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PARTNERSHIPS

*Steven A. Waters**
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I. INTRODUCTION

TEXAS jurisprudence was not changed by any partnership cases during the Survey period. In fact, there is nothing particularly monumental to report.[1] But, as usual, there are a number of cases that contain enough nuggets to justify reporting. Because limited liability companies are growing in importance,[2] and because the relevance of bankruptcy cases tends to cross state lines, we also considered cases in those areas for the period, and report on one of each flavor.

II. PARTNERSHIP CASES

A. FORMATION

Fiduciary Duties—Do parties to a partnership agreement owe a fiduciary duty to each other before the formation of the partnership?—*Tsai v. Joseph J. Blake & Associates, Inc.*

The principal partnership issue in *Tsai* was whether the defendant owed a fiduciary duty to the plaintiff *before* the formation of their partnership. Peter Tsai ("Tsai"), a Taiwanese real estate investor interested in Dallas area real estate, met with Henry Billingsley ("Billingsley") to discuss an investment in an 831 acre tract of land in Carrollton (the "Property"). Shortly after that meeting, Billingsley sent Tsai a letter with price information for the Property and a suggestion that they form a joint venture to hold the Property. Billingsley enclosed with the letter a sample standard form partnership agreement.[3] Some months later, Tsai engaged an independent appraiser (from a list supplied by Billingsley) who

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1. There were dozens of cases that involved partnerships as parties, but few contained a key partnership issue.

2. They would be wildly more popular if they were not subject, unlike partnerships, to the Texas franchise tax. They clearly are the tax pass-through entity of choice in states that do not have a similar tax impediment.

3. Tsai v. Joseph J. Blake & Assocs., Inc., No. 05-00-00962-CV (Tex. App.—Dallas Aug. 6, 2002, no pet.) (not designated for publication), 2002 WL 1792212, at *1 (noting that Billingsley sent this agreement to show Tsai the form of agreement that Billingsley typically used to hold property jointly with investors).

valued the property at $118,000,000, almost the identical value quoted by Billingsley in the initial meeting with Tsai.[4]

A few months later, Billingsley sent Tsai another letter to encourage Tsai's investment, since Tsai had independently confirmed the Property's value. After a few more months, Tsai sent Billingsley a deposit for the Property, and the two agreed to hold the investment in a limited partnership (the "Partnership").[5] Thereafter, Billingsley periodically updated Tsai on the value of the Property, consistently reporting appreciation. In 1995, Tsai elected to sell his interest in the Property and obtained new appraisals showing that the value of the Property was dramatically lower than the $118 million quoted by Billingsley in their initial meetings (and confirmed by the original appraisal Tsai obtained).[6] Tsai sued Billingsley alleging, among several other theories, that Billingsley had breached a fiduciary duty to Tsai by misrepresenting the Property's value.[7]

The trial court granted summary judgment for Billingsley on Tsai's breach of fiduciary duty claim on the ground that Billingsley did not owe Tsai a fiduciary duty *before* the Partnership was formed.[8] Tsai appealed, arguing that the trial court erred in ruling that Billingsley did not owe him a fiduciary duty before the Partnership was formed.[9] Tsai also claimed that Billingsley's fiduciary duty breach constituted constructive fraud.[10] Tsai's key theory was that a fiduciary duty arose two years *before* the formation of the Partnership when Billingsley sent him the letter suggesting formation of a joint venture to hold the Property and enclosed a form of partnership agreement.[11] Tsai supported the theory with the ar-

4. *Id.* (stating that while Billingsley had purchased the property in 1984 for $0.89 per square foot, he had told Tsai that the value of the property had increased to approximately $3.25 per square foot, or $117,873,360). Tsai's independent appraisal confirmed that the value was $118,000,000 as of June 15, 1988. *Id.*

5. *Id.* at *1-2. Tsai paid the initial deposit of $250,000 on November 30, 1988, immediately before formation of the entities that would hold the Property. The transaction ultimately closed on March 15, 1989. *Id.* at *2.

6. *Id.* (stating that the appraiser valued the Property at $7,900,000, as of September 1, 1995, and additional appraisals showed the value of the Property on June 15, 1988, as being $22,500,000, and $4,600,000, compared to both Billingsley's initial quote of $117,873,360 and Tsai's independent appraisal).

7. *Id.* (stating that Tsai's claims against Billingsley and his related entities included that they were "negligent, grossly negligent, made negligent misrepresentations, breached their fiduciary duties to [Tsai], committed common-law and statutory fraud, fraudulent concealment, and constructive fraud").

8. *Id.* (noting that the trial court also granted summary judgment for Billingsley on the claims of fraud and misrepresentation, ruling that "causes of action for fraud and misrepresentation 'arising out of statements regarding the value of real estate . . . are not actionable as a matter of law.'"); *id.* (stating that "the remaining causes of action were tried before a jury that found against [Tsai] on every issue.").

9. *Id.* at *3.

10. *Id.* The court stated that "[c]onstructive fraud is the breach of some legal or equitable duty which, regardless of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure the public interest." *Id.* at *5 (citing Gillum v. Republic Health Corp., 778 S.W.2d 558, 571 (Tex. App.—Dallas 1989, no writ)).

11. *Id.* Remember, this was simply a form that Billingsley used in similar situations and was not a document drafted for this particular deal.

gument that, in promoting the benefits of the investment and ultimate sale, Billingsley had engendered a confidential relationship.[12]

The court of appeals ruled that neither Billingsley's letter and sample partnership agreement, nor his "extolling the benefits of a confidential relationship,"[13] elevated the parties' pre-formation relationship to a level that imposed a fiduciary duty on Billingsley.[14]

In *dicta*, the court agreed with Tsai that parties who deal together "as joint venturers" owe a confidential relationship to each other; but such a joint venture relationship must first be found.[15] To determine whether the parties had formed a "joint venture" before their formal entry into the Partnership, the court examined the necessary elements of a joint venture: "(1) a community of interest; (2) an agreement to share profits; (3) an agreement to share losses; and (4) a mutual right of control or management of the enterprise."[16] The court determined that none of the parties' actions before the Partnership was formed—including Billingsley's suggestion that the parties form a joint venture, Tsai's placing a deposit on the property for the right to purchase a share of the investment, and the inclusion of the partnership agreement with Billingsley's letter to Tsai[17]— resulted in the creation of a joint venture. The court also stated that Billingsley and Tsai "never agreed they would have a mutual right of control or management of the enterprise or that they would share in the losses of the enterprise, two necessary elements of a joint venture. . . ."[18] Based on these findings, the court of appeals upheld the trial court's grant of summary judgment in favor of Billingsley.

Although somewhat inconsistent with the marketing efforts that go into finding an outside investor, it can be useful to a person in Billingsley's position to expressly deny (in writing) the existence of a confidential relationship, joint venture or partnership until definitive documents are executed.

B. Bringing Suit

Standing—Does an out-of-state partnership have standing to sue in Texas without first obtaining a certificate of authority?—*Goss v. Bobby D. Associates*

12. *Id.* at *6.

13. *Id.* It was difficult to find such an "extolling," as such, in the facts recounted in the opinion apart from Billingley's promotion of his experience in joint real estate investments in the Dallas market, especially with foreign partners, his family's standing in the community, and the derivative benefits to Tsai that would flow from that reputation.

14. *Id.* at *5-6 (stating that the court "refuse[d] to hold that a salesman's extolling the benefits of a confidential relationship creates such a relationship").

15. *Id.* at *6-7.

16. *Id.* at *7 (citing Swineheart v. Stubbeman, McRea, Sealy, Laughlin & Browder, Inc., 48 S.W.3d 865, 879 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

17. *Id.*

18. *Id.* The court stated that even if a fiduciary duty between the parties existed, Tsai produced no evidence of any action that would amount to breach of a fiduciary duty or constructive fraud on the part of Billingsley. *Id.*

Goss concerned whether an out-of-state partnership had standing to sue on a contract in Texas without first obtaining a certificate of authority. Wild Willie II Corporation entered into separate contracts to sell various parcels of land to Jackson O. Goss and others (collectively, "Goss"). Bobby D. Associates ("BDA") succeeded to Wild Willie's rights under the contracts. Thereafter, Goss defaulted on the contracts by failing to make the required payments to BDA. The trial court granted BDA's motion for summary judgment on its breach of contract claim, and Goss appealed, claiming that BDA did not have standing to sue in Texas.[19]

The essence of Goss's claim that BDA lacked standing was that BDA was a foreign corporation with no certificate of authority to do business in Texas.[20] Goss also produced a certificate from the Secretary of State of Ohio, BDA's principal place of business, stating that BDA was not registered to do business in its home state in any capacity.[21] But BDA had a good response—it was a general partnership, and the requirement that a foreign corporation obtain a certificate of authority before transacting business did not apply to general partnerships, but only to corporations.[22] The court agreed with BDA's reasoning and added that, under Article 8.01(B) of the Texas Business Corporation Act, a foreign corporation without a certificate of authority to do business in Texas nevertheless has standing to bring suit to secure or collect debts.[23] Thus, even if BDA had been a foreign corporation, it would have had standing to sue Goss to secure payment of the debt.[24]

Statute of Limitations—When does the statutory period for bringing suit under a partnership agreement begin to run?—*Martin-Del Campo v. Vega*

Vega turned on when the statute of limitations, which was the basis for the defendants' motion for summary judgment and affirmative defense, began to run between partners. Luis Martin-Del Campo entered into a written partnership agreement with Francisco Vega, president of Danish Creamery, Inc., for the purpose of acquiring twenty-two acres of land and "urbanizing [the land] in the best way possible in accordance with the market for its sale."[25] Martin-Del Campo made the initial contributions

19. Goss v. Bobby D. Assocs., 94 S.W.3d 65, 69 (Tex. App.—Tyler 2002, no pet.).

20. *Id.* at 69.

21. *Id.* at 69-70.

22. *Id.* at 70. The court might also have noted that out-of-state limited partnerships and limited liability companies are subject to registration requirements in Texas. TEX. REV. CIV. STAT. ANN. art. 6132b, § 10.01 (Vernon 2002); TEX. REV. CIV. STAT. ANN. art. 1528n, § 7.01 (Vernon 2002). There is no such requirement for general partnerships, which historically tended to involve more informal relationships and for which there is no centralized filing requirement.

23. *Goss*, 94 S.W.3d at 70.

24. *Id.*

25. Martin-Del Campo v. Vega, No. 13-00-00467 (Tex. App.—Corpus Christi Jan. 17, 2002, no pet.) (not designated for publication), 2002 Tex. App. LEXIS 551, at *1.

and monthly installments as required by the partnership agreement.[26] Vega later proposed that the partnership pay down a portion of the loan on the real estate. Martin-Del Campo agreed and paid his proportionate share, but he made no further payments to the partnership.[27]

For a reason not stated in the opinion, the defendants' suit to recover back payments from Martin-Del Campo was dismissed.[28] Martin-Del Campo then filed a petition in the trial court to dissolve the partnership and obtain an accounting, but the case was dismissed when the trial court granted the defendants' motion for summary judgment on the basis that the claim was barred by limitations.[29] Martin-Del Campo appealed. The defendants argued that the statutory period began to run when dealings between the parties ceased, which they claimed was "either: (1) when Martin-Del Campo made his final contribution to the partnership for purposes of debt reduction, or (2) when Vega sent Martin-Del Campo the Final Demand for payment."[30]

The appellate court noted that the four-year statute of limitations begins to run when a cause of action accrues and that "the cause of action accrues on the day that the dealings in which the parties were interested together cease."[31] As noted, the partnership was formed to urbanize the land and sell it.[32] The court found no evidence that this specific undertaking had ceased, even though Martin-Del Campo failed to make the payments required of him by the partnership agreement.[33] The court stated that "breach of the partnership agreement. . . does not denote cessation of dealings between the parties."[34] Accordingly, the court found that the statute of limitations had not run, and it overturned the trial court's grant of summary judgment and remanded the case for trial on the merits.

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26. *Id.* at *1-2

27. *Id.* at *2.

28. *Id.* at *3 n.1 (stating that the record failed to show why the defendants' suit to recover the back payments had been dismissed).

29. *Id.* at *4.

30. *Id.* at *6.

31. *Id.* at *8 (citing TEX. CIV. PRAC. & REM. CODE ANN. §16.004(c) (Vernon Supp. 2001)).

32. *Id.* at *1.

33. *Id.* at *8-9. In other contexts, including whether a partner may dissolve a partnership without breaching the partnership agreement, the completion or not of a "particular undertaking" can be the key issue. For example, Texas Revised Partnership Act Sec. 6.02 provides that a partner's withdrawal from a partnership is wrongful if it is accomplished by the express will of the partner before completion of the "particular undertaking" for which the partnership was formed. TEX. REV. CIV. STAT. ANN. art. 6132b, § 6.02(b)(2)(A) (Vernon 2001).

34. *Vega*, 2002 Tex. App. LEXIS 551, at *9 (citing Heathington v. Heathington Lumber Co., Inc., 398 S.W.2d 822, 826 (Tex. App.—Amarillo 1966, no writ) for the proposition that "where there is evidence of the existence of a partnership, such status or condition is presumed to continue until the contrary appears").

C. Alter Ego Liability and Limited Partnerships

Piercing the Limited Partnership Veil—Does the alter ego theory of liability apply to limited partnerships?—*Pinebrook Props., Ltd. v. Brookhaven Lake Prop. Owners Ass'n*

In *Pinebrook Properties, Ltd.*, the court had to determine whether Pinebrook Properties, Ltd. (the "Limited Partnership") and its general partner, Pinebrook Properties Management, L.L.C. (the "Limited Liability Company"), were, in fact, alter egos of A.C. Musgrave, Jr. ("Musgrave").[35] The Limited Partnership owned the property that was the subject of the litigation, as the successor in interest to Musgrave. Musgrave was the president and manager of the Limited Liability Company general partner.[36] The trial court found Musgrave liable and Musgrave appealed.

The court of appeals reversed the trial court's application of alter ego liability to Musgrave, finding the doctrine inapplicable to partnerships.[37] Partners in a general partnership have joint and several liability for the obligations of the partnership. Under the Texas Revised Limited Partnership Act, the general partners in a limited partnership have the same joint and several liability for partnership obligations as do partners in a general partnership.[38] Unless they accept liability by contract, limited partners are liable only to persons outside the limited partnership if they participate in control of the business, and then only to third parties who transact business with the limited partners reasonably believing that they are dealing with a general partner.[39]

So where does an alter ego theory fit into all of this? Courts have allowed third parties to pierce the corporate veil when the line between corporation and individual becomes so blurred that failure to hold the individual accountable for actions of the corporation would result in injustice.[40] But in this situation involving a partnership, the court concluded that alter ego liability is unnecessary to avoid injustice "because the general partner is always liable for the debts and obligations of the partnership to third parties."[41] That covers the general partner itself, but what about its owners (if the general partner is not an individual)? That is where the court next turned its attention. The court considered the liability of Musgrave, as president and manager of the general partner Limited Liability Company, by looking at the total dealings of Musgrave and the Limited Liability Company under a traditional alter ego analysis. Ex-

35. Pinebrook Props., Ltd. v. Brookhaven Lake Prop. Owners Ass'n, 77 S.W.3d 487, 491 (Tex. App.—Texarkana 2002, pet. denied).
36. *Id.* at 499. This is a very common structure—a limited liability company as sole general partner of a limited partnership.
37. *Id.*
38. *Id. See also* Tex. Rev. Civ. Stat. Ann. art 6132a-1, § 4.03(b) (Vernon 2001).
39. Tex. Rev. Civ. Stat. Ann. art. 6132a-1 § 3.03(a) (Vernon 2001).
40. *Pinebrook Props., Ltd.*, 77 S.W.3d at 499 (quoting First Nat'l v. Gamble, 132 S.W.2d 100, 103 (1939)).
41. *Id.* at 500.

amining the dealings between Musgrave and the Limited Liability Company, the court found no evidence to suggest that separateness between Musgrave and the Limited Liability Company had ceased to exist. Based on the lack of evidence, the court of appeals reversed the trial court's judgment that the Limited Liability Company was an alter ego of Musgrave and rendered a take-nothing judgment for Musgrave.[42]

D. DISSOLUTION

Dissolution—When does a partnership debt become an individual debt of a general partner?—*Boulle v. Nacol, Wortham and Assocs., P.C.*

This case involved an issue that the authors had not considered before—the effect of the assignment to one party of a debt for which that party and another have joint and several liability. In *Boulle*, Franco and Jean were partners in the Boulle Group, a general partnership (the "Partnership"). Jean and Franco hired Nacol, Wortham and Assocs., P.C. ("Nacol") to defend them and pursue their counterclaims in a lawsuit filed by Sunshine Mining Group.[43] Franco and Jean dissolved the Partnership in February 1991, and then amended their agreement with Nacol to provide that 1/3 of the proceeds from a judgment in their favor would be paid to Nacol as payment for Nacol's services.[44] Franco and Jean entered into the amendment individually and (purportedly) on behalf of the Partnership.[45] The lawsuit was settled favorably to Franco and Jean; however, Franco challenged the amount of fees owed to Nacol and demanded that the disputed portion be held in escrow pending resolution.[46] Franco and Jean agreed that they would split the remainder of the settlement proceeds and that Franco would assume liability for the escrowed disputed portion of Nacol's fees. Nacol obtained a default judgment against Franco and the Partnership, jointly and severally, for the disputed fees.[47] Nacol assigned the judgment to Jean. The trial court granted Jean's Motion for Turnover of Assets, and Franco appealed.[48]

On appeal, Franco claimed that the trial court's grant of Jean's turnover motion was erroneous on two separate grounds. First, Franco

42. *Id.* at 500-01 (stating that there was "no evidence provided that Musgrave commingled funds or that his assets and those of Pinebrook Management [L.L.C.] were not kept separate," and that "failure to comply with corporate formalities is no longer considered in determining alter ego and is therefore no evidence of alter ego."). Limited liability companies often are considered hybrids between corporations and limited partnerships, with features of each. It remains to be seen whether corporate-type "piercing the veil" analyses will be the norm for L.L.Cs, but this court, at least by implication, seemed to assume that it could.

43. Boulle v. Nacol, Wortham and Assocs., P.C., No. 05-01-00744-CV (Tex. App.—Dallas Feb. 7, 2002, no pet.) (not designated for publication), 2002 WL 188476, at *1.

44. *Id.*

45. *Id.* It is interesting that the dissolved partnership was a signatory. *See also infra* note 50.

46. *Id.*

47. *Id.*

48. *Id.*

claimed that because Jean and Franco were partners in a general partnership and were jointly and severally liable on the judgment in favor of Nacol, Nacol's assignment of the judgment to Jean extinguished the judgment as to Franco.[49] The court agreed with the principle and held that where two partners are jointly and severally liable on a debt, the assignment of the debt to one of the partners extinguishes the debt as to the other partner.[50]

But was the requisite joint and several liability present here? The court stated that, to be liable for the debt, Jean must have been an original party to the suit or the judgment must have been a partnership debt for which the partners had joint and several liability. Jean was not a party to the suit. For Nacol's judgment against Franco to be a partnership debt, Nacol had to have believed that the Partnership was still in existence "prior to either the filing of [the] suit or the entry of the judgment and [agreement] to release Jean from the debt."[51] The court found that "evidence at the turnover hearing established that Franco's debt on the judgment was incurred after the dissolution" of the Partnership and that Nacol had notice of the dissolution at the time the debt was incurred.[52] The parties' course of conduct indicated that the judgment against Franco was not a partnership debt and that Jean was not jointly and severally liable for the judgment against Franco.[53]

Franco also contended that, even if the judgment was not extinguished by the assignment to Jean, Jean was jointly and severally liable for the debt as a general partner.[54] The court summarily disposed of that issue, having already determined that the debt was not a debt of the Partnership. Therefore, the court concluded that Franco alone was liable, and had no right of contribution or indemnity from Jean.[55]

Dissolution—Is there a distinction between "dissolution" and "grounds for dissolution"?—*In re Woskob*

The answer to the question posed in the caption, as with "void" and "voidable," is "yes." The two are not the same. In *In re Woskob*, the Third Circuit Court of Appeals ruled that acts of wrongful exclusion serve only as *grounds* for dissolution in certain instances and do not automati-

49. *Id.* at *2.

50. *Id.* (citing BW Vill., Ltd. v. Tricon Enters., Inc., 879 S.W.2d 205, 209 (Tex. App.—Houston [14th Dist.] 1994, writ denied) and Rich v. Smith, 481 S.W.2d 162, 163-64 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.)). Because this principle applies to those with joint and several liability, it is ripe for application to general partners.

51. *Id.* at *2-3.

52. *Id.* at *3.

53. *Id.*

54. *Id.* at *1.

55. *Id.* at *4. And didn't that result leave the parties where they agreed to be, with Franco responsible for the disputed fees to Nacol?

cally dissolve the partnership by operation of law.[56] The court also ruled that the bankruptcy of a partner operates to dissolve a partnership only when the non-debtor partner refuses to continue in the partnership with the debtor-in-possession.[57]

The Third Circuit considered the bankruptcy court's ruling that, after her husband died, Ms. Woskob had exercised her option to purchase his interest in the Legends Partnership (the "Partnership") within the time provided by the partnership agreement.[58] On appeal from the bankruptcy court, the district court ruled that, before Mr. Woskob's death, certain other acts by the partners had dissolved the partnership by operation of law and that, consequently, the option period expired before Ms. Woskob's attempt to purchase Mr. Woskob's shares.[59] Establishing the ultimate act of dissolution and the date on which it took place remained critical to the determination of whether Ms. Woskob had timely exercised her purchase option.

Applying Pennsylvania law,[60] the Third Circuit considered three things: (1) whether acts of wrongful exclusion from the partnership were sufficient to cause the dissolution of the partnership, (2) whether one partner's filing of bankruptcy was sufficient to cause the dissolution of the partnership, and (3) whether the death of Mr. Woskob dissolved the partnership.[61] The valid exercise of Ms. Woskob's purchase option depended on a finding that Mr. Woskob's death, and not one of the earlier acts, was the event that dissolved the partnership.

1. Exclusion

The estate of Mr. Woskob (the "Estate") argued that either of two separate acts of wrongful exclusion from the partnership was sufficient to cause automatic dissolution. During their divorce proceedings, Mr. Woskob excluded Ms. Woskob from sharing in partnership proceeds. Not to be outdone, Ms. Woskob obtained a divorce decree awarding her the "exclusive right to manage and derive income" from the partnership, and she used that right to terminate Mr. Woskob's management role in the partnership.[62] The district court ruled that acts of wrongful exclusion were

56. *In re* Woskob, 305 F.3d 177, 183 (3d Cir. 2002) (emphasis added). Because bankruptcy principles often extend beyond state boundaries, we have included this Third Circuit case.

57. *Id.* at 186.

58. *Id.* at 181. The partnership agreement provided that either partner could exercise the purchase option within 30 days from an act of dissolution or within 90 days from the death of a partner. *Id.* at 181. Ms. Woskob exercised her option to purchase within the two weeks after Mr. Woskob's death. *Id.* at 180.

59. *Id.* at 181.

60. *Id.* (stating that because the partnership was formed and managed in the State of Pennsylvania, and because Pennsylvania was the principal place of business for the partnership, the court would apply the Uniform Partnership Act as adopted by the State of Pennsylvania).

61. *Id.*

62. *Id.* at 179-80 (explaining that the partnership had employed A.W. & Sons, a business owned by Mr. Woskob's family, to manage the partnership, and, following Ms. Wos-

sufficient to "dissolve a partnership automatically through operation of law."[63] Applied here, the district court found that, in each instance, one partner had wrongfully excluded the other from participation in the business of the partnership.[64]

On appeal, the Third Circuit noted that, while the Pennsylvania Uniform Partnership Act ("PUPA") provided for immediate and automatic dissolution of a partnership on expulsion of a partner, not all expulsions were of this variety. Automatic dissolution occurs only when a partner is expelled from the business of the partnership "in accordance with such a power conferred by the partnership agreement."[65] The court noted the distinction between acts of exclusion that supply grounds on which a court can base a judicial decree of dissolution and other acts of exclusion that cause immediate dissolution.[66] The acts of both partners were *grounds* for dissolution under 15 Pa.C.S. § 8354(a), which states in part that a court shall issue a decree dissolving a partnership where willful breach of the partnership by one of the partners creates a situation where it is no longer "reasonably practicable to carry on the business of partnership with him."[67] But here, the court found that because these acts were not committed "in accordance with [an expulsion] power conferred by the agreement between the partners," the partnership was not dissolved by operation of law under the PUPA § 8353(1)(iv).[68] Therefore, because the acts of exclusion were only grounds for dissolution and did not cause an automatic dissolution of the partnership, the court did not have to address whether the acts of exclusion were wrongful.[69]

2. *Bankruptcy*

The Estate took one more shot, arguing that the bankruptcy of Mr. Woskob caused the automatic dissolution of the partnership (starting the running of the time in which Ms. Woskob could exercise the purchase option). Section 8353 of the PUPA specifically provides for the immediate dissolution of a partnership on the bankruptcy of a general partner; however, the court found that 11 U.S.C. § 365(e)(1)(B) trumps that sec-

kob's receipt of the exclusive right to manage the Partnership, Ms. Woskob terminated the management agreement with A.W. & Sons).

63. *Id.* at 182.

64. *Id.* at 182 (stating that the district court relied upon *In re* Crutcher, 209 B.R. 347 (Bankr. E.D. Pa. 1997), interpreting Pennsylvania Uniform Partnership Act ("PUPA"), specifically 15 Pa. C.S. § 8353(1)(iv), as providing for the immediate dissolution of a partnership upon the expulsion of any partner). It seems odd that a court-sanctioned divorce decree could result in Ms. Woskob's *wrongful* exclusion of her husband—either she had the exclusive right to manage, or she did not.

65. *Id.* at 183 (quoting 15 Pa.C.S. § 8353(1)(iv)).

66. *Id.* at 182-83 (examining 15 Pa.C.S. 8353(1)(iv) which sets out the circumstances where a court must enter a judicial decree dissolving a partnership). Again, like "voidable" and "void." It is quite a different thing to declare a dissolution and to convince a court that sufficient grounds exist to do so.

67. *Id.* at 183.

68. *Id.*

69. *Id.*

tion of the PUPA to the extent that non-debtor partners consent to remain partners with a debtor partner after the debtor partner files for bankruptcy.[70] This provision of the bankruptcy code is subject to the limitations contained in 11 U.S.C. §§ 365(e)(2)(A) and 365(c)(1), which state that the anti-*ipso facto* provisions of § 365(e)(1)(B) do not apply when the non-debtor partners refuse to continue the partnership with the debtor.[71] The court found that Mr. Woskob, debtor-in-possession, remained a partner despite having filed for bankruptcy. Evidence indicat-

70. *See id.* at 184-85 (stating that "§365(e)(1) invalidates *ipso facto* provisions, which . . . are provisions of law or contract which specify that 'a bankruptcy filing *per se* will terminate or modify' an executory contract" such as a partnership agreement).

71. *Id.* at 186-87 (citing 11 U.S.C. 365(e)(2)(A), which states that 365(e)(1) "does not apply to an executory contract . . . of the debtor, whether or not such contract . . . prohibits or restricts assignment of rights or delegation of duties, if . . . (ii) such party does not consent to such assumption or assignment. . . ."; and citing 11 U.S.C. 365(c)(1), which states that "the trustee may not assume or assign any executory contract. . . of the debtor, whether or not such contract . . . prohibits or restricts assignment of rights or delegation of duties if . . . (B) such party does not consent to such assumption or assignment.").

The following is an excerpt from an unpublished paper co-authored by the author of this article.

Dissolution under State Law

> Both general and limited partnership statutes impose consequences on the bankruptcy of a partner or the partnership. Recent Texas-based case law, not universally followed, has intervened to contradict that result, or at least to explain that the term "bankruptcy" as used in the Texas Uniform Partnership Act ("TUPA") does not necessarily include (in the absence of more explicit coverage in the partnership agreement) reorganization under Chapter 11 of the Bankruptcy Code. *See In re Hawkins*, 113 B.R. 315 (Bankr. N.D. Tex. 1990), following the seminal case of *In re Safren*, 65 B.R. 566 (Bankr. C.D. Cal. 1986). In *Hawkins*, the subject partnership agreement, following the partnership statute, said simply that the partnership dissolved on the "bankruptcy" of a partner, without either defining the term or distinguishing between a partner's being in a Chapter 11 reorganization or a Chapter 7 liquidation. (For a case that expressly rejects *Safren*, concluding that the term "bankruptcy" in a state's partnership statute included both Chapter 7 and Chapter 11, but nevertheless finding under its facts that a partner's bankruptcy filing did not cause a dissolution, see *In re Siegal*, 190 B.R. 639 (Bankr. D. Ariz. 1996)). The cases finding that a Chapter 11 filing was not a "bankruptcy" for purposes of the TUPA (or its equivalent) found support on two primary grounds: (i) reorganizations were not part of the bankruptcy law in 1914 when the Uniform Partnership Act was passed (*Siegal* specifically rejected that argument based on Arizona's statutes being adopted after the Chapter 11 reorganization concept was born) and (ii) dissolution automatically flowing from the filing, with the possible consequences of winding up and termination, were inconsistent with federal bankruptcy policy favoring an opportunity to reorganize. Nevertheless, a clear statement of the parties' intent in the partnership agreement may influence the outcome in certain instances. (*Note*: Consider the effect of *In re Phillips*, discussed *supra*, in which the Fifth Circuit held that a general partner who had made a Chapter 11 filing was "bankrupt" for purposes of state law, disabling him from filing a voluntary petition on behalf of the limited partnership. However, there had been an earlier state court ruling ordering dissolution, which contributed to the court's finding.) The Texas Revised Partnership Act ("TRPA") approach, described below in subparagraph a.(1), so long as not varied by the partnership agreement itself, is more consistent with the Bankruptcy Code prohibition against *ipso facto* clauses that produce a termination simply as a result of the bankruptcy filing, not unlike the TUPA automatic partnership dissolution on bankruptcy of a partner.

ing Ms. Woskob's consent to Mr. Woskob's remaining a partner included

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a. General Partnership.

(1) TUPA TUPA § 31(5) stipulates that dissolution is caused by the bankruptcy of any partner or the partnership. The partnership agreement should determine whether this would produce a winding up (liquidation) and termination pursuant to TUPA § 38(1) (which, as noted above, may not be enforceable under federal bankruptcy law) or a continuation of the business by the other partners, also pursuant to TUPA § 38(1) [the authority to continue is rather oblique - the clause "unless otherwise agreed, . . ."].

(2) TRPA. Consistent with the TRPA bias favoring continuation, the bankruptcy of a partner is "an event of withdrawal" of that partner, but is not an event requiring a winding up under TRPA § 8.01. Although the subject should be dealt with in the partnership agreement (although federal bankruptcy law might preempt the effort in any event), the consequences of not doing so are different from those under the TUPA (i.e. dissolution leading to winding up as opposed dealing with the individual partner, but continuing the partnership).

(3) Federal Bankruptcy Law. The foregoing is under state law. But, because the federal bankruptcy law comes into play, and generally preempts state law (except where bankruptcy law expressly looks to state law), the provision attached as **Appendix "B"** *may* help the continuing partners' attempt to influence the outcome in the bankruptcy proceeding.

b. Limited Partnership.

The TRLPA at least contemplates that the parties may wish to vary the results of the statute in their agreement. TRLPA § 4.02(a)(4)(B) and (C) state that, unless otherwise provided in a *written* partnership agreement, or with the consent of all partners, a person ceases to be a general partner of a limited partnership if the person files a voluntary bankruptcy petition or becomes the subject of an order for relief or is declared insolvent in any federal or state bankruptcy or insolvency proceeding. If the partnership agreement does not provide for a contrary result (under the authority of TRLPA § 4.02(a)(4)), and subject to case law such as *In re Hawkins*, discussed above (if it survived *In re Phillips*, or can be distinguished), and to bankruptcy law *ipso facto* prohibitions, then the bankruptcy event causes dissolution under TRLPA § 8.01(3), *unless*, under the authority of Section 8.01(3)(B), all remaining partners (or a lesser number spelled out in the partnership agreement) agrees in writing to continue, with as appropriate the appointment of one or more new general partners. [*Note*: Section 8.03, which allowed *reconstitution* in the event of a dissolution of the type just discussed, has been repealed, in favor of the 8.01(3) language that allows *avoidance of dissolution* and its consequences by the will of the partners (either all of them, or as provided in their agreement).] Thus, the event leads either to an agreed continuation, or absent that to winding up pursuant to Section 8.04, the result depending on the pre-event partnership agreement or the agreement of the partners after the event. Putting any common law consequences aside, it is important to know the statutory consequences of a general partner's bankruptcy and to provide in the partnership agreement for avoidance of undesirable results. Again, federal bankruptcy law will have something to say about the enforceability of the agreement if it purports to reduce the interest or rights of the debtor.

Executory Contract Issue

a. Definition. *Bk. Code § 365* – subject to court approval, the trustee may assume or reject any executory contract of the debtor. The Bk. Code does not define "executory contract." The most widely accepted definition (a version of the so-called "countryman" definition, named for its author, the late Prof. Vern Countryman) is "a contract under which the obligations of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." Vern A. Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 460 (1973).

See Phoenix Exploration, Inc. v. Yaquinto (In re Murexco Petroleum, Inc.), 15 F.3d 60, 62-63 (5th Cir. 1994) (citing Countryman definition with approval).

b. Rejection.

(1) Standard. No standard for determining rejection is provided by the Bk. Code. Under the Bankr. Act, the standard developed for abandonments of property was whether the contract would be burdensome to the estate if not rejected. A less strict test, the "business judgment test", which requires only a showing that rejection would improve debtor's overall financial condition, applies in "ordinary" executory contract cases not involving collective bargaining agreements (for them, the burdensome test applies). *See, e.g., In re Food City*, 94 B.R. 91 (Bankr. W.D. Tex. 1988).

(2) Damages For Breach. Under §§ 365(g)(1) and 502(g) of the Bk. Code, rejection constitutes breach of the contract as of the date before the date the petition was filed - therefore, the claim generally is a prepetition, unsecured claim. Damages are uncertain because the claim is unliquidated.

c. Partnership Agreement Application. Almost 20 years ago, the issue of whether a partnership agreement was an executory contract began to emerge in case law. There now is considerable case law support for treating partnership agreements as executory contracts. This is discussed in more detail in the following subsections.

(1) Limited Partnership Agreement. In a seminal 1981 case, the court in *In re Harms*, 10 B.R. 817 (Bankr. D. Colo. 1981) rejected the Countryman definition of an executory contract (the failure of a limited partner to perform would not excuse the general partner's performance), but found limited partnership agreements to be executory contracts because of *substantial future contributions required of limited partners* and the many *continuing obligations of the sole general partner* - neither party had fully performed. Subsequent cases, applying either the Countryman test or the "functional approach" have held limited partnership agreements to be executory contracts provided that the partners have unfulfilled material obligations. *See, e.g. Phar-Mor, Inc. v. Strouss Bldg. Assocs.*, 204 B.R. 948, 954 n.5 (N.D. Ohio 1997) (collecting cases holding limited partnership agreements to be executory contracts). (*Note*: If the facts are that the limited partners have no further obligations, or *no* material ones, then the agreement may be found, in that situation, not to be an executory contract. See the discussion in *subparagraph (3)*, below, of *In re Smith.*)

(2) General Partnership or Joint Venture Agreement. The typical continuing and reciprocal duties and obligations among joint venturers or general partners presumably would result in a joint venture or general partnership agreement usually being considered an executory contract. Seneker & Lewis, *Selected Bankruptcy Aspects of Real Estate Partnerships and Hybrid Debt-Equity Arrangements*, in *Real Estate Bankruptcies and Workouts* 177 (ABA Section of Real Prop. Probate and Trust Law 1983). *See also, Siegal*, 190 B.R. at 643.

(3) But They Aren't Always Executory Contracts. Not all partnership agreements have been found to be executory contracts, nor should they be. The issue is whether there are material obligations left to be performed on both sides. In many limited partnership contexts, performance by the limited partners may be complete at the time of a bankruptcy filing. For example, in the case of *In re Smith* 185 B.R. 285 (Bankr. S.D. Ill. 1995), the court declined to find that the partnership agreement was an executory contract because the debtor was merely a passive contributor of capital and had no material obligations left to perform. It found that the provisions in the agreement relating to annual meetings, access to information, and having the right to seek a judicial dissolution were limited partner *rights* rather than *obligations*. The issue was important in this case because of the claim that the trustee relinquished rights under the partnership agreement to pursue judicial dissolution by failing to assume the contract in a timely manner and that, therefore, it was rejected by operation of law. It was important, therefore, that the particular agreement *not* be an executory contract.

her continuing to list him has a general partner on the tax returns for the years following the petition for bankruptcy.[72]

3. Conclusion

The court of appeals ruled that no event that occurred before the death of Mr. Woskob caused automatic dissolution of the partnership, vacated the ruling of the district court and remanded the case to the district court for a decision about whether Ms. Woskob validly exercised the purchase option.[73]

E. JOINT ENTERPRISE LIABILITY

Elements of Joint Enterprise Liability—What constitutes the "community of pecuniary interest" necessary to impose joint enterprise liability?—*Blackburn v. Columbia Medical Ctr. Of Arlington Subsidiary, L.P.*

As this case demonstrates, it is not always enough to show that no partnership was formed for there to be "joint owner" consequences.[74]

In *Blackburn*, appellant Blackburn appealed the trial court's grant of a no evidence summary judgment motion in favor of Columbia Medical Center of Arlington Subsidiary, L.P. ("Columbia"). Blackburn was injured in an auto accident and sought treatment at Columbia's medical facility.[75] Blackburn claimed that Dr. Phyllis Noss, the radiologist who Blackburn claimed was negligent in reviewing her X-rays, was a partner, principal or employee of Medical Imaging of Dallas ("Medical Imaging").[76] Blackburn sued Columbia on the theory that Dr. Noss' wrongful conduct was imputed to Medical Imaging and that Medical Imaging's liability was in turn imputed to Columbia, on the theory of *joint enterprise* liability.[77] The essential elements of joint enterprise liability include:

> (1) an agreement, express or implied, among members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.[78]

Steven A. Waters & Eric Terry, Bankruptcy and Insolvency Issues for Partnerships, L.L.C.'s and their Owners—The Good, The Bad, and The Ugly (July 18-19, 2002) (unpublished paper on file with the *SMU Law Review*).

72. *Woskob*, 305 F.3d at 187.

73. *Id.* at 187-88.

74. The flow of the opinion itself was at times difficult to follow.

75. Blackburn v. Columbia Med. Ctr., 58 S.W.3d 263, 266 (Tex. App.—Ft. Worth 2001, pet denied).

76. *Id.* at 266-67 (indicating that Blackburn argued that Dr. Noss's negligence was imputed to Medical Imaging).

77. *Id.* at 267 (stating that Blackburn alleged that Dr. Noss was negligent in several specific respects).

78. *Id.* at 271.

On appeal, Columbia argued that Blackburn failed to show that there was the requisite "community of pecuniary interest in that purpose between Columbia and Medical Imaging" or a right of control between them concerning the conduct at issue.[79]

There was no dispute about the existence of an agreement, express or implied, between Columbia and Medical Imaging—there was a written agreement that employees of Medical Imaging were *independent contractors* providing radiology services to patients at Columbia.[80] Because Dr. Noss was a principal and a partner at Medical Imaging, the first element of joint enterprise liability (the existence of an agreement) was satisfied.[81] The written agreement also satisfied the second element of joint enterprise liability, serving as evidence of a "common purpose" to be carried out by Columbia and Medical Imaging.[82]

The court then considered whether there was a "community of pecuniary interest" in that common purpose.[83] Columbia offered a "no partnership" defense—because there was no agreement to share profits or losses, there was no community of pecuniary interest in the common purpose. Sharing in profits and losses is an essential part of a partnership, and, as the court stated, a "joint venture is governed by the same rules as a partnership . . . ."[84] But this court was not looking only at whether a partnership or its cousin, a joint venture, existed. Citing *Texas Department of Transportation v. Able*, the *Blackburn* court stated that a joint *enterprise* is distinct from a joint *venture*, and sharing profits and losses is not necessary to establish a joint *enterprise*.[85]

Because the joint enterprise notion is not seen very often, perhaps a bit more extended discussion is warranted. In *Able*, the supreme court found that the purpose of the parties' relationship included sharing resources to further an ultimate purpose and realizing economic benefits from the relationship.[86] An express agreement to share profits and losses is not required—the fact that the relationship produced substantial monetary and

79. *Id.* at 269.

80. *Id.* at 271 (emphasis added).

81. *Id.* (stating that the summary judgment record showed that Dr. Noss was a principal and a partner at Medical Imaging).

82. *Id.* at 271-72 (stating that the summary judgment record showed that there was sufficient evidence to show a common purpose to be carried out by the group).

83. *Id.* at 272 (citing Shoemaker v. Estate of Whistler, 513 S.W.2d 10, 17 (Tex. 1974) for the rule that the element of common purpose is limited to "those endeavors in which the parties share a 'community of pecuniary interest' involving a business or pecuniary purpose.").

84. *Id.* at 272-73. That is mostly true, but Texas case law has grafted an additional condition in finding a joint venture, that the parties have agreed to share losses (and not just profits). *See Swineheart*, 48 S.W.3d at 879; Ayco Dev. Corp. v. G.E.T. Serv. Co., 616 S.W.2d 184, 186 (Tex. 1981).

85. *Blackburn*, 58 S.W.3d at 273 (citing Tex. Dep't of Transp. v. Able, 981 S.W.2d 765, 769 (Tex. App.—Houston 1998), *aff'd*, 35 S.W.3d 608 (Tex. 2000)) (emphasis added).

86. *Able*, 35 S.W.3d at 614 (stating that the master agreement "plainly recognized that the project contemplated a joint effort that utilized federal, state and local funds; shared resources in furtherance of the ultimate purpose of providing mass transit; and realized an economic gain on the investment.").

personnel savings indicated that it was more than one of mere convenience.[87] Therefore, a showing that profits and losses were shared was not necessary to find that a community pecuniary interest existed; rather, *realizing an economic gain* while *furthering a common purpose* were the key elements.[88] The *Blackburn* court noted that substantial monetary and personnel savings shared by the parties in *Able* amounted to that key economic benefit.[89]

The court in *Blackburn* found that, while the parties enjoyed benefits from the relationship, the benefits were of a general nature and did not amount to an economic gain sufficient to prove a community of pecuniary interest. Testimony at trial indicated that the arrangement provided a convenience for Columbia and its patients—the patients were not forced to go elsewhere to obtain radiological services. In addition, the agreement benefited Medical Imaging to the extent that Columbia maintained the facilities and equipment necessary to operate the radiology services—Medical Imaging did not have to buy and maintain its own equipment, services and facilities.[90]

To illustrate the difference between the general benefits enjoyed by Columbia and Medical Imaging and the type of economic benefits giving rise to a joint enterprise, the court contrasted the facts of this case with those in *St. Joseph Hospital v. Wolff*.[91] In *St. Joseph Hospital*, the relationship between the hospital and the Central Texas Medical Foundation (a local medical-residency training program) reduced costs and duplications and produced shared financial benefits and costs.[92] The court stated that the "reduction in costs and contemplation of economic gain by approaching the project as a joint undertaking" were the types of economic benefits contemplated by the court in *Able*.[93] By contrast, the *Blackburn* court noted that there was no evidence of a similar pecuniary or monetary interest in the relationship between Columbia and Medical Imaging and that the general benefits derived from the relationship did not give rise to a joint enterprise.[94]

87. *Blackburn*, 58 S.W.3d at 274 (stating that "the court [in *Able*] found it noteworthy that monetary and personnel savings produced from pooling of resources might have been substantial and that the project was not a matter of mere friendly or family cooperation and accommodation.").

88. *Id.* (stating that the common purpose furthered by the relationship *may* be the sharing of profits and losses) (emphasis added).

89. *Id.*; *Able*, 35 S.W.3d at 614. These distinctions can be pretty fine, not obvious on a first reading.

90. *Blackburn*, 58 S.W.3d at 275-76.

91. *Id.* at 276 (referring to St. Joseph Hosp. v. Wolff, 999 S.W.2d 579 (Tex. App.—Austin 1999), *rev'd on other grounds*, 94 S.W.3d 513 (Tex. 2002)).

92. *Id.* at 276 (stating that in *St. Joseph Hosp.* "the hospital paid residents an annual stipend and the foundation paid a housing allowance, billed patients while remitting a portion of the proceeds to the hospital for the residents' services").

93. *Id.*

94. *Id.* at 276-77. It certainly is the case that both Columbia and Medical Imaging economically benefited from their arrangement, but apparently the connection was found to be more incidental than in other situations where a joint enterprise was found.

Columbia chose not to emphasize that the benefits of the relationship between it and Medical Imaging did not amount to the economic benefits contemplated by the court in *Able*.[95] Instead, Columbia relied on the Fifth Circuit Court of Appeals' ruling in *Walker v. Messerschmitt Bolkow Blohm*, arguing that sharing profits and losses was, in fact, a necessary element of a community of pecuniary interest.[96] In *Walker*, the court ruled that the independent contractor relationship between the parties "generally precluded the imposition of joint enterprise liability."[97] Columbia followed the *Walker* court's assertion that joint enterprise was born out of the realm of partnership law, and a significant distinction between a partnership and an independent contractor relationship is that a partnership, and, by analogy, a joint enterprise, requires the sharing of profits and losses. Here, Columbia did not share profits and losses with Medical Imaging.[98] But the *Blackburn* court limited its application of *Walker* to the proposition that the independent contractor relationship precluded the imposition of joint enterprise liability, again rejecting Columbia's fundamental argument that sharing profits and losses was a necessary prerequisite to joint enterprise liability.[99] Fortunately for Columbia, success required only that it prevail on the independent contractor issue and not on an absence of profit and loss sharing.[100]

The agreement between Columbia and Medical Imaging expressly provided for an independent contractor relationship, but the court appropriately looked beyond the label chosen by the parties and examined the characteristics of the relationship to determine whether Medical Imaging (and its employees, partners, etc.) was (1) an independent contractor, or (2) part of a joint enterprise with Columbia.[101] The agreement provided that Medical Imaging and Columbia each had exclusive responsibility for its respective employees and that the employees of Medical Imaging could not incur any obligation on behalf of Columbia without express written consent.[102] Medical Imaging was "responsible for establishing its own schedule of fees and services and its sole source of compensation [was] its own collection of fees from its patients."[103] The court ultimately

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95. Perhaps it found the distinctions too fine, as well.

96. *Id.* at 274 (citing Walker v. Messerschmitt Bolkow Blohm GmBH, 844 F.2d 237, 242 (5th Cir. 1988)).

97. *Id.*

98. *Id.*

99. *Id.* at 274 (stating that "the *Walker* court did not address sharing of profits and losses in the context of supplying the community of pecuniary interest element for purposes of establishing joint enterprise liability.").

100. So, although the court did not agree with Columbia's particular application of *Walker*, it still found, on another theory enunciated in *Walker*, that there was not a joint enterprise. *Id.* at 271. A win is a win is a win.

101. The court was specifically looking to find a community pecuniary interest.

102. *See id.* at 275 (noting that Medical imaging was exclusively responsible for "payment of its respective income tax, vacation pay, sick leave, unemployment insurance, worker's compensation, retirement benefits, disability benefits, and any other employee benefits").

103. *Id.* (stating that each party was "responsible for their own finances and that one party could not be held responsible for any financial failure of the other party").

confirmed the independent contractor nature of the relationship and, in a meandering, back and forth manner, appeared to reconcile the holdings in *Able* and *Walker*—the very nature of an independent contractor relationship is contrary to there being the necessary community of pecuniary interest *in the common purpose* to find a joint enterprise.[104] Consequently, although Columbia's primary theory—that joint enterprise requires the sharing of profits and losses—was not successful, Columbia ultimately prevailed because characteristics that tended to disprove the existence of a community of pecuniary interest also supported an independent contractor relationship between the parties.[105] The court affirmed the trial court's grant of summary judgment in favor of Columbia.[106]

III. LIMITED LIABILITY COMPANY CASE

Workers' Compensation—Can the members of a limited liability company be considered employers for purposes of applying the Texas Workers' Compensation Act?—*Ingalls v. Standard Gypsum, L.L.C.*

McQueeney Gypsum Company ("McQueeney") and Temple-Inland Forest Products Corporation ("Temple") formed a limited liability company, Standard Gypsum, LLC ("Standard"). Under the terms of a separate management agreement, Temple agreed to "manage and operate" Standard's gypsum plant in McQueeney, Texas. Ingalls, an employee at the Standard plant, was injured in a work-related accident. He recovered workers' compensation benefits and then sued McQueeney and Temple, as members of Standard, claiming that his injury could be attributed to their negligence.[107] The trial court granted summary judgment in favor of McQueeney and Temple under the "exclusive remedy" theory of the Texas Workers' Compensation Act.[108] On appeal, the court considered

104. *Id.* This may be an area where court's "feel" for the essence of the parties' relationship determines the outcome. Were their efforts in such concert and their respective economic stakes so tied together that there was a "joint enterprise," or were the parties just cooperating in a way that satisfied their individual goals, a byproduct of which was a potential for economic success, even if somewhat tied to the same events? Certainly, the line seems not to be a bright one.

105. *Id.* at 276. On this issue, the court was definitive: "Here, there was absolutely no evidence regarding either party's pecuniary or monetary interest in the agreement, much less a *community* of pecuniary interest. In fact, the summary judgment evidence provided conclusively disproves any community of pecuniary interest, as it supports an independent contractor relationship." *Id.* (emphasis in original).

106. *Id.* at 278.

107. Ingalls v. Standard Gypsum, L.L.C., 70 S.W.3d 252, 254 (Tex. App.—San Antonio 2001, pet. denied)

108. *Id.* at 255 (quoting the Texas Workers Compensation Act, the court noted that "[r]ecovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage or a legal beneficiary against the employer or an agent or employee of the employer for the death of or a work-related injury sustained by the employee"). Employers who pay premiums and are part of the workers' compensation program generally are free from liability for non-program damages for covered claims.

two separate theories under which McQueeney and Temple could be liable as third parties.

First, the court considered whether Temple (a member of Standard) qualified as an employer for purposes of the exclusive remedy provision of the Texas Workers' Compensation. Temple argued that, under the management agreement, Temple had "the right to control the details of Ingalls' work."[109] Ingalls countered with evidence that Standard alone controlled the details of his work. The court ruled that, under the management agreement, Temple in fact controlled Standard's employees.[110] That control was complete enough, as the court noted, to render Temple liable for acts of Standard employees under the theory of respondeat superior.[111] The court held that, based on the exclusionary theory of the Texas Workers' Compensation Act, Ingalls served both Temple and Standard as an employee and that the nature of this dual-employment relationship precluded Ingalls' claim against Temple.[112]

Second, regarding McQueeney's liability, the court considered whether the members of a limited liability company should be considered employers for purposes of the Texas Workers' Compensation Act. The court began by stating that the Texas Legislature has adopted the *entity* theory of partnership law, meaning that a "partnership is an entity in itself rather than an aggregate of its members," and that "the employee of a partnership is not an employee of an individual partner and can recover against such partner, as a third party, for negligent injury incident to employment."[113] The court turned to *Sims v. Western Waste Industries* to illustrate how courts have resolved the issue of liability of a parent corporation for the acts of subsidiaries.[114] In *Sims*, the plaintiff sued the parent corporation of his employer, on a theory of products liability, for negligent design and manufacture of the garbage truck that injured him.[115] The court in *Sims* ruled that parent corporations should not be allowed to "reverse-pierce" the corporate veil to avail themselves of the protection of the exclusionary rule contained in the Texas Workers' Compensation Act. In other words, "the parent corporation could not argue that it was not liable for the actions of its subsidiary and then argue that it was the same entity for purposes of workers' compensation."[116]

109. *Id.* (noting in Ely v. Gen. Motors Corp., 927 S.W.2d 774, 777 (Tex. App.—Texarkana 1996, writ denied), that a "person may be the servant of two employers at one time as to one act if the service to one does not involve an abandonment of the other.").

110. *Id.* at 258.

111. *Id.* If you have the control necessary to be liable for employee actions, then you also have the benefit of the workers' compensation scheme to protect you against their efforts to assert separate claims.

112. *Id.*

113. *Id.* at 259 (internal citations omitted in original).

114. *Id.* at 259-60 (citing Sims v. W. Waste Indus., 918 S.W.2d 682 (Tex. App.—Beaumont, 1996, writ denied).

115. *Sims*, 918 S.W.2d at 683.

116. *Ingalls*, 70 S.W.3d at 260 (citing *Sims*, 918 S.W.2d at 686). .

The *Ingalls* court applied the reasoning of the *Sims* court to the potential liability of members of a limited liability company. The court, however, distinguished Ingalls' claim from the claim in *Sims*, noting that the plaintiff's claim in *Sims* was based on a theory of products liability, an independent tort that is separate from the parties' relationship as employer and employee.[117] The court ruled that, absent an independent tort on the part of the members of a limited liability company, those members should not be sued solely on the basis of their ownership of interests in the limited liability company.[118] The court of appeals reversed the portion of the case dealing with McQueeney's liability as a member of Standard and remanded the case for a determination of whether McQueeney had committed an individual tort in connection with Ingalls' injury.[119]

117. *Id.* at 261.

118. *Id.* For the court to have held otherwise, it would have ignored the strong, intentional liability shield that protects members of a limited liability company, as shareholders of a corporation are protected.

119. *Id.*