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Partnership Law

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PARTNERSHIP LAW

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ABSTRACT

This Article describes and analyzes major developments in partnership law that occurred in Texas between December 1 and November 30 of 2022.

I. INTRODUCTION

When considering last year's issues related to joint venture agreements, Texas courts continued their approach of generally following precedent and respecting the express terms of the relevant joint-venture agreements. In terms of precedent, when making decisions based on less than crystal clear statutes, Texas courts often took great care to examine the legislative history behind the relevant law. This Article is divided into five sections which highlight cases that discuss, respectively: (1) key terms of an operating agreement; (2) capacity to sue; (3) judicial dissolution; (4) indemnification.; and (5) charging orders against a limited liability company.

II. KEY TERMS OF AN OPERATING AGREEMENT

A. *IN RE DEMATTIA*¹

This case's significance lays in its clarification and virtual expansion of the scope of the right under an operating agreement to receive an advancement from the relevant limited liability company of a party's legal expenses in defending itself against a claim related to the limited liability company. In deciding *In re DeMattia*, the Fifth Court of Appeals at Dallas relied on both Texas and Delaware case law to conclude that a Texas LLC suing its former managing member was obligated by the indemnification and advancement provisions of the LLC's operating agreement to advance the former managing member's legal fees incurred in defending the lawsuit, notwithstanding the LLC's arguments that enforcement of the provision would violate public policy and specifically "radically skew the litigation dynamics" because of the former managing member's alleged unclean hands.²

In 1967, a group of Dallas firefighters formed Restoration Specialists, LLC (Restoration) to provide emergency services to properties damaged by storms and other adverse events.³ In 2004, Mark DeMattia (DeMattia) and his younger brother, David, acquired Restoration, with DeMattia becoming its managing member and David receiving a minority membership interest.⁴ DeMattia and David later expanded Restoration's services to include commercial construction and job order services.⁵ DeMattia then spun off the job services division into a separate company, RSCC, while retaining

1. 644 S.W.3d 225 (Tex. App.—Dallas 2022, orig. proceeding).

2. *Id.* at 233.

3. *See id.* at 228.

4. *See id.*

5. *See id.*

ownership.⁶ In 2018, WyoTexGa, LLC acquired Restoration.⁷ According to Restoration, a few days before the closing, DeMattia wrongfully copied Restoration's project history files for use by RSCC, upon the completion of which he deleted those files retained by Restoration.⁸ Restoration later sued DeMattia, claiming he had harmed the company during his tenure as managing member through his wrongful acts of providing a competitor, RSCC, with Restoration's project history files and then depriving Restoration of those same files by deleting them.⁹ DeMattia requested Restoration to indemnify, advance, and reimburse DeMattia's expenses incurred in defending the lawsuit pursuant to Restoration's operating agreement and various provisions of the Texas Business Organizations Code.¹⁰ After Restoration refused to advance the requested costs, DeMattia filed a counterclaim for breach of contract and advancement of his litigation expenses.¹¹ DeMattia then filed a motion for summary judgment on those claims.¹² After the trial court denied DeMattia's request, he filed a petition for writ of mandamus alleging that the trial court had abused its discretion by denying advancement of his legal expenses, which the U.S. Court of Appeals for the Fifth Circuit accepted.¹³

DeMattia argued that the agreement required Restoration to advance expenses incurred by a current or former member in an action brought against him before the final disposition of the matter.¹⁴ DeMattia further asserted that § 8.002(b) of the Texas Business Organizations Code provides that an advancement provision adopted in an LLC's governing documents is enforceable.¹⁵ In response, Restoration argued that it was not required to advance the requested legal expenses for several reasons, emphasizing public policy.¹⁶

The court first determined that mandamus was the appropriate relief to correct an order denying advancement of a claimant's legal fees when a trial court had clearly failed to analyze or correctly apply the law in the context of an advancement claim.¹⁷ The court then proceeded to analyze whether the trial court had abused its discretion in denying advancement under the agreement.¹⁸ The court noted that there is inadequate Texas case

6. *Id.*

7. *See id.*

8. *See id.* at 228 (alleging DeMattia sought to shift those projects to RSCC upon closing WyoTexGa, LLC's acquisition of Restoration).

9. *See id.*

10. *See id.*

11. *See id.*

12. *See id.*

13. *See id.* at 230 (explaining that DeMattia claimed that mandamus was the only acceptable remedy on the basis that receiving advancement only upon subsequent success on appeal, affirming that right would defeat the purpose of advancement).

14. *See id.* at 228–29.

15. *See id.* at 228 (citing TEX. BUS. ORG. CODE ANN. § 8.002(b)).

16. *See id.* at 229.

17. *Id.* at 230.

18. *See id.* at 230–32.

law addressing advancement under the Texas Business Corporation Act and the Texas Business Organizations Code.¹⁹ To make up for this dearth in authority, the court elected to supplement its reasoning with Delaware case law addressing the issue of advancement.²⁰ In doing so, the court cited to previous instances in which Texas courts have sought inspiration from Delaware in determining matters of corporate law, specifically *In re Aguilar*²¹ and *L Series, LLC v. Holt*.²² The court then explained the policy reasons underpinning both indemnification and advancement, stating that the primary objective is to encourage corporate service through the protection of an officer's personal financial resources against depletion in litigation arising from the officer's corporate service.²³ The court's reasoning rested on the assertion that its purpose in this instance was the same as in all other cases of contract construction: ascertaining the true intent of the parties.²⁴

The court applied this framework first in considering Restoration's contention that the agreement was ambiguous on the issue of advancement for previous members. The court disagreed.²⁵ Based on the plain language of the agreement, the court concluded the advancement clause clearly applied to both current and former members.²⁶ According to the court, Restoration's interpretation was not reasonable, as it would require the court to disregard the definition of "Proceeding" as set out in § 9.6(a) of the indemnification clause, which included threatened as well as ongoing litigation against a current or former member of Restoration, and to further infer that § 9.6(b) did not apply to former members.²⁷ Because Restoration's interpretation of ambiguity in the contract was not reasonable, the contract was not ambiguous.²⁸

Finally, the court rejected Restoration's argument that public policy barred advancement.²⁹ Restoration's rationale was that enforcement of the advancement provision in this instance was inappropriate because: (1) it would radically skew the litigation dynamics and (2) DeMattia had unclean hands.³⁰ The court determined that the case relied upon by Restoration to

19. *See id.* at 230.

20. *See id.* (explaining that it was common judicial practice, in Texas and beyond, to consider Delaware case law as persuasive authority).

21. *See id.* (citing *In re Aguilar*, 344 S.W.3d 41, 46–47 (Tex. App.—El Paso 2011, orig. proceeding)).

22. *See id.* (citing *L Series, LLC v. Holt*, 571 S.W.3d 864, 871 (Tex. App.—Fort Worth 2019, pet. denied)).

23. *See id.*

24. *See id.* (applying methods of interpretation, including applying the plain language meaning to terms in the agreement and considering the conduct of the parties to the agreement to determine those parties' true intent).

25. *Id.* at 233.

26. *Id.*

27. *See id.*

28. *See id.*

29. *See id.*

30. *Id.*

support its argument, *Travelers Indemnity Co. v. Mayfield*, did not apply because it confronted the issue of paying attorney’s fees in the absence of statutory authorization.³¹ The court stated that Restoration had not elaborated on precisely how enforcement of the agreement would unfairly skew proceedings.³² The court further stated that Restoration’s argument was inconsistent with Texas’s strong public policy favoring preservation of the freedom to contract.³³ The court elaborated that its mandate was to enforce the terms bargained for by and among sophisticated parties, not to re-imagine those rights and obligations under the guise of contractual interpretation.³⁴ The court, in coming to this conclusion, echoed the trial court’s resolution to seek guidance from Delaware law, affirming the right to advancement as stipulated in an agreement even where the party exercising the right is alleged to have unclean hands.³⁵

B. VETERINARY SPECIALISTS OF NORTH TEXAS, PLLC v. KING³⁶

Counsel should take note of the latitude parties have to determine the scope of advancement rights under an operating agreement. Careful and specific draftsmanship is key to the advancement issue, with parties needing to address in detail when advancement is desired.

This next case exhibits the necessity of coordinating the language in different provisions in an operating agreement to ensure that they properly cover the desired scenarios—specifically here, that of manager incapacity and forced buyout of his membership interest.³⁷ In *Veterinary Specialists of North Texas, PLLC v. King*, the U.S. Court of Appeals for the Fifth Circuit held that: (1) member disability did not immediately terminate membership where the operating agreement was silent on the matter and the corresponding disabled member refused both to accept the consideration tendered for his membership interest and to sign a document conveying his interest; (2) the trial court erred in granting a preliminary injunction forcing money payments in favor of the disabled member; and (3) the disabled member retained access to clients as a preservation of the status quo based on conduct between the parties.³⁸

Veterinary Specialists of North Texas, PLLC (VSNT) was a Texas professional limited liability company operating a specialty veterinary

31. *Id.* at 233–34 (citing *Travelers Indemnity Co. v. Mayfield*, 923 S.W.2d 590 (Tex. 1996)) (explaining that, in *Travelers*, the trial court had appointed counsel to represent a claimant as part of a worker’s compensation case, upon the conclusion of which the trial court ordered defendant’s insurer to pay claimant’s legal fees).

32. *See id.* at 234.

33. *See id.*

34. *See id.*

35. *See id.* at 234–35.

36. No. 05-21-00325-CV, 2022 WL 406095 (Tex. App.—Dallas Feb. 9, 2022, no pet. h.) (mem. op.).

37. *See id.* at *1.

38. *See id.* at *3–4, *6–7.

practice.³⁹ Burney and King were both veterinarians, and they became VSNT's sole owners in 2014.⁴⁰ VSNT was governed by an amended operating agreement (the Agreement), which became effective in April 2015 and made Burney and King each a manager and 50% owner of VSNT.⁴¹ "Over time, King lost the ability to competently treat VSNT's veterinary patients."⁴² King stopped treating veterinary patients in March 2020 and stopped coming to VSNT's animal treatment facility in April 2020.⁴³ "In July 2020, Burney invoked a disability provision in the Agreement and informed King that VSNT would buy him out as prescribed in the Agreement. King refused to cooperate with the buy-out."⁴⁴ After King's refusal, Burney sued King for breach of contract and declaratory judgment.⁴⁵ King answered and filed counterclaims for declaratory judgment.⁴⁶ He also asserted counterclaims against Burney on theories including breach of fiduciary duty, breach of contract, tortious interference, and fraud.⁴⁷ King applied for a temporary restraining order and a temporary injunction.⁴⁸ The trial court granted King's application for a temporary restraining order.⁴⁹ An associate judge later heard King's application for a temporary injunction and denied it.⁵⁰ King appealed that ruling to the presiding judge, who held a hearing, admitted a transcript of the hearing before the associate judge into evidence, and took additional evidence.⁵¹ The presiding judge then granted a temporary injunction that encompassed a number of orders generally directed at reinstating King as a member and manager of VSNT.⁵² VSNT and Burney (collectively, Appellants) filed an interlocutory appeal.⁵³

The court of appeals first addressed whether the trial court had abused its discretion by ruling that King showed a probability of success on the merits.⁵⁴ At trial, King argued that he was a VSNT manager and member under the Agreement and that Appellants breached the Agreement by locking him out of his contractual rights and benefits.⁵⁵ On appeal, Appellants did not dispute that they locked King out and instead argued that they had not breached the Agreement, citing to their evidence to establish that King was

39. *See id.* at *1.

40. *See id.*

41. *See id.* (explaining that Burney and King owned and operated VSNT on the same basis without any differentiation in their ownership interests or obligations as managers).

42. *Id.*

43. *See id.*

44. *Id.*

45. *See id.*

46. *See id.*

47. *See id.*

48. *See id.*

49. *See id.*

50. *See id.*

51. *See id.*

52. *See id.*

53. *See id.*

54. *See id.* at *2.

55. *See id.*

no longer a VSNT manager or member when they locked him out.⁵⁶ They argued that King had failed to show a probable right to continue as a VSNT member or manager as ordered by the temporary injunction.⁵⁷ Assuming, without deciding that the evidence established that King became disabled under the Agreement no later than the end of June 2020 and that King's disability automatically terminated his position as a VSNT manager and entitled VSNT to buy him out under the Agreement, the court of appeals concluded that there was nevertheless evidence that King was still a member.⁵⁸ Burney invoked the disability and buyout clauses on or around July 31, 2020, and VSNT tendered consideration to King for his membership interest.⁵⁹ Thus, Burney and VSNT argued that King ceased being a VSNT member on August 31, 2020.⁶⁰ King testified, however, that he refused to sign a document that would have conveyed his membership interest and had not cashed any of the checks VSNT sent to him as periodic installment payments for his membership interest.⁶¹ Appellants argued that these facts established that King ceased to be a VSNT member pursuant to § 8.4 of the Agreement, which provided that, upon a member's disability, VSNT had the right—at the sole discretion and election of the non-disabled member—to purchase the interest of the disabled member.⁶² Other provisions described how the purchase price would be determined in that event.⁶³ Based on these provisions, the court of appeals concluded that the evidence allowed the court to conclude that King was still a member.⁶⁴

The court next considered Appellants' argument that the trial court abused its discretion by ordering monetary payments to King.⁶⁵ Appellants were to make these payments commensurate with King's compensation, salary, insurance, and benefits as well as reimburse him for any premiums paid after he had been locked out of VSNT.⁶⁶ Finally, pursuant to the trial court's order, Appellants were to make VSNT pay King's legal fees.⁶⁷ The court of appeals concluded that this relief was not required.⁶⁸ The court based its conclusion on the premise that the goal of any injunction is to prevent irreparable injury or extreme hardship, but King's injuries, in the

56. *Id.* Appellants claimed that King was neither a manager nor a member of VSNT when they locked him out and, therefore, that King had failed to show a probable right to continue as either a manager or a member of VSNT. *See id.*

57. *Id.* Appellants pointed to the plain meaning of the Agreement to support their argument that King was no longer a manager or member of VSNT. *See id.*

58. *See id.* at *3.

59. *Id.* at *3, *6.

60. *See id.* at *3.

61. *See id.* at *2 (explaining how King testified that he never consented to surrendering his membership interest in VSNT, an argument which the court ultimately found persuasive).

62. *See id.*

63. *See id.*

64. *See id.* at *4.

65. *See id.*

66. *See id.*

67. *See id.*

68. *Id.* at *6 (finding that the record did not show a substantial risk of irreparable injury to King if VSNT did not pay his legal fees).

form of his mounting expenses, were compensable by money damages.⁶⁹ Further, King cited no evidence that he would experience either extreme hardship or irreparable injury if Appellants were not compelled to make these payments immediately.⁷⁰

Finally, the court considered Appellants' argument that the temporary injunction improperly altered the status quo by ordering that King would have clinical access to "clients."⁷¹ Appellants construed "clients" to mean "veterinary patients," arguing that the injunction changed the status quo because King voluntarily stopped treating veterinary patients in March 2020 before Burney invoked the disability clause in July of that year.⁷² King argued that "clients" referred to the pets' owners and "not the pets themselves."⁷³ Citing evidence showing that Burney and King agreed in early 2020 that King would engage in administrative and marketing duties, King argued that the orders giving him access to VSNT's clients, meaning pet owners, were consistent with the status quo.⁷⁴ Although King testified that he did not provide veterinary services for VSNT's paying clients after March 2020, he also testified that, in March 2020, Burney represented to King that his duties should shift from rendering clinical care to managing and marketing.⁷⁵ Although the court of appeals saw no evidence that King actually interacted with VSNT's clients after he stopped providing veterinary services, Appellants did not point to anything that explicitly prohibited him from doing so.⁷⁶ The court thus determined that ordering Appellants to give King "clinical access to clients" was not an abuse of discretion.⁷⁷ They based this determination on the reasonable conclusion that managing and marketing activities necessarily may require interaction with VSNT's clients.⁷⁸

This case shows that parties need to be careful when drafting incapacity and enforced buyout provisions in an operating agreement and ensure that they interrelate adequately to achieve the desired result.⁷⁹ For managing members wanting to maintain their membership interest, it is important that drafters sufficiently distinguish between incapacity and circumstances under which members will have their interests in a company subjected to forced buyout. In contrast, other members seeking buyout of incapacitated members' interests should emphasize specificity and overlap between said buyout provisions and the linked incapacity circumstances.

69. *See id.* at *5.

70. *See id.*

71. *Id.* at *6.

72. *Id.*

73. *Id.*

74. *See id.* The court also deduced that a plain language interpretation of the Agreement did not specifically prohibit non-managers of VSNT from interacting with clients. *See id.*

75. *See id.*

76. *See id.*

77. *Id.* at *7.

78. *See id.* at *6.

79. *See generally id.* at *6–7.

The underpinning theme is that circumstances and, by extension, courts will reward attentive draftsmanship while penalizing vague language and nebulous conditions.

C. LEARY V. COINMINT, LLC⁸⁰

Leary v. Coinmint, LLC serves as an important reminder for members of a limited liability company to carefully draft the forum selection clause in its operating agreement.⁸¹ In this case, the Court of Appeals for the Fourteenth District of Texas at Houston sustained a lower court decision that the manager of a limited liability company is bound by the choice of law and forum selection provisions in the operating agreement of the limited liability company when such manager signs the agreement in his or her individual capacity.⁸² Ashton Soniat and Prieur Leary III created a private Bitcoin mining firm known as Coinmint, LLC (Coinmint’).⁸³ Coinmint was owned by two members: Mintvest Capital, LTD (Mintvest) and Coinmint Living Trust, LLC (CLT).⁸⁴ The members entered into an operating agreement for Coinmint (the Coinmint Agreement) on November 21, 2016, pursuant to which each member had the right to appoint a manager of Coinmint.⁸⁵ Mintvest chose Leary as its manager, and CLT selected itself as manager.⁸⁶

The Coinmint Agreement also designated Coinmint’s principal office to be in Houston, Texas.⁸⁷ The forum selection clause stated that Harris County was to be the venue for all disputes under the Coinmint Agreement.⁸⁸ The Coinmint Agreement also had four signature blocks: one for each manager and member.⁸⁹ Soniat signed in his representative capacity for CLT as both member and manager, while Leary signed in his representative capacity for Mintvest as member and in his individual capacity as manager.⁹⁰

Leary and Soniat had a disagreement, which led to Coinmint and CLT filing suit against Leary in 2019 in Harris County, Texas, for breach of contract.⁹¹ A few weeks later, Coinmint and CLT amended their pleading to also include Mintvest as a defendant.⁹² When amending their pleading, Coinmint and CLT noted that the forum selection clause in the Coinmint

80. No. 14-20-00375-CV, 2022 WL 1498197 (Tex. App.—Houston [14th Dist.] May 12, 2022, no pet.) (mem. op.).

81. *See generally id.*

82. *See id.* at *1, *5.

83. *See id.* at *1 (noting that Soniat and Leary were childhood friends).

84. *See id.*

85. *See id.*

86. *See id.*

87. *See id.*

88. *See id.*

89. *See id.*

90. *See id.*

91. *See id.*

92. *See id.*

Agreement was its basis for selecting Harris County as its venue.⁹³ Leary and Mintvest later filed a special appearance to challenge jurisdiction in Harris County, arguing that the plaintiffs offered insufficient evidence to show minimum contact under both a general and specific jurisdiction analysis.⁹⁴ Further, Leary and Mintvest argued that signing an operating agreement with an “unenforceable venue clause” was not enough to establish personal jurisdiction.⁹⁵ Coinmint and CLT responded that the forum selection clause served as consent by Leary and Mintvest to be tried in that jurisdiction.⁹⁶ The trial court denied Leary and Mintvest’s special appearance, and both parties appealed. Mintvest’s appeal was dismissed, so only Leary was tried in the Court of Appeals for the Fourteenth District at Houston.⁹⁷

On appeal, the appellate court needed to determine whether the trial court erred in denying Leary’s special appearance.⁹⁸ In addition, Coinmint and CLT moved for sanctions against Leary.⁹⁹ The appellate court began its analysis by noting that Coinmint and CLT satisfied their initial burden of establishing proper jurisdiction under the Texas long-arm statute.¹⁰⁰ The next step, according to the court, was to analyze the defendant’s contacts with the forum to determine if the use of personal jurisdiction was appropriate.¹⁰¹ The court explained that personal jurisdiction is a “waivable right,” and thus, if a party consented to personal jurisdiction in a certain location in which that party did not have any contacts, the court’s exercise of personal jurisdiction of that party would not violate due process of law.¹⁰² Also, the court noted that Texas courts must enforce a forum-selection clause, unless such enforcement would be “unreasonable and unjust.”¹⁰³

Next, the court looked at the language of the forum-selection clause to confirm that this grievance would fall into its terms.¹⁰⁴ Because the forum-selection clause distinguished all “disputes” arising out of the Coinmint Agreement rather than “claims,” the court believed the scope of the forum-selection clause was broad.¹⁰⁵ Thus, according to the court, the claims

93. *See id.*

94. *See id.* at *2.

95. *Id.* at *3. Specifically, Leary argued he had not entered into any contracts in an individual capacity with Coinmint and CLT, nor had Leary entered into any other contracts with Texas entities. *See id.* Thus, Leary argued jurisdiction in the State of Texas was not appropriate. *See id.* Leary also argued that the forum selection clause was merely “permissive” and not mandatory. *Id.*

96. *See id.*

97. *See id.* (noting that Mintvest was dismissed without prejudice from this action).

98. *See id.*

99. *See id.*

100. *See id.*

101. *See id.*

102. *Id.*

103. *Id.* at *4 (citing *In re Automated Collection Techs.*, 156 S.W. 3d 557, 559 (Tex. 2004) (orig. proceeding)).

104. *See id.*

105. *Id.*

fell within the scope of the forum-selection clause.¹⁰⁶ For example, the court pointed to the fact that the claims involved the mismanagement of corporate assets and the potential deviation from the terms of the Coinmint Agreement by Leary to demonstrate that the claims were clearly covered by the forum-selection clause.¹⁰⁷

Despite the court's finding that the claims were covered by the forum-selection clause, Leary argued that the clause itself was invalid.¹⁰⁸ Leary pointed to 6 Del. C. § 18-109(d), which says that a member that is "not a [m]anager may not waive its rights to maintain a legal action or proceeding in the courts of the State of Delaware with respect to matters relating to the organization or internal affairs of a limited liability company."¹⁰⁹ Leary argued that because Mintvest, as a non-managing member, would not be able to waive its right to maintain a legal action in Delaware, then neither could Leary as Mintvest's representative.¹¹⁰ The court disagreed, explaining that, because Leary signed in his individual capacity as a non-managing member, he must abide by the forum-selection clause.¹¹¹ Thus, the court held that Leary had essentially consented to jurisdiction over the claims in this case by signing the operating agreement and that the trial court did not err in denying Leary's special appearance.¹¹²

Leary highlights the importance of considering the implications of drafting a well-thought-out forum-selection clause in a limited liability company operating agreement.¹¹³ Both managers and members should consider what they believe to be an appropriate venue if a dispute between the parties may take place, as it appears that courts may view a signature on an operating agreement as implied consent to personal jurisdiction in that venue.¹¹⁴ In addition, the court in this case noted the difference between "claims" and "disputes" when wording a forum-selection clause.¹¹⁵ Specifically, the court explained that the term "disputes" is broader, making it more likely for a court to determine that a forum-selection clause does indeed cover any kind of grievance between the parties.¹¹⁶ Generally, parties should carefully consider potential outcomes if a dispute were to arise between the parties and use this as a guide when drafting forum-selection clauses.

106. *See id.*

107. *See id.*

108. *See id.*

109. *Id.* (quoting DEL. CODE ANN. tit. 6, §18-109(d)).

110. *See id.*

111. *See id.* at *5. The court highlighted the distinction that Soniat, unlike Leary, signed as a representative to a member-manager. *See id.* Because Leary signed in his individual capacity as a manager, his argument here was not applicable. *See id.*

112. *Id.*

113. *See generally id.* at *4–5.

114. *See id.*

115. *See id.* at *4.

116. *See id.*

III. CAPACITY OF A PARTNER IN A PARTNERSHIP OR MEMBER OF AN LLC

A. JIAO v. XU¹¹⁷

The next case is significant because it clarifies the standing of a limited liability company (LLC) member or former member to bring a derivative suit on behalf of the LLC and a court's powers to determine and, by extension, enhance or reduce a party's interest in a company.¹¹⁸ In *Jiao v. Xu*, the U.S. Court of Appeals for the Fifth Circuit held that: (1) the assignor and/or assignee of a membership interest in a Texas LLC had standing to bring a derivative action against the LLC's managing member; (2) the trial court did not err in declaring part of the member's interest invalid due to the member's failure to pay the required capital contribution corresponding to the interest declared invalid; and (3) in an "Erie guess," the turnover order in favor of the LLC against the bad actor member—requiring that member to turn over his remaining membership interest to the LLC in partial satisfaction of the judgment against him—did not violate the exclusivity provision of the charging order statute in the Texas Business Organizations Code.¹¹⁹

In 2016, Ningbo Xu, Xiongen Jiao, Zhonghua Yu, and Pengfei Zhou formed Dongtai Investment Group, LLC (the Company) with the intention of acquiring the Crowne Plaza Hotel in Houston.¹²⁰ Jiao, Yu, and Zhou (collectively, the Assignors) each made a capital contribution of \$1,000,000.00 for a 16.66% membership interest in Dongtai, totaling a 49.98% membership interest among them.¹²¹ The Assignors later assigned their Company "membership interests to their children, Qianju Jiao, Jiatong Yu, and Xuanmei Zhou" (the Assignees).¹²² Under the Company's operating agreement, Xu was to pay \$3,000,000.00 for a 50.02% membership interest but ultimately only paid less than \$870,000.00 while still receiving the full majority interest in the Company.¹²³ Upon discovering financial wrongdoing by Xu, including unauthorized withdrawals from the Company's accounts, the Assignors and Assignees brought various claims against Xu, alleging, inter alia, breach of contract, fraud, derivative and non-derivative breach of fiduciary duty, and violations of § 10(b) of the Securities Exchange Act.¹²⁴ The parties entered an agreed order for temporary relief, which suspended Xu's powers as managing member of the Company and prohibited him from accessing or withdrawing funds from the Company's accounts.¹²⁵

117. 28 F.4th 591 (5th Cir. 2022).

118. *See id.* at 595.

119. *Id.* at 597, 599, 600.

120. *See id.* at 595.

121. *See id.*

122. *Id.*

123. *See id.*

124. *See id.*

125. *See id.* Xu did this in part through a company he controlled—LCL Company, LLC. *See id.*

Xu subsequently withdrew funds from the Company's accounts in violation of the order, leading the district court to hold Xu in contempt and impose sanctions against him.¹²⁶ In addition, the district court found that Xu had not made his agreed-upon capital contribution to the Company and declared Xu's total membership interest in the Company invalid with the caveat that the Company would be required to issue new units commensurate with Xu's actual capital contribution (14.45% instead of 50.02% to correspond with the actual capital contribution of \$867,889.11 instead of the required \$3,000,000.00).¹²⁷ Finally, the district court declared that Xu owed the Company \$1,304,400.00 based on the previous unauthorized withdrawals from the Company and entered a turnover order requiring Xu to return his newly-issued membership interest to the Company in partial satisfaction of the declaratory judgment award.¹²⁸ Xu appealed the district court's denials of his motions to dismiss, its grant of injunctive and declaratory relief, and its turnover order, which the Fifth Circuit accepted.¹²⁹

On appeal, Xu argued that the district court's declaration that part of his membership interest was invalid resulted functionally in his expulsion from the LLC and that the declaration thus violated § 101.107 of the Texas Business Organization Code.¹³⁰ The court, however, found no error in the district court's judgment.¹³¹ The court explained that the declaratory judgment had not expelled Xu from the Company, but rather it invalidated Xu's unit certificates because Xu had not paid for all the membership units he had contractually agreed to purchase.¹³² Instead, the declaratory judgment ordered that Xu be provided new certificates commensurate with the capital he had actually contributed.¹³³ This was not an expulsion from the Company but rather a declaration of actual interest in the Company.¹³⁴

The court next dealt with Xu's assertion that the district court's declaratory relief violated § 101.112(d) of the Texas Business Organizations Code, which provides that a charging order is the "exclusive remedy" for satisfying a judgment out of the judgment debtor's membership interest.¹³⁵ The court stated that this contention lacked merit as the district court's declaratory relief did not implicate § 101.112(d).¹³⁶ The court explained that,

126. *See id.*

127. *See id.*

128. *See id.* at 595–96. The turnover order effectively froze Xu's newly-stated interest in the Company immediately upon issuance. *See id.*

129. *See id.* at 596.

130. *See id.* at 598 (citing TEX. BUS. ORGS. CODE ANN. § 101.107 (stating that a member may not withdraw or be expelled from an LLC)).

131. *See id.* at 599.

132. *See id.*

133. *See id.* at 598–99. Because the trial court had ordered that Xu receive a new membership interest in the Company after deeming his previous membership interest to be invalid, the latter order did not constitute an expulsion from the Company. *See id.*

134. *See id.*

135. *Id.* at 599 (citing TEX. BUS. ORGS. CODE § 101.112(d)).

136. *See id.*

rather than constituting satisfaction of a judgment out of Xu's membership interest, the declaratory relief was a declaration of the percentage of Xu's membership interest in the Company based on Xu's actual capital contribution.¹³⁷ Xu further asserted that the declaratory relief violated the plain language of the Company's operating agreement, which limited the liability of a member to the losses, debts, liabilities, and obligations of the Company and provided that the members would only be able to receive distributions in cash.¹³⁸ The court stated that these provisions had no bearing on the district court's declaration that Xu failed to pay for his full membership interest and was thus only entitled to the membership interest for which he actually paid.¹³⁹

The court's determination perhaps required at least a trace of judicial innovation. Where the Texas Supreme Court has not ruled on a matter—as in determining whether a turnover order violates the exclusivity of a charging order—a federal court sitting in Texas must make an Erie guess, wherein the court deduces how the Texas Supreme Court would rule should the issue ever come before it.¹⁴⁰ Based on intermediate appellate case law in Texas, the court determined that the turnover order issued by the district court did not violate the exclusivity provision.¹⁴¹ The court's premises for this conclusion was that: (1) the Company, the LLC in which the units in question were initially issued, was the judgment creditor seeking Xu's membership interest in itself; and (2) the turnover order involved an explicit award of the membership interest from Xu to the Company; thus, the court concluded that § 101.112(d) did not preclude the turnover of Xu's interest to partially satisfy the Company's judgment against him.¹⁴² Here, the court made a reasoned prediction as to the direction of Texas business organization law.

This case is remarkable in at least two respects. First, the case indicates an assignor of an ownership interest in an LLC will retain the right to bring suit on behalf of such LLC after its assignment. Second, the case is evidence of an increased latitude of courts to alter the percentage interest a party has in an entity based on any breach committed against the LLC. The case implies that courts in Texas will look closely to the provisions of an operating agreement in determining what rights the parties had contracted for and likely expands the power of courts in enforcing those rights.

137. *See id.* The declaration of Xu's previous interest as invalid in accord with the order that he receive a new interest in the Company was actually a declaration of interest rather than an expulsion. *See id.*

138. *See id.*

139. *See id.*

140. *See id.* at 599–600 (citing *Hux v. Southern Methodist Univ.*, 819 F.3d 776, 780–81 (5th Cir. 2016)).

141. *See id.* at 600.

142. *Id.* (finding that the Company was Xu's judgment creditor in the context of the trial court's turnover order, rendering § 101.112(d) inapplicable).

B. VISION UP, LLC v. LONGABAUGH ON BEHALF OF ESTATE OF LONGABAUGH¹⁴³

Vision Up, LLC v. Longabaugh clarifies the concept that a release document signed by two members of an LLC—both in their own capacity as individuals and in their capacity as members of such LLC—also releases the LLC from the claims contained in such release.¹⁴⁴ Randy Hughes and Broc Spedale formed an LLC called “Vision Up” with the help of attorney Marvin Longabaugh.¹⁴⁵ Hughes and Spedale were the only two members of the LLC at that time.¹⁴⁶ Over time, Hughes and Spedale entered into a dispute, and Hughes told Longabaugh that Spedale no longer wanted to be a part of their restaurant business.¹⁴⁷ As a result, Longabaugh filed an amended certificate of formation of Vision Up with the Texas Secretary of State to remove Spedale as a member.¹⁴⁸ Spedale filed suit against Hughes alleging in the alternative that he was either wrongfully removed as a member of Vision Up or that he remained a member despite the amended certificate.¹⁴⁹ Hughes did not admit to either allegation, and Spedale amended his petition to also list Vision Up as a defendant.¹⁵⁰ Longabaugh began filing answers on behalf of both Hughes and Vision Up, and Spedale objected to his dual representation of both parties.¹⁵¹ Another attorney took over Vision Up’s defense, and Spedale amended his petition to add a claim by Vision Up against Longabaugh.¹⁵²

Although the Court of Appeals for the Fourteenth District of Texas at Houston flagged that it is not clear how the trial court came to this decision, they do confirm that the lower court found that Spedale was still a member of Vision Up.¹⁵³ While an appeal was pending, both Hughes and Spedale each signed a settlement and release which dropped their claims against Longabaugh.¹⁵⁴ Hughes and Spedale signed the release documents both in their individual capacity and in their capacities as members of Vision Up.¹⁵⁵

After the settlement, Vision Up entered into the lawsuit and alleged malpractice against Longabaugh.¹⁵⁶ In response, Longabaugh filed a

143. No. 14-19-00942-CV, 2021 WL 5934697 (Tex. App.—Houston [14th Dist.] Dec. 16, 2021, no pet.) (mem. op.).

144. *See generally id.*

145. *See id.* at *1.

146. *See id.*

147. *See id.* The court did not provide any detail as to whether the parties had any prior discussion before removing Spedale from the Certificate of Formation of Vision Up. *See id.*

148. *See id.*

149. *See id.*

150. *See id.*

151. *See id.*

152. *See id.*

153. *See id.*

154. *See id.* In connection with Hughes and Spedale dropping their claims against Longabaugh, Longabaugh’s malpractice carrier would make a payment to Spedale on Hughes’ behalf. *See id.*

155. *See id.*

156. *See id.* at *2.

motion for summary judgment, to which he used the settlement signed by Spedale and Hughes in his defense.¹⁵⁷ Hughes responded that, when signing the settlement documents, he was not intending to release Vision Up from the ability to assert its separate malpractice claims against Longabaugh.¹⁵⁸ Further, Hughes argued that Vision Up did not receive any consideration for releasing such claims, nor did either Hughes or Spedale have the proper authority to allow Vision Up to release its claims against Longabaugh.¹⁵⁹ The trial court rendered summary judgment in favor of Longabaugh, and Hughes appealed.¹⁶⁰

In his first argument, Hughes maintained that the settlements attached to Longabaugh's motion for summary judgment were not effective to release the claims Vision Up had against Longabaugh, and thus, the trial court erred when granting Longabaugh's motion for summary judgment.¹⁶¹ The court of appeals first turned to the general rules of contract construction to determine whether the settlement documents adequately released Vision Up from such claims.¹⁶² The court explained that if the meaning of a contract is in question, the court looks to the "four corners of the written agreement" to determine the intent of the parties rather than extrinsic evidence.¹⁶³ In addition, the contract should be read as a whole, such that no one provision alone would "control" the interpretation of the court.¹⁶⁴

In applying the rules of contract interpretation to Hughes's argument, the court generally felt that the settlement documents clearly contemplated that Hughes, Spedale, and Vision Up were releasing any potential claims against Longabaugh in connection with this conflict.¹⁶⁵ For example, the settlement signed by Hughes referred throughout to the "Hughes Parties," which was defined as "Randy Hughes, Individually and in on behalf of Vision Up, LLC."¹⁶⁶ Further, in the settlement document, the parties decided to "settle and resolve . . . all issues and disputes between them."¹⁶⁷ Also, the court pointed out that the settlement specifically referred to the fact that the settlement listed "the warranties, representations, agreements, and releases given hereunder, and for other good and valuable consideration, the sufficiency of which is hereby stipulated" as consideration for such

157. *See id.*

158. *See id.*

159. *See id.*

160. *See id.*

161. *See id.*

162. *See id.*

163. *Id.* (noting that, while it may look to outside circumstances when interpreting a contract's meaning, the parol evidence rule limited their ability to bring in extrinsic evidence); *see also* Piranha Partners v. Neuhoff, 596 S.W.3d 740, 743 (Tex. 2020); URI, Inc. v. Kleberg City, 543 S.W.3d 755, 763–64 (Tex. 2018).

164. *Vision Up, LLC*, 2021 WL 5934697, at *2 (citing *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003)).

165. *See id.* at *4.

166. *Id.* at *3.

167. *Id.*

settlement.¹⁶⁸ In addition, the settlement explicitly stated that Longabaugh's malpractice insurance provider would make payment to the "Hughes Parties."¹⁶⁹

As to whether Hughes had the authority to release Vision Up, the court points out that the settlement signed by Hughes contained an "Authority and Approval" section, to which it stated that the signatories to the documents were authorized "to bind . . . those entities on whose behalf he or she purports to act in the capacity identified" and that each signatory "warrants that all corporate or other approvals necessary . . . to enter into such Agreement have been obtained."¹⁷⁰ Vision Up argued that this release was analogous to the release in the case of *First Trust Corp. TTEE FBO v. Edwards*, in which the Court of Appeals for the Fifth District of Texas at Dallas held that a release signed by a shareholder and officer of a company did not release such company from the claims being released.¹⁷¹ The court noted that the release document in *Edwards* differed heavily from the release document signed by Hughes and Spedale.¹⁷² In *Edwards*, the release was not signed by the company itself, and it did not indicate that the company itself was releasing any of its claims against a third party.¹⁷³ On the other hand, the release signed by Hughes and Spedale was signed twice by both—once individually and the other in their capacity as a member of Vision Up.¹⁷⁴ In addition, the terms of the release "unambiguously expressed an intent to release Vision Up's claims."¹⁷⁵ Thus, the court found that it was conclusively established that both Hughes and Spedale had the proper authority to release Vision Up's claims.¹⁷⁶

Lastly, Vision Up attempted to argue that neither a malpractice claim nor its proceeds may be assigned.¹⁷⁷ While the court agreed with this statement, they explained that this argument was not relevant to this particular case.¹⁷⁸ There was no evidence that Vision Up assigned its claims to Hughes or Spedale; rather, Hughes and Spedale acted as Vision Up's governing persons in releasing those claims.¹⁷⁹ As such, the court determined this argument was irrelevant.¹⁸⁰

168. *Id.* (internal quotations omitted).

169. *Id.* (noting that the "Hughes Parties" had acknowledged receipt of the payment by Longabaugh's malpractice carrier).

170. *Id.* (internal quotations omitted).

171. *See id.* at *6 (citing *First Trust Corp. TTEE FBO v. Edwards*, 172 S.W. 3d 230, 239 (Tex. App.—Dallas, 2005, pet. denied)).

172. *See id.* (citing *Edwards*, 172 S.W.3d at 239).

173. *See id.* (citing *Edwards*, 172 S.W.3d. at 239).

174. *See id.*

175. *Id.*

176. *See id.*

177. *See id.* at *7.

178. *See id.*

179. *See id.*

180. *See id.*

Vision Up v. Longabaugh demonstrates the need for parties to clearly set forth both the terms and the parties to a contract.¹⁸¹ Documents should clarify when a party is signing in its individual capacity and not in its capacity as a member or manager of an entity. Further, when drafting release agreements, parties should think through and clearly state what exactly is being released by which party. The court underscored the importance of looking at the four corners of the document to determine a contract's meaning rather than any extrinsic evidence.¹⁸² As such, parties should work to include any important details, facts, or statements in a contract to avoid any form of contract interpretation issue. In addition, in a case where an individual serves as a manager of an entity, that individual should clarify his or her capacity when signing a document.

C. IN RE BREITBURN OPERATING LP¹⁸³

The next case is a refresher on the important principle that non-managing partners, as a general rule, lack the capacity to determine the day-to-day operation of the partnership in which they hold an interest, including the ability to bring suit in an individual capacity to enforce contracts entered into by the partnership.¹⁸⁴ In deciding *In re Breitburn Operating LP*, the Court of Appeals for the Fourteenth District of Texas at Houston held that: (1) a partner did not have the capacity to sue individually to require a party with whom the partnership had contracted to deposit funds into the registry of the court; and (2) the trial court had abused its discretion by ordering the party to deposit \$13.4 million into the registry of the court.¹⁸⁵ In ruling this way, the court left undisturbed case law predating the proliferation of the Texas Revised Uniform Partnership Act, leaving it an open question whether those rulings remain good law.¹⁸⁶

In June 1983, the Louisiana Land and Exploration Company (LLEC) created the LL&E Trust (the Trust).¹⁸⁷ LLEC and the Trust then created the LL&E Royalty Partnership (the Partnership).¹⁸⁸ The Partnership was formed for the purpose of receiving and holding overriding royalty interests; receiving proceeds from the overriding royalty interests; paying the liabilities and expenses of the Partnership; and disbursing remaining revenues to the 99% partner, the Trust, and the 1% managing general partner, LLEC.¹⁸⁹ LLEC entered into a series of nearly identical agreements

181. *See generally id.*

182. *See id.* at *2.

183. No. 14-21-00337-CV, 2022 WL 1151187 (Tex. App.—Houston [14th Dist.] Apr. 18, 2022, no pet. h.) (mem. op.) (per curiam).

184. *See id.* at *8.

185. *Id.*

186. *See generally id.*

187. *See id.* at *1.

188. *See id.*

189. *See id.*

(collectively, the Conveyance) with the Partnership which diverged only in the interests covered.¹⁹⁰

Eventually, ConocoPhillips Company (ConocoPhillips) became the managing general partner of the Partnership through a series of purchases, including that of LLEC's interest.¹⁹¹ The Trust alleged that Breitburn Operating L.P.'s (Breitburn) predecessors in interest breached the Conveyance by failing to disburse the royalties due to the Trust under the terms of the Conveyance.¹⁹² Breitburn's predecessors in interest then brought an action for declaratory judgment against the trustee of the Trust Roger D. Parsons (Parsons), claiming there had been no such breach.¹⁹³ Parsons counterclaimed, later amending his pleadings to add ConocoPhillips as a party and allege that ConocoPhillips, as general partner of the Partnership, had not taken any steps to protect the royalty interests or ensure compliance with the contractual terms of the Conveyance.¹⁹⁴ Breitburn asserted that the Trust was not entitled to recovery in the capacity in which it had originally sued in an amended answer and notified the Partnership that Breitburn intended to withdraw the funds then held in an account (the Funds) on behalf of the Partnership.¹⁹⁵ Parsons requested an order from the trial court to compel Breitburn to deposit the Funds into the registry of the court, which the trial court granted.¹⁹⁶ In the mandamus proceeding that followed, Breitburn asked the court of appeals to compel the trial court to vacate its order for deposit of the Funds.¹⁹⁷

The court summarized the admittedly tangled factual background of the matter by stating that when "all the dust settles from all the various acquisitions, transfers, assignments, and mergers, we are left with a relatively simple business structure. The [Partnership] has two partners: (1) the [Trust], a non-managing general partner; and (2) ConocoPhillips, the managing general partner. Parsons is the trustee of the [Trust]."¹⁹⁸ Breitburn contended that Parsons lacked capacity to pursue the Funds.¹⁹⁹ Breitburn asserted that only the Partnership, which was the assignee under the Conveyance, had capacity to sue for the Funds without reaching the issue of whether any party other than Breitburn was entitled to the Funds.²⁰⁰ In other words, Breitburn's argument turned on the premise that the Trust did not have the capacity to recover the Funds in the court's

190. *See id.*

191. *See id.*

192. *See id.* at *3. The Trust claimed breach of the Conveyance for (1) failure to make royalty payments for seven years, (2) increasing the amount held in escrow while failing to make royalty payments, and (3) failure to deposit the escrow with an independent escrow agent. *See id.*

193. *See id.*

194. *See id.*

195. *See id.* at *3.

196. *See id.*

197. *See id.* at *4.

198. *Id.*

199. *See id.*

200. *See id.*

registry.²⁰¹ The court noted that the Partnership was not a party to the case and that Parsons's pleadings and application for deposit into the court's registry made clear that Parsons was asserting claims on behalf of the Trust and was suing solely in his capacity as trustee.²⁰² Although Parsons challenged whether Breitburn properly verified its capacity defense, the court concluded that the issue had been tried by consent and Breitburn had established the affirmative defense of capacity.²⁰³

In analyzing the issue of capacity, the court recited the principle that the nature of a partnership as an entity is to be distinct from its partners and that the partnership has the ability to enter into contracts and sue and be sued in its own name.²⁰⁴ The court also noted the principles of partnership property and the distinction between a partnership interest and partnership property, specifically that the former cannot be equated with the latter or vice versa.²⁰⁵ While recognizing that a general partnership in Texas may sue on its own behalf under the Texas Business Organizations Code, Parsons argued that there was no statute or common-law rule that only the partnership, and not the partners, may pursue the rights of the partnership.²⁰⁶ According to Parsons, the common-law rule in Texas is that general partners are proper parties to pursue the rights of a general partnership, relying on *Allied Chem. Co. v. DeHaven*.²⁰⁷ Parsons's argument, at its core, was that as long as all of the general partners of a partnership are parties to a lawsuit, then any of the partners may pursue a claim on behalf of that partnership.²⁰⁸

The court determined that it was not necessary to definitely resolve one way or another whether the Texas Business Organizations Code had restricted or otherwise modified Texas case law, holding that a general partner may pursue claims of a general partnership in an individual capacity if all partners are parties to the suit.²⁰⁹ Their reasoning was that Parsons never pleaded that he, as trustee of the Trust, which was a partner in the Partnership, was bringing any claims on behalf of the Partnership.²¹⁰ The court articulated its reasoning by citing to *Allied*, explaining that within a year of that case, the Texas Legislature enacted the Texas Revised Uniform Partnership Act (the TRPA).²¹¹ Further citing to *In re Allcat Claims Serv.*,

201. *See id.* Breitburn's argument hinged on the premise that only the Partnership had capacity to sue for the Funds as opposed to any of the partners, including the Trust. *See id.*

202. *See id.*

203. *See id.* at *6–7.

204. *See id.* at *7 (citing *Am. Star Energy & Minerals Corp. v. Stowers*, 457 S.W.3d 427, 429 (Tex. 2015); TEX. BUS. ORGS. CODE ANN. § 152.101; TEX. R. CIV. P. 28).

205. *See id.* (citing TEX. BUS. ORGS. CODE § 152.101; *Stanley v. Reef Sec., Inc.*, 314 S.W.3d 659, 664 (Tex. App.—Dallas 2010, no pet.)).

206. *See id.*

207. *See id.* (citing *Allied Chem. Co. v. DeHaven*, 824 S.W.2d 257, 264 (Tex. App.—Houston [14th Dist.] 1992, no writ)).

208. *See id.* at *8.

209. *See id.*

210. *See id.*

211. *See id.*

L.P., the court explained that the TRPA definitively incorporated the entity theory of partnership, but the court refused to reach the issue of whether *Allied's* ruling remained good law.²¹² Finding that Breitburn had established its defense of capacity, the court held that the trial court had abused its discretion by ordering Breitburn to deposit the disputed funds into the court's registry.²¹³

This ruling should serve as a guide for counsel negotiating for provisions in an operating agreement that non-managing interest-holders in a business entity must resort to alternative measures to enforce their rights rather than litigation in an individual capacity. The possibility still remains from *Allied* that partners can sue in an individual capacity in suits wherein all partners are parties, but these scenarios will likely prove few and far between. As a result, counsel would do well to enumerate the rights of limited partners to oversee major business decisions.

IV. JUDICIAL DISSOLUTION

A. TRAVIS V. TRAVIS²¹⁴

In *Travis v. Travis*, the Ninth Court of Appeals at Beaumont held that genuine issues of fact precluded the lower court from granting summary judgment on a judicial dissolution in favor one member of a two-member LLC.²¹⁵ Brothers Daniel and Tommy Travis formed Travis Brothers Building Automation Texas, LLC (the Company) in Texas in 2007.²¹⁶ In connection with forming the Company, the brothers also signed an operating agreement.²¹⁷ The operating agreement set forth the total amount each brother had contributed to the Company at that time, with Daniel contributing \$6,000.00 and Tommy contributing \$5,000.00.²¹⁸ Further, the operating agreement allocated profits and losses in proportion to each member's capital interest in the Company.²¹⁹ The operating agreement also appointed both brothers as managers of the Company.²²⁰ In addition, the operating agreement provided that the member holding the majority of the capital interests of the Company shall elect the managers of the Company.²²¹

212. *See id.* at *8.

213. *See id.*

214. No. 09-20-00116-CV, 2022 WL 1177611 (Tex. App.—Beaumont Apr. 21, 2022, no pet. h.) (mem. op.).

215. *Id.* at *1.

216. *See id.*

217. *See id.*

218. *See id.*

219. *See id.*

220. *See id.* Daniel was also appointed as Chief Executive Manager, and his duties included the daily operations of the Company. *See id.* The court did not specifically note if Tommy was given an officer position. *See id.*

221. *See id.*

Eleven years after the Company was formed, Tommy filed an Original Petition for Dissolution and Application for Temporary Restraining Order and Injunctive Relief against Daniel and the Company.²²² Tommy argued that he and Daniel were both 50% co-owners of the Company, that Daniel had caused “substantial damages” to Tommy, and that there was a “deadlock within the Company” such that the parties would never reach resolution.²²³ Further, Tommy argued that Daniel had reduced his responsibilities and tried to remove him from the Company’s bank account.²²⁴ As a result, Tommy asked for dissolution pursuant to Texas Business Organizations Code (TBOC) §11.051.²²⁵ Daniel and the Company answered Tommy’s petition with a general denial and argued that Tommy did not own 50% of the Company.²²⁶

Later, Tommy filed a Traditional Motion for Summary Judgment and Request for a Court Appointed Person to Carry out the Winding Up of the Company under § 11.314 of the TBOC.²²⁷ Specifically, Tommy argued that § 11.314 authorized the winding up of the Company because: “1) the economic purpose of the Company is likely to be frustrated; 2) defendant’s conduct has made it impracticable to carry on business with the defendant; and 3) the defendant’s actions made it not reasonably practicable to carry out the Company’s business in conformity with the Company’s governing documents.”²²⁸ To support his claims, Tommy presented evidence like an American Express statement showing charges from July 2013 to 2015, a federal tax lien against the Company in the amount of \$580,289.19 from 2017 and 2018, and a letter from Daniel to Post Oak Bank asking that Tommy be removed as an authorized person from the account.²²⁹ In response to Tommy’s motion for summary judgment, the defendants provided evidence including an affidavit from the Company Controller and certified copies of federal tax lien releases.²³⁰ Further, the defendants argued that there was not competent evidence to show that the economic purpose of the entity was unreasonably frustrated or that another owner had participated in conduct which made it impractical for the Company to continue its business.²³¹ At a minimum, according to the defendants, the evidence presented at least brought about questions of fact, and thus, summary judgment by the trial court would not be appropriate.²³²

222. *See id.*

223. *Id.*

224. *See id.*

225. *See id.* Tommy also asked for a temporary and permanent injunctive relief under the TBOC. *See id.*

226. *See id.* at *2.

227. *See id.*

228. *Id.*; *see* TEX. BUS. ORGS. CODE ANN. § 11.314.

229. *See Travis*, 2022 WL 1177611, at *3.

230. *See id.*

231. *See id.*

232. *See id.* For example, the defendants pointed out that, per the terms of the Operating Agreement, Daniel clearly owned the majority interest in the Company, but Tommy had

On March 23, 2020, the trial judge ruled in favor of Tommy's Traditional Motion for Summary Judgment and Request for Court Appointed Person to Carry Out the Winding Up of the Company.²³³ According to the trial court, because Tommy and Daniel each owned a 50% interest in the Company and the two could not agree on business matters, Tommy and Daniel had reached an unresolvable deadlock.²³⁴ Thus, in the trial court's opinion, court-ordered winding up and dissolution was appropriate for this situation.²³⁵ The defendants appealed, and the Beaumont Court of Appeals heard the case.²³⁶

The court of appeals ultimately found that summary judgment was not appropriate because Tommy did not prove as a matter of law that he was entitled to summary judgment.²³⁷ The court began by analyzing § 11.314 of the TBOC.²³⁸ The court explained that this particular provision allows a court to wind up an entity if one of three "exigent" circumstances provided in the statute exists.²³⁹ Specifically, the statute calls for dissolution of a company by a court if the court determines that:

- (1) the economic purpose of the entity is likely to be unreasonably frustrated;
- (2) another owner has engaged in conduct relating to the entity's business that makes it not reasonably practicable to carry on the business with that owner; or
- (3) it's not reasonably practicable to carry on the entity's business in conformity with its governing documents.²⁴⁰

The appellate court first examined whether the economic purpose of the Company was likely to be frustrated.²⁴¹ Tommy argued that the purpose of the Company was likely to be frustrated because Daniel had created a "toxic work environment," used funds inappropriately, allowed a tax lien to be filed against the Company, and tried to remove Tommy from the Company.²⁴² However, Daniel disputed this evidence by providing proof that the Company obtained new profitable projects and that the Company is current on its federal and state taxes.²⁴³ In addition, Daniel's evidence reiterated the point that, per the terms of the operating agreement, Daniel clearly owned the majority interest in the Company, and Tommy had not presented any evidence which supported his claim he had made additional

included in his evidence that he and Daniel each owned 50% of the interest in the Company. *See id.*

233. *See id.* at *4.

234. *See id.*

235. *See id.*

236. *See id.* at *1.

237. *See id.* at *5.

238. *See id.*

239. *Id.* (citing *CBIF Ltd. P'ship v. TGI Friday's Inc.*, No. 05-15-00157-CV, 2017 WL 1455407, at *9 (Tex. App. — Dallas Apr. 21, 2017, pet. denied) (mem. op.)).

240. *Id.* (quoting TEX. BUS. ORGS. CODE ANN. § 11.314) (internal quotations omitted).

241. *See id.*

242. *Id.*

243. *See id.* In addition, Daniel provided proof that the liens against the Company were released and that there were currently no tax liens against the Company. *See id.*

contributions in the Company to level out their membership interests.²⁴⁴ Ultimately, the court believed there was a genuine issue of material fact regarding whether the economic purpose of the company was frustrated and that summary judgment was not appropriate.²⁴⁵

Next, the appellate court examined whether Daniel's behavior made it such that it was no longer practicable to carry on the business.²⁴⁶ Tommy pointed to items like the American Express statement and Daniel's attempts to reduce Tommy's salary and responsibilities at the Company as evidence that Daniel was acting inappropriately.²⁴⁷ However, the court found that Daniel had presented enough evidence to dispute Tommy's claims.²⁴⁸ For example, Daniel presented an affidavit explaining that non-business or personal expenses on a Company credit card were treated as distributions to that individual.²⁴⁹ Thus, it was questionable that the American Express statement Tommy provided showed that Daniel was acting in an unreasonable manner.²⁵⁰ Further, the court reiterated the fact that, per the terms of the Operating Agreement, Daniel had the power to remove Tommy from the Company because he owned the majority interest.²⁵¹ As such, the court ultimately found there was a material issue of genuine fact, and thus, summary judgment was also not appropriate on this issue.²⁵²

Third, the court examined whether it was no longer reasonably practicable to carry on the Company's business in conformity with the Company's organizational documents.²⁵³ Tommy argued that they were deadlocked because, under the operating agreement, both Tommy and Daniel were members and each of them owned 50% of the Company.²⁵⁴ As a result, according to Tommy, the Company needed to be dissolved.²⁵⁵ However, the court disagreed, noting that the operating agreement dictated that the membership interest of each partner depended on their respective capital contributions.²⁵⁶ Further, the affidavit Daniel supplied noted that the parties were still operating under the terms of the operating agreement.²⁵⁷ Consequently, the court found that there was a material fact issue as to

244. *See id.* at *6.

245. *See id.* at *7.

246. *See id.*

247. *See id.*

248. *See id.*

249. *See id.* In addition, in a second affidavit, an employee of the Company explained that if someone were to charge the Company's credit card for a personal expense, that person would end up paying for that item personally. *See id.*

250. *See id.*

251. *See id.*

252. *Id.*

253. *See id.*

254. *See id.*

255. *See id.*

256. *See id.* at *8. Tommy claimed he had made capital contributions to bring the brothers back to 50/50 ownership, but those claims were disputed by Daniel. *See id.*

257. *See id.*

whether it was reasonably practicable to carry on the Company's business in conformance with its governing documents.²⁵⁸

Lastly, the appellate court examined whether the trial court's finding that, due to Daniel and Tommy's "deadlock," a judicial dissolution was the only appropriate remedy.²⁵⁹ Again, the court pointed to the fact that, despite Tommy's claims that the two brothers each owned a 50% interest in the Company, the operating agreement showed that Daniel owned a larger interest than Tommy because his capital contributions were larger.²⁶⁰ Thus, the two brothers would not be in a "deadlock," as Daniel would have the deciding vote.²⁶¹ While Tommy claimed he had made additional capital contributions to bring the brothers back to a 50/50 ownership split, the accountants for the Company testified that these contributions were not reflected in the Company records.²⁶² Thus, the court found that there was a question of fact as to the correct proportion each brother owned in the Company, and ultimately, summary judgment was not appropriate.²⁶³

Travis v. Travis shows the hesitancy of the courts to use judicial dissolution as a means to resolve internal Company conflict when questions of fact still exist.²⁶⁴ The court's analysis of the facts in *Travis* highlights the notion that courts should carefully and thoughtfully examine the evidence provided by both parties in a judicial dissolution case to determine whether such judicial interference is necessary or helpful. Specifically, the court of appeals' analysis of § 11.314 and the court's role in reviewing the elements calls as a reminder to lower courts that if there is even a question over the facts provided by the parties, summary judgment would rarely be appropriate. If parties want to leave the possibility of judicial dissolution open, they should make strides to keep their company's records up to date and show conclusive evidence of the facts they want to establish. Ultimately, the court's decision in *Travis* makes it clear that a party asking a court for judicial dissolution will have to meet a high threshold of evidence showing judicial dissolution is a necessary and appropriate remedy, not just a mere convenience or benefit to the moving party.²⁶⁵

B. G FORCE FRAMING LLC v. MACSOUTH FOREST PRODUCTS,
L.L.C.²⁶⁶

G Force Framing LLC demonstrates Texas courts' hesitancy to dissolve or terminate an entity's existence, as the Court of Appeals for the Fifth

258. *See id.*

259. *See id.*

260. *See id.*

261. *Id.*

262. *See id.* at *9.

263. *Id.*

264. *See generally id.*

265. *Id.*

266. No. 05-20-00835-CV, 2022 WL 500027 (Tex. App.—Dallas Feb. 18, 2022, no pet. h.) (mem. op.).

District of Texas at Dallas found that an entity's failure to pay franchise taxes does not constitute grounds for involuntarily dissolving an entity.²⁶⁷ G Force Framing LLC (G Force) was formed on April 1, 2014, but failed to pay its franchise taxes, resulting in a tax forfeiture on January 29, 2016.²⁶⁸ Even though the entity had forfeited its tax status, G Force continued to enter into contracts.²⁶⁹ For example, G Force entered into a contract with Stoneleigh Construction Company, LLC (Stoneleigh) for framing on one of Stoneleigh's construction projects.²⁷⁰ During the construction, Stoneleigh and G Force disagreed on certain matters, and G Force filed affidavits for mechanic's and materialman's liens against Stoneleigh as a result of these disputes.²⁷¹ Stoneleigh subsequently filed suit against G Force for negligence and breach of contract.²⁷²

Stoneleigh moved for summary judgment on G Force's counterclaims asserting that, because G Force had forfeited its tax status on January 29, 2016, G Force did not have capacity to sue on any claims occurring post-forfeiture.²⁷³ G Force responded by providing summary judgment evidence of a Tax Clearance Letter for Reinstatement from the Texas Comptroller dated as of September 23, 2019, and a Certificate of Filing dated September 23, 2019, of G Force from the Office of Secretary of State, which specifically stated that G Force had been reinstated to active status.²⁷⁴ In addition, G Force amended its counterclaim to argue that, if they were unable to pursue its claims against Stoneleigh, including by reason of G Force forfeiting its limited liability company status, then Kerry Graves, in his individual capacity doing business as G Force, asserted such claims.²⁷⁵

The lower court initially granted relief in favor of Stoneleigh, noting that because G Force did not reinstate within the three-year period following its forfeiture, the claims that arose after the forfeiture had expired.²⁷⁶ After G Force's claims were dismissed, G Force and Graves amended their counterclaim, pursuant to which Graves asserted his claims on behalf of G Force and as himself doing business as G Force.²⁷⁷ On April 1, 2020, Stoneleigh moved for partial summary judgment to discharge the mechanic's liens G Force filed against Stoneleigh, and the trial court granted such motion.²⁷⁸ Further, the trial court granted summary judgment in favor of Stoneleigh, dismissing the claims made by Graves individually.²⁷⁹

267. *See id.* at *1.

268. *See id.*

269. *See id.*

270. *See id.*

271. *See id.*

272. *See id.* G Force then filed counterclaims against Stoneleigh. *See id.*

273. *See id.*

274. *See id.*

275. *See id.* at *2.

276. *See id.* (dismissing G Force's claims with prejudice).

277. *See id.*

278. *See id.*

279. *See id.*

Stoneleigh was also granted its request for attorney's fees and expenses related to their motion to dismiss.²⁸⁰ As a result, G Force appealed.²⁸¹

One of the issues G Force raised on appeal was whether the trial court erred in granting Stoneleigh's motion for summary judgment based on the fact that G Force was a terminated entity and, thus, did not have capacity to sue because its claims had expired under TBOC.²⁸² Stoneleigh had argued that, because G Force was forfeited for the period of January 29, 2016, to January 29, 2019, G Force's claims from that time period had expired under the Texas Tax Code.²⁸³ Thus, the court of appeals needed to determine whether the combination of G Force's tax forfeiture, together with its failure to timely reinstate itself, resulted in a termination under TBOC.²⁸⁴ The court noted that this was an issue of statutory interpretation, and thus, the court needed to review the issue *de novo*.²⁸⁵ Further, the court explained that, when determining the statutory meaning, the goal is to effectuate the Legislature's intent and that the court would need to review the entire statute as a whole to properly interpret its meaning.²⁸⁶

The court of appeals began its analysis by noting that a Texas entity exists perpetually unless its governing documents state otherwise or the entity is terminated pursuant to the TBOC or Texas Tax Code.²⁸⁷ Stoneleigh argued that under Texas Tax Code § 171.251, which states that:

The comptroller shall forfeit the corporate privileges of a corporation on which the franchise tax is imposed if the corporation: . . . does not pay, within 45 days after the date notice of forfeiture is mailed, a tax imposed by the chapter or does not pay, within those 45 days, a penalty imposed by this chapter relating to that chapter.²⁸⁸

G Force was terminated, as it took three years for the entity to be reinstated.²⁸⁹ Pursuant to the Texas Tax Code, if an entity does not revive its forfeited privileges within 120 days, the entity is denied the right to sue or defend in a court of the state.²⁹⁰ Thus, Stoneleigh argued that G Force became a terminated entity under the TBOC as it took longer than 120 days for the entity to reinstate its privileges with the comptroller.²⁹¹ The TBOC defined a terminated entity as an entity which has either been: "(A) terminated in a manner authorized or required by [the TBOC], unless

280. *See id.*

281. *See id.*

282. *See id.* at *5.

283. *See id.*

284. *See id.*

285. *See id.* (citing *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003)).

286. *See id.* (citing *City of San Antonio*, 111 S.W.3d at 25; *State v. Gonzales*, 82 S.W.3d 322, 327 (Tex. 2002)); *see also* *Jones v. Fowler*, 969 S.W. 2d 429, 432 (Tex. 1998).

287. *See G Force Framing LLC*, 2022 WL 500027, at *5 (citing TEX. BUS. ORGS. CODE ANN. § 3.003).

288. *Id.* (quoting TEX. TAX CODE ANN. § 171.251) (internal quotations omitted).

289. *See id.*

290. *See id.* (citing TEX. TAX CODE § 171.309).

291. *See id.* (citing TEX. BUS. ORGS CODE § 11.001(4)).

the entity has been reinstated in the manner provided by [the TBOC]; or (B) forfeited pursuant to the Tax Code, unless the forfeiture has been set aside.”²⁹²

First, the court of appeals needed to determine whether G Force had been involuntarily terminated pursuant to the terms of the TBOC.²⁹³ The court began its analysis by noting that, in 2003, the Texas legislature recodified the TBOC.²⁹⁴ In the earlier and now repealed version of the TBOC, an entity could be involuntarily dissolved for its failure to pay franchise taxes.²⁹⁵ However, the TBOC does not currently include an entity’s failure to pay franchise tax as a basis for involuntarily dissolving such entity.²⁹⁶ The court concluded that the removal of the failure to pay franchise taxes as a grounds for dissolution demonstrated the legislature’s choice to eliminate that as a grounds for dissolution.²⁹⁷ Thus, the court of appeals held that G Force was not terminated under the TBOC for its failure to pay franchise taxes.²⁹⁸

Next, the court reviewed whether G Force was considered a terminated entity due to its delinquency in paying its franchise taxes under the Texas Tax Code.²⁹⁹ The court noted that G Force was reinstated back to active status in September 2019.³⁰⁰ However, Stoneleigh argued that G Force had to reinstate within three years to not be considered a terminated entity.³⁰¹ However, the court of appeals held that Stoneleigh’s arguments held no weight because the sections referenced in the TBOC only applied to entities *terminated* pursuant to the TBOC.³⁰² Since G Force was not involuntarily dissolved under the terms of the TBOC, the sections referenced in the TBOC were not applicable.³⁰³ Thus, because G Force was not a terminated entity, G Force could continue to pursue its claims against Stoneleigh.³⁰⁴

G Force Framing LLC reflects the hesitancy of Texas courts to involuntarily dissolve an entity pursuant to the terms of the TBOC. In this case, the court of appeals followed the careful and thoughtful process of reviewing evidence we have seen in other recent cases to prevent G Force from being involuntarily terminated. Although the officers of an entity

292. TEX. BUS. ORGS. CODE § 11.001(4).

293. See *G Force Framing*, 2022 WL 500027, at *6.

294. See *id.*

295. See *id.* (citing Act of May 25, 1981, 67th Leg., R.S. ch. 297, § 25(B)(1), 1981 Tex. Gen. Laws 831, 843 (repealed 2003)).

296. See *id.*

297. See *id.*

298. *Id.*

299. See *id.* at *7.

300. See *id.*

301. See *id.* Stoneleigh pointed to several sections of the TBOC to back up their argument, including TBOC § 11.253, which states that a terminated entity “‘is considered to have continued in existence without interruption from the date of termination’ if the terminated entity was reinstated before the third anniversary of the date of its involuntary termination.” *Id.* (quoting TEX. BUS. ORGS. CODE §§ 11.356, 11.359, 11.253).

302. *Id.*

303. See *id.*

304. See *id.*

should be careful to pay any required fees or taxes charged by the State, this case should also provide some relief that Texas courts may not come down harshly on an entity for failure to pay its franchise taxes. Similarly, parties should closely review the TBOC to determine the grounds for involuntarily dismissing an entity, as it seems courts will strictly follow the items contained in the statute.

V. INDEMNIFICATION

A. NEWSTREAM HOTELS & RESORTS, LLC v. ABDOU³⁰⁵

In *Newstream Hotels & Resorts, LLC v. Abdou*, the Court of Appeals for the Second District of Texas at Fort Worth held that the Texas Citizens Participation Act (the TCPA), an anti-SLAPP statute, did not apply to a claim of wrongful indemnification against the general partner of a limited partnership and its affiliate because the claim was not premised on communication—which is protected under the TCPA, but rather on conduct which is not protected.³⁰⁶ As a result, the court refused to grant the general partner and its affiliate’s motion to dismiss the investors’ amended claim against them.³⁰⁷

The underlying business dispute of the case involved the construction of a mixed-use real estate development in Flower Mound, Texas, known as Lakeside Crossing (the Project).³⁰⁸ Lakeside Crossing Land Partners (LCLP) was a limited partnership involved in the construction of the Project, with Newstream Hotels and Resorts, LLC acting as its general partner (collectively, Newstream).³⁰⁹ Investors in LCLP (the Investors) brought suit against Newstream on various claims, including Newstream’s alleged misrepresentations and mismanagement of the Project.³¹⁰ Over the course of the resultant litigation, Newstream notified the Investors that it was going to withdraw funds from LCLP to indemnify Newstream for attorney’s fees and overall legal expenses in connection with the Investors’ claims against Newstream.³¹¹ In response, the Investors filed an amended petition asserting factual allegations that the indemnification claimed by Newstream was wrongful.³¹² Newstream then filed a motion to dismiss the amended claims, citing the TCPA. Newstream’s theory was that the Investors’ petition, as amended, was based on, or in response to, Newstream’s communications

305. No. 02-21-00343-CV, 2022 WL 1496537 (Tex. App.—Fort Worth May 12, 2022, no pet.) (mem. op.).

306. *Id.* at *1.

307. *See id.*

308. *See id.*

309. *See id.*

310. *See id.*

311. *See id.* at *1, *3. Newstream notified all limited partners that it had utilized Partnership money for indemnification purposes and that the Partnership had to raise extra funds as a result of those payments. *See id.* at *3.

312. *See id.* at *1.

informing the Investors of the indemnification.³¹³ This theory also sought to characterize Newstream's invoices, payments, and checks, sent to secure Newstream's indemnification, as communications sent in furtherance of litigation and therefore eligible for TCPA protection.³¹⁴ The trial court denied Newstream's motion.³¹⁵ They subsequently filed an interlocutory appeal, to which the court of appeals granted review.³¹⁶

As the decision of whether to grant a motion to dismiss as a matter of law, the reviewing court evaluated the trial court's decision using a *de novo* standard, limiting its level of deference.³¹⁷ The court started its analysis of Newstream's claims by describing the legal requirements for a motion to dismiss under the TCPA.³¹⁸ First, in its evaluation, the court must accept the nonmoving party's (here, the Investors) pleadings as the "best and all-sufficient" evidence of the nature of their claim.³¹⁹ An important guiding principle articulated by the court was that a movant (here, Newstream) simply alleging conduct that has a communication embedded within it does not create the relationship between the claim and the communication necessary to invoke the TCPA.³²⁰ If a claim fails to properly assert communication as its basis and is instead premised on conduct, the TCPA does not apply.³²¹ After resolving this threshold issue of communication versus conduct, the review of a TCPA motion to dismiss involves a three-step analysis.³²² First, the movant seeking the protection of the TCPA bears the burden of demonstrating that the claim up for dismissal is based on or is in response to the movant's exercise of the right to free speech.³²³ Second, if the moving party satisfies its burden to prove the applicability of the TCPA, then the nonmoving party must establish a *prima-facie* case for each necessary element of the underlying claim by clear and specific evidence.³²⁴ Finally, if the non-moving party satisfies the second step, the moving party must establish a basis on which it is entitled to judgment as a matter of law.³²⁵

Applying these standards to the case before them, the court found that the trial court had properly denied Newstream's motion.³²⁶ The

313. *See id.*

314. *See id.*

315. *See id.*

316. *See id.*

317. *See id.* at *2. This standard of review allowed the court to analyze the pleadings, any evidence permitted in a summary judgment action, and any submitted affidavits that set forth the facts supporting liability or a defense. *See id.*

318. *See id.*

319. *See id.* at *3.

320. *See id.*

321. *See id.* (citing *Pacheco v. Rodriguez*, 600 S.W.3d 401, 410 (Tex. App.—El Paso 2020, no pet.).

322. *See id.*

323. *See id.*

324. *See id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c)).

325. *See id.* (citing TEX. CIV. PRAC. & REM. CODE § 27.005(d)).

326. *See id.* at *4.

central issue to the Investors' claim was the premise that Newstream had breached the partnership agreement and violated Texas law by unilaterally collecting funds under a claimed right of indemnity.³²⁷ The Investors were not objecting to Newstream's notification of its exercise of its right of indemnification but rather the exercise itself.³²⁸ Their amended complaint was based on conduct, not communication, taking the matter outside of the TCPA.³²⁹ To further elaborate on the contours of its TCPA analysis, the court specified that it rejected Newstream's assertion that a quote in the Investor's response to the motion to dismiss supported Newstream's argument.³³⁰ The Investors' response to the motion to dismiss contained sworn testimony that Newstream had informed all limited partners of LCLP that the partnership had to raise additional capital.³³¹ As Newstream explained in the communication, part of the capital it was raising would go towards indemnifying itself.³³² The Investors' testimony also included the statement that Newstream's request for capital had depleted the Partnership's funds and, therefore, diminished the limited partners' likelihood of receiving a return of their contributions to the Partnership.³³³ Newstream claimed that this testimony showed that the Investors had responded to the communication of LCLP's intent to raise capital by filing wrongful indemnity claims.³³⁴

The court noted that this argument ignored that the Investors' pleadings were the best and all-sufficient evidence of the nature of the claim.³³⁵ Further, the quoted testimony showed that conduct, not communication, caused the Investors' harm and served as the basis for the amended claims.³³⁶ Finally, the court rejected Newstream's argument that the Investors' amended claims were brought in response to the communications contained within the invoices, checks, and payment requests generally sent to withdraw funds from LCLP.³³⁷ Any communications contained within the checks and invoices were merely evidence of Newstream's conduct.³³⁸ The Investors did not object to these communications in and of themselves, but rather the activities Newstream sought to conduct through their submission.³³⁹

327. *See id.* at *1. Even though the Investors had been informed of Newstream's conduct in relation to the indemnity situation, it was Newstream's conduct that caused the harm to Investors for which they sought relief. *See id.*

328. *See id.*

329. *See id.*

330. *See id.* at *4. The essence of the claim remained that Newstream had breached its contract with the Investors and violated Texas law through the wrongful indemnification of which the communications were merely evidence. *See id.*

331. *See id.* at *3.

332. *See id.* at *3–4.

333. *See id.*

334. *See id.* at *3.

335. *See id.* at *4.

336. *See id.*

337. *See id.*

338. *See id.*

339. *See id.*

Counsel would do well to take note that the parties they represent cannot take advantage of the TCPA to protect the exercise of their rights under an operating agreement. Specifically, the TCPA does not grant parties a more expansive indemnification right than the one for which they bargained for in the operating agreement, further underscoring the importance of careful draftsmanship and the explicit stipulation of rights in a governing document.

VI. CHARGING ORDERS AGAINST A LIMITED LIABILITY COMPANY

A. THOMAS V. HUGHES³⁴⁰

Although Texas courts may be hesitant to pierce the corporate veil, courts are often inclined to use other tools to punish bad actors for fraudulent behaviors. As case in point is *Thomas v. Hughes*, in which the U.S. Court of Appeals for the Fifth Circuit affirmed a lower court decision requiring a judgment debtor to obtain court approval before transferring its membership interest in a single-member LLC or before that same LLC transferred any of its real property or funds to any unrelated entity.³⁴¹ In 2019, a federal jury held that Lou Ann Hughes fraudulently transferred assets to avoid a state court judgment against Hughes and her company Performance Probiotics.³⁴² Hughes and Performance Probiotics were charged with over \$3,000,000.00 in damages pursuant to the judgment.³⁴³ The parties against Hughes then applied for a charging order against Hughes's membership interest in M.G. & Sons, LLC (M.G. & Sons).³⁴⁴ Hughes was the sole member of M.G. & Sons, and the entity owned real property in San Antonio.³⁴⁵ The district court granted the charging order and provided that the parties against Hughes had the right to receive Hughes's distributions received in connection with her membership interest in M.G. & Sons.³⁴⁶ Further, the district court's order noted that M.G. & Sons must obtain leave of court before transferring its property to a third party, transferring its funds to a third party except in the ordinary course of business, or transferring Hughes' interest in M.G. & Sons to a third party.³⁴⁷ Hughes appealed the order, arguing that these restrictions exceed the scope of Texas law and that they would interfere with M.G. & Son's ordinary business.³⁴⁸

340. 27 F.4th 363 (5th Cir. 2022).

341. *See id.* at 365–66, 368.

342. *See id.* at 366. The state court judgment against Hughes was for (1) misappropriating trade secrets and (2) breaching her fiduciary duty owed to the company, as Hughes was the company's attorney. *See id.*

343. *See id.*

344. *See id.*

345. *See id.*

346. *See id.*

347. *See id.* at 368.

348. *See id.*

The Fifth Circuit began its analysis by noting that, under Texas law, a court may charge a membership interest of a judgment debtor in a limited liability company, and if such charge is ordered, the judgment creditor would then have the right to receive a distribution that the judgment debtor would have been entitled to receive.³⁴⁹ However, per the terms of the TBOC, a judgment creditor is not entitled to possession of the items owned by the limited liability company.³⁵⁰ However, Hughes points to the fact that the charging order in this instance restricts M.G. & Sons from transferring property, funds, and Hughes's membership interests.³⁵¹ Thus, Hughes argues that the charging order creates an improper remedy as to the limited liability company's property.³⁵²

The Fifth Circuit disagreed with Hughes's reading of the charging order at issue.³⁵³ The Fifth Circuit first noted that the courts have inherent power to enforce its judgments by suitable methods and that such methods include charging orders and injunctive relief.³⁵⁴ In support of this statement, the Fifth Circuit pointed to the Court of Appeals for the Fifth District of Texas at Dallas's decision in *Int. of M.W.M.*³⁵⁵ In that case, the court of appeals upheld a trial court charging order which charged certain entities with not paying a father his distribution until the judgments by his ex-wife were paid.³⁵⁶ The father had argued that the charging order acted more as an injunction, and thus was improper under the TBOC.³⁵⁷ The court of appeals disagreed, noting that the statute under the TBOC was not the sole method of enforcing the relevant judgment, which can include injunctive relief.³⁵⁸

Thus, the Fifth Circuit found that charging order was appropriate and valid as the district court merely included injunctive relief as a judgement enforcement method.³⁵⁹ Hughes further argued that injunctive relief was not appropriate in this instance because it was not requested by the charging parties.³⁶⁰ However, the court noted that even if the charging parties did not specifically request an injunction, the relief the charging parties sought involved preventing M.G. & Sons from transferring its assets.³⁶¹ Thus, even if the charging order technically functions as an injunction, a charging order and injunction can "coexist with the charging order under the facts

349. *See id.* at 367 (citing TEX. BUS. ORGS. CODE ANN. §§ 101.112(a), (b)).

350. *See id.* (citing TEX. BUS. ORGS. CODE § 101.112(f)).

351. *See id.*

352. *See id.*

353. *See id.* at 368.

354. *See id.* (citing *Arndt v. Farris*, 633 S.W.2d 497, 499 (Tex. 1982); *ex rel. M.W.M.*, 2020 WL 6054337, at *2 (Tex. App.—Dallas Oct. 14, 2020, no. pet.) (mem. op.)).

355. *See M.W.M.*, 2020 WL 6054337, at *2.

356. *See id.* at *1.

357. *See id.* at *3.

358. *See id.*

359. *See Thomas*, 27 F.4th at 368.

360. *See id.*

361. *See id.*

of this case” according to the Fifth Circuit.³⁶² Further, the court found that injunctive relief was proper in this instance because the district court had concluded that, in Hughes’s past, she had made fraudulent transfers to avoid payment of a judgment.³⁶³ Thus, due to her long-standing practice of attempting to evade monetary judgments, an injunction was appropriate in this instance.³⁶⁴

Next, the Fifth Circuit examined whether the charging order was inappropriate because it restricted M.G. & Sons’ business.³⁶⁵ The court held that, because the charging order specifically carved out transfers made by M.G. & Sons in the ordinary course of business, it did not interfere with M.G. & Sons’ day-to-day business.³⁶⁶ Further, Hughes argued the charging order was inappropriate because it subjected M.G. & Sons to injunctive relief when M.G. & Sons was not a party to the action.³⁶⁷ While the court agreed with Hughes on this point, the court noted that, under the charging order, M.G. & Sons faced no liability.³⁶⁸ Thus, the Fifth Circuit revised the charging order merely to require Hughes to obtain leave of court before any transfers are made in connection with her interest.³⁶⁹

Thus, while courts remain hesitant to pierce the corporate veil, they may still punish bad actors, even if it means preventing access to the funds or property held by an entity in which a party has an interest. Further, parties should be aware that court interference with their interest in an entity is not limited to addressing the entities which are at issue in the case at hand; rather, courts may enjoin distributions or other property owed to such party by an entity that is not involved in the issue. In addition, parties should take comfort that the Fifth Circuit took care to prevent the innocent entity, M.G. & Sons, from suffering any harm done by Hughes. The court’s clarification in removing M.G. & Sons from having to obtain leave of court for making transfers demonstrates the court’s preference to let Texas companies handle their own business with limited court interference. As such, while membership holders in a business should be aware that their interests might become the interest of a judgment holder, the business itself should be able to continue its day-to-day operations as normal.

362. *Id.* The court referenced *In re Brookshire Grocery Co.* as support for its conclusion that a motion can do more than what is included in its caption. *See id.* (citing *In re Brookshire Grocery Co.*, 250 S.W.3d 66, 72 (Tex. 2008)).

363. *See id.* at 369.

364. *See id.*

365. *See id.*

366. *See id.*

367. *See id.*

368. *See id.*

369. *See id.* The court also highlighted the fact that Hughes had previously fraudulently transferred assets, and thus, the lower court did not abuse its discretion in including a transfer restriction. *See id.*

VII. CONCLUSION

The cases featured in this article highlight the continued importance of careful wording and thoughtful issue spotting when drafting joint venture agreements. Partners should take care to contemplate and think through all reasonably possible scenarios when drafting their operating documents because, as many of the cases discussed above indicate, unlikely scenarios (somehow) arise!

