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Partnerships

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PARTNERSHIPS

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A number of noteworthy partnership cases were decided during this year's survey period. In addition, the Texas Revised Limited Partnership Act[1] and the Texas Uniform Partnership Act[2] were amended, the latter to introduce a new type of partnership - the registered limited liability partnership.[3] For the reader's convenience, the authors grouped the cases under topical headings corresponding to the most important partnership law aspect of the case.

I. CASES

A. Liability of Individual Partners For Partnership Obligations

The cases in this section exemplify, in very different contexts, the general rule that general partners of a partnership have joint and several liability for the debts and obligations of the partnership.

1. Carlyle Joint Venture v. H. B. Zachry Company[4]

In *Carlyle* the court considered whether joint venture partners were individually liable for an arbitration award entered against the joint venture in an arbitration proceeding in which the partners were not parties and did not participate.[5] The joint venture and a contractor entered into a construction contract that required disputes between the parties to be resolved by arbitration. Accordingly, when a dispute later arose, the controversy was submitted to arbitration and an award was made in favor of the contractor against the joint venture. The contractor then sued on the arbitration award and obtained a state district court judgment confirming the award against the

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1. TEX. REV. CIV. STAT. ANN. art. 6132a-1 (Vernon 1970 and Vernon Supp. 1992) [hereinafter TRLPA].
2. TEX. REV. CIV. STAT. ANN. art. 6132b (Vernon 1970 and Vernon Supp. 1992) [hereafter TUPA].
3. TEX. REV. CIV. STAT. ANN. art. 6132b, §§ 2, 15, 45-A, 45-B, 45-C (Vernon Supp. 1992).
4. 802 S.W.2d 814 (Tex. App.—San Antonio 1990, writ denied).
5. The joint venture partners were not served or otherwise joined in the arbitration proceeding. The court viewed the issue of the partners' individual liability in this context as one of "first impression." *Id.* at 815.

joint venture.[6] In addition, the trial court granted summary judgment in the amount of the award against the joint venture partners, individually and severally.[7]

The partners appealed, challenging the judgment against them individually on the ground that they were not parties to the arbitration proceeding. The court rejected their argument and held as a matter of law that "when the joint venture is a party to an arbitration proceeding which results in an award against the joint venture, individual partners of the joint venture are individually and severally liable for the award as a debt and obligation of the joint venture under the law of partnerships."[8] The court noted that because a joint venture is so similar in nature to a partnership,[9] partnership law applies to joint ventures[10] and, therefore, joint venture partners are jointly and severally liable for all debts and obligations of the joint venture.[11] In this case those debts and obligations included the arbitration award judicially confirmed by the trial court against the joint venture.[12]

2. *Nance v. Resolution Trust Corporation*[13]

In this lender liability suit,[14] the court determined the extent of the general partner's liability under partnership law for a debt of a limited partnership.[15] The general partner's appeal from a trial court judgment for the

6. Suit was filed pursuant to the Texas General Arbitration Act, TEX. REV. CIV. STAT. ANN. arts. 224-49 (Vernon 1973 and Vernon Supp. 1990). 802 S.W.2d at 815.

7. *Id.*

8. *Id.* at 816. The stakes were the personal assets of the individual venturers. Although they are entitled to be indemnified by the partnership under TUPA § 18(1)(b), that would be a hollow right if the joint venture had few or no assets.

9. "The elements of a joint venture are: (1) mutual right of control; (2) community of interest; (3) agreement to share profits as principals; and (4) agreement to share losses, costs, or expenses." *Id.* at 816 n.2 (citing Coastal Plains Development Corp. v. Micrea, Inc., 572 S.W.2d 285, 287 (Tex. 1978)).

10. 802 S.W.2d at 816. This is settled Texas law. *See*, Truly v. Austin, 744 S.W.2d 934, 937 (Tex. 1988) (applying partnership law of joint and several liability).

11. 802 S.W.2d at 816; TEX. REV. CIV. STAT. ANN. art. 6132b, § 15 (Vernon Supp. 1992).

12. 802 S.W.2d at 816. The result would probably have been different if the plaintiff had sought to enforce the arbitration award directly against the assets of the joint venture partners without having a judgment against the partners, even if the plaintiff had a judgment confirming the arbitration award against the joint venture. TEXAS CIVIL PRACTICE AND REMEDIES CODE § 17.022, entitled "Service on Partnership," reads: "Citation served on one member of a partnership authorizes a judgment against the partnership *and* the partner actually served." TEX. CIV. PRAC. & REM. CODE § 17.022 (Vernon 1986) (emphasis added). See the discussion of two cases on a similar legal issue in last year's survey, Steven A. Waters & Joni Gaylor, *Partnerships, Annual Survey of Texas Law*, 45 SW. L.J. 553, 554 n.7 and 566, nn.107-08.

13. 803 S.W.2d 323 (Tex. App.—San Antonio 1990), *writ denied per curiam*, 813 S.W.2d 154 (Tex. 1991).

14. The claim involved a fairly straightforward "breach of commitment to lend," with a request for lost profits, and not the more typical lender liability claims of bad faith, fraud, deceptive trade practices, etc.

15. The court cited to TRLPA, which became effective on September 1, 1987, but which applies to pre-existing partnerships before September 1, 1992, only if those partnerships amend their agreements to affirmatively adopt TRLPA. The limited partnership here was formed in 1983 and nothing in the opinion suggests that the partnership acted to adopt TRLPA. The result would have been the same, however, under the Texas Uniform Limited Partnership Act,

lender non obstante veredicto was based on the terms of a guaranty agreement. The general partner in *Nance* urged that, although normally he would be liable under partnership law for all debts of the limited partnership,[16] his liability here for the deficiency balance owed on a loan made to the limited partnership was limited, as a matter of law, to fifty percent of the deficiency because he had executed a guaranty agreement limiting his liability to fifty percent of the amount due on that loan.[17] The court rejected this argument, found that the guaranty agreement by its terms provided a totally independent basis of liability from that imposed by law on a general partner, and held that Nance was separately liable as a general partner for all debts of the partnership.[18] Thus, Nance's liability as a general partner was found to be totally independent of, and in this case greater than, his liability as a guarantor.[19]

3. *Martin v. First RepublicBank, Fort Worth, N.S.*[20]

Martin confirms that partners have direct liability for partnership debts. In *Martin* the bank sued the joint venture partners to recover amounts due under promissory notes executed by the joint venture. The court rejected the partners' argument that they were liable only for unpaid deficiency amounts remaining after collection efforts against the joint venture were exhausted, and held that, under Texas partnership law,[21] joint venture partners are jointly and severally liable for promissory notes executed by the joint venture[22] and that they may be sued directly on joint venture debts, separately from the joint venture.[23] The court noted further that these joint venture partners were also directly liable individually under separate guaran-

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TEX. REV. CIV. STAT. ANN. art. 6132a, § 10(a) (Vernon 1970), and TUPA § 15, which the court properly cited. 803 S.W.2d at 334.

16. TUPA § 15 makes each general partner jointly and severally liable for the debts and obligations of the partnership. TEX. REV. CIV. STAT. ANN. art 6132b, § 15 (Vernon Supp. 1992).

17. In addition to asking the court to find as a matter of law that his liability was limited to fifty percent by virtue of the guaranty, Nance asked in the alternative for a jury question on the issue. Although it is not unusual for a general partner to be required to sign a guaranty (e.g., because a general partner's liability under TUPA § 15 is in some respects derivative of the partnership's liability, there are occasions, such as when the debt of the partnership is or becomes non-recourse, where the guaranty imposes liability when general partner status would not), the facial inconsistency here suggests that Nance had a point. The court apparently disagreed.

18. 803 S.W.2d at 334.

19. *Id.* Effectively, the court found that the statement in the guaranty that the guarantor's obligations were independent of the borrower's (and, therefore, its partners') meant that the general partner/guarantor's liability was the greater of that imposed by the two statuses.

20. 799 S.W.2d 482 (Tex. App.—Fort Worth 1990, writ denied).

21. The court observed that "[a] joint venture is a legal entity 'in the nature of a partnership.' " (quoting Brown v. Cole, 155 Tex. 624, 291 S.W.2d 704, 709 (1956)). *Id.* at 487. The court also analyzed the partner's position under Texas partnership law.

22. 799 S.W.2d at 487 (citing McGhee v. Wynnewood State Bank, 297 S.W.2d 876, 883 (Tex. Civ. App.—Dallas 1956, writ ref'd n.r.e.)).

23. 799 S.W.2d at 487 (citing 297 S.W.2d at 883); *see also* Foster v. Daon Corp., 713 F.2d 148, 151 (5th Cir. 1983) (plaintiff may sue a partner directly, without bringing suit against the partnership).

ties executed by them.[24]

B. Form Of Contribution To A Partnership

1. Cooke v. Dykstra[25]

The issues in *Cooke* were whether limited partners, who became obligated as guarantors, agreed to contribute capital to the limited partnership in the amount guaranteed and whether withdrawing those guaranties created liability for breach of the limited partnership agreement. In *Cooke* each of two limited partners executed a separate $25,000 guaranty agreement, collectively guaranteeing payment of a $50,000 line of credit established for the benefit of the limited partnership.[26] The general partner sued the limited partners for breach of the limited partnership agreement after he was denied access to the $50,000 line of credit the limited partners had guaranteed and after the limited partners "attempted to terminate the partnership."[27] The general partner received a jury award of actual damages of $120,000,[28] but it cannot be determined from the opinion how those damages were computed. Apparently, one is left to infer that the damages resulted from the adverse effect on the partnership's exporting business of the inability to draw on the line of credit and that the limited partners' actions, perhaps revoking their guaranties, rendered the line of credit inaccessible.[29]

Section 9.01 of the limited partnership agreement provided that "[t]he liability of the Limited Partners with regard to the Partnership in all respects is restricted and limited to the amount of the actual capital contributions that they make or agree to make to the Partnership."[30] Based on this provision, the limited partners' theory on appeal was that they had not made a contri-

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24. 799 S.W.2d at 486 (citing Universal Metals & Mach., Inc. v. Bohart, 539 S.W.2d 874, 877 (Tex. 1976)).

25. 800 S.W.2d 556 (Tex. App.—Houston [14th Dist.] 1990, no writ).

26. The description in the opinion of the guaranty agreements and loan relationships is confusing, and the statement in the text is an interpolation. It is unclear from the opinion whether the limited partners (i) executed a guaranty directly to the partnership or (ii) executed a guaranty in favor of the third party lender who made the $50,000 line of credit available, or both, and if only in favor of the lender, whether the partnership agreement itself referred to a limited partner guaranty obligation. For example, each of the following statements is made in the opinion: (1) "As their contribution to the partnership, appellants executed guaranty agreements to American Trade Company ("the partnership") in the amount of $25,000 each." *Id.* at 558; (2) "Appellants executed guaranty agreements to First City Bank Clear Lake, guaranteeing a $50,000 line of credit for American Trade Co." *Id.* at 559; (3) "By guaranteeing a $25,000 line of credit for the partnership, each appellant contributed or agreed to contribute $25,000 to the limited partnership." *Id.*; and (4) "The partnership agreement limits appellants' liability to the amount of their contributions. Each limited partner contributed $25,000 in the way of a guaranty agreement on a line of credit at First City National Bank Clear Lake; therefore, the liability of each appellant is limited to $25,000." *Id.*

27. *Id.* at 561. What the limited partners actually did and whether their actions were in any way dealt with by the partnership agreement is not stated in the opinion. *See infra* note 54, regarding "termination" versus "dissolution" of a partnership.

28. *Id.* at 558. The jury also awarded the general partner attorney's fees, but that award was reversed by the court for evidentiary reasons. *Id.*

29. *Id.* One must also assume that the general partner's claim was for "his share" of the partnerhip's profits that were lost as a result of the limited partners' breach.

30. *Id.* at 559.

bution to the partnership and, therefore, had no liability.[31] The court disagreed and found that the limited partners' guarantees of the partnership's line of credit were contributions, or agreements to contribute, to the partnership.[32] The court pointed to Section 5 of the Texas Uniform Limited Partnership Act,[33] which limits the permitted form of contributions by a limited partner to either cash or other property, and apparently characterized the guaranties as agreements to contribute cash.[34] The court, however, reduced the damage award from $120,000 to $50,000, limited to $25,000 against each limited partner to equal the maximum liability of each under the partnership agreement.[35]

C. *Breach Of A Partner's Fiduciary Duty*

The cases discussed in this section underscore the potential consequences, including suffering exemplary damages, of a partner's failure to observe the fiduciary duty owed by one partner to another.

1. *Cheek v. Humphreys*[36]

The partnership law issues in *Cheek* involve the prerequisites to imposing exemplary damages for breach of a partner's fiduciary duty, how to compute lost profits caused by breach of a partnership agreement, and the method of valuing partnership assets on dissolution. In *Cheek* the plaintiff and the defendant orally formed a partnership to conduct a business to buy, package, and sell onions. The partnership purchased equipment, leased and moved into a building, and began business operations. Within the next two years, the defendant moved the partnership equipment without the plaintiff's consent to the defendant's mother's business location, first locally and then to another city, transferred partnership funds into a different account, and changed the partnership's telephone number to that of his mother's business. Furthermore, the defendant denied the plaintiff access to the partnership books and failed after demand by the plaintiff to provide information regarding partnership matters.[37] The plaintiff sued for breach of the partnership

31. The guaranty agreements were the only evidence presented of the limited partners' contribution to the partnership. *Id.*

32. *Id.*

33. *Id.*; TEX. REV. CIV. STAT. ANN. art. 6132a, § 5 (Vernon 1970) [hereinafter TULPA].

34. A better or more complete analysis, perhaps, is that failing to maintain the guaranties in place (if that in fact is what happened) constituted a breach of TULPA § 18, which provides that a limited partner is liable to the partnership for the difference between his actual contribution and the contribution stated in the certificate as having been made. TEX. REV. CIV. STAT. ANN. art. 6132a, § 18 (Vernon 1970).

35. 800 S.W.2d at 559. Or was the limitation in the guaranties?

36. 800 S.W.2d 596 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

37. Although not cited in the case, it appears that the plaintiff obtained jury issues and findings under TUPA § 20 ("Partners shall render on demand true and full information of all things affecting the partnership to any partner) and TUPA § 21(1) ("Every partner must account to the partnership for any benefit . . . derived by him without the consent of the other partners from any transaction connected with the . . . conduct . . . of the partnership or from any use by him of its property.") TEX. REV. CIV. STAT. ANN. art. 6132b, §§ 20, 21 (Vernon 1970).

agreement and breach of fiduciary duty and was awarded actual and exemplary damages.[38]

The appellate court began its exemplary damages analysis by noting that partners owe a fiduciary duty to each other.[39] According to the court, the key inquiry in determining the propriety of exemplary damages for breach of that fiduciary duty was whether the fiduciary "intended to gain an additional benefit for himself," not whether there was an intent to injure.[40] Therefore, exemplary damages were found to be proper where a fiduciary participated in self-dealing.[41] The court also stated that a showing of malice or ill will supports an award of exemplary damages.[42] In this case, as an apparently independent basis for affirming the trial court's award of exemplary damages, the court pointed both to the defendant's self-dealing actions and to his several intentional acts of misconduct and concluded that sufficient evidence existed to support the trial court's finding of malice.[43]

On a second point, the court also affirmed the trial court's award to the plaintiff of damages for lost profits caused by the defendant's breach of the partnership agreement. Without expressly so stating, the court apparently equated profits lost because of a breach of the agreement with post-dissolution profits.[44] The court concluded that the plaintiff's testimony that the defendant's post-breach profits of $294,811.23 to $491,352.05 would have been profits of the partnership, in which the plaintiff would share, was sufficient evidence to support the trial court's award to the plaintiff of $9,827.41 damages.[45]

On the third issue, the proper basis for valuing partnership equipment on

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38. 800 S.W.2d at 597.

39. *Id.* at 599 (citing Thigpen v. Locke, 363 S.W.2d 247, 253 (Tex. 1962)).

40. 800 S.W.2d at 599 (citing International Bankers Life Ins. Company v. Holloway, 368 S.W.2d 567, 583-84 (Tex. 1963)).

41. 800 S.W.2d at 599 (citing Texas Bank & Trust Co. v. Moore, 595 S.W.2d 502, 510 (Tex. 1980)). Indeed, the duty of loyalty is a key element of a partner's fiduciary duty to other partners, evidenced in the statute in TUPA § 21. *See supra* note 37.

42. 800 S.W.2d at 599 (citing Cole v. Tucker, 6 Tex. 266 (1851)). "Malice" has been defined as "ill-will, spite, evil motive, or purposing the injuring of another." Clements v. Withers, 437 S.W.2d 818, 822 (Tex. 1969).

43. 800 S.W.2d at 599.

44. As the court noted, absent a contrary agreement each partner shares equally the profits and surplus remaining after liabilities are satisfied. *See* TEX. REV. CIV. STAT. ANN. art. 6132b, § 18(1)(a) (Vernon 1970). This is the distributable "net" left after assets are sold and creditors are paid. A partner must, however, establish his right to post-dissolution profits. 800 S.W.2d at 599 (citing Taormina v. Culicchia, 355 S.W.2d 569, 576 (Tex. Civ. App. —El Paso 1962, writ ref'd n.r.e.)). The court never returned to the issue of plaintiff's "right" to profits.

45. 800 S.W.2d at 599. The court's discussion of the lost profits issue is entirely unsatisfying. On the one hand, the plaintiff sued for a dissolution of the partnership, presumably under TUPA § 32(1)(d) (judicial dissolution available when a partner wilfully or persistently breaches the partnership agreement or engages in conduct relating to the partnership that makes him an unsuitable business partner). The court never said, however, whether dissolution was granted by the trial court. In addition, the court's discussion seems almost to assume that dissolution occurred earlier (e.g., when the defendant usurped the partnership opportunity) and that the court considered the plaintiff to be a retiring partner under TUPA § 42 and was analyzing the plaintiff's position under that section. TUPA § 42 allows certain former partners who are not continuing in the partnership to receive the value of their interest at dissolution plus, at their option, either interest on that value or profits attributable to the use of

dissolution, the court found that the lower court erred in using book value.[46] The court felt that book value was too arbitrary.[47] Implying that market value is the proper measure of value of partnership assets on dissolution, the court held that the plaintiff failed to meet his burden of proof to show market value[48] and remanded the equipment valuation issue to the trial court for a new trial.[49]

2. *Murphy v. Canion*[50]

Murphy involved an action for breach of partnership agreement and breach of fiduciary duty relating to the usurpation by one partner of partnership business opportunities. In *Murphy* the plaintiff and the defendant formed a partnership to conduct real estate business. A key provision in their written partnership agreement stated that: "[b]oth partners agree to devote their full-time efforts to the conducting of partnership business and agree that all personal earnings from personal services shall be included as partnership income."[51] The court interpreted this provision to mean that any real estate business conducted by the partners during the term of the partnership was for the benefit of the partnership.[52]

Without advising the plaintiff, the defendant became involved in four real estate transactions during the term of the partnership, in two of which he used partnership funds. The defendant personally profited from each of these secret transactions,[53] to the exclusion of the partnership. Some of the transactions originated during the term of the partnership but were consummated after termination of the partnership,[54] which was initiated by the de-

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that value in the partnership's business. TEX. REV. CIV. STAT. ANN. art. 6132b, § 42 (Vernon 1970).

A simpler analysis that appears to fit the facts could base the damage award either on (1) actual damages from breach of a partnership agreement to share profits equally (which is consistent with the plaintiff's testimony) or (2) a claim for actual damages for breach of fiduciary duty under TUPA § 21(1), which requires the breaching partner to hold ill-gotten gains in trust for the partnership. TEX REV. CIV. STAT. ANN. art. 6132b, § 21(1) (Vernon 1970).

Interestingly, the plaintiff did not challenge the award amount of $9,827.41, which represented only approximately two to three percent of the plaintiff's own estimate of profits lost.

46. 800 S.W.2d at 598.

47. *Id.* (citing Johnson v. Braden, 286 S.W.2d 671, 672 (Tex. Civ. App.—San Antonio 1956, no writ).

48. 800 S.W.2d at 598. The plaintiff testified that the book value of the equipment was $17,896.69, which was significantly greater than the defendant's market valuation of the equipment at between $1,500 and $2,000. *Id.*

49. *Id.* at 600.

50. 797 S.W.2d 944 (Tex. App.—Houston [14th Dist.] 1990, no writ).

51. *Id.* at 945.

52. *Id.* at 945-46. It would be impossible to spend all of one's time conducting partnership real estate activities and engage in separate, personal real estate deals "on the side."

53. The defendant went to extraordinary lengths to ensure that the transactions were hidden from the plaintiff, including using a "straw man" to acquire title to property. *Id.* at 946.

54. It is difficult to determine from the opinion whether either the parties or the court used the word "termination" correctly. Neither misuse is uncommon. TUPA § 29 defines dissolution and TUPA § 30 makes clear that dissolution, winding up and termination are different steps in the life of a partnership, chronologically in that order. TEX. REV. CIV. STAT. ANN. art. 6132b, §§ 29, 30 (Vernon 1970); *see infra* note 61.

fendant after the plaintiff's discovery of the defendant's activities.[55] The jury agreed with the plaintiff's claim that the defendant breached the partnership agreement and his fiduciary duty and awarded the plaintiff actual and exemplary damages, but the actual damage award was offset by almost one-half to compensate the defendant for his efforts in producing the profits.[56]

The appellate court disagreed with the lower court's allowance of an offset against the actual damage award for the value of the defendant's services, which the court viewed as a recovery by the defendant in quantum meruit.[57] In reversing the trial court on the offset issue, the appellate court held that the defendant's misconduct prevented him from having the "clean hands" necessary to recover under the equitable doctrine of quantum meruit.[58] The court also held that a partner who breaches a partnership agreement cannot recover in quantum meruit from his partners.[59]

The court next considered whether the defendant's breach of fiduciary duty caused the plaintiff's actual damages. The court easily found sufficient evidence to support the jury's conclusion that, effectively, if the defendant had not breached his fiduciary duty to the plaintiff by excluding the plaintiff from the four real estate transactions, then the plaintiff would have been entitled to one-half of the profits ultimately earned by the defendant from those transactions.[60] In sustaining the jury award to the plaintiff of actual damages in that amount, the court expressly rejected the defendant's theory that because the defendant received the profits from the secret transactions after dissolution of the partnership[61] the damages were not proximately caused by the defendant's breach of fiduciary duty.[62]

Finally, the court held that it was proper to impose exemplary damages for the defendant's breach of fiduciary duty.[63] As in *Cheek v. Humphreys*,

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55. The court referred to a provision in the partnership agreement allowing "termination" by a partner with 90 days' notice. 797 S.W.2d at 946. Again, it appears that "termination" may have been confused with "dissolution," which is an event to be followed by winding up (i.e. liquidation of assets) and then termination. Nevertheless, the court appears to act on the basis that the partnership terminated 90 days after defendant gave his notice.

56. *Id.* at 947.

57. *Id.* "The equitable doctrine of quantum meruit is based on the principle that one receiving benefits that are unjust for him to retain should make restitution or pay the value of the benefit to the party contributing the benefit." *Id.* (citing Baldwin v. Smith, 586 S.W.2d 624, 632 (Tex. Civ. App.—Tyler 1979), *rev'd on other grounds*, 611 S.W.2d 611 (Tex. 1980)). The defendant did not use the term "quantum meruit." *See infra* note 59.

58. 797 S.W.2d at 947 (citing Truly v. Austin, 744 S.W.2d 934, 938 (Tex. 1988)).

59. *Id.* The court found no legal basis for and rejected the defendant's assertion that he had plead for an offset or recoupment rather than quantum meruit. *Id.*

60. *Id.* at 949.

61. *Id.* at 948. At this point in the opinion, the court referred to the defendant's argument that he received funds after "dissolution", not "termination." Again, inconsistent use of the two terms is confusing, but not unusual. *See supra* note 55.

62. 797 S.W.2d at 948. In the face of the overwhelming evidence of his improper actions, the defendant did not challenge the finding of breach of fiduciary duty. *Id.*

63. *Id.* at 949. Though not directly invoked by the court at this point in the opinion, the court's earlier quote of Justice Cardozo on the standard of conduct for fiduciaries is indicative of the court's strong feelings about breach of fiduciary duty:

> [C]opartners, owe to one another, while the enterprise continues, the duty of the

decided by the same court several months later,[64] the court keyed on whether the defendant acted intentionally[65] and implied that an act of self-dealing was necessarily intentional.[66] The court concluded that the jury's finding that the defendant wilfully and intentionally breached his fiduciary duty supported an award of exemplary damages.[67]

D. Creation Of A Partnership

Partnerships are not always formed by written agreements drafted by knowledgeable counsel, beginning "The parties hereby form a partnership." If the statutory criteria set forth in TUPA section 7 are met, a partnership may exist when one party or the other least expects it. The cases in this section illustrate, however, that allegations of that nature are not always successful.

1. Federal Savings & Loan Insurance Corporation v. Griffin[68]

The court in *Griffin* analyzed whether a partnership existed among a bank, a joint venture, and the joint venture partners, individually, in connection with a loan made by the bank to the joint venture, and guaranteed by the joint venture partners. In the bank's suit against the defendant joint venture partner to recover a deficiency due on the loan,[69] the defendant asserted breach of partnership duties by the bank as an affirmative defense. The defendant theorized that the loan documents established that a partnership had been formed among the bank, the joint venture, and the individual joint venture partners. The trial court rejected the defendant's affirmative defense and found him liable under the guaranty.[70]

After reviewing the loan documents executed by the parties, the court of appeals held that the parties clearly lacked the requisite intent, which the

> finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. [Citation omitted] Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.

Id. at 948 (quoting Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545, 546 (1928)).

64. *See supra* text and accompanying notes 36-49.

65. 797 S.W.2d at 949.

66. *Id.* "Exemplary damages are proper where, as in this case, a fiduciary has engaged in self-dealing." *Id.* (citing Texas Bank & Trust Co. v. Moore, 595 S.W.2d 502, 510 (Tex. 1980)).

67. 797 S.W.2d at 949.

68. 935 F.2d 691 (5th Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3420 (U.S. Dec. 10, 1991) (No. 91-809). In addition to the partnership issues discussed here, the case contains important discussions of usury and guaranty law issues.

69. Initially, the suit was on the guaranty for the full amount of the indebtedness, prompted because a direct action against the debtor joint venture was stayed by the joint venture's federal bankruptcy filing. After the stay was lifted, the lender foreclosed and the suit continued for the amount of the deficiency remaining after foreclosure. *Id.* at 694.

70. *Id.* at 695.

court considered the key element, to form a partnership.[71] The court acknowledged that a statement in a written agreement that no partnership is formed between the parties to that agreement is not necessarily conclusive of the issue. The court believed, however, that in this case the combination of (i) the inference from the loan documents that no partnership was created,[72] (ii) the absence of an agreement between the parties to share losses,[73] and (iii) the statutory rebuttal of the presumption of partnership from a profit-sharing arrangement when that arrangement is in the context of a loan transaction[74] clearly reflected the parties' intent here not to become partners.[75]

2. *Murphy v. McDermott, Inc.*[76]

The partnership issue examined in *Murphy* concerned the existence of a partnership. The plaintiff in this case sued a marine contractor for breach of an oral agreement to pay commissions to the plaintiff arising from the purchase by the contractor of marine vessels. The trial court granted the contractor's cross-motion for summary judgment on grounds that included an affirmative defense that all claims against the contractor had been released.[77] The release in question was signed by a third party with whom the plaintiff had orally agreed to share the commissions from the sale to the defendant contractor.

On appeal, the court rejected the contractor's contention that the release was given by the third party on behalf of a partnership between the plaintiff and the third party.[78] Relying on TUPA section 7(3),[79] which states that "sharing of gross returns does not of itself establish a partnership," the court found that the agreement between the plaintiff and the third party to share commissions did not establish a partnership.[80] The court also found that the third party's referral to the plaintiff as his partner did not, alone, create a partnership.[81]

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71. *Id.* at 700 (citing Voudouris v. Walter E. Heller & Co., 560 S.W.2d 202, 206 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ)).

72. 935 F.2d at 699-700.

73. *Id.* (citing Gutierrez v. Yancey, 650 S.W.2d 169, 172 (Tex. App.—San Antonio 1983, no writ)); *see also* TEX. REV. CIV. STAT. ANN. art. 6132b, § 15 (Vernon Supp. 1992) (partners have joint and several liability for partnership obligations). The court rejected the defendant's "highly imaginative" assertion that the bank agreed to share in seventy-five percent of the joint venture's losses because the defendant's liability under his guaranty was limited to twenty-five percent of the indebtedness owed on the joint venture loan. 935 F.2d at 699. An agreement to share in losses of a business is not created by limiting the liability of a guarantor. *Id.*

74. TEX. REV. CIV. STAT. ANN. art. 6132b, § 7 (Vernon 1970). Section 7 provides that in determining the existence of a partnership the "receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment . . . [a]s interest on a loan, though the amount of payment vary with the profits of the business." *Id.*

75. 935 F.2d at 700.

76. 807 S.W.2d 606 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

77. *Id.* at 608.

78. *Id.* at 613.

79. TEX. REV. CIV. STAT. ANN. art. 6132b, § 7(3) (Vernon 1970).

80. 807 S.W.2d at 613.

81. *Id.* The court found the third party's statement that he and the defendant were partners to be the statement of a legal conclusion on an issue of disputed fact (i.e., the existence of a

E. Accounting And Characterization Of Partnership Assets

1. Biggs v. First National Bank of Lubbock [82]

The three primary partnership topics discussed by the court in *Biggs* are: (1) the requirement of an accounting between partners as a condition precedent to a suit by one partner against another involving the partnership business; (2) the propriety of a unilateral judicial partition of partnership property; and (3) the accrual of prejudgment interest before completion of an accounting establishing an amount owed by one partner to another partner. Responding to one partner's claim that an accounting first must be rendered by the court, the court acknowledged the general rule that an accounting and settlement is required before one partner can sue another over claims arising out of the partnership business.[83] The court concluded, however, that the jury charge, taken as a whole,[84] effectively asked the jury to render an accounting between the partners.[85] In a later, unexplained contradiction, the court overruled the trial court's finding of damages for breach of fiduciary duty arising from the retention by one partner of partnership assets, on the basis that the requisite accounting had not been rendered.[86]

The court also examined whether the trial court, after having determined that a particular tract of land was in fact partnership property,[87] could award ownership of that property to one partner individually. The appellate court viewed such an award as effecting a partition that could not properly be made without either suitable pleadings or an agreement of the parties.[88]

The court reversed and rendered the trial court's award of prejudgment interest. The court took the view that prejudgment interest cannot be awarded until there has been an accounting to determine the amount owed by one partner to another.[89] As an exception to this general rule, prejudgment interest is allowed before an accounting is completed where the accounting has been hindered by the fraud or misconduct of a partner.[90]

II. STATUTORY CHANGES

The Texas legislature amended both the TUPA and the TRLPA during

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partnership) which was insufficient to sustain a summary judgment in light of defendant's affidavit that he did not authorize a release of the commission. *Id.*

82. 808 S.W.2d 232 (Tex. App.—El Paso 1991, writ denied).

83. *Id.* at 236 (citing Kartalis v. Commander Warehouse Joint Venture, 773 S.W.2d 393, 394 (Tex. App.—Dallas 1989, no writ).

84. The charge "required [the jury] to consider all of the testimony and evidence presented and to reach a determination that would compensate [a partner's] estate to the extent of his partnership interest in the funds and assets which had come into [the other partner's] possession and for which he had failed to report and account." 808 S.W.2d at 236.

85. *Id.*

86. *Id.* at 238.

87. The fact that legal title was in the name of only one partner was correctly held not to be determinative. *Id.* at 237.

88. *Id.*

89. *Id.* at 238 (citing Conrad v. Judson, 465 S.W.2d 819, 830 (Tex. Civ. App. - Dallas 1971, writ ref'd n.r.e.)).

90. 808 S.W.2d at 238. No such delay was found here.

the survey period.[91] The changes to TUPA are particularly significant.

A. Registered Limited Liability Partnership

Sections 83, 84, 85 and 86 of the Omnibus Business Association Act of May 20, 1991,[92] amended sections 2 and 15 of, and added new sections 45-A through 45-C to, the Texas Uniform Partnership Act to create a new type of entity, the registered limited liability partnership.[93] This type of entity is allowed by the amendment of TUPA section 15, which created a new paragraph (2).[94] While partners in an ordinary general partnership are jointly and severally liable for all debts and obligations of the partnership,[95] a partner in a registered limited liability partnership is not individually liable for debts and obligations that arise from "errors, omissions, negligence, incompetence, or malfeasance committed in the course of the partnership business by another partner or representative of the partnership not working under the supervision or direction of the first partner at the time the errors, omissions, negligence, incompetence or malfeasance occurred, unless the first partner. . . was directly involved in the specific activity" or had notice or knowledge of the events that created the liability at the time of their occurrence.[96] It is expected that many professional service organizations, including law firms, accounting firms, and engineering firms, will choose to register to become registered limited liability partnerships. New paragraphs (3) and (4) added to TUPA section 15 make clear that a partner in a registered limited liability partnership remains liable for other partnership debts and obligations and that the liability of the partnership assets for the partnership's debts and obligations is unaffected by paragraph (2).[97]

New sections 45-A, 45-B and 45-C contain the procedural requirements for creating a limited liability partnership. These requirements include the registration requirements, requirements regarding the name of the partnership, and minimum professional liability insurance requirements.[98]

B. Texas Revised Limited Partnership Act Amendments

Sections 55 through 78 of the Act of May 20, 1991, contain amendments to the Texas Revised Limited Partnership Act.[99] Some of the more notable changes are described below.

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91. Act of May 20, 1991, 72nd Leg., R.S., ch. 901, 1991 Tex. Sess. Law Serv. 3161 (Vernon).

92. *Id.*

93. TEX. REV. CIV. STAT. ANN. art. 6132b, §§ 2, 15, 45A-C (Vernon Supp. 1992).

94. *Id.* § 15.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* §§ 45A-C.

99. Act of May 20, 1991, 72nd Leg., R.S., ch. 901 §§ 55-78, 1991 Tex. Sess. Law Serv. 3161, 3219-33 (Vernon).

1. Non-Partner Liquidator

Section 2.02 was amended to add a subsection (f). This subsection allows a limited partnership to have a non-partner liquidator after dissolution. It also provides that the liquidator will not have the liability of a general partner by virtue of being the liquidator.[100]

2. Certificate

A number of changes were made to the certificate requirements contained in section 2.04. One change is that a certificate of amendment need not be signed by a withdrawing general partner. Other changes are that a certificate of cancellation must be signed by all general partners participating in the winding up of the limited partnership's affairs or by the non-partner liquidators if no general partners are so participating and that a certificate of correction must be signed by at least one general partner.[101]

3. Mergers and Interest Exchanges

Section 2.11, dealing with mergers between Texas limited partnerships and other Texas and U.S. limited partnerships, has been substantially rewritten to, among other things, state in greater detail what must be contained in a plan of merger and to state things that may be contained in the plan of merger.[102] Significantly, a new section (h) has been added to allow a Texas limited partnership to combine with other types of entities, including corporations, general partnerships, and joint stock companies, through an "interest exchange" pursuant to which the Texas limited partnership interests are exchanged for cash or securities, or both, of the acquiring entity.[103] The Texas statute still requires that the limited partnership agreement of the Texas limited partnership contain authorizing language for a merger or an interest exchange.[104]

4. Delayed Effectiveness of Certain Filings

A new section 2.12 was added to allow the effectiveness of certain documents to be as of a time and date after the time and date otherwise provided by the TRLPA. These documents include amendments or restatements of certificates, mergers, registrations or cancellations regarding foreign limited partnerships, and changes in the registered office or registered agent.[105]

5. Procedure to Correct Inaccurate or Defective Instruments

A new section 2.13 has been added to allow a certificate of correction to be filed to correct inaccuracies contained in any instrument authorized by the

100. TEX. REV. CIV. STAT. ANN. art. 6132a-1, § 2.02(f) (Vernon Supp. 1992).
101. *Id.* § 2.04.
102. TEX. REV. CIV. STAT. ANN. art. 6132a-1, § 2.11 (Vernon Supp. 1992).
103. *Id.*
104. *Id.*
105. *Id.* § 2.12.

TRLPA to be filed with the secretary of state.[106]

6. Safe Harbor Provisions

Minor changes were made to section 3.03(b), which contains the so-called "safe harbor" powers. These powers may be possessed or exercised by a limited partner without making the limited partner liable as a general partner.[107] These rights now include settling or terminating a derivative action and proposing, approving or disapproving (i) an election to reconstitute the limited partnership or continue its business or (ii) a merger of a limited partnership.[108]

7. Provision for Creditors on Winding Up

Section 8.05 was amended to change the limited partnership option on winding up of either paying creditors or establishing a reserve, to either paying them or making reasonable provision for payment.[109]

8. Indemnification

Several sections of article 11, dealing with indemnification of a general partner, were amended.[110] The amendments deal primarily with the mechanics of determining the permissibility of indemnification and the undertaking required of a general partner before he may obtain advanced payment of expenses. Also, a new section 11.21 was added to expressly allow a limited partnership agreement to restrict the circumstances under which indemnification is required.[111]

9. Facsimile Filings

A new section 13.04 was added to allow a certificate or other instrument authorized to be filed with the secretary of state under TRLPA to be "a photographic, photostatic, facsimile, or similar reproduction of a signed" document and to permit any signature to be a facsimile.[112]

106. *Id.* § 2.13.
107. *Id.* § 3.03(b).
108. *Id.*
109. *Id.* § 8.05.
110. *Id.* § 11.
111. *Id.* § 11.21.
112. *Id.* § 13.04.