MULTIPLYING DEFENDANTS
(to increase collectability)

<u>CAUTION</u>: This paper has not been updated since 2004. The Supreme Court rejected single business enterprise as a theory of recovery, thus requiring reliance on fraudulent transfers and sham to perpetrate a fraud.

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I. INTRODUCTION

Accounts referred for collection, as well as any claim that makes the basis for a suit for monetary relief, come to your office in many forms. Often, in collection matters, it may only consist of a summary statement of account, addressed to "ABC Company, attn: accounts payable". The debtor entity and the potential liable parties are not apparent from the face of the documents. This paper is directed to analyzing claims with the intent to multiply the defendants to increase collectability. Many of the topics addressed in this paper were "lifted" with permission from the Texas Collection Manual (3rd ed 2000) published by the State Bar of Texas.

Preferably, the collection package forwarded to the attorney should include:

a. The credit application and any guaranties;

b. A copy of the summary statement of account as well as copies of the unpaid invoices;

c. The debtor's current address, phone number and accounts payable contact;

d. Copies of any agreements or correspondence between the creditor and its debtor relating to payment of the account and relating to any complaints by the debtor regarding the creditor's services or products furnished;

e. Copies of all financial statements and credit reports obtained on the debtor and, if the credit was not recently approved, new credit reports on the liable individuals.

This complete package will be useful in determining the correct debtor or debtors, and will hopefully reveal the possibility of multiplying the defendants to increase collectability.

II. GUARANTIES

Guaranties must be in writing in order to be enforceable, Texas Business and Commercial Code §26.01 (Vernon's 1987). They are either general in scope i.e. for all sums, or limited scope, i.e. for all sums due pursuant to the lease from A to B, or for all liability up to $20,000.00. See §9.11 Action on Guaranty, et seq, Texas Collections Manual (3rd ed 2000) for a discussion of suits on guaranties.

While an extensive examination of suretyship law is beyond the scope of this paper, the purpose of mentioning the obvious additional defendant in the form of a guarantor is necessary as a basis for the following suggestions:

1. Always ask your client if there is a guarantor on the debt and to be sure and check their files for same. A long term relationship may have begun with a guaranty required by a previous credit administrator.

2. Always ask to see the client's credit application for the debtor, because guaranties are often made a part of the credit application.

3. Always review the client's contract documentation. Often one line guaranties are included as part of the lease or contract.

4. It is entirely appropriate to request a guaranty after the fact, in consideration for holding off suit against the original obligor.

5. Encourage your clients to require guaranties and to include them in their credit application process.

III. PARTNERSHIPS AND OTHER NON-CORPORATE ENTITIES

A. General Partnership

Texas general partnerships are governed by the Texas Revised Partnership Act, Tex. Rev. Civ. Stat. Ann. arts. 6132b-1.01 to -9.06 (Vernon

Supp. 2000). See TRCS art. 6132b-2.03 for the factors determining whether a partnership exists.

Generally, all partners are jointly and severally liable for partnership debts and obligations unless otherwise agreed by the claimant. TRCS art. 6132b-3.04. An incoming partner has no liability for obligations arising before his entry into the partnership, relating to an action taken or omission occurring before entry, or arising under a contract or commitment entered into before entry. TRCS art. 6132b-3.07.

An action may be brought against the partnership and any individual partner. TRCS art. 6132b-3.05(b). Service on any partner will support a judgment against the partnership and the partner served. Tex. Civ. Prac. & Rem. Code Ann. § 17.022 (Vernon 1997). If the suit is against several partners jointly indebted under a contract and citation is served on at least one but not all partners, judgment may be rendered only against the partnership and the partners actually served, not against the partners not served. TCPRC § 31.003.

A claim against a partnership may be satisfied against the assets of a partner only if a judgment is also entered against the partner based on the same claim and the judgment obtained against the partnership remains unsatisfied for ninety days after entry. TRCS art. 6132b-3.05(d). The creditor can proceed directly against an individual partner if (1) the partnership is a debtor in bankruptcy, (2) the creditor and the partnership agree that the creditor is not bound by article 6132b-3.05(d), (3) the court orders otherwise, finding that partnership property subject to execution is clearly inadequate to satisfy the judgment, or (4) liability is imposed by law on the partner independently of his status as a partner. TRCS art. 6132b-3.05(e).

B. Limited Partnership

A limited partner is not liable for the debts of the limited partnership unless he either is also a general partner or participates in the control of the business. If the limited partner participates in control of the business, he is liable only to persons transacting business with the limited partnership who reasonably believe, based on the limited partner's conduct, that he is a general partner. Tex. Rev. Civ. Stat. Ann. art. 6132a-1, § 3.03(a) (Vernon Supp. 2000). If a limited partner knowingly permits his name to be used in the name of the limited partnership except as allowed under TRCS art. 6132a-1, § 1.03, he will be liable to creditors extending credit to the limited partnership who do so without knowledge that the limited partner is not also a general partner. TRCS art. 6132a-1, § 3.03(d).

See TRCS art. 6132a-1, § 3.03(b), for a nonexclusive list of actions a limited partner can take that are deemed not to constitute participation in control of the business.

C. Limited Liability Partnership

A partner in a limited liability partnership is not individually liable for debts or obligations of the partnership arising from the errors, omissions, negligence, incompetence, or malfeasance committed by another partner or a representative of the partnership not working under the supervision or direction of the partner, as long as these acts occurred while the partnership was registered. The partner will be liable, however, if he was directly involved in the specific activity in which the error, omission, and so forth was committed by the other partner or representative or he had notice or knowledge of the wrongs at the time of their occurrence and failed to take reasonable steps to prevent or cure them. Tex. Rev. Civ. Stat. Ann. art. 6132b-3.08(a)(2) (Vernon Supp. 2000).

Partners in a limited liability partnership are not liable for partnership liabilities arising from causes other than errors, omissions, negligence, incompetence, or malfeasance. TRCS art. 6132b-3.08(a)(1).

A limited liability partnership must carry liability insurance of at least $100,000. TRCS art. 6132b-3.08(d)(1).

D. Limited Liability Company

Neither a member nor a manager of a limited liability company is personally liable for the debts, obligations, or liabilities of the limited liability company including under a judgment, decree, or court order. Tex. Rev. Civ. Stat. Ann. art. 1528n, art. 4.03(A) (Vernon 1997).

E. Association or Unincorporated Joint-Stock Company

Liability for a debt of a foreign or domestic association or unincorporated joint-stock company can be fixed on an individual member as well as on the company or association, provided that the individual sought to be held liable is served and judgment is obtained against him. Execution cannot issue against a stockholder's or member's individual property until execution has issued against the organization's joint property and has been returned without satisfaction. Tex. Rev. Civ. Stat. Ann. arts. 6133, 6136, 6137 (Vernon 1970). The composition and liability of these entities are discussed in *Thompson v. Schmitt*, 274 S.W. 554 (Tex. 1925), and *Wells v. Mackay Telegraph-Cable Co.*, 239 S.W. 1001 (Tex. Civ. App.—Galveston 1921, no writ).

IV. HUSBANDS AND WIVES

A. Availability of community and separate property to satisfy a judgment.

One spouse's separate property cannot be seized to satisfy a judgment against the other spouse unless both spouses are liable under another rule of law. Tex. Fam. Code Ann. § 3.202(a)(Vernon 1997).

Section 3.202(b)of the Family Code provides that unless both spouses are personally liable, the community property subject to one spouse's sole management, control, and disposition is not subject to liabilities that the other spouse incurred before marriage or to a non-tortious liability that the other spouse incurred during marriage.

Section 3.201 of the Family Code provides that a person is personally liable for the acts of the person's spouse only if: (1) the spouse acts as an agent for the person; or (2) the spouse incurs a debt for necessaries. A spouse does not act as an agent for the other spouse solely because of the marriage relationship. Tex. Fam. Code Ann. § 3.201(c)(Vernon 1997).

Sole-management community property is subject to liabilities incurred by that spouse before or during marriage, and joint management community property is subject to the liabilities of either spouse incurred before or during marriage. All community property is subject to tortious liability of either spouse incurred during marriage. Tex. Fam. Code Ann. § 3.202(b)(c) and (d)(Vernon 1997); Carlton v. Estate of Estes, 664 S.W.2d 322 (Tex. 1983) (joint-management community property).

Consequently, the creditor with a judgment against one spouse should try to locate:

> (1) That spouse's separate property;
>
> (2) Community property subject to that spouse's sole management, control and disposition; and
>
> (3) Joint-management community property.

If the judgment is against both spouses for joint liability, all community property and both spouses' separate property can be reached. See Cockerham v. Cockerham, 527 S.W.2d 162 (Tex. 1975). Of course, a specific item of property might be exempt under some other rule of law, such as the general personal property exemption statutes.

B. Classification of property as community or separate.

Property possessed by either spouse during (or on dissolution of) marriage is presumed to be community property. Tex. Fam. Code Ann. §

3.003(a) (Vernon 1997); see Ray v. United States, 385 F. Supp. 372, 377 (S.D. Tex. 1974), aff'd, 538 F.2d 1228 (5th Cir. 1976). The degree of proof necessary to establish that property is separate property is clear and convincing evidence. Tex. Fam. Code Ann. § 3.003(b) (Vernon 1997). Sole-management community property is that community property that the spouse "would have owned if single, including:

> (1) personal earnings;
>
> (2) revenue from separate property;
>
> (3) recoveries for personal injury; and
>
> (4) the increases and mutations of, and the revenue from, all property subject to the spouse's sole management, control and disposition."

Tex. Fam. Code Ann. § 3.102(a)(Vernon 1997).

The spouses can agree in writing that other community property will be sole-management community property. Tex. Fam. Code Ann. § 3.102(c)(Vernon 1997). Unless otherwise provided, mixed community property is joint management community property. Tex. Fam. Code Ann. § 3.102(b) (Vernon 1997). Community property not included in one of these exceptions is joint-management community property. Tex. Fam. Code Ann. § 3.102(c)(Vernon 1997). Classification of the property can be done through post-judgment discovery or through motion practice. It has also been done by intervention in a divorce action by a judgment creditor seeking a turnover order and declaratory judgment. Owen v. Porter, 796 S.W.2d 265 (Tex. App.--San Antonio 1990, no writ). See Brooks v. Sherry Lane National Bank, 788 S.W.2d 874 (Tex. App.--Dallas 1990, no writ) wherein the Court affirmed a garnishment judgment in favor of husband's creditor awarding funds in two bank accounts in spite of husband and wife's testimony of their intent that both accounts be her separate property or special community property. The couple's "intent" was superseded by the opening of the accounts as joint accounts with joint right of control.

Effective January 1, 2000, Section 4.201 et seq was added to the Family Code allowing spouses to agree to convert separate property to community property. While agreements such as these may be useful for estate planning purposes, they will increase the property subject to a judgment creditor's reach since community property is subject to seizure for more debts than is separate property.

C. Order in Which Property is Subject to Execution.

Family Code Section 3.203 provides for judicial determination of the order in which property is subject to execution as follows:

(a) A judge may determine, as deemed just and equitable, the order in which particular separate or community property is subject to execution and sale to satisfy a judgment, if the property subject to liability for a judgment includes any combination of:

> (1) a spouse's separate property;
>
> (2) community property subject to a spouse's sole management, control, and disposition;
>
> (3) community property subject to the other spouse's sole management, control and disposition; and
>
> (4) community property subject to the spouses' joint management, control, and disposition.

(b) In determining the order in which particular property will be subject to execution and sale, the judge shall consider the facts surrounding the transaction or occurrence on which the suit is based.

V. CORPORATIONS

Corporations are by their very nature designed as tools to limit liability to the corporate entity to the extent of its assets. However, corporations whose doors are closed and phones

are disconnected do not always mean an end to one's collection efforts.

A. Business That Has Incorporated without Change of Name

1. Statutory Notice Repealed

Tex. Rev. Civ. Stat. Ann. art. 1302-2.02 (Vernon 1997) was repealed effective September 1, 2003. It provided that if a business incorporated without a name change, notice of its intention to incorporate had to be given once a week for at least four consecutive weeks in a newspaper published in the county in which the firm has its principal business office. If no newspaper was published in that county, the notice had to be published in a newspaper in an adjoining county. Until the notice has been published for the full period, the limited liability afforded by corporate status did not apply unless the creditor had actual knowledge of the incorporation.

2. Potential Individual Liability without the notice statute

Under agency theory, it may be possible to hold the sole proprietor or partner liable for debts of a subsequent corporate entity that was an incorporation of the pre-existing business without a name change under the theory that the new entity is an undisclosed principal. See Agent Liability, infra.

B. Piercing the Corporate Veil

1. Alter Ego—Contractual Obligations

A shareholder will be held individually liable for the contractual obligations of the corporation if—

a. the shareholder organizes and operates the corporation as a mere tool or business conduit;

b. the shareholder and corporation are sufficiently unified that holding only the corporation liable would be an injustice; and

c. the shareholder used the corporation for the purpose of perpetrating an actual fraud for his direct personal benefit and did perpetrate such a fraud.

Factors to consider in determining whether shareholder and corporation had unified are—

a. the degree to which the corporation's and the shareholder's property had been separated;

b. the amount of financial interest, ownership, and control the shareholder exercised over the corporation; and

c. whether the shareholder had used the corporation for personal purposes.

Tex. Bus. Corp. Act Ann. art. 2.21(A) (Vernon Supp. 2000); *Castleberry v. Branscum*, 721 S.W.2d 270, 272 (Tex. 1986).

2. Alter Ego—Noncontractual Obligations

A creditor seeking to prove alter ego for a noncontractual obligation need not prove actual fraud. *See* Tex. Bus. Corp. Act Ann. art. 2.21(A)(2) (Vernon Supp. 2000); *Love v. State*, 972 S.W.2d 114, 117 (Tex. App.—Austin 1998, writ denied).

3. Inadequate Capitalization

Inadequate capitalization of the corporation, such that the corporation's assets were insufficient to meet its debts, is another ground for piercing the corporate veil. *See Castleberry v. Branscum*, 721 S.W.2d 270, 272 (Tex. 1986); *Harwood Tire-Arlington, Inc. v. Young*, 963 S.W.2d 881, 885 (Tex. App.—Fort Worth 1998, writ dism'd by

agr.); *Holmes v. Clow*, 533 S.W.2d 99, 105 (Tex. Civ. App.—Tyler 1976, no writ).

4. Other Theories

The corporate veil can also be pierced if the shareholder uses the corporation to—

1. perpetrate an actual fraud for the shareholder's personal benefit;
2. evade an existing legal obligation;
3. circumvent a statute;
4. protect a crime or justify a wrong; or
5. achieve a monopoly.

Castleberry v. Branscum, 721 S.W.2d 270, 272 (Tex. 1986). For contract cases, actual fraud must also be proved. Tex. Bus. Corp. Act Ann. art. 2.21(A)(2) (Vernon Supp. 2000).

5. Failure to Follow Corporate Formalities

Although formerly a consideration in proving alter ego in contract claims, failure to follow corporate formalities is eliminated by Tex. Bus. Corp. Act Ann. art. 2.21A(3) (Vernon Supp. 2000). *See also* TBCA art. 2.21, Comments of Bar Committee—1996.

6. Single Business Enterprise

A doctrine similar to piercing the corporate veil is the "single business enterprise" doctrine. If corporations are not operated as separate entities, but rather integrate their resources to achieve a common business goal, each corporation may be held liable for the debts incurred in pursuit of that business purpose. *Old Republic Insurance Co. v. EX-IM Services Corp.*, 920 S.W.2d 393, 395-96 (Tex. App.—Houston [1st Dist.] 1996, no writ). Factors to consider in determining whether a single business enterprise exists are common employees and offices; common business names; services rendered by employees of one corporation on behalf of the other corporation; undocumented transfers of funds between corporations; and unclear allocation of profits and losses between the corporations. *Paramount Petroleum Corp. v. Taylor Rental Center*, 712 S.W.2d 534, 536 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

7. Serial Incorporators

The doctrine of serial incorporators is not yet a reported legal doctrine. This author has coined the term to describe the fact situation when one or more individuals utilize the corporate form to do business, then abandon it and form a new corporate entity when the first becomes over burdened with debt. Often the pattern continues. Whereas single business enterprise entities co-exist, serial incorporators utilize entities consecutive in time. This pattern of activity could be used as a basis for piercing the corporate veil. Or, if assets are transferred from one corporation to another, a fraudulent transfer action may be appropriate.

8. Foreign Corporation

The statutory limitations on piercing the corporate veil (that is, having to prove actual fraud in contract cases and the unavailability of failure to follow corporate formalities as a ground for piercing) may not apply to foreign corporations. See Tex. Bus. Corp. Act. Ann. § 1.02(A)(11) (Vernon Supp. 2000), which defines "corporation" as a corporation for profit other than a foreign corporation. Tex. Bus. Corp. Act Ann. art. 2.21 (Vernon Supp. 2000) refers only to "corporations," not "foreign corporations." The author is not aware of case law on this matter.

C. Insolvent and Dissolved Corporations

1. "Trust Fund" Theory

Under the common law, when a corporation becomes insolvent and ceases doing business, the officers and directors hold corporate assets in trust

for the benefit of creditors. *Hixson v. Pride of Texas Distributing Co.*, 683 S.W.2d 173, 176 (Tex. App.—Fort Worth 1985, no writ); *Fagan v. La Gloria Oil & Gas Co.*, 494 S.W.2d 624, 628 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ).

This common-law doctrine has been circumscribed by statute. It does not apply, for instance, to a dissolved corporation except for predissolution claims. *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 551-52 (Tex. 1981); *but see Smith v. Chapman*, 897 S.W.2d 399, 401-02 (Tex. App.—Eastland 1995, no writ) (trust fund cause of action available against directors of dissolved corporation).

2. Dissolved Corporation

A dissolved corporation has a limited existence for three years after dissolution to prosecute or defend proceedings in its corporate name, permit the survival of a claim of or against it, hold title to corporate property for the purpose of distributing the property, and settle any other affairs not settled before dissolution. Tex. Bus. Corp. Act Ann. art. 7.12(A) (Vernon Supp. 2000).

3. "Denuding" of Corporate Assets

If one or more shareholders appropriate the corporation's assets, leaving it unable to satisfy corporate claims, the corporation's creditors may trace the assets and hold the shareholders responsible for the corporation's obligations, to the extent of the corporate assets received by the shareholder. *World Broadcasting System, Inc. v. Bass*, 328 S.W.2d 863, 865-66 (Tex. 1959); *Huff v. Harrell*, 941 S.W.2d 230, 236 (Tex. App.—Corpus Christi 1996, writ denied). A "denuding" claim is typically brought with one or more causes of action, such as alter ego or fraudulent transfer.

D. Corporation or Limited Liability Company That Fails to Pay Franchise Tax

1. Forfeiture of Right to Do Business

A corporation that fails to pay its franchise tax or file reports will forfeit its right to do business in Texas, thereby losing its right to sue or defend in any court in this state. This forfeiture can be made by the comptroller of public accounts without judicial proceedings. Tex. Tax Code Ann. §§ 171.251-.257 (Vernon 1992 & Supp. 2000). These provisions also apply to limited liability companies. T Tax C § 171.001(b)(3)(A) (Supp. 2000).

2. Individual Liability of Directors, Officers, and Managers

Each director and officer of a corporation whose right to do business within Texas is forfeited will be held liable for any debt of the corporation incurred or created in Texas that is incurred or created in Texas after the date when the report, tax, or penalty is due. The liability accrues as if the directors and officers were partners. Tex. Tax Code Ann. §§ 171.252, 171.255 (Vernon 1992). The liability of partners is joint and several, so not all the officers and directors need be sued; the obligation can be enforced against individual officers or directors. *Sheffield v. Nobles*, 378 S.W.2d 391, 392 (Tex. Civ. App.—Austin 1964, writ ref'd); *see First National Bank v. Silberstein*, 398 S.W.2d 914, 915-16 (Tex. 1966). The creditor should serve each individual whose liability is sought.

These provisions also apply to directors or managers of limited liability companies. T Tax C § 171.001(b)(6) (Supp. 2000). The Texas Limited Liability Company Act, however, only provides for members (the owners), managers, agents, and officers, not directors. *See* Tex. Rev. Civ. Stat. Ann. art. 1528n, art. 2.21 (Vernon 1997).

3. Defense

Any officer or director can avoid liability by showing that the debt was created either over his objection or without his knowledge, if the exercise of reasonable diligence to ascertain the affairs of the corporation would not have revealed the intention to create the debt. Tex. Tax Code Ann. § 171.255(c) (Vernon 1992); *see First National Bank v. Silberstein*, 398 S.W.2d 914, 916 (Tex. 1966).

E. Liability of a Corporation for Debts of Pre-existing Business

Persons who are individually liable for a pre-incorporation debt remain liable for that debt after incorporation. The new corporation formed from a pre-existing business will also be liable for the debts of the pre-existing business. *Ryder Truck Rental, Inc. v. Ace Sales Co.*, 368 S.W.2d 869 (Civ. App.-Austin 1963, n.r.e.).

F. Asset Sale v. Stock Sale

A change of ownership of a business that is incorporated should necessarily raise the question: Was this a sale of assets or a sale of stock? If Owner-X of 100% of stock in ABC, Inc. sells that stock to New Owner-Y, the entity remains intact and the corporate liabilities remain the corporate liabilities. If, however, Owner-X of 100% of stock in ABC Inc. sells the assets of the corporation to New Owner-Y, the liabilities do not follow the assets. Texas Business Corporation Act, §5.10, B. (Vernon's Supp 2001). In this event, Owner-X has the duty to apply the proceeds of that sale to payment of the debts of ABC Inc. under the trust fund theory, supra. If Owner-X diverts those funds to his own use or benefit, a fraudulent transfer action may be brought by ABC Inc.'s creditors.

G. Liability of Promoters and Subsequent Corporations

Contracts are sometimes signed by promoters of a business before the corporation that is formed to operate the business is incorporated. Promoters are defined as those who discover the business opportunity, investigate its economic feasibility and assemble the necessary resources, property and personnel. *Aloe Limited, Inc. v. Koch*, 733 S.W.2d 364 (Tex. App. – Corpus Christi 1987, no writ). The court in Aloe Limited went on to state that as a general rule, where a promoter enters into a contract in the name of a corporation which has not yet been formed, he is personally liable on the contract absent an agreement with the contracting party that the promoter is not liable. However, there is no personal liability where the contract is made in the name and solely on the credit of the proposed corporation and the contracting party knows that the corporation does not yet exist. Whether a promoter is personally liable on a pre-incorporation contract depends on the intention of the contracting parties.

It has also been held that a contract made by a promoter upon express agreement that the corporation alone is to be bound and that no personal liability is to exist against the promoter is valid. *Weeks v. San Angelo National Bank*, 65 S.W.2d at 349. A subsequent adoption of the contract by the corporation will relieve the promoter of personal liability. See also *Fish v. Tandy Corporation*, 948 S.W.2d 886 (Tex. App.-Ft. Worth 1997, writ denied).

VI. FRAUDULENT TRANSFERS

A. Availability

Fraudulent transfer laws enable a party to negate or undo the effect of a transfer of property that would otherwise place the property beyond the reach of the transferor's creditors. Only creditors can bring fraudulent transfer claims. *See* Tex. Bus. & Com. Code Ann. § 24.005 (Vernon Supp. 2000), § 24.006 (1987). Although only creditors with claims can pursue fraudulent transfer actions, the term *claims* covers a broad

concept, including liquidated, unliquidated, matured, unmatured, legal, equitable, or even disputed claims. TB&CC § 24.002(3) (Supp. 2000).

B. What Constitutes Transfer

A "transfer" can be either a transfer of title or of any interest in the debtor's property, or creation of a lien or other encumbrance in the property. A disclaimer of inheritance is not a transfer. Tex. Bus. & Com. Code Ann. § 24.002(12) (Vernon Supp. 2000).

C. When Transfer or Obligation Occurs

A transfer of realty (other than fixtures) is made when the transfer is so far perfected that a good-faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset superior to the interest of the transferee. A transfer of personalty or fixtures occurs when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien (other than under the fraudulent transfer statutes themselves) superior to the transferee's interest. Tex. Bus. & Com. Code Ann. § 24.007(1) (Vernon 1987).

An obligation is incurred when the writing executed by the obligor is delivered to or for the benefit of the obligee, if the obligation is evidenced by a writing. Otherwise, it is incurred when it becomes effective between the parties. TB&CC § 24.007(5).

D. Present vs. Future Creditors

A present creditor is one whose claim arose before the transfer was made or the obligation was incurred. Tex. Bus. & Com. Code Ann. § 24.006(a) (Vernon 1987). A future creditor is one whose claim arose within a reasonable time after the transfer was made or the obligation was incurred. TB&CC § 24.005(a) (Supp. 2000).

E. Insiders

Certain transfers to insiders can be avoided by either present or future creditors. See Tex. Bus. & Com. Code Ann. § 24.005(b)(1) (Vernon Supp. 2000), § 24.006(b) (1987). The list of insiders is expansive, including relatives, partners, officers and directors of a debtor corporation, partnerships in which the debtor is a partner, "affiliates," or "persons in control." See TB&CC § 24.002(7) (Supp. 2000) for the list of these insiders. But see Matter of Holloway, 955 F.2d 1008, 1010 (5th Cir. 1992); J. Michael Putman, M.D.P.A. Money Purchase Pension Plan v. Stephenson, 805 S.W.2d 16, 18 (Tex. App.—Dallas 1991, no writ) (list at section 24.002(7) is merely illustrative).

F. Insolvency

Insolvency is a factor in fraudulent transfers that can be attacked by either present or future creditors. *See* Tex. Bus. & Com. Code Ann. § 24.005(b)(9) (Vernon Supp. 2000), § 24.006 (1987). A debtor is insolvent if the sum of his debts is greater than the sum of his assets at a fair valuation. TB&CC § 24.003(a) (Supp. 2000). A separate rule exists for partnership debtors. TB&CC § 24.003(c). The sum of the debtor's assets does not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has otherwise been transferred in a manner making the transfer voidable under the Fraudulent Transfer Act. TB&CC § 24.003(d). Debts are not included to the extent they are secured by a valid lien on the property of the debtor not included as an asset. TB&CC § 24.003(e).

The debtor is presumed to be insolvent if he is not paying his debts as they come due. TB&CC § 24.003(b).

G. Value and Reasonably Equivalent Value

Value is given for a transfer or an obligation if, in exchange for the transfer or obligation,

property is transferred or an antecedent debt is secured or satisfied. Value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person. Tex. Bus. & Com. Code Ann. § 24.004(a) (Vernon Supp. 2000).

A person gives "reasonably equivalent value" if that person acquires an interest of the debtor in an asset by a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the debtor's interest on default under a mortgage, deed of trust, or security agreement. TB&CC § 24.004(b). "Reasonably equivalent value" includes, but is not limited to, a transfer or obligation that is within the range of values for which the transferor would have sold the assets in an arm's-length transaction. TB&CC § 24.004(d).

H. Transfer with Intent to Hinder, Delay, or Defraud

A transfer made or obligation incurred by a debtor is fraudulent as to a present or future creditor if the debtor made the transfer or incurred the obligation with actual intent to hinder, delay, or defraud any creditor. Tex. Bus. & Com. Code Ann. § 24.005(a)(1) (Vernon Supp. 2000). "Actual intent" may be determined by considering any of these factors, among others:

1. The transfer or obligation was to an insider.
2. The debtor retained possession or control of the property after the transfer.
3. The transfer or obligation was concealed.
4. Before the transfer was made or the obligation was incurred, the debtor had been sued or threatened with suit.
5. The transfer was of substantially all the debtor's assets.
6. The debtor absconded.
7. The debtor removed or concealed assets.
8. The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
9. The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
10. The transfer occurred shortly before or shortly after a substantial debt was incurred.
11. The debtor transferred the essential assets of his business to a lienor who transferred those assets to an insider of the debtor.

TB&CC § 24.005(b).

Ordinarily the question of intent is a fact question, unless the fraud is admitted, the fraudulent intent is apparent on the surface, or there is some interest reserved in the property inconsistent with the alleged conveyance. *Quinn v. Dupree*, 303 S.W.2d 769, 774 (Tex. 1957); *Letsos v. H.S.H., Inc.*, 592 S.W.2d 665, 670 (Tex. Civ. App.—Waco 1980, writ ref'd n.r.e.); *see also BMG Music v. Martinez*, 74 F.3d 87 (5th Cir. 1996).

A transfer or obligation is not voidable under section 24.005(a)(1) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee. TB&CC § 24.009(a).

The general statute of limitations for this cause of action is either four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant. TB&CC § 24.010(a)(1). If the action is brought on behalf of a spouse, minor, or ward, it must be brought within two years after it accrues or, if later, within one year after the transfer or obligation was or

could reasonably have been discovered by the claimant. TB&CC § 24.010(b)(1).

I. Transfer for Less Than Reasonably Equivalent Value—Present or Future Creditors

A transfer made or obligation incurred by a debtor is fraudulent as to a present or future creditor if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either—

1. was engaged in or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

2. intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

Tex. Bus. & Com. Code Ann. § 24.005(a)(2) (Vernon Supp. 2000). See section G above regarding reasonably equivalent value.

A transfer is not voidable on these grounds if it resulted from termination of a lease on default by the debtor when the termination is pursuant to the lease and applicable law or enforcement of an article 9 security interest. TB&CC § 24.009(e).

The general statute of limitations for this cause of action is four years from the date the transfer was made or the obligation was incurred. TB&CC § 24.010(a)(2). If the action is brought on behalf of a spouse, minor, or ward, the cause of action is extinguished unless brought within two years after it accrues or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant. TB&CC § 24.010(b)(1).

J. Transfer for Less Than Reasonably Equivalent Value—Present Creditors Only

A transfer made or obligation incurred by a debtor is fraudulent as to a present creditor if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor was insolvent at that time or became insolvent as a result of the transfer or obligation. Tex. Bus. & Com. Code Ann. § 24.006(a) (Vernon 1987).

The general statute of limitations for this cause of action is four years from the date the transfer was made or the obligation was incurred. TB&CC § 24.010(a)(2) (Supp. 2000). If the action is brought on behalf of a spouse, minor, or ward, it must be brought within two years after it accrues or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant. TB&CC § 24.010(b)(1).

K. Transfers to Insiders— Present Creditors Only

A transfer made by a debtor is fraudulent as to a present creditor if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at the time, and the insider had reasonable cause to believe that the debtor was insolvent. Tex. Bus. & Com. Code Ann. § 24.006(b) (Vernon 1987).

Such a transfer is not voidable—

1. to the extent the insider gave new value to or for the benefit of the debtor after the transfer was made, unless the new value was secured by a valid lien;

2. if made in the ordinary course of business or financial affairs of the debtor or the insider; or

3. if made pursuant to a good-faith effort to rehabilitate the debtor and the transfer

secured present value given for that purpose as well as an antecedent debt of the debtor.

TB&CC § 24.009(f) (Supp. 2000).

The statute of limitations for this cause of action is one year after the transfer was made. TB&CC § 24.010(a)(3).

L. Remedies of Creditors

The remedies a creditor in a fraudulent transfer action can seek include—

1. avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

2. an attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with applicable law relating to ancillary proceedings;

3. injunctive relief against further disposition or transfer of the asset;

4. appointment of a receiver to take charge of the asset transferred;

5. if judgment has been obtained on a claim against the debtor, a levy of execution on the asset; or

6. any other relief circumstances may require.

Tex. Bus. & Com. Code Ann. § 24.008 (Vernon 1987). A creditor may also seek punitive damages. If the transfer or obligation is avoidable, the court must render judgment for the creditor in the amount of the value of the asset transferred as of the time of the transfer, subject to adjustment as the equities may require. Adjustment of the value of the asset may *not* take into account—

1. physical additions or changes to the asset;

2. repairs to the asset;

3. payment of tax on the asset;

4. payment of any debt secured by a lien on the asset superior or equal to the rights of the voiding creditor; or

5. preservation of the asset.

TB&CC § 24.009(c) (Supp. 2000).

M. Credits Accruing to Good-Faith Transferees

Although a good-faith transferee is not entitled to credit for payments made for repair or upkeep of the asset, he is entitled to a claim or credit, to the extent he gave value for the transfer or obligation, to—

1. a lien, prior to the rights of the voiding creditor, or a right to retain any interest in the asset transferred;

2. enforcement of any obligation incurred; or

3. a reduction in the amount of liability on the judgment.

Tex. Bus. & Com. Code Ann. § 24.009(d)(1) (Vernon Supp. 2000). The good-faith transferee is also entitled to a lien against the asset, superior to the rights of the voiding creditor, to the extent of the value of improvements the transferee made. TB&CC § 24.009(d)(2).

N. Statutes of Limitations

See sections H. through K. above regarding statutes of limitations on particular fraudulent transfer causes of action.

If the claimant is under a legal disability when the limitations period starts, the time of the disability is not included, but if the disability arises during the limitations period, the running of limitations is not suspended. Creditors may not tack one disability to another to extend the period. A creditor is "disabled" if he is either less than eighteen years old, regardless of marital status, or

of unsound mind. Tex. Bus. & Com. Code Ann. § 24.010(c) (Vernon Supp. 2000).

O. Attorney Fees

Effective September 1, 2003, Tex. Bus. & Com. Code Ann. §24.013 (Vernon Supp. 2003) provides that the court may award costs and reasonable attorney's fees as are equitable and just.

VII. AGENT LIABILITY

A. Personal Liability of Individual Signing in Representative Capacity

An authorized representative signing an instrument will not be personally liable on the instrument if the party represented is identified in the instrument and the instrument shows unambiguously that the representative signed on behalf of the represented party. The representative will be liable to a holder in due course without notice of the representative capacity if either condition is not met. The representative will be liable to a party not a holder in due course if either condition is not met, unless the representative can prove that the original parties to the instrument did not intend for the representative to be liable. Notwithstanding the above, if the representative signs his name as drawer of a check without indication of his representative status and the check is payable from an account of the represented party who is identified on the check, the representative is not liable if his signature is an authorized signature of the represented party. Tex. Bus. & Com. Code Ann. § 3.402 (Vernon Supp. 2000).

B. Agency

One who contracts in his own name as an agent for an undisclosed principal is personally liable, even if he disclosed the fact of agency. *Carter v. Walton*, 469 S.W.2d 462, 471-72 (Tex. Civ. App.—Corpus Christi 1971, writ ref'd n.r.e.). An individual is personally liable on a contract he signed as a purported agent if no authority to do so existed. *Talmadge Tinsley Co. v. Kerr*, 541 S.W.2d 207, 209 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.). To avoid personal liability, an agent has the duty to disclose not only that he is acting in a representative capacity but also the identity of his principal. *Gonzales County Water Supply Corp. v. Jarzombek*, 918 S.W.2d 57, 60 (Tex. App.—Corpus Christi 1996, no writ). The fact that a person opened an account in the name of a business without use of the terms *incorporated*, *corporation*, or *company* in the business name is not enough to create a duty for a creditor to investigate to see if the business is in fact a corporation. The test of disclosure is the creditor's actual knowledge that a business is a corporation or whether the creditor had reasonable grounds to know of the corporation's existence. *Wynne v. Adcock Pipe & Supply*, 761 S.W.2d 67, 69 (Tex. App.—San Antonio 1988, writ denied).