdrawal requires winding up of the firm on specified occurrences. These include the express will of a majority in interest of the partners (if the partnership is not for a definite term, i.e. one "at will" in prior terminology),<sup>386</sup> the express will of all the partners (if the partnership is for a definite term or project),<sup>387</sup> illegality of continuation,<sup>388</sup> and sale of substantially all assets.<sup>389</sup> An individual partner can avoid the lock-in effect of these continuity provisions if he can persuade a court to hold that the economic purpose of the firm is likely to be unreasonably frustrated,<sup>390</sup> a partner's conduct makes it not reasonably practicable to carry on business with that partner,<sup>391</sup> or it is not otherwise reasonably practicable to carry on the business in conformity with the partnership agreement.<sup>392</sup> A partnership is terminated, as under prior law, only when winding up is completed.<sup>393</sup>

To facilitate transformation of business structures, TRPA allowed general partnerships to convert to limited partnerships and later to other entities or vice versa on consent of a majority in interest of the partners.<sup>394</sup> To protect a limited partner for becoming liable as a general partner without her consent, she is considered withdrawn unless she agrees in 60 days to remain a partner.<sup>395</sup> In similar vein, both general and limited partnerships became able to merge with one or more domestic or foreign general and limited partnerships and other entities, e.g., limited liability companies and corporations on approval as provided in the partnership agreement.<sup>396</sup> Partner's interests could be changed into a wide variety of other kinds of interests in the resulting entities<sup>397</sup> but a partner could not be subjected to new liabilities without his consent.<sup>398</sup> Interest exchanges between partnerships and other entities were authorized.<sup>399</sup>

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384. 1993 Tex. Laws 3900 adding TEX. REV. CIV. STAT. ANN. Art, 6132b-6.01.

385. 1993 Tex. Laws 3901 adding TEX. REV. CIV. STAT. ANN. Art, 6132b-7.01.

386. 1993 Tex. Laws 3905 adding TEX. REV. CIV. STAT. ANN. Art, 6132-8.01(a).

387. 1993 Tex. Laws 3905 adding TEX. REV. CIV. STAT. ANN. Art, 6132b-8.01(b).

388. 1993 Tex. Laws 3905 adding TEX. REV. CIV. STAT. ANN. Art, 6132b-8.01(d).

389. 1993 Tex. Laws 3905 adding TEX. REV. CIV. STAT. ANN. Art, 6132b-8.01(f).

390. 1993 Tex. Laws 3905 adding TEX. REV. CIV. STAT. ANN. Art, 6132b-8.01(e)(1).

391. 1993 Tex. Laws 3905 adding TEX. REV. CIV. STAT. ANN. Art, 6132b-8.01(e)(2).

392. 1993 Tex. Laws 3905 adding TEX. REV. CIV. STAT. ANN. Art, 6132b-8.01(e)(3).

393. 1993 Tex. Laws 3905 adding TEX. REV. CIV. STAT. ANN. Art, 6132b-8.02.

394. 1993 Tex. Laws 3907-08 adding TEX. REV. CIV. STAT. ANN. Art, 6132b-9.01 amended in 1997 when *id.* § 9.05 was added.

395. 1993 Tex. Laws 3907-08 adding TEX. REV. CIV. STAT. ANN. Art, 6132b-9.01(b).

396. 1993 Tex. Laws 3908-11, 3912 adding TEX. REV. CIV. STAT. ANN. Arts., 6132b-9.02(a), 6132b-9.04. § 9.02 was amended in 1997.

397. 1993 Tex. Laws 3908-09 adding TEX. REV. CIV. STAT. ANN. Art, 6132b-9.02(b).

398. 1993 Tex. Laws 3910 adding TEX. REV. CIV. STAT. ANN. Art, 6132b-9.02(g)(9).

399. 1993 Tex. Laws 3911 adding TEX. REV. CIV. STAT. ANN. Art, 6132b-9.03, later amended by 1997.1601-02.

Following the pattern set by the Business Corporation Act and TRLPA, the general partnership statute was to become effective five years later unless adopted sooner by a firm desiring its benefits.<sup>400</sup> On the same pattern, TRPA became the supplemental law or linkage for limited partnerships after five years unless they adopted it sooner.<sup>401</sup>

Key figures in the development of partnership statutes were Steven A. Waters and W. Alan Kailer who chaired the Bar Committee at different times.

### (3) *Limited Liability Partnerships (LLPs)*

Nineteen ninety-one brought the possibility of general partnerships becoming limited liability partnerships (LLPs). LLPs were still general partnerships but eliminated vicarious liability of one partner for the torts of another. More specifically, this dispensed with the traditional joint and several liability of partners for partnership obligations, but only for those obligations arising from torts rather than from contracts. The idea came from Lubbock lawyers James H. Milam, Philip W. Johnson and Robert L. Duncan who were concerned about pending government suits against lawyers who had not represented failed savings and loan associations—of which there were then many—but whose partners had represented them. Their Senator offered a short bill stating that a partner in a professional firm is not liable for misconduct in rendering a professional service by another partner or employee. The Senate passed the Bill without much comment. In the House it was criticized on several grounds. These included covering only professionals (particularly lawyers), relieving professionals from responsibility for persons they supervised, failing to signal persons dealing with the partnership that familiar partner liability was missing and leaving injured parties with no source of recovery. Representative Steve Wolens asked me as one of the critics to redraft the Bill in response to these comments. My redraft included input from Byron F. Egan, Larry Schoenbrun and Robert Hamilton. It was open to all kinds of partnerships, denied partners protection from liability of persons they supervised or directed, required LLPs to register annually with the Secretary of State and include “LLP” as part of their firm name, and carry at least \$100,000 of liability insurance covering the specified conduct. In that form it quickly passed and became law.<sup>402</sup>

The LLP concept was popular and widely used.<sup>403</sup> Louisiana, the Dis-

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400. 1993 Tex. Laws 3912 adding TEX. REV. CIV. STAT. ANN. Art. 6132b-10.03, later renumbered 11.03.

401. 1993 Tex. Laws 3914-15 adding TEX. REV. CIV. STAT. ANN. Art. 6132a-1 § 13.03.

402. 1991 Tex. Laws 3234-35 amending Tex. Civ. Stat. Ann. art. 6132b § 15 and adding §§ 45-A, 45-B and 45-C.

403. See, e.g., R. Dennis Anderson, Alan R. Bromberg, Byron F. Egan, Campbell A. Griffin, Larry L. Schoenbrun & Charles Szalkowski, *Registered LLPs*, 55 TEX. B.J. 728 (1992); Robert W. Hamilton, *Registered Limited Liability Partnerships: Present At the Birth (Nearly)*, 66 U. COLO. L. REV. 1 (1995); Sue Saab Fortney, *Seeking Shelter in the Minefield of Unintended Consequences—The Traps of Limited Liability Law Firms*, 54 WASH & LEE L. REV. 717 (1997); ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIB-

trict of Columbia adopted or modified it in 1993 and within a few years and with support from large accounting firms every state passed some version of it. Texas later refined and expanded its coverage to “full shield” by including protection of partners from partnership contract liability as well as tort liability.<sup>404</sup> This occurred after a number of other states did so.

The LLP provisions were carried forward in TRPA when it was passed in 1993.<sup>405</sup>

#### 4.4 SECURITIES

In the 1980s and 1990s the rigidity of Texas securities law loosened in important respects, largely through the creation or expansion of exemptions via State Securities Board rule-making authority.<sup>406</sup> In part this was response to the 1983 amendment allowing the Securities Act to be construed “to encourage capital formation . . . and to minimize regulatory burdens on issuers.”<sup>407</sup> Other significant factors were the increasing flexibility of Securities Commissioners Richard D. Latham , then Denise Voigt Crawford, and the persuasiveness of James R. Peacock III and others on the State Bar of Texas Committee on Securities.

Issuers of securities gained the flexibility of ULOE, the Uniform Limited Offering Exemption<sup>408</sup> which initially permitted unregistered offers and sales—but without “general advertising”—in coordination with federal Regulation D:<sup>409</sup>

- Up to \$500,000 to unlimited numbers of investors with no disclosure requirements,

- Up to \$5,000,000 to unlimited accredited investors and maximum 35 nonaccredited investors with modest disclosure requirements if there were any unaccredited buyers, and

- Over \$5,000,000 to unlimited accredited investors with registration-equivalent disclosure.

The securities were restricted as to resale and general solicitation was forbidden. Issuers gained also the ability to sell without securities registration—but with some advertising—to expanded classes of institu-

STEIN ON LIMITED LIABILITY PARTNERSHIPS AND THE REVISED UNIFORM PARTNERSHIP ACT (2001).

404. 1997 Tex. Laws 1594-95 amending TEX. CIV. STAT. ANN. art. 6132b § 3.08(a)(1) to provide for nonliability for “debts and obligations of the partnership” with an exception in § 3.08(a)(2) if the partner was directly involved in the specific activity in which the misconduct occurred or had notice of the misconduct and did not take reasonable steps to prevent or cure it.

405. 1993 Tex. Laws 3894-96 adding TEX. REV. CIV. STAT. ANN. Art. 6132b-3.08.

406. TEX. REV. CIV. STAT. ANN. Art.581-5T.

407. 1983 Tex. Laws 2716 § 3, now TEX. REV. CIV. STAT. Art. 581-10-1; *see supra* text accompanying note 192.

408. Reg. 109.13(k), 7 TEX. ADMIN. CODE § 109.13(k), 3 CCH Blue Sky L. Rep. ¶ 55,563.

409. Securities and Exchange Commission Rules 501-506, 17 C.F.R. §§ 230.501-230.506 as originally issued in Securities Act Release No. 6389 (Mar. 8, 1982), 24 S.E.C. Docket 1166 (1982).

tional<sup>410</sup> and accredited<sup>411</sup> investors. Accredited investors are primarily financial institutions, trusts or partnerships with \$5,000,000 of assets, and natural persons with \$1,000,000 of net worth or \$200,000 of income (or \$300,000 joint income with spouse) in the two most recent years.<sup>412</sup> Texas-registered dealers were permitted to use the Internet for general advertising of their products and services—but without efforts to sell and subject to other conditions.<sup>413</sup> The reach of the Internet was recognized further in letting non-Texas dealers (therefore typically unregistered here) make offers on the Internet if they state that securities are not being offered for sale to anyone in Texas and no sale is made in Texas.<sup>414</sup>

Buyers of unregistered securities gained significant ability to resell without registration in modest amounts (15 sales in 12 months in addition to sales under certain other exemptions).<sup>415</sup> They also gained significant ability to resell without registration after a reasonable one-year holding period<sup>416</sup> by compliance with SEC Rule 144.<sup>417</sup>

While registration requirements were loosened, enforcement was tightened somewhat. The 1995 amendments gave the Commissioner new authority to impose administrative fines for violation of the Securities Act in amounts up to \$10,000 per violation (maximum \$100,000 for multiple violations in a single proceeding or series of related proceedings)<sup>418</sup> and expanded authority to revoke or suspend registration, e.g. because of disciplinary action by another regulatory agency.<sup>419</sup> The fines were frequently imposed in administrative orders to sanction lesser violations, although not all orders impose fines. Criminal enforcement continued to have primary emphasis, and recent statistics show the state is generally recognized to obtain more criminal convictions for securities violations than any other state and possibly than all other states combined:

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410. Reg. 109.3, 7 TEX. ADMIN. CODE § 109.3, 3 CCH Blue Sky L. Rep. ¶ 55,553 (qualified institutional buyers).

411. Reg. 109.3, 7 TEX. ADMIN. CODE § 109.3, 3 CCH Blue Sky L. Rep. ¶ 55,553; Reg. 109.13(k), 7 TEX. ADMIN. CODE § 109.13(k), 3 CCH Blue Sky L. Rep.; Reg. 139.16, 7 TEX. ADMIN. CODE § 139.16, 3 CCH Blue Sky L. Rep. ¶ 55,720E (“limited use advertisements” allowed).

412. 406. Securities and Exchange Commission Rule 501(a), 17 C.F.R. §§ 230.501(a).

413. Reg. 139.18, 7 TEX. ADMIN. CODE § 139.18, 3 CCH Blue Sky L. Rep. ¶ 55,720G.

414. Reg. 139.17, 7 TEX. ADMIN. CODE § 139.17, 3 CCH Blue Sky L. Rep. ¶ 55,720F.

415. Reg. 139.14, 7 TEX. ADMIN. CODE § 139.14, 3 CCH Blue Sky L. Rep. ¶ 55,720C (15 sales in 12 months in addition to sales under certain other exemptions).

416. Reg. 139.13, 7 TEX. ADMIN. CODE § 139.13, 3 CCH Blue Sky L. Rep. ¶ 55,720B.

417. Securities and Exchange Commission Rule 144, 17 C.F.R. § 230.144. Other requirements include current public information about the issuer of the security, limits on amounts sold in 3 months (generally equal to one week’s trading volume) unless held for 2 years, and required sale in brokers’ transactions. The holding period was originally two years.

418. 1995 Tex. Laws 1995, § 13 adding TEX. REV. CIV. STAT. ANN. Art. 581 § 23-1.

419. 1995 Tex. Law 1992-93 § 9 amending TEX. REV. CIV. STAT. ANN. Art. 581-14.

Year	Criminal Convictions	Administrative Orders
1997	116	163
1998	37	183
1999	85	178
2000	72	98

Commissions were allowed to be collected by unregistered persons in transactions exempted by rule (previously only those exempted by statute were covered) but securities exempt by statute (e.g., government securities) no longer allowed commissions by unregistered persons.<sup>420</sup>

NSMIA (The National Securities Markets Improvement Act of 1996) preempted a large part of state securities law. It forbade states to register securities of federally registered investment companies and securities listed on the New York or American Stock Exchanges or the NASDAQ National Market System<sup>421</sup> ("covered securities").<sup>422</sup> This preemption had little effect in Texas because most of those securities were already exempted by Texas statute or rule. The major exception was investment companies (mutual funds) which Texas regularly had required to register. Their fees had supplied a substantial part of the Board's revenue but NSMIA allowed continuation of state fees.<sup>423</sup>

NSMIA prohibited state "merit" regulation with respect to covered securities<sup>424</sup> but left it intact for securities not "covered," e.g. those of companies making their first public offering. NSMIA contained a national exemption for sales to "qualified buyers"<sup>425</sup> as SEC defined that phrase but SEC has not yet defined it. NSMIA also preempted a number of exemptions including those for broker,<sup>426</sup> dealer,<sup>427</sup> non-issuer,<sup>428</sup> non-underwriter<sup>429</sup> and nonpublic<sup>430</sup> transactions. At the same time it preempted a number of kinds of regulations of broker-dealers.<sup>431</sup> But it preserved state authority to investigate and prosecute for fraud and for unlawful broker-dealer conduct.<sup>432</sup>

2001 legislation originated largely from Securities Board staff in con-

420. 1995 Tex. Law 1997-98 amending TEX. REV. CIV. STAT. ANN. Art. 581-34.

421. SECURITIES ACT §§ 18(a)(1), 18(b)(1)-(2), 15 U.S.C. §§ 77r(a)(1), 77r(b)(1)-(2).

422. SECURITIES ACT §§ 18(c)(2)(B), 15 U.S.C. §§ 77r(c)(2).

423. SECURITIES ACT §§ 18(c)(2)(B), 15 U.S.C. § 77r(c)(2)(B).

424. SECURITIES ACT § 18(a)(3), 15 U.S.C. 77r(a)(3).

425. SECURITIES ACT § 18(b)(3), 15 U.S.C. § 77r (b)(3)

426. SECURITIES ACT § 18(b)(4)(B) referring to *id.* § 4(4), 15 U.S.C. § 77r(b)(4)(B), referring to *id.* § 77d(4).

427. SECURITIES ACT § 18(b)(4)(A) referring to *id.* § 4(3), 15 U.S.C. § 77r(b)(4)(A), referring to *id.* § 77d(3).

428. SECURITIES ACT § 18(b)(4)(A) referring to *id.* § 4(1), 15 U.S.C. § 77r(b)(4)(A), referring to *id.* § 77d(1).

429. SECURITIES ACT § 18(b)(4)(A) referring to *id.* § 4(1), 15 U.S.C. § 77r(b)(4)(a), referring to *id.* § 4(1).

430. SECURITIES ACT § 18(b)(4)(D) referring to SEC rules under *id.* § 4(2), 15 U.S.C. § 77r(b)(4)(D), referring to SEC rules under *id.* § 77d(2).

431. SECURITIES EXCHANGE ACT § 15(h), 15 U.S.C. § 78o(h).

432. SECURITIES ACT § 18(c)(1), 15 U.S.C. § 77r(c)(1).

nection with Sunset Review<sup>433</sup> and highlighted enforcement. The Commissioner and staff gained rights to inspect brokers and their records without notice,<sup>434</sup> to issue cease-desist orders against fraudulent practices,<sup>435</sup> and to issue cease-desist orders without notice or hearing in emergency situations.<sup>436</sup> Criminal prosecutions of corporations and associations for Securities Act violations was authorized for the first time. If the violation was by a person acting within scope and authorized or recklessly tolerated by a majority of the governing board or by a high managerial agent within his or her authority.<sup>437</sup> There is a defense if the high managerial agent with responsibility exercised due diligence to prevent the violation.<sup>438</sup>

In contrast to increased remedies for the Commissioner and the State, a defrauded buyer's damages remedy was reduced if the buyer disposed of the security for less than its value. Her measure of damages is the price she paid (plus legal interest) less the greater of the value at disposition or the actual consideration she received.<sup>439</sup> A new remedy was added for the defrauded client of an investment adviser,<sup>440</sup> similar to that for a defrauded buyer or seller of a security.

Investment advisers had long been included in the Texas definition of "dealer" and so registered and regulated without recognition of professional differences from dealers. Federal law had registered and regulated advisers separately from dealers (and brokers) since 1940. As part of the 1996 NSMIA federal preemption of a large part of state securities regulation, states were barred from requiring registration of large investment advisers i.e. those having under management at least \$25,000,000 or more per SEC rule.<sup>441</sup> SEC reset that amount at \$30,000,000.<sup>442</sup> New or revised Texas sections in 2001 defined investment advisers and subjected them to registration, regulation and liability much like dealers.<sup>443</sup> In comity with the federal law, federally registered advisers were allowed to do Texas business with a notice filing in lieu of registration.<sup>444</sup> The Texas invest-

433. Sunset Advisory Commission, State Securities Board Sunset Staff Report (2000).

434. TEX. REV. CIV. STAT. ANN. Art.581-13-1.

435. TEX. REV. CIV. STAT. ANN. Arts 581-23.

436. TEX. REV. CIV. STAT. ANN. Arts 581-23-2.

437. TEX. REV. CIV. STAT. ANN. Arts 581-29-3.

438. TEX. REV. CIV. STAT. ANN. Arts 581-29-3(c).

439. TEX. REV. CIV. STAT. ANN. Arts 581-33D(3). In either case, income received on the security is deducted from the damages measure.

440. TEX. REV. CIV. STAT. ANN. Arts 581-33-1.

441. Investment Advisers Act § 203A(b)(1), 15 U.S.C. § 80b-3a(b)(1) barring state registration of advisers registered under id § 203. Id § 203A(a)(1) generally bars § 203 registration of advisers with less than \$25,000,000 of assets under management. There is an exception for an adviser whose home state (where it has its principal office and place of business) regulates it as an adviser.

442. Investment Advisers Act Rule 203A-1, 17 C.F.R. § 275.203A-1.

443. *E.g.*, TEX. REV. CIV. STAT. ANN. Art. 581-4N, -8, -1, -12B, -12-1, -13, -13-1, -14, -17, -18, -20, -21, -23B, -23-1, -25, -33-1.

444. TEX. REV. CIV. STAT. ANN. Art. 581-12-1.

ment adviser definition<sup>445</sup> closely repeated the federal definition.<sup>446</sup> But Texas did not copy the federal exemption for very-small advisers – those with fewer than 15 clients in 12 months.<sup>447</sup> The industry longed for this exemption in Texas but Commissioner and staff opposed it. While states from were barred from requiring registration of federally registered investment advisers, a state was allowed to require registration of an investment adviser representative who has a place of business located within that state.<sup>448</sup> Texas required registration of adviser representatives.<sup>449</sup>

The 2001 amendments enlarged the three-member State Securities Board to five, directed it to make and implement policies separating its policing making responsibility from the management responsibility of the Commission and employees and made the Board similar to other state agencies in various respects.<sup>450</sup>

In a considerable departure from regulation and enforcement, a novel and promising section directed the Commissioner to “develop and implement investor education initiatives to inform the public about the basics of investing in securities, with a special emphasis placed on the prevention and detection of securities fraud.”<sup>451</sup>

## 5. SOME OBSERVATIONS

Nineteenth century hostility to large organizations and capital accumulations has given way to a recognition of their necessity in an increasingly complex and interrelated society. Nineteenth century insistence on personal liability has given way to a recognition of the role of financier risk in encouraging enterprise. The securities law barriers to access to public investors have moderated.

Texas was slow in developing its business organization laws. The pace quickened in the last half of the 20th century and accelerated rapidly in the last two decades of that period. In the main, the state has been a follower, not a leader in this kind of legislation. Notable exceptions include its authorization of radical multi-party, multi-survivor mergers,<sup>452</sup> its allowance of easy conversion from one kind of entity to another,<sup>453</sup> and its innovation of LLPs without partner liability for partnership obligations (initially for those arising from another’s conduct).<sup>454</sup> As a follower, its models have usually been Uniform Acts, which have a degree

445. TEX. REV. CIV. STAT. ANN. ART. 581-4N.

446. Investment Advisers Act § 202(a)(11), 15 U.S.C. § 80b-2(a)(11).

447. Investment Advisers Act § 203(c), 15 U.S.C. § 80b-3(c).

448. Investment Advisers Act § 203A(b)(1)(A), 15 U.S.C. § 80b-3a(b)(1)(A).

449. TEX. REV. CIV. STAT. ANN. ART. 581-12B.

450. TEX. REV. CIV. STAT. ANN. ARTS. 581-2, -2-1, -2-2, -2-3, -2-4, -2-5, 2-5, -2-6, -2-7, -2-8.

451. H.B. No. 2255, 79<sup>th</sup> Leg. Reg. Sess., 2001 Tex. Sess. Law Serv. § 1.03 adding TEX. REV. CIV. STAT. ANN. ART. 581-43.

452. See *supra* text accompanying notes 219-21.

453. See *supra* text accompanying notes 280-85, 316, 350-88.

454. See *supra* text accompanying notes Part 4.3(3).

of national consensus, or Delaware, which is most responsive to business needs. Potent influences have been the federal tax laws.<sup>455</sup>

Business law generally responds to business needs, and business needs are usually for flexibility. At least since the 1950s, the prime interpreters of those needs and the initiators of change have been the Committees of the State Bar Business Law Section (formerly the Section on Corporation, Banking and Business Law). Their work has been careful, thoughtful and competent. Their members have been experienced in the subject of their work. The experience was gained largely in law firms representing businesses. Their orientation was naturally pro-management. The overall trend of Texas business law has been toward greater flexibility of structure and greater freedom of contract. Flexibility from a management point of view has a price in diminished rights of and protections for shareholders and investors.

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455. Market factors include taxation, which has had its impact. See Alan R. Bromberg, *Tax Influences on the Law of Business Associations*, 16 BAYLOR L. REV. 327 (1964).



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