

THE ROLE OF THE BUSINESS LAW SECTION AND THE TEXAS BUSINESS LAW FOUNDATION IN THE DEVELOPMENT OF TEXAS BUSINESS LAW

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I. INTRODUCTION

In 1950, the statutory and regulatory law governing business organizations and commerce in Texas, which is referred to in this article as “Business Law,” was neither comprehensive nor flexible. By no stretch of the imagination was Texas considered a leader in developing laws to deal with an increasingly complex business environment.

A few Texas lawyers, representing primarily large business interests, organized to take the lead in changing the legal climate for business in Texas. First came the Committee on Revision of Corporation Laws, which was organized in 1950. This committee was succeeded in 1953 by the Section of Corporation, Banking and Business Law of the State Bar of Texas, which changed its name in 1986 to the Section of Business Law and is referred to in this article as the “Section.” After an initial wave of legislative success in the 1950s and 1960s, the ability of the Section to effect much legislative change slowed due to (i) the dominance of the State Bar Board of Directors by individuals who were neither business lawyers nor sympathetic to the reform of Business Law and (ii) the inability to obtain lobbying support. As a result, the Texas Business Law Foundation (the “Foundation”) was created in 1988 to function alongside the Section, but outside the State Bar of Texas. The Foundation emerged with initial successes in 1989 and 1991, followed by tremendous progress and movement in 1993 and 1995.

This is the proud story of the Section and the Foundation and of hundreds of business lawyers donating thousands of hours to the people of Texas to develop a modern system of Business Law. This story of almost fifty years of development of Business Law, and of the organizations and lawyers who helped shape it, has been told only in part before.¹

II. EARLY BUSINESS LAW

Business Law generally responds to business needs and is shaped by market forces.² Since the 1950s, the primary interpreters of those needs and initiators of change have been the committees of the Section. On the whole, Texas has responded well—if slowly—to the changing needs of its businesses and has imposed restraints only where necessary to prevent abuses. During this period, the overall trend of Business Law has been toward greater flexibility of structure and greater freedom of contract.

In the last decade of the nineteenth century and the early decades of the twentieth, substantial efforts were made to codify commercial law and make it uniform across the United States. Texas joined those efforts very slowly, adopting the 1896 Uniform Negotiable Instruments Law in 1919,³ the 1906 Uniform Warehouse Receipts Act in 1919,⁴ the 1909

¹ See Richard D. Haynes & Hal M. Bateman, *A Brief History of the Section*, 16 BULL. OF SEC. ON CORP., BANKING & BUS. L. 3 No. 4, June, 1979; Robert S. Troth, *Brief History of the Corporation, Banking and Business Law Section*, 20 BULL. OF SEC. ON CORP., BANKING & BUS. L. 1 No. 1, Oct. 1982. See also Paul Carrington, A DALLAS LAWYER FOR SIXTY YEARS, at 163-170.

² Market forces include taxation, which has had its impact. See Alan R. Bromberg, *Tax Influences on the Law of Business Associations*, 16 BAYLOR L. REV. 327 (1964).

³ The Uniform Negotiable Instruments Act, Tex. S.B. 211, 36th Leg., R.S. (1919).

⁴ The Uniform Warehouse Receipts Act, Tex. S.B. 215, 36th Leg., R.S. (1919).

Uniform Stock Transfer Act in 1943,⁵ and the 1933 Uniform Trusts Receipts Act in 1959.⁶ Furthermore, Texas did not adopt a number of business-related uniform acts, such as those relating to bills of lading, fraudulent conveyances, and chattel mortgages.

Nineteenth century hostility to large organizations and capital accumulations has given way to recognition of their necessity in an increasingly complex and interrelated society. Nineteenth century insistence on personal liability has also given way to recognition that limitation of risk can be used to encourage enterprise. The historical pattern in Texas and elsewhere has been less one of development and reform and more one of development and relaxation. The development is far from over.

Business Law has been made primarily in three places: the Legislature, the regulatory agencies, and the law offices. The courts have had a relatively small role in making it, though they have had some role in unmaking it. Accordingly, little will be said about the courts. What goes on in law offices is hard to trace, especially in past periods, so relatively little will be said about that development. Our primary focus will be on the development of Business Law through statutes and regulations.

III. ADOPTION OF TEXAS BUSINESS CORPORATION ACT

The enactment in 1955 of the Texas Business Corporation Act (the "TBCA") brought Texas corporation law into the twentieth century and ultimately led to the formation of the Section. Prior to the adoption of the TBCA, the serious rigidities imposed by the corporation statutes of Texas, which had been enacted prior to 1900, had become increasingly burdensome as ownership of corporate shares became widespread. Many of the shortcomings of Texas corporation law had been noted by Dean Ira P. Hildebrand of The University of Texas School of Law ("UT") in his 1942 treatise.⁷ Many were discovered by Nebraska Professor Edmund O. Belsheim, who taught corporation law while visiting at UT and whose 1949 call for reform helped galvanize and guide the reshapers of Texas corporation law.⁸

The driving force for change, however, was Paul Carrington of Dallas. He served on the American Bar Association Committee that revised the Model Business Corporation Act, which was based on the Illinois Business Corporation Act of 1933. Mr. Carrington persuaded the State Bar of Texas to form the Committee on Revision of Corporation Laws in 1950, and he served as its first chairman. Initial members were Adrian F. Levy, Sr. of Galveston, Lewis Scott Wilkerson, Assistant Secretary of State, and three professors: E.W. Bailey of UT, J. Leon Lebowitz, then of Baylor University School of Law ("Baylor") and now at UT, and Talbot Rain of Southern Methodist University School of Law ("SMU"). Early additions to this committee included Peyton B. Randolph of Plainview, Professor Margaret Amsler of Baylor, and Professor Alan Bromberg of SMU. Working from the Model Business Corporation Act, the Committee prepared and published an exposure draft and request for comments in 1951,

⁵ Uniform Stock Transfer Act, Tex. S.B. 200, 48th Leg., R.S. (1943).

⁶ Uniform Trusts Receipts Act, Tex. S.B. 237, 56th Leg., R.S. (1959).

⁷ Ira P. Hildebrand, HILDEBRAND TEXAS CORPORATIONS (1942).

⁸ Edmund O. Belsheim, The Need for Revising the Texas Corporation Statutes, 27 TEX. L. REV. 659 (1949).

received numerous comments, and made responsive modifications and refinements.⁹ These revisions were given further public exposure in 1952.¹⁰

The Committee's product was introduced in the 1953 Legislature and reported favorably—but loaded with 65 amendments—by a House Committee too late in the session to be acted upon.¹¹ The primary point of controversy was a proposal that a 2/3 (rather than 4/5) vote of shareholders would suffice for mergers, consolidations, asset sales, and dissolutions.

With the addition to the Committee in 1953 of George Slover, Jr. of Dallas and Robert S. Trotti of the Attorney General's Office, some further modifications were made, and the TBCA passed with little further change in 1955.¹² Among highly important provisions differing from the 1874 Act, the TBCA authorized multiple corporate purposes,¹³ perpetual duration,¹⁴ purchases by a corporation of its own shares,¹⁵ redemption of shares,¹⁶ different classes of shares (including shares whose terms could be fixed in substantial part by directors),¹⁷ restrictions on share transfers,¹⁸ classification (staggering) of directors,¹⁹ executive committees of directors,²⁰ actions by unanimous shareholder consent without a meeting,²¹ appraisal rights for shareholders dissenting from mergers and certain other corporate actions,²² and major actions (mergers, consolidations, asset sales and dissolutions) with the approval of directors

⁹ Paul Carrington et al., *First Draft of Texas Business Corporation Act*, 14 TEX. B.J. 219 (1951).

¹⁰ See, e.g., E.Y. Boynton, *Introduction to the Symposium on the Proposed Business Corporation Act*, 4 BAYLOR L. REV. 405 (1952). One of the symposium articles traces the history of Texas corporation law and the development of the proposed Act. Paul Carrington, *The History of the Proposed Texas Business Corporation Act*, 4 BAYLOR L. REV. 428 (1952).

¹¹ A brief summary of the early development of the TBCA is Paul Carrington, *Revision of Corporation Laws*, 17 TEX. BAR J. 381 (1954). The files of the SMU members of the Committee from 1950 on are held in the Underwood Law Library at SMU.

¹² TEX. BUS. CORP. ACT ANN. (Vernon 1955). The emergency clause, with the inimitable sweep of Paul Carrington's style, refers to the incompleteness, inconsistency, and uncertainty of existing law; the need for clarification; the modern laws of other states; and the loss of Texas enterprise and tax revenue because of incorporation in other states. *Id.* art. 11.01.

¹³ *Id.* art. 2.01. At the same time, it did away with the restricted list of statutory purposes, which had grown to more than 100 by 1955. The 1955 Act required purposes to be stated fully in the charter. A later amendment eliminated this requirement and made it sufficient for the charter to state that a corporation was organized for "the transaction of any or all lawful business." *Id.* art. 3.02, § A(3); see also *id.* art. 2.01. See generally Michael A. Schaeffler, *The Purpose Clause in the Certificate of Incorporation: A Clause in Search of a Purpose*, 58 ST. JOHN'S L. REV. 476 (1984), reprinted at 28 CORP. PRAC. COMMENTATOR 297 (1986).

¹⁴ TEX. BUS. CORP. ACT ANN. art. 3.02, § A(2) (Vernon 1955).

¹⁵ *Id.* art. 2.03, which in 1987 was repealed and reenacted in TBCA art. 2.02; see Act of 1987, 70th Leg., R.S. ch. 93, § 48(a) 1987 Tex. Gen. Laws 203, 23a.

¹⁶ TEX. BUS. CORP. ACT ANN. arts. 4.08-4.10, article 4.07 repealed by Act of 1987, 70th Leg., R.S., ch. 93, § 48(a), 1987 Tex. Gen. Laws 203, 230.

¹⁷ TEX. BUS. CORP. ACT ANN. arts. 2.12-2.13.

¹⁸ *Id.* art. 2.22.

¹⁹ *Id.* art. 2.33.

²⁰ *Id.* art. 2.36.

²¹ *Id.* art. 9.10A.

²² *Id.* arts. 5.11-5.13.

and 4/5th's shareholder vote.²³ The TBCA also abolished (with minor exceptions) the ultra vires doctrine, which had hampered corporations with single or narrow purposes,²⁴ provided for cumulative voting of shares (a proportional representation device) so long as expressly granted in the charter,²⁵ made the directors' (or shareholders') determination of the value of property received for shares conclusive in the absence of fraud,²⁶ and set detailed limits on the payment of dividends and other distributions.²⁷

The 1955 TBCA had a transition period in which it did not apply to preexisting corporations unless they adopted it.²⁸ Institutes were held to publicize the TBCA and assist lawyers in dealing with it.²⁹

IV. ORGANIZATION OF BUSINESS LAW SECTION

The Section was created by the Board of Directors of the State Bar at the Annual Convention in 1953 as a result of the efforts to modernize the then-archaic Texas corporation laws.

A. Early Section History

The Section was formally organized in Dallas on March 13, 1954. Paul Carrington was the first Chairman, Dillon Anderson of Houston was the first Vice-Chairman, and George Slover, Jr. was the first Secretary-Treasurer. The first Council of the Section consisted of Mr. Carrington, Mr. Anderson, Rex Baker of Houston, Earl A. Brown of Dallas, Thomas B. Ramey of Tyler, Hugh B. Smith of Fort Worth, and Lewis White of Houston.³⁰

B. First Section Committees

Initially, the Section had a Membership Committee, an Annual Meeting Committee, a Committee on Revision of Corporation Laws, a Committee on Securities and Investment Banking, a Committee on Antitrust Matters, and a Committee on Unincorporated Business Entities. The following year the Committee on the Uniform Commercial Code was formed.³¹

C. Section Today

²³ TEX. BUS. CORP. ACT ANN. arts. 4.02, 4.03, 5.03, 5.10.

²⁴ *Id.* art. 2.04.

²⁵ *Id.* art. 2.29 § D.

²⁶ *Id.* art. 2.16 § B.

²⁷ *Id.* arts. 2.38-240; articles 2.39 and 2.40 repealed by Act of 1987, 70th Leg., R.S., ch.93, § 48(a), 1987 Tex. Gen. Laws 203, 230.

²⁸ *Id.* art. 914 § B.

²⁹ *E.g.*, Proc. Tex. Bus. Corp. Act Inst. (Nov. 10-11, 1955). Educational efforts dealing with later amendments included Alan R. Bromberg, *Corporate Organizational Documents and Securities—Forms and Comments*, 28 SW. L.J. 874 (1974), reprinted in *State Bar of Texas, Practice Skills Course* (1975), and in 18 CORP. PRAC. COMMENTATOR 137 (1976); Alan R. Bromberg, *Corporate Organizational Documents and Securities—Forms and Comments Revised*, 30 SW. L.J. 961 (1976).

³⁰ *See supra*, note 1.

³¹ *Id.*

The Section today is the second largest section of the State Bar. It has over 4,000 members, has 15 working committees, and is governed by a council, often members with four ex-officio members. Its officers consist of a Chairman, Vice-Chairman, and Secretary-Treasurer.³²

D. Committees Today

Over the Section's forty-plus-year history, the Section's committee structure has changed to meet the needs and interests of Texas business lawyers, with several standing and ad hoc committees having been formed, renamed, merged, or dissolved. During Bar year (2004-05), the Section will have the following standing committees:

- Bankruptcy Law Committee
- Commercial Code Committee
- Commercial Financial Services Committee
- Consumer Financial Services
- Contracts
- Corporation Law Committee
- Donated Legal Services Committee
- E-Commerce
- General Practice
- Information/Journal Committee
- Judicial CLE
- Legal Opinions Committee
- Litigation
- Non-Profit Corporation Law Committee
- Partnership Law Committee
- Professional Ethics
- Securities Law Committee

³² *Officers / Council Members*, Business Law Section of the State Bar of Texas, at <http://www.texasbusinesslaw.org/officers.html> (last visited Mar. 6, 2005).

Technology/Website

Texas Business Law Foundation Liaison

Committee of Past Chairs³³

E. Publications

In 1963 the Section, thanks to Marvin S. Sloman of Dallas, published its first Bulletin to update Section members regarding Business Law developments. This publication made a significant contribution in keeping business lawyers informed of new developments in Business Law. For many years, the Bulletin was printed as a courtesy by several of the leading legal and financial printing firms of this State, for which the Section was most appreciative. West Publishing Company and Mead Data Control have recently begun to publish many of the past issues of the Bulletin in Westlaw and Lexis, respectively. In the Spring of 2003, the Bulletin was replaced by the *Texas Journal of Business Law*, which is published quarterly with the assistance of a Student Editorial Board at The University of Texas School of Law. In addition to publishing the Bulletin, the Section has furnished its members with other publications, including the annual reprinting of relevant portions of the SMU Law Review's (formerly, the Southwestern Law Journal's) Annual Survey of Texas Law, together with several booklets, such as Incorporation Planning in Texas. In 1992, the Legal Opinions Committee, then chaired by Darrel A. Rice of Dallas, published an extensive report on legal opinion practices in Texas.³⁴

F. Continuing Legal Education

The Section, in addition to presenting its own institutes and programs, has worked closely with the law schools of the State and with other Sections of the Bar in co-sponsoring institutes during the year and annual programs during the State Bar Conventions. Many well known scholars, public officials, and members of the bar throughout the United States have participated in these Section-sponsored institutes and programs.

G. Specialization

The broad scope of Business Law, by its nature, overlaps into such areas as taxation, antitrust, and international law. The broad scope of professional responsibility of the Business Law practitioner is one of the main reasons that the council of the Section has consistently voted to discourage the creation of legal specialties in its areas of practice under the State Bar's Board of Legal Specialization program.

H. Dues

³³ *Committees*, Business Law Section of the State Bar of Texas, at <http://www.texasbusinesslaw.org/committees.html> (last visited Mar. 6, 2005).

³⁴ The State Bar of TX Bus. Law Sec. Legal Opinions Committee, *Report of the Legal Opinions Committee Regarding Legal Opinions in Bus. Transactions*, 29 BULL. OF BUS. L. SEC. I SPECIAL ISSUE (Nos. 2 & 3, June-Sept. 1992); see also Patrick R. Cowlishaw and Byron F. Egan, *The Limited Role of Environmental Legal Opinions in Financing Transactions*, 3 J. OF ENVIRON. PERMITTING 97 (Winter 1993/94).

All these activities by the Section have been funded by the assessment of annual Section membership dues. From its formation until 1974, these dues were only \$2.50 per year. These dues are now \$30.00 per year.

I. Legion Contributions

The actions and accomplishments of the Section's various committees, and the outstanding chairs and members of the Committees working on a multitude of projects, are legion. It has been a magnificent effort on the part of all. A special tribute is given for those that have chaired the Section from its inception. It has been a responsibility and a time-consuming duty. These chairpersons are as follows:³⁵

- 1953 Paul Carrington of Dallas
- 1954 Hugh B. Smith of Fort Worth
- 1955 Earl A. Brown of Dallas
- 1956 Thomas B. Ramey of Tyler
- 1957 Adrian Levy of Galveston
- 1958 John H. Crooker, Jr. of Houston
- 1959 Carl Hug of Houston
- 1960 Frank M. Ryburn, Jr. of Dallas
- 1961 Frank M. Wozencraft of Houston
- 1962 Hubert D. Johnson of Dallas
- 1963 James H. Kerr, Jr. of Houston
- 1964 John N. Jackson of Dallas
- 1965 Stanley Plettman of Beaumont
- 1966 Walter J. Morrison of Houston
- 1967 Alan R. Bromberg of Dallas
- 1968 John T. Maginnis of Houston
- 1969 Marvin S. Sloman of Dallas

³⁵ *Officers / Council Members*, Business Law Section of the State Bar of Texas, at <http://www.texasbusinesslaw.org/officers2.html> (Mar. 7, 2005).

- 1970 William T. Fleming, Jr. of Houston
- 1971 William J. Rochelle, Jr. of Dallas
- 1972 Howard Wolf of Houston
- 1973 Richard D. Haynes of Dallas
- 1974 Campbell A. Griffin, Jr. of Houston
- 1975 J. Leon Lebowitz of Austin
- 1976 John T. Kipp of Dallas
- 1977 John A. Barrett of Houston
- 1978 Hal M. Bateman of Lubbock
- 1979 Harold F. Kleinman of Dallas
- 1980 Myron M. Sheinfeld of Houston
- 1981 Larry L. Schoenbrun of Dallas
- 1982 George E. Henderson of Austin
- 1983 Michael M. Boone of Dallas
- 1984 Charles H. Still of Houston
- 1985 George W. Coleman of Dallas
- 1986 Sam Rosen of Fort Worth
- 1987 Marc H. Folladori of Dallas (now Houston)
- 1988 Robert E. Wood, Jr. of Lubbock (now Dallas)
- 1989 Evelyn H. Bieiy of San Antonio
- 1990 Byron F. Egan of Dallas
- 1991 Charles Szalkowski of Houston
- 1992 R. Dennis Anderson of Houston
- 1993 Dan L. Nicewander of Dallas
- 1994 Steven A. Waters of San Antonio

- 1995 Robert F. Gray, Jr. of Houston
- 1996 Michael W. Tankersley of Dallas
- 1997 Scott Sheehan of Houston
- 1998 Daryl B. Robertson of Dallas
- 1999 Curtis Huff of Houston
- 2000 James R. Peacock III of Dallas
- 2001 W. David East of Houston
- 2002 Cullen N. Godfrey of Austin
- 2003 Bradley L. Whitlock of Dallas
- 2004 Gail Merel of Houston

V. SECTION COMMITTEE ACTIVITIES BEFORE THE TEXAS BUSINESS LAW FOUNDATION

Summarized below are some of the legislative activities of the Section's committees prior to the organization of the Foundation in 1988. The post-Foundation legislative endeavors of the Section's committees are summarized below in parts VII through XIV in the discussion of the Foundation's legislative record, for the two are successfully intertwined.

A. Corporation Law Committee

The TBCA was the first general change in the corporation laws of Texas since 1874. Analysis, study and revision of the corporation laws continue as goals of the Section's Corporation Law Committee. This continuing work was responsible for the passage of the Texas Non-Profit Corporation Act ("TNPCA")³⁶ in 1959, the Texas Miscellaneous Corporation Laws Act ("TMCLA")³⁷ in 1961, and later the special TBCA provisions relating to close corporations³⁸ and the Texas Professional Corporation Act,³⁹ as well as numerous amendments to the TBCA.⁴⁰ The TBCA has continued to serve Texas business remarkably well, partly because it was carefully drafted initially and partly because it has had the

³⁶ See TEX. REV. CIV. STAT. ANN. arts. 1396-1.01 *et seq.* (Vernon 1980 & 2003).

³⁷ See TEX. REV. CIV. STAT. ANN. art. 1302-1.01 *et seq.* (Vernon 1980 & 2003).

³⁸ See TEX. BUS. CORP. ACT ANN. art. 12 *et seq.* (Vernon 1980 & 2003).

³⁹ See TEX. REV. CIV. STAT. ANN. art. 1528e (Vernon 1980 & 2003).

⁴⁰ See D. Gilbert Friedlander & R. Scott Cohen, *1985 Amendments to the Texas Business Corporation Act and Other Texas Corporation Laws*, 23 BULL. OF SEC. ON CORP., BANKING & BUS. L. 2 (Nov. 1985); Byron F. Egan and Amanda M. French, *1987 Amendments to the Texas Business Corporation Act and Other Texas Corporation Laws*, 25 BULL. OF SEC. ON CORP., BANKING & BUS. L. 1 (Sept. 1987); *Summary of Business Organizations Bill* (NB 278), 28 BULL. OF BUS. L. SEC. 31 (June 1991).

continuing attention of the Section's Corporation Law Committee since the bill's enactment in 1955.⁴¹ This committee has watched for problems in the TBCA and has served as a clearinghouse for problems discovered by others. It has prepared amendments to solve problems deemed worthy of legislative action. This committee has written substantially all of the amendments since 1955 as well as comments—published in Vernon's Annotated Texas Statutes—on the original TBCA and amendments. The comments explain the provisions, advise on their use, and reveal their drafters' intent.⁴² They serve as an unofficial legislative history that is valuable in a state that has virtually no accessible official legislative history. Corporation Law Committee members have also published articles providing a useful road map through the legislative updates of the TBCA.⁴³

The TBCA's flexibility has been increased by a number of amendments, including provisions for broader indemnification of officers and directors⁴⁴ and authorization of rights, options and convertible securities,⁴⁵ voting agreements,⁴⁶ other committees of directors,⁴⁷ one-person boards of directors,⁴⁸ actions by directors by unanimous consent without a meeting,⁴⁹ telephonic meetings of shareholders, directors and committees,⁵⁰ one incorporator (rather than three),⁵¹ charter amendments without shareholder or director action in bankruptcy reorganization,⁵² clarification of when bylaw amendments can be made by the board of directors,⁵³ and added flexibility for close corporations.⁵⁴ The shareholder vote for mergers, consolidations, asset sales, and dissolutions has been reduced from 4/5ths to 2/3rds and may be reduced by charter provision to a simple majority.⁵⁵ The TBCA now even permits corporations to merge with partnerships and other entities.⁵⁶ In 1987, the TMCLA was amended to add a provision permitting the limitation of director liability by the articles of incorporation.⁵⁷ The nineteenth century restrictions on corporate ownership of land were finally repealed in 1981.⁵⁸

⁴¹ A tenth anniversary evaluation is Paul Carrington, *The Texas Business Corporation Act As Enacted and Ten Years Later*, 43 TEX. L. REV. 609 (1965).

⁴² Other educational efforts of the Committee are cited in *supra* notes 9, 10 and 40 and the accompanying text.

⁴³ See *supra*, note 40.

⁴⁴ TEX. BUS. CORP. ACT ANN. art. 2.02-1 (Vernon 2003).

⁴⁵ *Id.* art. 2.14-1.

⁴⁶ *Id.* art. 2.30B.

⁴⁷ *Id.* art. 2.36.

⁴⁸ *Id.* art. 2.32A.

⁴⁹ *Id.* art. 9.10B.

⁵⁰ TEX. BUS. CORP. ACT ANN. art. 9.10C.

⁵¹ *Id.* art. 3.01A.

⁵² *Id.* art. 4.14A.

⁵³ *Id.* art. 2.23B.

⁵⁴ *Id.* arts. 12.01 – 12.54.

⁵⁵ *Id.* arts. 5.03, 5.10, 6.03A(3).

⁵⁶ TEX. BUS. CORP. ACT ANN. art. 5.01.

⁵⁷ TEX. REV. CIV. STAT. ANN. art. 1302-7.06B (Vernon 2003); see Egan and French, *supra* note 40, at 16-21.

⁵⁸ 1981 Tex. Gen. Laws 848 § 34 (repealing what was then TEX. REV. CIV. STAT. ANN. arts. 1302-4.01 - 1302-4.07 (Vernon 1980), which generally prohibited a corporation from buying land "unless . . . necessary to enable such corporation to do business in this State," permitted "town lot corporations" (those buying, subdividing and selling land in incorporated cities or within two miles of their boundaries,) and authorized escheat of lands held in violation).

Flexibility is usually viewed from a management perspective and, in some cases, involves some reduction in shareholder rights. But Texas has not deprived shareholders of significant protections when adding to management flexibility as the TBCA has been modernized.

B. Partnership Law Committee

Paul Carrington's work on the TBCA was an inspiration to many. As an associate in the law firm Mr. Carrington headed, Alan R. Bromberg of Dallas had a minor hand in the original TBCA. Shortly after he joined the SMU law faculty in 1956, Professor Bromberg became a member of the Corporation Law Committee and has participated in its activities since then. His early teaching and writing focused partly on general partnerships, then entirely a matter of case law. This work led Professor Bromberg to see problems in that area that were similar to those in the corporate area, to propose a similar solution based on the 1914 Uniform Partnership Act, and to chair a Dallas Bar committee appointed in 1959 to study and refine that proposal.⁵⁹ That committee studied the Uniform Partnership Act over the course of a year and made some modifications, particularly to adapt to Texas community property concepts. That committee's bill was published for comment,⁶⁰ sponsored by the State Bar, and enacted with few amendments in 1961 as the Texas Uniform Partnership Act ("TUPA").⁶¹ The main changes accomplished by TUPA included preponderant treatment of the partnership as an entity (rather than as an aggregate of individuals), clearer rules for determining the existence of a partnership when disputed, clarification of the very limited rights of partners in specific partnership property, establishment of priority of partnership creditors in partnership assets, creation of a charging order for a partner's individual creditor against his or her interest in the partnership, authorization of a partnership to acquire and dispose of any estate in real property, specification of rights of partners inter se, clarification of the grounds and consequences of dissolution, and authority for the partners to agree that death would not dissolve the partnership.⁶²

Professor Arthur L. Harding of SMU is credited with pointing out the need for a more usable limited partnership law, especially in connection with oil and gas drilling activities. The 1916 Texas Uniform Limited Partnership Act ("TULPA") was passed in 1955, replacing Texas' 1846 statute.⁶³ TULPA gave limited partners better protection against liability. It rejected the concept that limited partners were, in essence, general partners, but shielded from liability only by strict compliance with prescribed formalities of organization and operation. Substantial compliance with formalities became sufficient. Limited partners' contributions could be in property as well as cash. Restrictions on distribution of profits and return of contributions were eased. TULPA, however, adhered to the basic concept that a limited partner taking part in control of the partnership business loses limited liability.

⁵⁹ D. Sher & Alan R. Bromberg, *Texas Partnership Law in the 20th Century—Why Texas Should Adopt the Uniform Partnership Act*, 12 SW. L.J. 263 (1958).

⁶⁰ Alan R. Bromberg, *The Proposed Texas Uniform Partnership Act*, 14 SW. L.J. 437 (1960).

⁶¹ 1961 Tex. Gen. Laws 289. The changes made in the Legislature, and the reasons for them, are detailed in Alan R. Bromberg, *Texas Uniform Partnership Act—The Enacted Version*, 15 SW. L. J. 386 (1961).

⁶² See generally Alan R. Bromberg, *Partnership Dissolution—Causes, Consequences and Cures*, 43 TEX. L. REV. 631 (1965).

⁶³ 1955 Tex. Gen. Laws 471 (now expired).

A Partnership Law Committee of the Section was formed in 1974. Professor Bromberg has been a member of that committee since its inception and chaired it from 1979-81. The committee became the monitor and modifier of the Texas partnership statutes in the same way the Corporation Law Committee is the guardian of the Texas corporation statutes. One of the Partnership Law Committee's first projects was to clarify the uncertain status of limited partnerships formed in other states but doing business in Texas. A 1977 amendment, drafted largely by George W. Coleman of Dallas and Professor Bromberg, provided for voluntary qualification as a foreign limited partnership. Qualification would assure that a foreign partnership's internal affairs and the liabilities of its limited partners would be governed by the laws of the jurisdiction in which the partnership was formed.⁶⁴

The Texas Supreme Court, in its famous 1975 *Delaney* opinion, manifested nineteenth century hostility to limited liability by calling for strict compliance with TULPA and holding that limited partners would be personally liable for partnership debts if they took part in control of the partnership business in the capacity as officers and directors of a corporate general partner.⁶⁵ The court effectively disregarded the separate entity of the corporation.⁶⁶ And, more seriously, the court raised, but did not decide, the question whether a corporation could be the sole general partner of a limited partnership.⁶⁷ Virtually all business lawyers thought it plain that both partnership and corporation law expressly permitted corporate general partners, and corporate general partners were widely used. Seizing on the mention of the issue in *Delaney* and a 1945 public policy statement of the Texas Supreme Court that had been flatly contradicted by later legislation, the Texas Attorney General opined in 1978 that a corporation could not be the sole general partner of a limited partnership.⁶⁸ An immediate outcry, including sharp criticism by law professors at SMU, Texas Tech, and UT⁶⁹ led to withdrawal of that part of the opinion within a week.⁷⁰

The same Attorney General's Opinion concluded that unanimous consent of partners was necessary for various actions, including dissolutions, asset sales, and amendments of partnership agreements. This, too, provoked outcry⁷¹ and concession of error by the Attorney General.⁷² To put these and related problems to rest, the Partnership Law Committee wrote and procured passage of amendments in 1979 authorizing corporations (and partnerships, trusts, estates and others) to be general or limited partners⁷³ and permitting non-unanimous

⁶⁴ 1977 Tex. Gen. Laws 1107 (now expired).

⁶⁵ *Delaney v. Fidelity Lease Ltd.*, 526 S.W.2d 543, 545 (Tex. 1975).

⁶⁶ *Id.*

⁶⁷ *Id.* at 546.

⁶⁸ Op. Tex. Att'y Gen. H-1229 (1978).

⁶⁹ The professors' letter of Aug. 22, 1978, to the Attorney General was published later in Alan R. Bromberg et al., *Corporate General Partners*, 16 BULL. OF SEC. ON CORP., BANKING & BUS. L. 24 (Sept. 1978).

⁷⁰ Op. Tex. Att'y Gen. No. H-1229a (1978).

⁷¹ E.g., Alan R. Bromberg et al., *Unanimity Requirements in Limited Partnerships*, 16 BULL. OF SEC. ON CORP., BANKING & BUS. L. 3 (Dec. 1978).

⁷² Op. Tex. Att'y Gen. No. H-1321 (1978) (unanimity "is not necessarily required").

⁷³ Act effective Aug. 27, 1979, 66th Leg., R.S., ch. 724, §§ 2A, 5, 1979 Tex. Gen. Laws 1781, 1782 (now expired).

votes as provided in the partnership certificate.⁷⁴ The amendments also shielded limited partners from personal liability in a variety of situations, including acting as officers or directors of corporate general partners and voting on dissolutions, amendments, asset sales, and other important matters.⁷⁵ And even if they took part in control, they would be liable only to a creditor reasonably believing them to be general partners.

Thus were *Delaney* and the Attorney General's view rejected in favor of flexibility and limited partner protection.⁷⁶

The Partnership Law Committee has provided comments on the 1977 and 1979 amendments,⁷⁷ as well as a heavily annotated model form of limited partnership agreement.⁷⁸ Members of the Section's Partnership Law Committee have also provided guidance for users of TUPA and TULPA.⁷⁹

A Revised Uniform Limited Partnership Act (1976), and a revision of that Act in 1985, further liberalized some aspects of limited partnership structure and finance, particularly freedom of contract among the partners and priority of the partnership agreement, rather than the publicly filed certificate, as the governing document of the partnership.⁸⁰ Working from these and their Delaware adaptations, the Partnership Committee, chaired by Steven A. Waters of San Antonio, prepared a wholly new limited partnership statute, which was enacted in the 1987 Legislature.⁸¹

The Securities Law Committee, the Securities Act of 1933, and the Securities Exchange Act of 1934 have dominated securities law since their enactment, but they expressly preserved state jurisdiction. So state law has continued to be important, especially in states like Texas that require securities to meet a government-tested "fairness" or "merit" standard rather than allowing investors to make their own decisions on the basis of fully disclosed information about the securities.

⁷⁴ *Id.*

⁷⁵ Act effective Aug. 27, 1979, 66th Leg., R.S., ch. 724, § 2, 1979 Tex. Gen. Laws 1781 (now expired).

⁷⁶ The policy issues are well discussed in George W. Coleman & David A. Weatherbie, *Special Problems in Limited Partnership Planning*, 30 SW. L. J. 887 (1976).

⁷⁷ TEX. REV. CIV. STAT. ANN. art. 6132b, §§ 13-15, 18 (Vernon Supp. 1997).

⁷⁸ Partnership Law Committee, Corp., Banking & Bus. Law Sec., State Bar of Texas, *Limited Partnership: Model Agreement and Certificate with Commentaries*, 26 S. TEX. L. REV. 25 (1985).

⁷⁹ Alan R. Bromberg & Joseph M. Stuhl, *A Suggested Form of Partnership Agreement for Use Under Texas Uniform Partnership Act*, 24 TEX. BAR J. 933 (1961) (*modified and reprinted, inter alia*, ALAN R. BROMBERG, CRANE & BROMBERG ON PARTNERSHIP 597 (1968); 19 ROBERT W. HAMILTON, TEXAS PRACTICE: BUSINESS ORGANIZATIONS § 6.15, at 136 (1973); 8A F. ELLIOTT & HAL M. BATEMAN, WEST'S TEXAS FORMS - BUSINESS ENTERPRISES: PARTNERSHIPS AND UNINCORPORATED ASSOCIATIONS 37 (1980)). Alan R. Bromberg, *Source and Comments*, 17 TEX. REV. CIV. STAT. ANN. art. 234 (Vernon 1962); Alan R. Bromberg, *Partnership Dissolution—Causes, Consequences and Cures*, 43 TEX. L. REV. 631 (1965) (*modified and reprinted in* 7 LAW OFFICE ECON. AND MGMT. 27 & 159 (1966); ALAN R. BROMBERG, CRANE & BROMBERG ON PARTNERSHIP (1968)).

⁸⁰ A brief description of the 1976 Uniform Act and its relation to Texas law is given in Alan R. Bromberg, *Preface to Limited Partnership: Model Agreement and Certificate*, 26 S. TEX. L. REV. 15 (1985).

⁸¹ TEX. REV. CIV. STAT. ANN. art. 6132a-1 (Vernon Supp. 2005).

In 1953 and 1954, an effort was begun to modernize the Texas Securities Act to assist in meeting the needs of the investing public. This has been and continues to be a major effort by the Securities Law Committee to facilitate capital formation consistent with the protection of investors. This has taken place in close cooperation with the Office of the Texas Securities Commissioner.

The 1913 Texas Securities Act was tightened somewhat by its 1923 replacement, which was notable for raising the criminal penalties for certain securities violations to ten years in prison.⁸² A more comprehensive law was passed in 1935, probably inspired by the speculations and misfortunes of the 1920's and the federal laws of 1933 and 1934 they elicited.⁸³ The 1935 Texas law broadened the state's discretion to grant or deny a permit to sell securities by adding the famous "fair, just, and equitable" test.⁸⁴ The law required registration of securities dealers and agents (salespeople).⁸⁵ Many exemptions were added, including exemptions for securities issued in bona fide reorganizations and mergers and securities issued by trust companies and companies listed on the major stock exchanges.⁸⁶ Until 1941, the Securities Act contained no provision allowing private actions upon violation of its contents, although common law and other statutory private causes of action were available.⁸⁷

⁸² Act of June 4, 1923, 38th Leg., 1st C.S., ch. 52, 1923 Tex. Gen. Laws 114. The ten-year penalties are in §§ 12, 14, and 17. Other changes included broadening the coverage to embrace interests in joint stock associations and other noncorporate organizations. The standard for granting a permit was amplified to include a requirement "that values warrant" the permit. *Id.* § 5. But there was relaxation in an important respect: the limit on expenses and promotion was raised from 15% to 20% and "stock issued for property or other things of its equivalent value shall not be classed as promotion stock, the values at which such property is accepted to be approved by the Secretary of State." *Id.* Escrow of sale proceeds, secured by a bond of the promoters, was authorized in some situations. *Id.* § 6. Offers were more explicitly regulated. *Id.* § 9. Cooperation with federal authorities was authorized. *Id.* § 10. Mergers had to be approved by the Secretary of State and a majority of the stockholders. *Id.* §§ 11-12. Dividends "out of any funds other than the actual earnings" were outlawed. *Id.* §§ 13-14. Ten-year prison sentences were prescribed for most violations. *Id.* §§ 12, 14, 17, and 19. Newspapers were prohibited from carrying advertisements for securities that lacked permits; sanctions were \$100-\$1,000 and ten days to six months in jail. *Id.* § 18. The Secretary of State was to publish at least quarterly a summary of permit applications and his finding as to each concern "whether such concern was solvent and whether . . . it was or is fraudulent . . . to secure for the benefit of the people the utmost publicity respecting the affairs of concerns whose stock is obtainable by them . . ." *Id.* § 21. New exemptions included those for securities of building and loan corporations and corporations of "solvent going concern for a period of two years." *Id.* § 6a. The munificent sum of \$7,500 was appropriated to carry out the purposes of the Act for the first year. *Id.* § 25. The emergency clause sounded a familiar theme of victimization of local citizens and a new theme of victimization of out-of-state citizens by Texas promoters:

Texas has in recent years been flooded with worthless securities, issued and sold by irresponsible parties to the people of this State, resulting in great loss to investors, especially wage earners, a class least able to stand such losses, and . . . many companies have organized and made their domicile, or home office in this State, and sold worthless securities through the mails and otherwise, to people in other states by reason of inadequate laws in this State . . .

Id. § 29.

⁸³ Securities Act, 44th Leg., R.S., ch. 100, 1935 (Tex. Gen. Laws) 255.

⁸⁴ *Id.* § 8.

⁸⁵ *Id.* §§ 12-15.

⁸⁶ *Id.* §§ 3(f), (g), (o); 23(f).

⁸⁷ Sale of Securities-Voidable in Certain Cases, 47th Leg., R.S., ch. 363, § 2, 1941 Tex. Gen. Laws 593.

Enforcement of the 1935 Act may have been lax. The trust company exemption became a major loophole after it was construed to include any company organized with trust powers.⁸⁸ Since corporations with trust powers could be readily organized with minimum capital and without the supervision accorded to bank-type trust companies, hundreds organized and widely sold securities without permits. The scandals that followed when many of these securities proved worthless prompted the 1955 Texas Securities Act.⁸⁹ That statute was drafted with input from a newly appointed State Bar Committee on Securities and Investment Banking, which was initially chaired by Talbot Rain of Dallas and included William H. Tinsley of Dallas, and, among other things, deleted the trust company exemption.⁹⁰ A 1957 Act⁹¹ was similar but removed securities from the jurisdiction of the Secretary of State and created a separate State Securities Board and Securities Commissioner to administer the statute.⁹² The first Commissioner was William M. King, who previously served in the FBI and the Texas Attorney General's Office. He was brought in as, and proved to be, a vigorous enforcer and strict constructionist for more than a decade. Much of the enforcement was through the criminal laws, a tradition that continues today. Texas is thought to have more criminal convictions for securities violations than the rest of the states combined.⁹³ In the 1957 Act, criminal penalties were reduced to no more than \$1,000, no more than two years in prison, or both fine and imprisonment.⁹⁴

The 1957 Act also covered securities sold by insurance companies, which had been exempt under the 1935 Act and one whose exemption was a source of scandal.⁹⁵ Principal innovations of the 1957 Act⁹⁶ (compared to the 1935 Act) included registration by coordination for securities also registered with the Securities and Exchange Commission ("SEC"),⁹⁷ registration by notification for securities of well-established companies with specified levels of earnings,⁹⁸ requirement of the use of a full disclosure prospectus in most offerings,⁹⁹ permission to use preliminary prospectuses encouraged by federal law,¹⁰⁰ extension of the "fair, just, and equitable" requirement to the price paid by promoters or founders if that price is less than the price charged the public,¹⁰¹ exemption of unsolicited

⁸⁸ *Carney v. Sam Houston Underwriters, Inc.*, 272 S.W.2d 942 (Tex. Civ. App.—Austin, 1954, writ ref'd n.r.e.).

⁸⁹ The Securities Act, 54th Leg., R.S., ch. 67, 1955 Tex. Gen. Laws 322.

⁹⁰ The background and content of the 1955 Act, with particular reference to the trust company exemption, is explained in William H. Tinsley, *The Texas Securities Act*, 18 TEX. B.J. 273 (1955).

⁹¹ Securities Act, 55th Leg., R.S., ch. 269, 1957 Tex. Gen. Laws 575.

⁹² *Id.* §§ 2-3.

⁹³ Alan R. Bloomberg, *Texas Business Organization and Commercial Law—Two Centuries of Development*, 55 SMU L. REV. 83, 109 (2002).

⁹⁴ Securities Act, 55th Leg., R.S., ch. 269, § 29, 1957 Tex. Gen. Laws 575, 598.

⁹⁵ Securities Act, 44th Leg., R.S., ch. 100 § 3(i), 1935 Tex. Gen. Laws 260.

⁹⁶ See generally Julian M. Meer, *The Texas Securities Act—1957 Model: Facelift or Forward Look?*, 36 TEX. L. REV. 429 (1958).

⁹⁷ This was taken from UNIF. SEC. ACT § 303 (1956), with the addition of Texas' "fair, just, and equitable" standard. See Securities Act, 55th Leg., R.S., ch. 269, 1957 Tex. Gen. Laws 575.

⁹⁸ *Id.* § 7(B).

⁹⁹ *Id.* § 9(C).

¹⁰⁰ *Id.* § 22.

¹⁰¹ *Id.* § 10(A).

purchase orders,¹⁰² exemption of sales where the number of total securities holders would not exceed 35,¹⁰³ and exemption of secondary trading in securities already outstanding.¹⁰⁴

The 1957 Act proved troublesome in many respects. Some of the problems were caused by misinterpretation by the courts and required legislative or administrative correction. For example, a ruling that “person” did not include “corporation,”¹⁰⁵ so that corporations were free of the statute, was soon reversed, but called for an amendment to be sure.¹⁰⁶ A ruling that a “brochure” used to sell stock was “advertising” that would destroy the private offering exemption¹⁰⁷ was effectively reversed by administrative interpretation.¹⁰⁸ A ruling that commissions could not be collected by an unregistered person on an exempt transaction¹⁰⁹ required a statutory reaffirmation of the plain meaning to the contrary.¹¹⁰

Other amendments stemmed from perceived needs for a small offering exemption for interests in oil and gas properties,¹¹¹ for an expanded small offering exemption after a company acquired 35 shareholders,¹¹² for rule making authority in the State Securities Board,¹¹³ for authority to put fraudulent dealers into receivership,¹¹⁴ for clearer civil liabilities¹¹⁵ and statutes of limitations for stiffer criminal penalties,¹¹⁶ and for clearer rules on

¹⁰² Securities Act, 55th Leg., R.S., ch. 269, § 5(P), 1957 Tex. Gen. Laws 575.

¹⁰³ *Id.* § 51. A similar exemption for oil and gas interests was added as § 5(Q) of the 1957 Securities Act by Act of April 23, 1959, 56th Leg., R.S., ch 88, 1959 Tex. Gen. Laws 147.

¹⁰⁴ Securities Act, 55th Leg., R.S., ch. 269, 1957 Tex. Gen. Laws 575.

¹⁰⁵ *Dempsey-Tegeles & Co. v. Flowers*, 465 S.W.2d 208 (Tex. Civ. App.—Beaumont, 1971, writ granted), reversed by 472 S.W.2d 112 (Tex. 1971). The earlier decision was criticized in J. Leon Lebowitz, *Corporations, Annual Survey of Texas Law*, 26 SW. L.J. 86, 112-21 (1972).

¹⁰⁶ Securities Act, 62nd Leg., R.S., ch. 235, § 1, 1971 Tex. Gen. Laws 1085 (now § 4B of the Act). The emergency clause disavowed the earlier *Dempsey* opinion and confirmed that the Legislature’s intent was always to include “corporation in person” for civil liability. *Id.* § 2. However, corporations remain excluded from the criminal provisions of § 29 of the Act by the last sentence of § 4B.

¹⁰⁷ *Tumblewood Bowling Corp. v. Maise*, 388 S.W.2d 479 (Tex. Civ. App.—Beaumont 1965, writ ref’d n.r.e.). This decision was criticized in Alan R. Bromberg, *Texas Exemptions for Small Offerings of Corporate Securities—The Prohibition on Advertisements*, 20 SW. L.J. 239 (1966).

¹⁰⁸ See 7 TEX. ADMIN. CODES § 109.13(b) (1996) (State Sec. Bd., Limited Offering exemptions).

¹⁰⁹ *Rowland Corp. v. Integrated Sys. Tech., Inc.*, 488 S.W.2d 133 (Tex. Civ. App.—Waco 1971, writ ref’d n.r.e.). This decision was criticized in Alan R. Bromberg, *Collectibility of Commissions on Exempt Transactions in Securities*, 11 BULL. OF SEC. ON CORP., BANKING & BUS. L. 3 (Oct. 1973) and in J. Leon Lebowitz, *Recent Developments in Texas Corporation Law—Part II*, 28 SW. L.J. 823, 864-67 (1974).

¹¹⁰ TEX. REV. CIV. STAT. ANN. art. 581 (Vernon 1964).

¹¹¹ TEX. REV. CIV. STAT. ANN. art. 581-5Q (Vernon Supp. 2005).

¹¹² *Id.* art. 581-5I(c) (amending § 5 to the Act, permitting sales for up to 15 buyers every 12 months). See Alan R. Bromberg, *Texas Exemptions for Small Offerings of Corporate Securities*, 18 SW. L.J. 537 (1964).

¹¹³ TEX. REV. CIV. STAT. ANN. art. 581-28-1 (Vernon Supp. 2005).

¹¹⁴ *Id.* art. 581-25-1.

¹¹⁵ *Id.* art. 581-33. Before the 1963 amendment, art. 581-33 provided merely that sales in violation of the Act were “voidable,” without distinguishing among possible violations. The 1963 and 1977 amendments specified the violations giving rise to liability (including fraud in purchase as well as in sale), prescribed the measure of liability, and extended liability to controlling persons and aiders of violators. They authorized the shortening of the statute of limitations by making a rescission offer. See also Hal M. Bateman, *Securities Litigation: The 1977 Modernization of Section 33 of the Texas Securities Act*, 15 HOUS. L. REV. 839 (1978); Alan R. Bromberg, *Civil Liability Under Texas*

when and how offers might be made.¹¹⁷

The Texas Securities Act remains seriously flawed. It contains some miserable drafting, including twisted and imprecise definitions, inconsistent language in related sections, redundancies, and 500-word sentences. It has inadequate exemptions for investor resale of securities.¹¹⁸ It literally makes a dealer subject to registration requirements¹¹⁹ of everyone who buys or sells a security, including ordinary investors.¹²⁰ Its statutes of limitations for private suits for fraud (generally three years from discovery with a five-year cutoff)¹²¹ or for failure to register (three years)¹²² are among the longest in the nation, giving investors unjustifiable opportunities to speculate on the success of a company, or the market for its securities, and then sue for a refund if they are disappointed.

The most serious drawback of the Texas Securities Act is the requirement that the Commissioner find that the plan of business of the issuer and the price of a security are “fair, just, and equitable” before the security can be registered for public sale.¹²³ This “merit” standard is vague, paternalistic, interferes with market access by honest businesses needing capital, limits choice by investors, and requires superhuman wisdom and judgment to exercise properly the broad discretion it grants the Commissioner. The standard has been interpreted, among other things, to set a number of arbitrary limits (e.g., on compensation, minimum investment by promoters, and maximum numbers of options), to inhibit certain kinds of actions (such as loans to officers), to influence (i.e., reduce) the price at which a security can be sold, and to require escrow and possible cancellation of previously issued securities.¹²⁴ These are inappropriate kinds of actions for a government agency to take. They have a particularly chilling impact on new, small, or speculative enterprises. This is especially unfortunate as Texas turns to high technology, often developed by new companies, to stimulate an economy that has lagged badly with the drop in oil and gas prices.

The merit standards are hotly debated,¹²⁵ but it is widely agreed that their application

Securities Act § 33 (1977) and Related Claims, 32 SW. L.J. 867 (1978); Claude P. Bordwine, *Civil Remedies Under the Texas Securities Laws*, 8 HOUS. L. REV. 657 (1971); Julian M. Meer, *A New Look at the Texas Securities Act*, 43 TEX. L. REV. 680 (1965).

¹¹⁶ The sanctions of two years and \$1,000 in the 1957 Act were increased to 10 years and \$5,000 for most violations in Texas Security Law, 57th Leg., R.S., ch. 466, § 29, 1961 Tex. Gen. Laws 1047; and to 10 years (not less than 2 years) and \$5,000 for fraud violations involving less than \$10,000 and 20 years (not less than 2 years) and \$10,000 for fraud violations involving \$10,000 or more. *Id.* art. 581-29C.

¹¹⁷ 1979 Tex. Gen. Laws 357, § 5 (now TEX. REV. CIV. STAT. ANN. art. 581-22 (Vernon Supp. 2005)).

¹¹⁸ TEX. REV. CIV. STAT. ANN. art. 581-5C(1) (Vernon Supp. 2005).

¹¹⁹ *Id.* art. 581-12.

¹²⁰ *Id.* art. 581-4C.

¹²¹ *Id.* art. 581-33H(2).

¹²² *Id.* art. 581-33H(1)(a).

¹²³ *Id.* art. 581-10A. Similar language appears in art. 581-7C(2) with a slightly different burden of proof; the Commissioner may deny registration if he finds that the registrant has not proven the proposed plan of business of the issuer to be “fair, just, and equitable.” There seems to be no practical difference in application.

¹²⁴ See, e.g., TEX. ADMIN. CODE § 113.3 (West 1996) (State Sec. Bd., Fair, just, and equitable standards).

¹²⁵ See, e.g., Ernest W. Walker & Beverly B. Hadaway, *An Investigation of the Efficacy of the Merit Standards of the Securities Act of the State of Texas* (June 5, 1981), substantially reprinted as Walker & Hadaway, *Merit Standards*

made Texas, for years, the most difficult state in the U.S. in which to register securities for public sale.¹²⁶

The Section's Securities Law Committee tried unsuccessfully in 1969, 1983, and 1985 to modernize and clarify the Texas Securities Act and delete or limit the merit standard.¹²⁷ Leaders of the Bar forces included Charles H. Still of Houston, John E. Dees, Jr. of Dallas, and Professor Bromberg. Leaders of the opposition were former Securities Commissioners William M. King and Roy Mouer, both of Austin. The 1985 proposal passed the Texas House, where Representative Steve Wolens sponsored it, by a margin of almost four to one. A head count indicated a majority for it in the Senate, where Senator Ray Farrabee sponsored it, but the bill was caught in a cross-fire between the American Stock Exchange and the National Association of Securities Dealers over exemption of securities listed in the NASD's Automated Quotations system. As a result, it never mustered the 2/3rd's vote necessary to bring it onto the Senate floor. However, these efforts led to two amendments that have softened somewhat the harshness of the merit standard. One states the general purpose of the Securities Act to be "to protect investors and consistent with that purpose, to encourage capital formation, job formation, and free and competitive securities markets, and to minimize regulatory burdens on issuers and persons subject to this Act, especially small businesses."¹²⁸ The other allows the Commissioner to "waive or relax any restriction or requirement in the [Securities] Board's rules that, in his opinion, is unnecessary for the protection of investors in a particular case."¹²⁹

The State Securities Board has used its rule-making power to liberalize small offering exemptions quite substantially and to coordinate them partially with federal exemptions.¹³⁰ To date, however, the Board has failed to adopt a small offering exemption that is as flexible as that provided under SEC Rule 504.¹³¹

Revisited: An Empirical Analysis of the Efficacy of Texas Merit Standards, 7 J. CORP. L. 651 (1982) (defending the standards); Hal M. Bateman, *Statement Concerning "Full Disclosure" Securities Registration in Texas*, 20 BUL., OF SEC. ON CORP., BANKING & BUS. L. 4 (Oct. 1982) (attacking the standards). On similar issues not limited to Texas, see Conrad G. Goodkind, *Blue Sky Laws: Is There Merit in the Merit Requirements?*, 1976 WIS. L. REV. 79 (defending); Ruthford B. Campbell, Jr., *An Open Attack on the Nonsense of Blue Sky Regulation*, 10 J. CORP. L. 553 (1985) (attacking); Mark A. Sargent, *Blue Sky Law—The Challenge to Merit Regulation—Part I*, 12 SEC. REG. L.J. 276 (1984); Mark A. Sargent, *Blue Sky Law—The Challenge to Merit Regulation—Part II*, 12 SEC. REG. L.J. 367 (1985) (balanced); American Bar Assoc., Ad Hoc Subcomm. on Merit Regulation of the State Regulation of Securities Committee, *Report on State Merit Regulation of Securities Offerings*, 41 BUS. LAW 785 (1986) (balanced).

¹²⁶ This is the view of virtually every securities lawyer we have ever talked to. It is also the finding of a statistical survey of securities lawyers. Jay T. Brandi, *Securities Practitioners and Blue Sky Laws: A Survey of Comments and a Ranking of States by Stringency of Regulation*, 10 J. CORP. L. 689 (1985).

¹²⁷ The 1969 and 1983 proposals are described in some detail in Alan R. Bromberg, *The Proposed Texas Uniform Securities Act*, 31 TEX. B.J. 1030 (1968), and Alan R. Bromberg, *Texas Securities Act*, 46 TEX. B.J. 36 (1983).

¹²⁸ TEX. REV. CIV. STAT. ANN. art. 581-10-1 (Vernon Supp. 2005).

¹²⁹ *Id.* art. 581-10(D).

¹³⁰ TEX. ADMIN. CODE § 109.13 (1996) (State Sec. Bd., Limited offering exceptions). The main—and very important—Texas deviation from federal law is the requirement that a non-accredited investor be sophisticated or that the investment be suitable for the investor. *Id.* § 109.13(k)(8).

¹³¹ *Cf.* Rules governing the limited offer and sale of securities without Registration under the Securities Act of 1933, 17 C.F.R. § 230.504 (2004) with TEX. REV. CIV. STAT. ANN. Art. 581-22 (Vernon Supp. 2005) and TEX. ADMIN. CODE § 109.13. As a result of Securities Law Committee efforts, the State Securities Board is considering an amendment to its rules that would provide a securities registration exemption for offers and sales to natural persons

The Securities Law Committee has worked extensively with the State Securities Board and its Staff in the implementation of its rule-making power in a number of areas, but most significantly in connection with a new rule relative to the inapplicability of the program registration guidelines to exempt offerings¹³² and with new or revised securities registration exemptions for private resale transactions,¹³³ sales made pursuant to SEC Rule 144,¹³⁴ and transactions with certain financial institutions and institutional investors not specified under Section 5.H of the Securities Act.¹³⁵ The latter regulatory changes were the result of efforts led by Eugene W. Albert of Fort Worth, Chairman of the Securities Law Committee from 1990 to 1992, and James R. Peacock, III of Dallas, who succeeded as Chairman in 1992. In addition, during the last few years, a subcommittee, chaired by Patsy W. Nichols of Austin, coordinated with the Board's General Counsel to have interpretative letters and no-action letters issued between 1984 and 1992 summarized, and have those summaries published in the Section Bulletin.

C. Commercial Code Committee

In 1967, Texas thoroughly modernized its commercial law by adopting the 1962 version of the Uniform Commercial Code ("UCC").¹³⁶ This replaced the Negotiable Instruments Law, the Uniform Stock Transfer, Trust Receipt and Warehouse Receipts Acts, and various chattel mortgage and conditional sales laws. Along with the TBCA, the UCC is among the most significant changes in Business Law. Much of the impetus for the UCC initially came from banks and other lenders, but the impetus for updating the UCC has come from the Commercial Code Committee.

D. Banking Law Committee

While state banking law continues to exist, and proliferate, banking law is increasingly federal, administered by the Federal Reserve Board, the Federal Deposit Insurance Corporation and the Comptroller of the Currency.¹³⁷ While no attempt is made to cover it in detail here,¹³⁸ the Section's Banking Law Committee drafted a major amendment to the Texas Banking Code, enacted in 1983, to establish procedural rights and duties of various parties when any information is requested from a bank about its customer.¹³⁹

that are "accredited investors" for offerings made other than pursuant to the uniform limited offering exemption.

¹³² See 7 TEX. ADMIN. CODE §113.12 (1996) (State Sec. Bd., Applicability of guidelines to exempt offerings).

¹³³ See State Sec. Bd. Rule 139.14, 7 TEX. ADMIN. CODE §139.14 (West 1996) (added effective Aug. 28, 1992), reprinted in 3 Fed. Sec. L. Rep. (CCH) ¶55,720C.

¹³⁴ See State Sec. Bd. Rule 139.13, 7 TEX. ADMIN. CODE § 139.13 (West 1996) (added effective Aug. 28, 1992), reprinted in 3 Fed. Sec. L. Rep. (CCII) ¶55,702B.

¹³⁵ See State Sec. Bd. Rule 109.3(c), 7 TEX. ADMIN. CODE § 109.3(c) (West 1996) (added effective Dec. 1, 1992), reprinted in 3 Fed. Sec. L. Rep. (CCH) ¶55,553.

¹³⁶ 1967 Tex. Gen. Laws 2343 (now, with amendments, at TEX. BUS. & COM. CODE ANN. § 1.101 *et seq.* (Vernon 1968 and Supp. 2005)).

¹³⁷ See generally Texas Banking Code, TEX. REV. CIV. STAT. ANN. arts. 342-101 *et seq.* (Vernon 1973) (now expired).

¹³⁸ See, e.g., Joseph Jude Norton, BANKING LAW MANUAL, ch. 3 (1983).

¹³⁹ See TEX. REV. CIV. STAT. ANN. art. 342-705, § 1 (Vernon Supp. 2005). Dan L. Nicewander was Chairman of the Banking Law Committee and, together with S. Scott Sheehan, Professor Robert E. Wood, Jr., Gene Huff and

VI. FORMATION OF THE TEXAS BUSINESS LAW FOUNDATION

The Section generally controlled its legislative programs until the early 1970s, when the State Bar acted to require prior approval of all proposed legislation that presumed to have Bar sponsorship. This requirement placed additional work requirements on the Section and its committees, and ultimately it politicized the effort at the State Bar Board of Directors level.

The growing tendency of the State Bar Board of Directors was to deny sponsorship for legislation drafted by Committees of the Section if the proposed legislation was considered (by the State Bar Board) to be controversial or if it conflicted with a judicial decision.¹⁴⁰ Since bad judicial decisions were undermining confidence in Texas as a good place to do business, this situation had to change.

In 1987, Sam Rosen of Fort Worth responded by writing to a number of leading business lawyers in Texas to propose the formation of an association of business lawyers independent of the Section. An independent, privately-funded association would permit Texas business lawyers to provide active legislative support for proposals that they perceived to be important to the economic development of the State and the administration of justice in the area of Business Law, thus eliminating dependence on State Bar support for such legislation.

In response to Mr. Rosen's initiative, a number of Texas business lawyers met in Dallas on July 23, 1988, and agreed to form the Texas Business Law Foundation. It is a Texas non-profit corporation whose incorporators were Byron F. Egan of Dallas, Campbell A. Griffin, Jr. of Houston, and Mr. Rosen. Its certificate of incorporation was issued on September 20, 1988. The first Board of Directors and officers of the Foundation were as follows: R. Dennis Anderson of Houston, Thomas E. Baker of Houston, Bryan B. Bishop of Dallas, Professor Alan R. Bromberg of Dallas, Sam P. Burford, Jr. of Dallas, K. Scott Cohen of Dallas, George W. Coleman of Dallas, Mr. Egan, Marc H. Folladori of Dallas, Mr. Griffin (Chairman), Professor Robert W. Hamilton of UT, Professor J. Leon Lebowitz of UT, Mr. Rosen (Vice Chairman), William T. Satterwhite of Dallas, Larry L. Schoenbrun of Dallas, Michael J. Shearn of San Antonio (Secretary), Charles Szalkowski of Houston, Michael W. Tankersley of Dallas (Treasurer), Robert F. Watson of Fort Worth, and Robert E. Wood, Jr. of Dallas. Marion M. "Sandy" Sanford of Austin and his partners at Sanford, Kuhl & Perkins, L.L.P. have served as the Foundation's legislative counsel since its beginning.

The Foundation's principal objective is to help create a favorable business climate in the State of Texas and thereby promote economic development through the establishment and maintenance of a progressive system of Business Laws. The Foundation encourages the drafting of legislation to cure particular problems, monitors state legislative and administrative proposals, endorses and supports proposals that further its objective, and opposes proposals that are contradictory to this objective.

George E. Henderson, worked on drafting and passing the amendment. For a discussion of the amendment, see Dan L. Nicewander, *Financial Record Privacy—What Are and What Should Be the Rights of the Customer of a Depository Institution*, 16 ST. MARY'S L.J. 601 (1985).

¹⁴⁰ See Robert W. Hamilton, *The Texas Business Law Foundation and Proposed Business Legislation in Texas*, 10 CORP. COUNS. REV. I (1991).

The Foundation's agenda is established by its Board of Directors. Board members recommend, review and discuss numerous legislative and administrative proposals originating from many sources including, among others, the Section and the Corporate Counsel Section of the State Bar. From these deliberations, the Foundation's Board concludes whether to endorse or oppose such proposals. The Foundation representatives may arrange for legislators to sponsor bills and for witnesses to speak before legislative committees on behalf of, or in opposition to, legislative proposals and may discuss legislation with individual state legislators.

Any individual duly licensed or authorized to practice law in any jurisdiction or any member of the faculty of any accredited law school may become a Fellow of the Foundation. In order to provide funding for the Foundation's purposes, the annual dues for the Fellows are set at \$100. The Foundation's bylaws call for two other classes of membership: (1) Sustaining Members, primarily businesses and large law firms, whose annual dues are \$2,500, and (2) Contributing Members, primarily smaller law firms, whose annual dues are \$1,000. Members who contribute at the \$2,500 level are generally represented on the Board of the Foundation.

VII. LEGISLATIVE PROGRAM OF THE FOUNDATION IN 1989

Going into its first legislative session, the Foundation was led by Campbell A. Griffin, Jr. of Houston, Chairman; Sam Rosen of Fort Worth, Vice Chairman; Michael J. Shearn of San Antonio, Secretary; and Michael J. Tankersley of Dallas, Treasurer. R. Dennis Anderson of Houston was Chairman of the Board's Legislative Committee.

The legislative program of the Foundation in 1989 was remarkably successful. The Foundation endorsed and supported the following legislation, which was enacted:

1. **Overturing *Castleberry* (S.B. 1427).** To overrule the Texas Supreme Court's *Castleberry v. Branscum*¹⁴¹ decision, TBCA art. 2.21 was amended to eliminate constructive fraud as a basis for holding shareholders liable for contractual obligations of a corporation.¹⁴² This legislation was initially drafted in 1987 by the Corporation Law Committee of the Section (then chaired by Byron F. Egan of Dallas), but was denied State Bar sponsorship. The denial of sponsorship was the catalyst for the formation of the Foundation because it caused the founders of the Foundation to see the need for an organization independent of the State Bar and equipped to get legislation passed.¹⁴³
2. **Omnibus Corporation Law Bill (H.B. 472).** The Corporation Law Committee's tradition of bi-annually coming forth with important amendments to the TBCA and other corporate statutes was continued through the Foundation's sponsorship of this bill. The most far-reaching of its changes gave unprecedented flexibility in business combinations by permitting transactions that previously would

¹⁴¹ 721 S.W.2d 270 (Tex. 1986).

¹⁴² See Robert F. Gray, Jr. & Gregory J. Sergesketter, *Corporations, Annual Survey of Texas Law*, 44 Sw. L. J. 225, 226-27 (1990).

¹⁴³ See Hamilton, *supra* note 140, at 4.

have required multiple steps and types of legal procedures to be effected through a single TBCA Part Five statutory merger, including (i) mergers of corporations with partnerships and other non-corporate entities, (ii) mergers with two or more resulting entities, and (iii) a division of a single corporation into two or more entities.¹⁴⁴ TBCA Part Five was also revised to authorize a “share exchange” where the equity interests of a corporation may be acquired by another corporation or other entity in a transaction approved by shareholder vote that does not involve the metaphysics or mechanics of a statutory merger.¹⁴⁵ Other significant changes in the bill included clarification of the authority of a corporation to issue, without consideration, rights or options to purchase shares for consideration, the addition of a limitations period for violations of preemptive rights, and the authorization of the election of directors by plurality vote.¹⁴⁶

3. **Security Interests in Lease Transactions (S.B. 625).** This bill amended § 1.201.37 of the Texas Business & Commerce Code (“TB&CC”) to facilitate the determination of whether an instrument creates a lease or security interest.
4. **Covenants Not to Compete (S.B. 946).** This bill added §§ 15.50 and 15.51 of the TB&CC to address the validity of noncompetition agreements and codify the principles of law as they existed prior to the Texas Supreme Court’s *Hill* decision and its progeny.¹⁴⁷ A different version of this legislation was initially drafted by a committee of the Intellectual Property Section of the State Bar and was denied State Bar sponsorship.
5. **Bold Faced Type (S.B. 224).** This bill repealed TB&CC § 35.53, which had provided that any provision of a contract, to the effect that the contract would be governed by the laws of a state other than Texas, or would be subject to litigation or arbitration in another state, was voidable unless set forth in boldfaced print, capitalized, underlined, or otherwise set off in such a manner that a reasonable person against whom the provision was directed would notice. This statute, enacted in 1987 and of uncertain origin, had resulted in considerable embarrassment.¹⁴⁸
6. **Limitation of Director Liability (S.B. 1271).** This bill amended TMCLA art. 1302-7.06 to extend the limitation of director liability provisions adopted in 1987 to all state chartered associations and made procedural modifications.¹⁴⁹
7. **Non-Profit Corporation Loans (S.B. 1025).** This bill amended the TNPCA to

¹⁴⁴ See Curtis W. Huft, *The New Texas Business Corporation Act Merger Provisions*, 21 ST. MARY’S L.J. 109 (1989).

¹⁴⁵ *Id.* at 134.

¹⁴⁶ See Gray & Sergesketter, *supra* note 142, at 225-235.

¹⁴⁷ *Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168 (Tex. 1987); see Gray and Sergesketter, *supra* note 142, at 236-38.

¹⁴⁸ See Gray & Sergesketter, *supra* note 142, at 236.

¹⁴⁹ *Id.* at 235.

authorize non-profit corporations to make loans to officers who are not also directors of the non-profits corporation, for limited purposes.¹⁵⁰

The Foundation opposed the following proposed legislation, which did not pass:

- A proposal to prohibit “golden parachute” payments by corporations to their officers and directors upon any change in control passed the Senate but, after a lengthy hearing at which several representatives of the Foundation appeared or provided written testimony, the bill died in the House Committee.
- A proposal to require disclosure of foreign ownership of Texas corporations also died in committee.
- A proposal to require a corporation’s agent for receipt of service to be located only in the county where the corporation’s principal place of business is located likewise died in committee.
- A proposal to include civil securities fraud as a predicate act permitting forfeiture actions under Texas’ state RICO statute was deleted in a House-Senate Conference Committee.

In the Foundation’s successful initial foray into the Texas Legislature, the Foundation’s legislative team was led by Sandy Sanford and his partners. Mr. Anderson, in addition to chairing the Foundation Board’s Legislative Committee, led the charge on the Foundation’s corporation law bills (items 1, 2, 6 and 7 above), with considerable assistance from Professors. Alan R. Bromberg of SMU, Robert W. Hamilton and J. Leon Lebowitz of UT, Robert F. Gray, Jr. of Houston, and others. Mr. Gray was primarily responsible for the Covenants Not to Compete Bill.

VIII. LEGISLATIVE PROGRAM OF THE FOUNDATION IN 1991

In 1990, the State Bar Board adopted policies in response to the decision of the U.S. Supreme Court in *Keller v. State Bar of California*, which limited the Section’s legislative activities to drafting legislation and providing information.¹⁵¹ Fortunately, the Foundation had already been formed.

In view of *Keller* and having gained confidence in its first legislative foray in 1989, the Foundation adopted a more ambitious legislative agenda for 1991.¹⁵² The Foundation’s membership and funding had grown, and it now had 35 directors. The officers were Larry L. Schoenbrun of Dallas, Chairman; R. Dennis Anderson of Houston, Vice Chairman; Newton W. Wilson, III of Houston, Secretary; and Michael W. Tankersley of Dallas, Treasurer. Professor Robert W. Hamilton of UT served as Chairman of the Board’s Legislative

¹⁵⁰ *Id.* (Limited purpose includes financing the officer’s residence or providing the loan not exceed a specified percentage of the officer’s annual salary for any other purpose).

¹⁵¹ *Keller v. State Bar of California*, 496 U.S. 1 (1990).

¹⁵² See Egan, *Business Law Section Report*, 54 TEX. B. J. 694 (July 1991), and Hamilton, *supra* note 140.

Committee.

The Foundation's ambitious 1991 legislation program had mixed results as follows:

1. **Business Organizations Bill (H.B. 278; S.B. 519).** This bill passed and further updated the TBCA,¹⁵³ gave Texas the limited liability company,¹⁵⁴ and created the "registered limited liability partnership," which was an entirely new entity.¹⁵⁵
2. **Business and Commerce Code Bill (H.B. No. 1032).** This bill contained provisions that would have amended the TB&CC to add UCC Chapters 2A [of Goods] and 4A [Funds Transfers]; conformed Chapter 24 to the Uniform Fraudulent Transfer Act; repealed Chapter 6 [Bulk Sales law]; and added new sections to enhance the ability of parties to contractually select the governing law in transactions where the amount involved was at least \$1,000,000. This important bill failed to clear the logjam on the House calendar as the session ended. Peter Winship of SMU deserves much credit for killing the bill. His arguments against the choice of law provisions in the bill were ultimately not persuasive but delayed the movement of the bill for critical weeks. This bill was resurrected and passed in 1993, as discussed below.
3. **Consideration for Stock/Bond Issuance (Amendment) (H.J.R. 77; S.J.R. 35).** This resolution for the repeal of Article XII, Section 6, of the Texas Constitution, which limited the forms of consideration that could be received for stock, passed the Senate but failed to clear the logjam on the House calendar as the session ended. Article XII, Section 6, was repealed in 1993, as discussed below.
4. **Shareholder Liability/Castleberry (H.B. 2693; S.B. 1159).** A bill to eliminate judicial confusion regarding the burial of *Castleberry* by the 1989 amendment of TBCA art. 2.21 by S.B. 1427 was killed in the House Business and Commerce Committee by the determined opposition of one key Representative.¹⁵⁶
5. **Usury (RB. 2498).** A bill to comprehensively reform Texas' usury laws applicable

¹⁵³ See *Summary of Business Organizations Bill* (HB 278), 28 BULL. OF BUS. L. SEC. 31 (No. 2, June 1991).

¹⁵⁴ See TEX. REV. CIV. STAT. ANN. art. 1528n (Vernon 2003); Byron F. Egan, *LC's & LLP's: Statutory Framework Tax Treatment and Practical Considerations About Limited Liability Companies and Limited Liability Partnerships*, Univ. of Hous. Corp., Part. & Bus. L. Institute (July 30, 1992); Richard M. Fijolek & William D. Ratliff, *Texas Limited Liability Companies*, 28 BULL. OF BUS. L. SEC. 29 (No. 3, Sept. 1991).

¹⁵⁵ R. Dennis Anderson et al., *Registered Limited Liability Partnerships*, 28 BULL. OF SEC. OF BUS. L. 1 (No. 3, Sept. 1991); reprinted 55 TEX. BAR J. 728 (July 1992). The registered limited liability partnership ("L.L.P.") started as a remedy for the malpractice liability exposure of partners in professional partnerships and an attempt to give them the liability protection already afforded to other professionals by the Texas Professional Corporation Act. The resulting legislative compromise was an amendment to TUPA, which has been followed in 21 other states, including Delaware and New York. William Safire has described the L.L.P. in *The New York Times* as an entity that "combines the protection of a corporation with the camaraderie of a partnership." See Egan, *LC'S & LLP's: Practical Considerations About Limited Liability Companies and Limited Liability Partnerships*, Univ. of Hous. Corp., Part. & Bus. L. Institute (August 4, 1994).

¹⁵⁶ See Hamilton, *supra* note 140, at 120.

to business transactions encountered serious opposition and failed to clear the logjam on the House calendar as the session ended.

6. **Shareholder Rights (RB. 1244; S.B. 581).** This important bill, addressing abuses associated with hostile takeovers of Texas corporations, was killed in the House Business and Commerce Committee by the determined opposition of one key Representative.¹⁵⁷
7. **Business Records Retention (RB. 1767).** This bill, which passed, amended TB&CC § 35.48(b) to provide that a business record required to be kept by state law may be destroyed at any time after the third anniversary of the date the record was created unless otherwise prescribed by the law requiring the record.
8. **Contractual Limitations Periods/Notice Requirements (H.B. 2212; S.B. 1158).** This bill passed and subsequently amended §§ 16.070 and 16.071 of the Texas Civil Practices and Remedies Code to provide that, in the case of contracts involving \$500,000 or more, those provisions do not prohibit the parties, by contract, from (i) limiting the period in which a lawsuit can be brought to less than two years (it is common in business combination transactions for the parties to agree that any claims for breach of warranties must be brought within a specified period, which is often less than two years; the bill clarified that such is permitted in qualified transactions) or (ii) requiring that notices of events that may lead to breach of contract claims be made more promptly than 90 days after the event (it is common in business combination transactions for notice of events that could lead to breach of contractual warranties be made sooner than 90 days thereafter; the bill clarified that such is permitted in qualified transactions).¹⁵⁸
9. **Foreign Corporation Venue (RB. 2814).** This bill, which would have provided that the venue of lawsuits against foreign corporations would be the same as that of similarly situated domestic corporations, was blocked by the plaintiffs' lawyer lobby.¹⁵⁹
10. **Deceptive Trade Practices—Consumer Protection Act Amendments (H.B. 6; S.B. 297).** This bill, which would have amended the Texas Deceptive Trade Practices-Consumer Protection Act ("DTPA") so that claims could not be made thereunder with respect to securities transactions, was also blocked by the plaintiffs' lawyer lobby.¹⁶⁰ DTPA applicability to securities claims was considered inappropriate in view of the extensive civil liability provisions of the Texas Securities Act.¹⁶¹

¹⁵⁷ See Byron F. Egan & Brad L. Whitlock, *State Shareholder Protection Statutes*, UT 11th Ann. Conf. on Sec. Reg. and Bus. L. Problems (March 10, 1989).

¹⁵⁸ Tex. H.B. 2212, 72nd Leg., R.S. (1991); Tex. S.B. 1158, 72nd Leg., R.S. (1991).

¹⁵⁹ Tex. H.B. 2814, 72nd Leg., R.S. (1991).

¹⁶⁰ TEX. BUS. & COM. CODE ANN. § 17.41-17.63 (Vernon 2002 and Supp. 2005) [hereafter "DTPA"].

¹⁶¹ Despite the absence of an express statutory exclusion for securities transactions in the DTPA, there were early indications that the provisions of the DTPA and the Texas Securities Act presented irreconcilable differences that

In retrospect, 1991 can be viewed as a legislative session in which many seeds were planted; some sprouted that year, some waited until 1993 to blossom and some will be fertilized in later sessions. Professor Hamilton, as Chairman of the Foundation Board's Legislative Committee, Byron F. Egan of Dallas, as Chairman of the Section, and Alan R. Bromberg of Dallas were involved in most of the bills. The Business Organizations Bill and the proposed repeal of Article XII, Section 6, of the Texas Constitution were spearheaded by J. Patrick Garrett of Houston. The Business and Commerce Code Bill was omnibus legislation that included the efforts of many, including Dorothy Bjorck of Dallas, Daryl B. Robertson of Dallas, and Charles Szalkowski of Houston. The Usury Bill effort was led by Mr. Anderson and J. Scott Sheehan of Houston. The Shareholder Rights Bill crusade was headed by Mr. Egan. The Contractual Limitations Periods/Notice Requirements Bill can be attributed to the efforts of Campbell A. Griffin, Jr. of Houston. The effort to exclude securities claims from the DTPA was captained Professor Bromberg and John E. Dees, Jr. of Dallas. The efforts in 1991 paved the way for the Foundation's successes in 1993.

IX. LEGISLATIVE PROGRAM OF THE FOUNDATION IN 1993

By the 1993 legislative session, the Foundation had extensive legislative experience and was well recognized and respected in the State Capital. The Foundation had 64 directors and its officers consisted of: Byron F. Egan of Dallas, Chairman; Newton W. Wilson of Houston, Vice Chairman; Brian M. Lidji of Dallas, Secretary; and Cullen M. Godfrey of Dallas, Treasurer. J. Leon Lebowitz of the University of Texas and Michael W. Tankersley of Dallas were Co-Chairmen of the Board's Legislative Committee.

In 1993, the legislative program of the Foundation was extensive and largely successful. The Foundation helped pass the following:

1. **Covenants Not to Compete Bill (H.B. 7).** Texas Business and Commerce Code (hereinafter "TB&CC") §§ 15.50-51 were amended to (1) presume that a covenant not to compete is supported by adequate consideration if it is ancillary to or part of an

would prohibit the DTPA from applying to securities transactions. *Allais v. Donaldson, Lujkin & Jenrette*, 532 F. Supp. 749, 751-752 (S.D. Tex. 1982); *E.F. Hutton & Co. v. Youngblood*, 708 S.W.2d 865, 869-871 (Tex. App.—Corpus Christi, 1986), *opinion withdrawn and the judgment of the court of appeals modified and aff'd per curiam*, 741 S.W.2d 363 (Tex 1987). More recent court decisions have held that the Texas Securities Act does not preempt the DTPA with respect to securities transactions, provided that recovery can be had only under one of the statutes. See *Frizzell v. Cook*, 790 S.W.2d 41, 44-47 (Tex. App.—San Antonio, 1990, *writ denied*); see also *MBank Fort Worth, NA. v. Trans Meridian, Inc.*, 625 F. Supp. 1274, 1277-1280 (N.D. Tex. 1985), *aff'd in part and rev'd in part*, 820 F.2d 716 (5th Cir. 1987), *rehearing denied*, 826 F.2d 391 (5th Cir. 1987). Under the rationale of these cases, the DTPA could cover certain types of securities and a broad array of services provided as part of, or in connection with, a securities transaction. These cases make the law in Texas different from the majority of other states and thus need to be overturned by legislative or judicial action. The availability of treble damages for DTPA actions serves to encourage plaintiffs to try to fashion a DTPA claim in any securities transaction in order to recover a windfall not usually available to a prevailing party in a securities action, which has been recognized by commentators who have lamented that the "specter of treble damages" now overhangs all securities transactions in Texas. Gray & Sergesketter, *supra* note 142, at 242-44.

otherwise enforceable agreement at the time it is made; (2) presume enforceability of covenants not to compete ancillary to otherwise enforceable agreements to the extent that a covenant contains time, geographical area and scope of activity limitations that are reasonable; (3) overturn the Texas Supreme Court decision in *Travel Masters, Inc. v. Star Tours, Inc.*,¹⁶² which held that an employment-at-will contract is not an otherwise enforceable agreement sufficient to support a covenant not to compete; and (4) alleviate the confusion of the lower courts that have erroneously concluded that two separate but similar analyses are required to answer the question of enforceability of covenants not to compete: a determination whether the covenant not to compete violates common law principles as defined by the Supreme Court and a determination whether the covenant is in conflict with TB&CC §§ 15.50-51 notwithstanding the legislative intention that the enforceability determination be made solely by reference to TB&CC §§ 15.50-51.¹⁶³

¹⁶² *Travel Masters, Inc. v. Star Tours, Inc.*, 827 S.W.2d 830 (Tex. 1991).

¹⁶³ H.B. 7 was intended to communicate clearly to the courts that TB&CC §§ 15.50-52 (the “Covenants Not to Compete Act”) are the exclusive authority in determining the enforceability of covenants not to compete and that the policy of this State is that covenants not to compete are to be enforced to the maximum extent that they are reasonable—to the extent that a covenant restricts too much, it is to be reformed by the court until it can be enforced, but it is not to be rejected. These sections were originally enacted in 1989 to overturn the Supreme Court’s decision in *Hill v. Mobile Auto Trim, Inc.*, 725 S.W. 2d 168 (Tex. 1987), and were believed to be a straight-forward statement of legislative intent that covenants not to compete are to be enforced by judicial reformation if necessary. Nevertheless, some strange decisions resulted as the courts continued their hostility to covenants not to compete in face of the statute.

In three cases decided on the same day in 1990, the Texas Supreme Court reaffirmed its antagonism to covenants not to compete. In those cases—*DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670 (Tex. 1990); *Martin v. Credit Protection Ass’n, Inc.*, 793 S.W.2d 667 (Tex. 1990); and *Juliette Fowler Homes, Inc. v. Welch Associates, Inc.*, 793 S.W.2d 660 (Tex. 1990)—the Court found that (1) the proof of protectable interest presented by plaintiff was insufficient (*DeSantis*, 793 S.W.2d at 680-84); (2) the covenant was unenforceable as a matter of law because the employee was employed at-will (*Martin*, 793 S.W.2d at 679-80), and (3) the covenant was unenforceable as a matter of law because the covenant contained no geographic covenant and was overbroad as to restrained activity (*Juliette Fowler Homes*, 793 S.W.2d at 663). Each of the three cases was pending at the time TB&CC § 15.50 and § 15.51 became effective. In each case, however, the Court held that the result reached in the case would have been the same if the TB&CC provisions were applied. *DeSantis*, 793 S.W.2d at 685; *Juliette Fowler Homes*, 793 S.W.2d at 663 n.6; *Martin*, 793 S.W.2d at 669 n.1. See also *Peat Marwick Main & Co. v. Haass*, 818 S.W.2d 381 (Tex. 1991) (merger agreement between two public accounting firms provided for certain payments to the partnership if a partner left the firm and began servicing any client who was a client of the firm as of the termination date or became a client during the 24-month period thereafter; the Court said the clause “functions as a covenant not to compete as surely as if the agreement expressly stated that the departing member will not compete,” and then held that the provision was unreasonable and unenforceable because it required payments for clients obtained by the firm within two years after the termination).

These decisions necessitated the Legislature to state again in H.B. 7 what it intends to be the public policy of this State regarding the enforceability of covenants not to compete. As amended by H.B. 7, the Covenants Not to Compete Act provides that a covenant not to compete is enforceable

1. if it is ancillary to or part of an otherwise enforceable agreement at the time it is made,
2. to the extent that it contains time, geographical area and scope of activity limitations that are reasonable, and
3. does not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.

See Byron F. Egan, *Potpourri—Covenants Not to Compete; Constitutional Amendment to Repeal Required Consideration for Stock/Bond Issuance; Limitation of Bank Director Liability; and Other Bills that Passed or Failed During the 73rd Legislature*, UT BUSINESS LEGISLATION UPDATE: THE TEXAS REVISED PARTNERSHIP ACT AND

2. **Texas Revised Partnership Act.** The Texas Revised Partnership Act (TRPA) is a complete update of the general partnership law of Texas and is a product of a four-year study by the Section's Partnership Committee.¹⁶⁴ TRPA generally follows the structure and specifically adopts many of the sections of the Revised Uniform Partnership Act (RUPA) adopted by the National Conference of Commissioners on Uniform State Laws in 1992. RUPA's development paralleled that of TRPA and several Section members were involved with its drafting as well as with TRPA.

TRPA's main changes from the existing Texas Uniform Partnership Act ("TUPA") are (i) the term "dissolution" is not used, withdrawal of a partner does not require winding up (liquidation)—it only requires redemption (buyout) of the withdrawn partner at fair value unless a majority in interest of remaining partners choose to wind up; (ii) creditors must exhaust partnership assets before collecting partnership debts from individual partners on joint and several liability; (iii) partners' duties are defined as loyalty and care (a partner does not owe a trustee level of fiduciary duty to other partners and the term "fiduciary" is not used in TRPA); a business judgment rule is codified; (iv) no duty of loyalty and care exists in the formation of a partnership except in its operation and liquidation; (v) entity treatment of partnerships is stressed; (vi) a loss sharing agreement is not essential to the existence of a joint venture; (vii) partners are given authority to sue each other and the partnership without an accounting; and (viii) partners can generally vary by agreement most of the rights among partners except as to information access and the duties of loyalty, care and good faith. TRPA is similar in many respects to TUPA, including the following areas: (a) definition of what relationships are partnerships; (b) treatment of joint ventures as partnerships; (c) actual and apparent authority of partners to deal with third persons; (d) joint and several liability of partners for partnership obligations; (e) registered limited liability partnerships (but the annual fee to the Secretary of State was increased to \$200 per partner); (f) equal sharing of profits and losses unless otherwise agreed; (g) equal management rights unless

OTHER MAJOR BUSINESS LAW DEVELOPMENTS (1993).

Although the Legislature's intent is clear, H.B. 7's impact is more complicated. Enforcement remains in the hands of the court system, and the Texas Supreme Court has over the past eight years repeatedly exhibited animosity toward covenants not to compete. There are indications that the Supreme Court will continue its pattern of following its prior decisions instead of following the clear legislative intent. In *Light v. Centel Cellular Co. of Texas*, 883 S.W.2d 642 (Tex. 1994), the Supreme Court appeared to hold that an employment-at-will agreement was illusory and was not an otherwise enforceable agreement, to which a covenant not to compete could be ancillary, because it did not give rise to an interest worthy of protection. The Court cited and followed the reasoning of *Travel Masters, Inc. v. Star Tours, Inc.*, 827 S.W.2d 830 (Tex. 1992) and *DeSantis*, 793 S.W.2d 670, but purported to base its decision on the Covenants Not to Compete Act. The Supreme Court's analysis in *Centel* ignores the language and legislative history of TB&CC § 15.51 which states that employment-at-will relationships will support covenants not to compete and, when viewed in the context of the legislative history of the Covenants Not to Compete Act, reminds one of the definitional reasoning of Humpty Dumpty: "When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean,—neither more nor less."

"The question is," said Humpty Dumpty, "which is to be master—that's all." Lewis Carroll, *THROUGH THE LOOKING-GLASS* ch.6 (Hugh Haughton ed., Penguin Classics 2003) (1865).

¹⁶⁴ TEX. REV. CIV. STAT. ANN. art. 6132A §§ 1.01 et seq. (Vernon Supp. 2005).

otherwise agreed; (h) ordinary course of business matters decided by a majority-in-interest; other matters decided by all partners unless partners have otherwise agreed; (i) partner's interest may be community property, but partnership property and management rights cannot; (j) power of partner to withdraw at any time; and (k) judicial withdrawal (equivalent to judicial dissolution).¹⁶⁵

3. **Banking Code Amendments Regarding Liability of Bank Directors and Officers (H.B. 1076).** To clarify existing law, this bill amended Article 10, Chapter IV, of the Texas Banking Code to limit, for purposes of application to the Financial Institutions Reform, Recovery and Enforcement Act of 1989, the personal liability of disinterested bank officers and directors for damages sought by any federal banking agency to those damages arising from the gross negligence or willful misconduct of the officer or director.
4. **Texas Business & Commerce Code Bill (H.B. 1113).** This legislation amended the TB&CC by (1) adding new Chapters 2A and 4A to create comprehensive statutory frameworks for leases of goods and for wire funds transfers, respectively, and to make Texas law conform to the laws of other states in these areas; (2) repealing Chapter 6 (the Bulk Sales law), which impeded good faith bulk sales transactions and which had become outmoded by modern legal and commercial developments; (3) making Chapter 24 conform with the Uniform Fraudulent Transfer Act; (4) adding new § 35.51 and § 35.52 to the TB&CC, allowing parties to substantial business transactions (at least \$1,000,000) to choose through written agreement the law that will govern their contractual relations if the law chosen bears a reasonable relation to the transaction, thereby modifying the Texas Supreme Court's 1990 decision in *DeSantis v. Wackenhut Corp.*;¹⁶⁶ and (5) making other conforming amendments and correcting technical errors in other sections of the TB&CC.¹⁶⁷
5. **Business Organizations Bill (H.B. 1239).** This omnibus bill contained amendments to the TBCA, the Texas Limited Liability Company Act (TLLCA)¹⁶⁸ and the Texas Professional Corporation Act.¹⁶⁹ The TBCA changes were part of the continuing effort by the Section's Corporation Law Committee to keep TBCA as a modern, flexible business corporation statute, and included (i) provisions to make the TBCA a more hospitable statute for mutual funds by allowing new classes of shares to be created without shareholder approval and eliminating the requirement that mutual funds have annual meetings of shareholders; (ii) amendment of TBCA art. 2.21 to clarify that the corporate entity is to be disregarded in contract cases only if actual fraud is involved; and (iii) further refinements to the merger provisions in

¹⁶⁵ See TEX. CIV. STAT. ANN. Art. 6132A (Vernon 1970).

¹⁶⁶ *DeSantis*, 793 S.W.2d at 677-78.

¹⁶⁷ See TEX. BUS. & COM. CODE ANN. (Vernon 1987)

¹⁶⁸ TEX. REV. CIV. STAT. ANN. art. 1528n (Vernon Supp. 2005); see Byron F. Egan, *LC's & LLP's: Statutory Framework Tax Treatment and Practical Considerations About Limited Liability Companies and Limited Liability Partnerships*, Univ. of Hous. Corp., Part. & Bus. L. Institute (July 29, 1993).

¹⁶⁹ TEX. REV. CIV. STAT. ANN. art. 1528e (Vernon 2003 and Vernon Supp. 2005).

TBCA Part Five.¹⁷⁰ The TLLCA changes resolved various issues that had arisen in forming and operating a limited liability company (LLC) under the TLLCA and reduced the likelihood of inadvertently including provisions that would keep an LLC from being taxed as a partnership. Before H.B. 1239 passed, the TLLCA relied heavily on incorporation by reference to the TBCA and the TMCLA; as a result of the bill, the TLLCA now more specifically spells out what is incorporated by reference. A new Part Eleven was added to the TLLCA to authorize the creation of professional LLCs with a liability shield comparable to that afforded to a professional corporation. The amendments also added new merger provisions in TLLCA Part Ten, modeled after § 2.11 of TRLPA and TBCA art. 5.16, which specifically permit LLCs to merge with other entities.

6. **Texas Non-Profit Corporation Act (HB. 1494).** The TNPCA¹⁷¹ was updated by this bill to ensure that Texas remains an attractive state for non-profit corporations and to address the potential liability of directors in a manner that enhances the willingness of qualified people to serve as directors of non-profit corporations.¹⁷² Many of the changes conformed the TNPCA to the TBCA, while others simply eliminated ambiguities in the existing TNPCA.

The bill included provisions (i) allowing names to be reserved; (ii) allowing a registered agent to change with one filing its address with respect to all corporations for which it is registered agent; (iii) defining the powers of the members, the board and other non-profit corporations specified in the articles of incorporation to amend the articles and amend, repeal or adopt bylaws (including a provision allowing the board of directors to adopt certain nonsubstantive amendments to the articles); (iv) dealing with the setting of record dates and the maintenance of lists of members entitled to notice of and to vote at meetings; (v) deleting references to trustees as being distinct from directors and permitting a variety of names for governing bodies to be used by all non-profit corporations (board of directors is defined as the members vested with the management of the affairs of the corporation, irrespective of the name by which such group is designated), and clarifying that, regardless of the name given the board of directors, their duties and liabilities are those of directors as set forth in the TNPCA and not those of trustees as contemplated by the Texas Trust Act or the common law; (vi) allowing a corporation to vest the management of its affairs in

¹⁷⁰ To make Texas a more favorable domicile for corporations registered as investment companies (“mutual funds”) under the Investment Company Act of 1940 (“1940 Act”), (i) Sec. C. was added to TBCA art. 2.12 to permit an open end mutual fund to create and issue new classes or series of shares (portfolios or types of funds), or to increase, decrease or delete the authorized shares of any existing class or series, without shareholder approval (the provision was based on Md. Gen. Corp. L. sec. 2-105(c)); (ii) Sec. D was added to TBCA art. 2.24 to provide that, if the articles of incorporation or bylaws so provide, a mutual fund is not required to hold an annual meeting of shareholders or elect directors in any year that the election of directors is not required to be acted upon under the 1940 Act (the provision was based on Md. Gen. Corp. L. sec. 2-501); and (iii) Sec. B was added to TBCA art. 2.32 to provide that a mutual fund director, unless removed in accordance with the articles of incorporation or bylaws, holds office for the term for which the director is elected and until the director’s successor has been elected and qualified.

¹⁷¹ TEX. REV. CIV. STAT. ANN. arts. 1396-1.01 *et seq.* (Vernon 2003 & Supp. 2005).

¹⁷² See J. Michael Wylie, *A Review of the 1993 Amendments to the Texas Non-Profit Corporation Act*, 30 BULL. OF SEC. OF BUS. L. 31 (No. 4, Dec. 1993).

either its board of directors or its members; (vii) addressing the election and removal of directors; (viii) allowing directors and officers to rely on certain information, opinions, reports and statements when they do not have the knowledge to make such reliance unwarranted; (ix) setting forth standards of conduct for directors (generally in good faith in a manner reasonably believed to be in the best interests of the corporation); (x) applying the TBCA provisions regarding procedures to validate interested director or member transactions; (xi) allowing a board of directors to adopt certain nonsubstantive amendments to the articles of incorporation without member approval; (xii) providing for the delayed effectiveness of certain filings; and (xiii) allowing the board of directors to fully delegate investment decisions to a paid advisor.¹⁷³

7. **Amendments to Texas Credit Code Allowing Correction of Certain Violations (H.B. 2005).** This bill amended Article 5069-1.06 of the Texas Credit Code to allow a lender to avoid liability for usury violations if the lender corrects the violation within 60 days of discovery and notifies the borrower of the correction before the borrower has given the lender written notice of the claim.
8. **Reinstatement of the Doctrine of Forum Non Conveniens (S.B. 2).** This bill reintroduced the doctrine of forum non conveniens for Texas courts and thereby overturned the Supreme Court's decision in *Dow Chemical Co. v. Alfaro*.¹⁷⁴ The bill, applicable to causes of action filed on or after September 1, 1993, amended Chapter 71 of the Texas Civil Practices & Remedies Code to provide that a court may, on written motion of a party, decline jurisdiction and stay or dismiss an action, in whole or in part, (i) with respect to a claimant that is not a legal resident of the United States, upon a finding that such action would be more properly heard in a forum outside Texas; and (ii) with respect to a claimant who is a legal resident, if the moving party proves by a preponderance of the evidence that: (a) another appropriate forum offers a remedy and would provide a fair, convenient place of trial; (b) trial in the current forum would cause a substantial injustice to the moving party, and the balance of the private interests of the parties and the public interest of the state predominates in favor of the other forum; and (c) the stay or dismissal would not result in unreasonable duplication or proliferation of litigation. Defendants must submit to the alternate jurisdiction and waive any statute of limitations defenses before any stay or dismissal will be granted. A *forum non conveniens* motion must be filed not later than the time required for a motion to transfer venue.
9. **Repeal of Texas Constitution Article XII Section 6 (H.J.R. 57).** Article XII, Section 6, of the Texas Constitution limited the forms of consideration for which stock and bonds of a corporation could be issued.¹⁷⁵ Though the dangers of watered stock had disappeared, Article XII, Section 6, continued to unnecessarily restrict the financing of Texas business, and prevented Texas from adopting modern TBCA provisions, which greatly simplify the rules relating to the issuance of stock and debt

¹⁷³ *Id.*

¹⁷⁴ *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674 (Tex. 1990).

¹⁷⁵ TX. CONST. art. XII, § 6.

by corporations.¹⁷⁶ The repeal of Article XII, Section 6, required the Foundation to obtain the concurrence of both the House and the Senate to putting the issue before the voters and then the approval of the general public of the repeal. On November 2, 1993, the voters, by a vote of 541,456 (53%) to 481,688 (47%), repealed Article XII, Section 6. An amendment to TBCA art. 2.16 made in 1991 in anticipation of the repeal of Article XII, Section 6, became operative upon its repeal.

The Foundation also contributed to the demise of bills to regulate food franchises, give the State Securities Board and other agencies fining authority, and make usury laws applicable to secondary market transactions in debt securities.

Unfortunately, the Foundation did suffer some casualties, although that was to be expected given the aggressiveness of its Legislative agenda. The Foundation lost its usury, negotiable instruments, contractual choice of venue, and DTPA bills. Thus, the Foundation had the start of its agenda for the 1995 legislative session.

The Foundation's legislative counsel team was again led by Sandy Sanford and included John Kuhl, Val Perkins and Robert Spellings, all of Austin. Professor Alan R. Bromberg of Southern Methodist University played a role in every bill passed or killed, in addition to leading the effort on the Partnership Bill. John C. Ale of Houston, W. Alan Kailer of Dallas and Steven A. Waters of San Antonio also played key roles in the passage of TRPA. Scott Cohen and George W. Coleman, both of Dallas, shepherded the Business Organizations Bill through. Daryl B. Robertson of Dallas led the struggle to get the TB&CC Bill through the legislative obstacles, and was assisted by Prof. Russell Weintraub of the University of Texas and others. The TNPCA amendments were orchestrated by Mr. Tankersley. The credit for initiating the repeal of Texas Constitution Article XII, Section 6, goes to J. Patrick Garrett of Houston, while Prof. Bromberg, Mr. Egan and others wrote explaining the need for the repeal and urging editorial support thereof.¹⁷⁷ The Foundation's Covenants Not to Compete Bill effort was led by Robert F. Gray, Jr. of Houston, who received critical support from David Greenlee of Fort Worth and Prof. Lebowitz. Many other lawyers produced much-needed calls and letters to key legislators that gave the bills a push at crucial times. As a result of these collective efforts, the Foundation is now a well-known and well-respected force in the Legislature.

X. LEGISLATIVE PROGRAM OF THE FOUNDATION IN 1995

The Foundation's extensive legislative experience and recognition in the State Capitol set the stage for the 1995 legislative session. The Foundation had 62 directors and its officers consisted of B. Dennis Anderson of Houston, Chairman; Cullen M. Godfrey of Dallas, Vice Chairman; David A. Schwarte of Fort Worth, Secretary; and Sally A. Schreiber of Dallas, Treasurer. Alan R. Bromberg of Dallas, Judith C. Glaubig of Houston, and Daryl B. Robertson of Dallas were Co-Chairmen of the Board's Legislative Committee.

¹⁷⁶ Alan R. Bromberg & Byron F. Egan, *A Chance to Trim Texas' Bloated Constitution*, HOUS. CHRONICLE, Oct. 27, 1993, at 10B.

¹⁷⁷ *Id.*

The legislative program of the Foundation in 1995 was extensive. The results were as follows:

Bills Sponsored by the Foundation and Passed by the Legislature:

1. **Business and Commerce Code Bill (H.B. 1728):** This bill amended the TB&CC to completely revise Chapter 3 (Negotiable Instruments) and substantially revise Chapter 4 (Bank Collections and Deposits). Revised Chapters 3 and 4 are based on revisions to Articles 3 and 4 of the Uniform Commercial Code which were approved by the National Conference of Commissioners of Uniform State Laws (“NCCUSL”) and the American Law Institute. In general, the revisions remove certain impediments to the use of modern technologies and clarify troublesome issues in existing law. The revisions to Chapters 3 and 4 have been adopted in more than 40 states.
 - **Benefits Achieved.** Revised Chapters 3 and 4 remove numerous uncertainties that exist in the current provisions and clarify troublesome issues to allow appropriate business planning and to reduce litigation. The revisions also allow better use of modern technologies, thereby increasing speed and reliability and lowering costs to banks and their customers. The changes to Chapter 4 are intended to expedite the availability of funds to customers and to reduce risks to banks by increasing conformity with Regulation CC.
 - **Scope.** The type of contracts covered by Chapter 3 has been clarified, thereby promoting certainty of legal rules and reducing litigation costs and risks. Checks that omit “words of negotiability” are nevertheless fully negotiable. Travelers’ checks are clearly brought within the scope of Chapter 3. Also, variable interest rate instruments are negotiable under Chapter 3. Clarifications have been made with respect to the impact of the FTC “Holder” Rule and the ability of parties to instruments outside Chapter 3 to contract for the application of its rules. The definition of “bank” is expanded for purposes of revised Chapters 3 and 4 to clearly include savings and loans and credit unions so that their checks are directly governed by the TB&CC. Revised Chapter 4 clarifies that checks drawn on credit lines are subject to the rules for checks drawn on deposit accounts.
 - **Automation.** Revised Chapters 3 and 4 remove certain impediments to the use of automation and other modern technology. They do not allow disclaimer of warranties for checks, thus protecting banks against losses from unauthorized endorsements, alterations and the like. Revised Chapter 4 (i) provides warranties by the depository bank against misencoding errors on checks; (ii) allows a depository bank to become a holder without obtaining or supplying a customer’s actual physical endorsement; (iii) clarifies that failure of equipment or interruption of computer facilities may be an excuse with respect to the midnight and other deadlines; and (iv) allows the bank to check the account balance once within its midnight deadline and not be liable if it dishonors on that basis and a later credit arrives. A definition of “ordinary care” has also

been added. This definition clarifies that financial institutions that take checks for processing or payment may use automated means without manual handling. To constitute “ordinary care,” automated check handling must be consistent with the bank’s policies and may not vary unreasonably from the general usage of banks.

- **Definition of “Good Faith.”** The definition of “good faith” is expanded to include observance of reasonable commercial standards of fair dealing. This objective standard applies to the performance of all duties under Chapters 3 and 4.
- **Accord and Satisfaction.** Detailed new rules have been added with respect to accord and satisfaction of bona fide disputes through the tender of a full settlement check. Mistaken deposits of checks offered in full settlement may be reversed by return of the funds within 90 days. Creditors may designate a particular office for receipt of full settlement checks.¹⁷⁸
- **Cashier’s Checks.** Detailed provisions have been added that improve the acceptability of bank obligations (cashier’s checks) as cash equivalents. Disincentives have been added for wrongful dishonor, including possible recovery of consequential damages. If a cashier’s check is lost or stolen, revised Chapter 3 provides a customer a remedy to recover the value of the check but with protection for the bank.¹⁷⁹
- **Statute of Limitations.** Special statutes of limitations have been added by revised Chapters 3 and 4 so that the law is uniform among states.
- **Truncation.** “Truncation” means that the depository bank retains a check for safekeeping and forwards key information from the check electronically to the payor bank. Revised Chapters 3 and 4 recognize and facilitate truncation by agreement, but do not require it. Chapter 4 authorizes electronic presentment of items, and related provisions remove other impediments to truncation.¹⁸⁰
- **Forgeries and Alterations.** The rules for allocation of loss from forgeries and alterations have been reformed in an attempt to reduce litigation. If a bank is negligent with respect to the handling of a check, a comparative negligence standard is adopted and the loss is shared, unlike the present absolute rule where the customer may be precluded from bringing a claim against the bank if the customer is also negligent.¹⁸¹
- **Fiduciary Provisions.** Chapter 3 protects drawers and persons owed a fiduciary responsibility by imposing stricter standards for obtaining holder in

¹⁷⁸ TEX. BUS. & COM. CODE ANN. § 3.311 (Vernon 2004).

¹⁷⁹ *Id.* at § 3.312.

¹⁸⁰ *Id.* at § 4.110.

¹⁸¹ *Id.* at § 3.404.

due course rights by a person dealing with the defaulting fiduciary.¹⁸²

2. **Uniform Unincorporated Nonprofit Association Act Bill (H.B. 1661).** This bill added to the Texas statutes the Uniform Unincorporated Non-Profit Association Act, which was approved by NCCUSL in 1992.¹⁸³ The statute allows unincorporated non-profit associations to own and convey property, bring and defend lawsuits, and exercise other privileges accorded legal entities. The association is treated as a legal entity separate from its members. The statute also limits the vicarious liability of individual members of the association for its contracts and torts.
3. **Texas Environmental, Health, and Safety Audit Privilege Act Bill (H.B. 2473).** The statute provides that reports prepared as a result of a voluntary environmental or health and safety evaluation of a facility or operation regulated under the state's environmental or health and safety laws would not be admissible as evidence in any civil, criminal or administrative proceeding, subject to certain specified exceptions.¹⁸⁴ Similar environmental legislation has been enacted in at least three states and is pending in several others.
 - **Privilege.** A party asserting the privilege would have the burden of proof, and the availability of the privilege would be determined in camera under the Texas Rules of Civil Procedure. Any waiver of the privilege must be express. A court may require disclosure of audit information if it finds that the privilege is asserted for a fraudulent purpose, that the material is not eligible for the privilege or that the material shows that the owner/operator did not take reasonable steps to correct noncompliance with environmental or health and safety laws.
 - **Type of Information.** The privilege will not apply to information that is otherwise required by law to be reported to regulatory agencies, information that regulatory agencies collect through their own inspection activities, and information obtained from a source not involved with the preparation of the audit.
 - **Presumption Against Penalties.** The bill provides a rebuttable immunity presumption from administrative, civil or criminal penalties of a violation found through an audit if (i) the violation is voluntarily disclosed to a regulatory agency; (ii) reasonable steps are initiated and completed to correct the violation; and (iii) the person discovering the violation cooperates with the regulatory agency. Willful, intentional or reckless violations will not be protected by this immunity.
4. **Real Estate Investment Trust Act Bill (S.B. 1617).** This bill substantially revised the Texas Real Estate Investment Trust Act. The act was revised to some

¹⁸² *Id.* at § 3.206.

¹⁸³ Texas Uniform Unincorporated Nonprofit Association Act of 1995, TEX. BUS. ORG. CODE § 252 (Vernon 2004).

¹⁸⁴ TEX. REV. CIV. STAT. ANN. Art. 4477cc (Vernon 2004).

degree in 1989, but had not been thoroughly overhauled since its adoption almost 33 years before. The new provisions are intended to parallel in many respects the modern provisions of the TBCA.

Bills Sponsored by the Foundation and Not Passed by Legislature:

1. **Business Organizations Bill (FIB. 1425).** This bill would have amended the Texas Business Corporation Act, the Texas Non-Profit Corporation Act, the Texas Miscellaneous Corporations Laws Act, the Texas Limited Liability Company Act, the Texas Revised Partnership Act, and the Texas Revised Limited Partnership Act.
 - **Conversion.** The bill would have added provisions intended to permit a transaction called a conversion. In a conversion, a Texas entity (j. corporation, limited partnership, limited liability company, etc.) would have been able to convert to another form of Texas business organization by filing articles of conversion with the Texas Secretary of State and without the necessity of forming the new organization and then doing a merger or transfer of assets. The organization would continue in existence without interruption but in a different form.
 - **Business Combinations With Affiliated Shareholders.** The bill would have added a new Part Thirteen to the TBCA, which includes a business combination law modeled on § 203 of the Delaware General Corporation Law and a similar statute in New York. Under these provisions, certain business transactions between a public Texas corporation and a shareholder beneficially owning 20% or more of its outstanding stock would be prohibited for a three-year period after the acquisition of the 20% ownership. The prohibition would not apply if two-thirds of the unaffiliated shareholders approve the transaction at a meeting (not by written consent) or the board of directors approves the transaction or the shareholder's acquisition of shares prior to the acquisition.
 - **Shareholder Agreements.** Amendments would have allowed all shareholders by agreement to modify the powers of the board of directors of a Texas corporation. "Close" corporation status would not have to be elected to enter into these kinds of agreements. These provisions were modeled on the Revised Model Business Corporation Act.
 - **Derivative Provisions.** New statutory standards for dealing with derivative actions, which are based on the derivative action provisions of the Revised Model Business Corporation Act, would have been added to the TBCA. Procedures would have been codified under which a disinterested and independent group of directors may determine the appropriate action that should be taken with respect to a derivative proceeding. These changes also incorporated concepts from the ALI Corporate Governance Project.
 - **Shares and Debt Consideration.** Changes would have been made to certain provisions of the TBCA and the Texas Miscellaneous Corporation Laws Act to

expand the types of consideration permitted to be received by a corporation in exchange for issuance of shares. These changes are now permitted by the 1993 Constitutional amendment removing the prior restrictions on types of legal consideration for shares.

- **Broker Non-Votes.** TBCA Article 2.28 would have been amended to clarify the effect on a vote of shares that do not vote for or against or expressly abstain on a particular matter.
- **Elimination of Merger Plan Filing Requirements.** The filing process for mergers and exchanges of stock would have been simplified to eliminate the filing of the plan of merger or exchange with the Texas Secretary of State. These changes were intended to simplify the filing process and conform Texas law to Delaware law.
- **Interested Director/Officer Transaction.** With respect to contracts between an interested director or officer and a corporation that are approved by the shareholders or the disinterested directors, amendments would have been made that were intended to reject certain Delaware cases that have raised questions about the validity of these contracts in certain circumstances.
- **Single Business Enterprise Protection.** The protections afforded by TBCA Article 2.21 to shareholders against alter ego liability would have been extended to affiliates of the corporation. An amendment that would have eliminated the failure to comply with corporate formalities as a basis for piercing the corporate veil for any “obligation” (as opposed to a mere “contractual obligation”) of a corporation, was removed from the bill by a House Committee.
- **Other Amendments.** Other amendments to the TBCA, the Non-Profit Corporation Act, the Miscellaneous Corporations Laws Act, the Limited Liability Company Act, the Revised Partnership Act, and the Revised Limited Partnership Act would have been technical in nature or clarifying or conforming changes.

The bill was passed by the House, but it was not passed by the Senate, although it reached the Senate “intent calendar” on the last day of the session.

2. **Texas Securities Act Amendment Bill (2563).** This bill would have amended the Texas Securities Act to limit liability of lawyers, accountants, and other professionals in connection with offerings of \$5,000,000 or less of the securities of small business issuers. For violations of the Act, these professionals could be found liable for not more than three times their fees. A small business issuer does not have any securities registered under Section 12 of the Securities Exchange Act of 1934 and has annual gross revenues of \$25 million or less.¹⁸⁵ The bill was passed by the House but was not recommended out of the Senate Committee before the deadline.

¹⁸⁵ 15 U.S.C.A. § 781 (West 1997).

3. **Indemnification and Release Agreement Bill (RB. 99; S.B. 611).** This bill would have revised section 35.43 to the TB&CC. Section 35.43 would have provided that the enforceability of indemnification agreements and release agreements will not be affected by the fact that such agreements do not meet particular disclosure criteria requirements and that such agreements be set forth conspicuously or be expressed through the use of particular language. The new statute would have applied only to commercial transactions and would not have affected any requirement that such agreements meet particular disclosure criteria in consumer transactions. It was designed to modify the fair notice requirements enunciated in the Texas Supreme Court case of *Dresser Industries. v. Page Petroleum*.¹⁸⁶ As originally drafted, the bill would have also negated the express negligence test established by the Texas Supreme Court in *Ethyl Corp. v. Daniel Construction Co.*¹⁸⁷ Under this test, the intent of an indemnified party to be exculpated from his own negligence must be specifically stated in the indemnity contract. Because of criticism from various parties against abandonment of the express negligence test, the portion of the bill reversing the *Ethyl* case had been removed. The bill was never passed out of the requisite Senate or House Committees during the session.
4. **Contractual Choice of Venue Bill (H.B. 249).** This bill would have added a new § 15.002 to the Civil Practice and Remedies Code. This new section would have provided that in a major transaction (defined as a transaction involving consideration of \$1 million or more), the parties may agree in writing that any suit arising from the transaction must be brought in a particular jurisdiction, and such an agreement would be enforced if the action were brought in that jurisdiction. The bill was a casualty of tort reform in the sense that it was categorized as a tort reform bill that was not part of the compromise package and was blocked from the outset.
5. **Credit Code Amendments Bill (H.B. 3071; S.B. 1473).** This bill would have revised certain provisions in Chapter 1 of the Texas Credit Code. The latest version of the bill would have excluded from the definition of interest the following in the case of a qualified commercial loan: (i) options, conversion rights, and equity participations; (ii) guaranties; and (iii) underwriter's discounts or commissions. A qualified commercial loan is a loan for purposes of business, commercial, investment or other similar purposes in the original principal amount of \$5 million or more. The original form of the bill would have eliminated the draconian penalties for contracting for usurious interest, excluded prepayment premiums from the definition of interest, and made numerous other reforms to the usury statute. These other reform provisions were removed from the bill by a House Committee.

The bill passed out of House Committee but was not passed by the House before the May 8 deadline for passage of House-originated bills. The bill was then introduced in the Senate but was not passed by the Senate prior to the May 19 deadline for passage of Senate-originated bills. Attempts to add it as an amendment to another Credit Code bill (H.B. 3101) were temporarily successful, but eventually

¹⁸⁶ 853 S.W.2d 505 (Tex. 1993).

¹⁸⁷ 725 S.W.2d 705 (Tex. 1987).

failed.

6. **Covenants Not to Compete Bill (H.B. 644; S.B. 511).** As originally introduced, this bill would have (i) repealed existing TB&CC § 15.50, the statute that now establishes the criteria for enforceability of covenants not to compete; and (ii) added a new Chapter 20 to specify those criteria. The new Chapter 20 was designed to modify the holding in *Light v. Centel Cellular Co. of Texas*, in which the Texas Supreme court declined to enforce a non-competition covenant in an at-will employment contract on the grounds that the covenant was not ancillary to an otherwise enforceable agreement within the meaning of Chapter 15.¹⁸⁸ The new Chapter 20 also would have eliminated geographical restrictions as criteria for enforceability of covenants relating to non-solicitation of customers or other employees. The original bill received substantial criticism from Committee members at House hearings, and a more modest revision of § 15.50 of the TB&CC was substituted.

The revised bill, S.B. 511, attempted to modify the holding in *Light* by clarifying that a non-competition covenant is enforceable if it is ancillary to or part of an “otherwise valid transaction or relationship” as an alternative to the current statutory language of an “otherwise enforceable agreement.” It also would have clarified that the covenant is not enforceable to the extent it contains limits on scope of activity, duration, or territory that are unreasonable or impose a restraint greater than is necessary to protect the goodwill or other business interest of the promisee.

The bill was passed in its two different forms by the Senate but was never reported out by House Committee.¹⁸⁹ The bill was not approved by the House Committee due to the continuing policy objections by certain Committee members to use of non-competition covenants in at-will employment relationships.

Bills Endorsed and Supported by the Foundation:

1. **Professional Service Negligence Bill (JIB. 506).** This bill was sponsored by other groups but was endorsed and supported by the Foundation. It provided an exception to the joint and several liability provisions of the Civil Practice and Remedies Code for professional service negligence. Because of the more general tort reform bill relating to joint and several liability, which was eventually passed by the Legislature, the bill was never recommended out by House Committee. However, the concept of an exception for professional service negligence was incorporated in the DTPA tort reform bill passed by the Legislature and described below.
2. **Charitable Corporations as Trustee Bills (S.B. Nos. 1250 and 1251).** These bills were sponsored by other groups but were endorsed and supported by the Foundation. The bills would have amended (i) the powers provision of the Texas Non-Profit Corporation Act to empower Texas non-profit corporations to serve as

¹⁸⁸ *Light v. Centel Cellular Co. of Texas*, 883 S.W.2d 642, 648 (Tex. 1994).

¹⁸⁹ S.J. of Tex., 74th Leg., R.S. 1335 (1995).

trustees of trusts of which they are beneficiaries and (ii) the exemption provisions of the Texas Banking Code to provide that a non-profit corporation serving as a trustee is not conducting a banking or trust business. These bills were never recommended out by Senate Committees.

Bills Opposed by the Foundation:

1. **Indemnity Agreements for Refineries or Chemical or Power Plants (H.B. 1526).** This bill would have amended the Civil Practice and Remedies Code to expand existing provisions that void certain agreements purporting to indemnify a person against his own negligence. The scope of the provisions would have been expanded from oil and gas and mining agreements to also include construction contracts for refineries, chemical plants and power plants. Because the Foundation viewed this bill as in direct conflict with its indemnity and release agreement bill (H.B. 99), the Foundation elected to oppose this bill, and it was never recommended out by the House Committee.
2. **Liability of Parties to Real Estate Improvements Contract (S.B. 757).** The bill would have limited the liability of a party to a contract to improve real property to damages for his own negligence. It prohibited the transfer of liability for a party's own negligence by any means, including through a contract. Because the Foundation viewed this bill as in direct conflict with its indemnity and release agreements bill (H.B. 99), the Foundation elected to oppose this bill, and the bill was never recommended out by the Senate Committee.

Bills Monitored by the Foundation:

1. **Revised Chapter 8 of the Texas Business and Commerce Code (Together With Companion Amendments to Chapter 9) (H.B. 3200).** This bill substantially revised TB&CC Chapter 8 (Investment Securities) and makes companion amendments to Chapter 9 (Secured Transactions). Chapter 8 is revised to cover the indirect, as well as direct, holding system for securities. The indirect holding system includes a multi-tier pyramid of securities accounts at securities intermediaries and depository companies. Rules are adopted and new concepts and terms are added to cover the indirect holding system. The Chapter 9 amendments allow creation of a perfected security interest in securities held through a securities account at a securities intermediary.
2. **DTPA Tort Reform Bill (H.B. 668).** This bill substantially amended the Deceptive Trade Practices and Consumer Protection Act (DTPA) and forms part of the 1995 Texas Legislature's tort reform package.¹⁹⁰ The bill was primarily sponsored by other groups. The Foundation, however, specifically endorsed and supported inclusion in the bill of an exemption for professional services negligence. The final bill contained a provision exempting from the DTPA the rendering of a professional service, which is "the providing of advice, judgment, opinion or similar

¹⁹⁰ Texas Deceptive Trade Practices Act is codified at TEX. BUS. & COM. CODE §§ 17.41-17.63 (Vernon 2002).

professional skill.” The exemption did not include (i) an express factual misrepresentation, breach of warranty or unconscionable act that cannot be characterized as advice, judgment or opinion; or (ii) a failure to disclose information in violation of the TB&CC.¹⁹¹

In addition to the professional service exception, the bill expands a consumer’s right to waive the benefits of the DTPA. Enforceable waivers require representation of the consumer by legal counsel (who may not be identified, suggested, or selected by seller), lack of significantly disparate bargaining position, and specific conspicuous, bold-face waiver language. Gross consideration disparity is removed from the definition of “unconscionable action” in TB&CC.¹⁹²

The bill also excludes from the DTPA a transaction or project involving total consideration by the consumer of more than \$500,000, other than the consumer’s residence. If the consumer is represented by an attorney who is not identified, suggested, or selected by the defendant, the \$500,000 maximum is reduced to \$100,000. Actions for bodily injury or death or for the infliction of mental anguish are also exempted. Unless the cause of action arises under another law, consumers may only recover economic damages except: (i) if the conduct was committed knowingly, the consumer can recover damages for mental anguish but the trier of fact may not award more than three times the economic damages; or (ii) if the conduct was committed intentionally, the consumer may recover damages for mental anguish but the trier of fact may not award more than three times the economic damages and the mental anguish damages. Venue based on the place of business of defendant is eliminated. Venue is the same as Chapter 15 of the Civil Practice & Remedies Code plus any county where the defendant or his agent solicited the transaction.

Compulsory mediation may be obtained for controversies over \$15,000 by either party within 90 days after the service date of the pleading. A new, expanded section on settlement offers is added to the DTPA by the bill. If the damages found by the trier of fact are equal to or less than the settlement offer, the consumer’s damages are limited to the settlement offer plus his attorney’s fees prior to the settlement offer (unless the offer included such fees).

The Foundation’s legislative agenda for 1995 was far reaching and further enhanced the Foundation’s reputation and impact in the Legislature and the community. Important legislation was conceived and enacted as a result of the Foundation.

XI. LEGISLATIVE PROGRAM OF THE FOUNDATION IN 1997

The Foundation continued an ambitious legislative program in the 1997 legislative session. The Foundation was led by Chairman Cullen M. Godfrey of Dallas and Vice Chairman Charles Szalkowski of Houston, and it received extensive assistance from its

¹⁹¹ TEX. BUS. & COM. CODE § 17.49(c)(1)-(2) (Vernon Supp. 2004).

¹⁹² *Id.* at 2989.

esteemed legislative counsel, Sanford Kuhl & Perkins. The successes of the Foundation in 1997 were great, but the losses were disappointing. In 1997, Governor Bush's tax reform was the 800-pound gorilla that dominated the legislature's attention.¹⁹³

Bills Sponsored by the Foundation and Passed by Legislature:

1. **Business Organizations Bill (BOB IV) (S.B. 555; H.B. 1104).** The Business Organizations Bill was a culmination of three years and many long hours of work by members of the Foundation and the Business Law Section of the State Bar of Texas. This bill was finally considered by the Texas Legislature and passed. One of its chief purposes was to conform the several statutes dealing with Texas business organizations, including the Texas Business Corporation Act, the Texas Miscellaneous Corporation Laws Act, the Texas Limited Liability Company Act, the Texas Revised Limited Partnership Act, and the Texas Revised Partnership Act. Included were some significant changes benefiting limited liability partnerships as well as conversion provisions for changing the form of legal entities.
2. **Credit Code Amendments (Usury Bill) (H.B. 1971; S.B. 1649).** The Usury Bill received much attention in 1997 and, again, due to the heroic efforts of our legislative counsel, was passed with few amendments. The major aspect of this bill was to eliminate or substantially circumscribe the penalties for usury. Now, usurious interest must be collected, not just be contracted for, and the lender must receive notice and an opportunity to cure. Other provisions give lenders the opportunity for equity kickers in large transactions without running afoul of usury limitations. The Usury Bill culminated a three-session effort led by Dennis Anderson and Scott Sheehan of Houston and Dan Nicewander of Dallas.
3. **Securities Act Amendment (Small Offerings Exemption) (H.B. 1507; S.B. 808).** The Securities Act Amendment received less fanfare and was easily passed. The statute places a limit on liability for those lawyers, accountants and other advisors involved in small issuer transactions.
4. **Anti-Environmental Audit Legislation (H.B. 1571).** Finally, the Environmental Audit Privilege Bill was supported by the Foundation and presented in defense to the Anti-Environmental Audit Bill, which was directly in opposition to the Foundation's Environmental Self Audit Privilege Bill passed in the 1995 legislative session.
5. **Corrective Environmental Audit Legislation (H.B. 3459, S.B. 1585).** This was corrective legislation.

The Foundation sponsored several bills which did not pass, although UCC Art. 5 and Contractual Choice of Venue were passed in the 1999 session and the groundwork was laid for their passage in the 1997 session.

¹⁹³ See, e.g., Wayne Slater, *Legislators End Session Dominated by Tax Issue*, DALLAS MORNING NEWS, Jun. 3, 1997, at 1A.

Bills Sponsored by the Foundation and Not Passed by Legislature:

1. **Non-Profit Corporations Bill (S.B. 554; H.B. 1172).**
2. **UCC Art. 5 (Letters of Credit) (H.B. 1560; S.B. 547).**
3. **Attorney-Client Privilege (S.B. 953; H.B. 2419; N.B. 2476).**
4. **Indemnification & Release.**
5. **Anti-Indemnity (H.B. 961; S.B. 530).**
6. **Large Contractor Exemption to Drilling Contract Anti-Indemnity Law (S.B. 1604; H.B. 3033).**
7. **“Disclosure Criterion” Relief in Drafting I & R Provisions (S.B. 1605; H.B. 3041).**
8. **Other-Anti-Additional Insured (H.B. 2630).**
9. **Contractual Choice of Venue (H.B. 2547; S.B. 1855).**
10. **Covenants Not to Compete (S.B. 885; N.B. 2988).**

XII. LEGISLATIVE PROGRAM OF THE FOUNDATION IN 1999

The Foundation was led by Charles Szalkowski of Houston, Chairman and Michael W. Tankersley of Dallas, Vice Chairman. The 1999 legislative session saw the introduction of a gigantic Business Organizations Code bill, which would take three sessions to finally pass.

Bills Sponsored by the Foundation and Passed by Legislature:

1. **UCC Art. 5 (Letters of Credit) (S.B. 85).** This bill was a carry-over from the 1997 legislative session and revised Business & Commerce Code Chapter 5 on letters of credit to enhance commercial acceptability of letters of credit.
2. **UCC Art. 9 (Secured Transactions) (S.B. 1058; H.B. 2606).** Kudos were due to Professor David East of South Texas Law School for a nice double on UCC legislation. Texas was the second state (after California) to enact revised Article 9. The Foundation helped include some non-uniform amendments unique to Texas.
3. **Art. 9 Electronic Filing (S.B. 478, 479; H.B. 1306, 1307).** Things finally worked out for the Secretary of State’s electronic filing bills, which were originally detached from the Foundation’s bill for fear it would bog down.
4. **Finance Code Amendments (Usury Bills) (CSSB 172; CSSB 1201; H.B.**

2779, 2780 and 2781; CSHB 2180). CSSB 172 (Bundle of Loans and Qualified Commercial Loan Floor) and H.B. 2781 (Bundle of Loans) and H.B. 2180 (Corrections Amendment) made minor amendments to the Finance Code.

5. **Contractual Choice of Venue (S.B. 648; H.B. 1272).** This bill was also a carry-over from the 1997 legislative session.
6. **Euro Dollar Conversion (S.B. 1619; H.B. 2585).** This bill provided that, if a contract specifies payment in one of the national currencies that is being replaced by the "Euro," the Euro is a commercially reasonable substitute and may be used to determine value.
7. **Y2K Legislation (S.B. 598; H.B. 9).** Signed, effective May 19, 1999. This bill limited liability for year 2000 computer date failures.

Bills Sponsored by the Foundation and Not Passed by Legislature:

1. **Business Organizations Code (Big Bob) (H.B. 2681).**
2. **Contractual Indemnity (S.B. 1404).**
3. **Charitable Annuities (S.B. 333; H.B. 823).**

XIII. LEGISLATIVE PROGRAM OF THE FOUNDATION IN 2001

The Foundation continued to expand its legislative program for the 2001 session. The officers of the Foundation consisted of Michael W. Tankersley of Dallas, Chairman; Daryl Robertson of Dallas, Vice Chairman; Judith C. Glaubig of Houston, Secretary; and David Greenley of Fort Worth, Treasurer. The focus of the legislative effort by the Foundation continued to be the Business Organizations Code bill, which reached the 10-yard line, but did not get over the goal line in 2001.

Bills Sponsored by the Foundation and Passed by Legislature:

1. **Uniform Electronic Transactions Act (H.B. 1201; S.B. 393).** UETA answered a variety of questions raised by the increasing incidence of electronic commerce. The Federal Uniform Electronic Signatures Act recently enacted by Congress covers some of the same ground, but provides for state preemption through legislation of this sort. UETA was passed into law in 2001.
2. **UCC Article 9 Technical Amendments (H.B. 1367; S.B. 433).** Based upon lobbying efforts of the Foundation, Texas was among the first states to adopt the revised UCC Article 9 in the 1999 session, but applied a delayed adoption date to the bill of January 1, 2001. As might be expected with a bill of this magnitude, a number of technical corrections were needed and were passed into law in 2001.

Bills Sponsored by the Foundation and Not Passed by Legislature:

1. **Business Organizations Code (H.B. 327; S.B. 967).** When enacted, the Business Organizations Code will be the first business organization law in the United States to codify and integrate substantially all of a state's business organization laws. This project generated national attention. The Code is based upon a hub and spoke concept that has already drawn national attention for its innovations. The hub contains provisions that are generally applicable to all business organizations—name selection and reservation, registered agent provisions, filing requirements and fees and the like—while each spoke contains provisions that are relevant to the particular type of business organization. It was opposed by the Texas Trial Lawyers Association in 2001 and did not pass.

XIV. LEGISLATIVE PROGRAM OF THE FOUNDATION IN 2003

The Foundation officers consisted of Daryl Robertson of Dallas, Chairman; Curtis Huff of Houston, Vice Chairman; J. Scott Sheehan of Houston, Secretary; and David Greenley of Fort Worth, Treasurer. The major goal of the Foundation in the 2003 legislative session, as it had been in 1999 and 2001, was passage of the Business Organizations Code bill. In 2003 the bill finally crossed the goal line, thanks to the heroic efforts of Chairman Daryl Robertson.

Bills Sponsored by the Foundation and Passed by Legislature:

1. **Business Organizations Code (the Code) (H.B. 1156).** This mammoth project was also sponsored by the Foundation in the 1999 and 2001 Texas Legislatures. The Code incorporates, modernizes and reorganizes substantially all of the Texas business organization laws—the TBCA, the TNPCA, the TLLCA, the TRLPA, the TRPA, as well as others—into a single integrated code. It was drafted by the Codification Committee of the State Bar's Business Law Section consisting of experienced business law firm practitioners, solo lawyers, business law professors and representatives of the Secretary of State's office with the assistance of the Legislative Council. This huge bill can be downloaded from the website maintained by the Business Law Section of the State Bar of Texas at <http://www.texasbusinesslaw.org/>. It can also be downloaded from the Texas Legislature's website at <http://www.texasonline.com> as HB1156, as filed in the 2003 Legislature. The Business Law Section's Codification Committee prepared a detailed Revisor's Report identifying the source law for each section of the Code and providing background and reasons for various changes to be effected by the Code. The Code contains substantive changes from existing laws. The central Title 1 of the Code contains provisions that are generally applicable to all business organizations—name selection and reservation, registered agent provisions, filing requirements and fees and the like—while the other Titles contains provisions that are relevant to the particular type of business organization. The Code goes into effect on January 1, 2006.
2. **Texas Business Corporation Act Amendments (H.B. 1165).** This bill amends various provisions of the TBCA and Texas Miscellaneous Corporation Laws Act. These acts were in need of updating, since they had not been amended since

1997. The bill made a number of changes to these statutes to mirror changes effected by the Code and to update them to reflect changes made in Delaware.

3. **Limited Liability Company Act Amendments (H.B. 1637).** This bill amended the Texas Limited Liability Company Act, the Texas Revised Limited Partnership Act and the Texas Revised Partnership Act. The bill eliminates certain causes of dissolution of a limited liability company to conform to changes in federal tax laws and the practice of most other states. The bill permits admission of members to a limited liability company without making a capital contribution and admission as a general partner to a limited partnership without making a capital contribution. The bill also effects a number of other changes that are also made in the Code. Finally, the bill amends the Government Code to require the Secretary of State to maintain a public record of instruments filed with it evidencing the organization of any Texas entity. This change fixes a possible ambiguity caused by the definition of "registered organization" in Chapter 9 of the Uniform Commercial Code as adopted in Texas.
4. **UCC Article 1 General Provisions (H.B. 1394).** The National Conference of Commissioners on Uniform State Laws (NCCUSL) and the America Law Institute (ALI) have adopted a revised version of Article 1 of the Uniform Commercial Code. The bill adopted the uniform national version, with the exception that it retained existing, well-developed provisions of the Texas version of the UCC with respect to choice of law provisions.
5. **UCC Article 9 Technical and Other Amendments (S.B. 995).** Texas was among the first states to adopt the revised UCC Article 9 in the 1999 session. As might be expected with a bill of this magnitude, a number of technical corrections have been identified by NCCUSL and the ALI. This bill effects these technical amendments. In addition, the bill amends one section of UCC Article 9 to correct a perceived error with respect to the duration of financing statements represented by filed mortgages covering as-extracted collateral and timber to be cut.

Bills Sponsored by the Foundation and Not Passed by Legislature:

1. **Usury Amendments.** The Foundation also supported, but did not actively lobby for, a constitutional amendment and related legislation removing usury limits on commercial loans. The Foundation supported the work of other sponsors who funded efforts to draft and lobby for a constitutional amendment to clarify what constitutes interest for purposes of usury penalties in relation to commercial loans. These efforts of the other sponsors died in a House committee. The House has reviewed the usury issue through an interim study in 2004 led by Representative Solomons. A number of amendments to the Finance Code will be introduced as bills in the 2005 legislative session and the Foundation may elect to be involved in this activity.

XV. CONCLUSION AND THE FUTURE

As the Section and the Foundation look back on their achievements, there is justification for pride of accomplishment. As they look forward to the 2005 legislative session, there is

reason for confidence. Their leaders are seasoned in legislative affairs. Curtis Huff of Houston will be Chairman of the Foundation and Gail Merel of Houston will be Chairman of the Section. The Section and Foundation officers and committee chairs are prepared to lead, and the Foundation directors are in place to guide. The Business Law legislative agenda for 2005 will be equal to the tradition that has been established, and its success should be of equal measure.