THE EFFICIENT MERGER: WHEN AND WHY COURTS INTERPRET BUSINESS TRANSACTIONS TO TRIGGER ANTI-ASSIGNMENT AND ANTI-TRANSFER PROVISIONS

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I. INTRODUCTION

A basic presumption of contract law is that rights under agreements are assignable unless the agreement itself, a statute, or public policy provides otherwise.[1] This presumption ensures that each party to the contract gets precisely what they bargained for.[2] Additionally, the free transferability of

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[1] 3 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS §§ 11.2, 11.4 (2d ed. 1998); U.C.C. § 2-210(2) (2008); 3 RESTATEMENT (SECOND) OF CONTRACTS § 317(2) (1981).

[2] *See* Tenneco Inc. v. Enter. Prods. Co., 925 S.W.2d 640, 646 (Tex. 1996).

contract rights encourages parties to enter into business transactions because the parties are assured that all the rights, remedies, and benefits incidental to the property being acquired will transfer with the property.[3] Under this presumption, when multiple business entities are merged, the rights, powers, interests, and properties continue their existence, ultimately to be exercised by the surviving entity.[4] Without this presumption, it would not be efficient to merge business entities due to the additional legal costs and efforts required to ensure proper transfer and assignment of such rights, powers, and interests involved. When one or more parties choose to limit the ability of the other parties to assign and transfer rights, it is commonly accomplished through the inclusion of anti-assignment and anti-transfer provisions.[5] Thus, while the presumption of free-assignability creates a basis for mergers, the efficient merger only arises when the contracting parties embody this presumption through express contractual language describing the effect of a merger on pre-existing anti-assignment and anti-transfer clauses. By addressing pre-existing contractual language, the merging entities ensure that rights, powers, interests, and properties shift between the entities as intended in the agreement of merger.

Unfortunately, not every contract addresses the ability to assign and transfer certain rights. When a contract fails to address transfers or assignments and a later merger causes argument over the ability to assign or transfer, the state merger statute governing the transaction is used to fill in the gaps.[6] Thus, while companies generally merge with the expectation that the company resulting from the merger will have complete freedom to exercise the rights and powers of both the acquiring company and the acquired company, historically, the extent of such exercise depended upon the intention of the legislature as manifested in the statute governing the matter.[7] Absent any agreement to the contrary, the consolidated company

[3] Hinton Prod. Co. v. Arcadia Exploration & Prod. Co., 261 S.W.3d 865, 871 (Tex. App.—Dallas 2008, no pet.).

[4] *See* Novartis Seeds, Inc. v. Monsanto Co., 190 F.3d 868, 872 (8th Cir. 1999).

[5] Note, *Effect of Corporate Reorganization on Nonassignable Contracts*, 74 HARV. L. REV. 393, 394–95 (1960).

[6] Sears, Roebuck & Co. v. AIG Annuity Ins. Co., 270 S.W.3d 632, 634 (Tex. App.—Dallas 2008, pet. filed).

[7] *See* Barreiro v. Bank of Italy Nat'l Trust & Sav. Ass'n, 13 P.2d 1017, 1023 (Cal. App. 1932), *aff'd on reh'g*, 14 P.2d 786 (Cal. App. 1932) (*In re* Barreiro's Estate); Pa. Utils. Co. v. Pub. Serv. Comm'n, 69 Pa. Super. 612, 1918 WL 2303, at *2 (Super. Ct. 1917); Yazoo & M. V. R. Co. v. Sunflower County, 87 So. 417, 418 (Miss. 1921).

can only have the rights and powers that the statute expressly or impliedly confers upon it.[8] Implicit in this statement is the general presumption that two parties bargaining at arm's-length can always agree to contract around the language of the applicable merger statutes and nullify their effect. The basis for this Comment arises from situations where the contract ambiguously addresses the issues of assignability and transferability of contract rights.

The leading case addressing this issue in Texas is *TXO Production Co. v. M.D. Mark, Inc.*, which held that a merger does not constitute a transfer or assignment in the state of Texas.[9] *TXO* involved the merger of a subsidiary (TXO Prod. Co.) into its parent (Marathon) and left a lingering issue of whether a Texas court would come to a different conclusion based on similar facts if the merger involved unrelated entities.[10] The Texas Business Corporation Act and the Texas Business Organizations Code both answer this issue, at least in cases where the Texas merger statutes are relied upon in the resolution of the case.[11] While discussed at length in Section II of this Comment, it is important to introduce *TXO* here because the issues arising under the facts of *TXO* are the same issues sought to be resolved in this Comment. Additionally, it is one of the few Texas cases addressing these issues and provides persuasive precedent that Texas practitioners may use in addressing this matter with their clients.

This Comment seeks to illustrate two distinct lines of cases arising from fact patterns similar to *TXO*. The main issue in this Comment is when and why certain anti-transfer and anti-assignment clauses have greater effects on mergers than others, and when those effects result from court interpretation of a contract versus application of state statutory language. Part II addresses this issue by looking at several lines of cases that provide reasoning and conclusions similar to either *TXO Production Co. v. M.D. Mark, Inc.,* or *PPG Industries, Inc. v. Guardian Industries Corp.*[12] While the methodology appears to be unique to this Comment, for purposes of simplicity and organization, the cases discussed are referred to as following

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[8] *In re Barreiro's Estate*, 13 P.2d at 1023.

[9] 999 S.W.2d 137, 143 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

[10] *Id.* at 141.

[11] *See* Tex. Bus. Corp. Act Ann. art. 5.06, § A(2) (Vernon Supp. 2008); Tex. Bus. Orgs. Code Ann. § 10.008(a)(2) (Vernon 2007).

[12] *TXO Prod. Co.*, 999 S.W.2d at 143; PPG Indus., Inc. v. Guardian Indus. Corp., 597 F.2d 1090 (6th Cir. 1979).

the *TXO* or *PPG* lines. Part III includes analysis of merger statutes from across the county and illustrates multiple situations where the effect of a merger on a contract of a merging party is interpreted using state merger statutes. Part IV addresses the potential complications that the Uniform Fraudulent Transfer Act may have upon the meaning of "transfer" as it pertains to the effect of a merger in Texas. Part V explores the rigidity of the Texas view regarding the effect of a merger on anti-assignment and anti-transfer language. Finally, Part VI reaches a conclusion from the case law, statutes and commentaries consulted in writing this Comment.

In Texas, the main issue is well-settled by statute.[13] At least in situations where the Texas merger statutes are used to fill in gaps and ambiguities with respect to the effect of a merger on assignment and transfer of rights, Texas courts are likely to follow *TXO* and hold that a merger is not a transfer or assignment.[14] However, a situation could arise where implications of public policy and the potential outcome of following the *TXO* holding may cause a court to be reluctant to follow *TXO*. In Texas, as well as other states, there appears to be room for this situation to arise when the issue is transferability of rights under limited liability company and partnership agreements.

II. TWO DISTINCT INTERPERTATIONS: DECIPHERING THE *TXO* AND *PPG* LINES OF CASES

A. *The* TXO *Line: Why Have Texas Courts Historically Interpreted Anti-Assignment and Anti-Transfer Provisions As Being Ineffective on the Outcome of a Merger?*

1. Building Blocks: *Bailey v. Vanscot Concrete Co.*

In Texas, traditionally, state courts having the opportunity to determine the effect of a merger on anti-assignment and anti-transfer language allow the acquiring or surviving company to operate under the contract with the full rights, privileges, powers, and interests which both companies enjoyed prior to the business transaction that brought the companies together.

In *Bailey v. Vanscot Concrete Co.*, Vanscot Concrete Company and Hoveringham USA, Inc. were merged into Cen-Tex Ready-Mix Concrete

[13] Tex. Bus. Corp. Act Ann. art. 5.06, § A(2); Tex. Bus. Orgs. Code Ann. § 10.008(a)(2).

[14] *TXO Prod. Co.*, 999 S.W.2d at 142–43.

Company, and later changed its name to Tarmac Texas, Inc.[15] Three months after the articles of merger were filed, Bailey was allegedly injured by contaminated concrete delivered by a truck with the inscription "Express/Pennington" on the side.[16] After determining that Vanscot was the owner of the company, Bailey filed suit against Vanscot Concrete Company.[17] Vanscot asserted a defect of parties and denied under oath that it was a corporation.[18]

The Texas Supreme Court stated that "Vanscot had no actual or legal existence at the time of Bailey's accident."[19] The court, in addressing the party designations argument, ultimately held: "In a merger, the privileges, rights, and duties of the corporation are transferred to the surviving corporation and are there continued and preserved."[20] Thus, the court recognized the basic concept that, in Texas, the surviving corporation succeeds to all the rights, powers, and privileges of all corporations involved in the merger.[21] More importantly, the court characterized the effect of the merger as being a "transfer" of rights, powers, and privileges.[22] While the Texas Supreme Court's use of the term "transfer" cannot amount to anything more than dicta in a holding resolving party designations, whether or not the court purposely selected the term "transfer" can only be determined if and when the issue is ever before the Texas Supreme Court.

2. The Modern Texas View: *TXO Production Co. v. M.D. Mark, Inc.*

TXO is quintessential to any discussion on the effect of Texas merger statutes on the interpretation of anti-assignment and anti-transfer

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[15] 894 S.W.2d 757, 758 (Tex. 1995).

[16] *Id.*

[17] *Id.*

[18] *Id.* During trial, Bailey was granted leave to file a trial amendment to make the defendants "Vanscot Concrete Company d/b/a/ Express/Pennington Concrete Company." In response to the amendment, Vanscot moved for a directed verdict at the conclusion of Bailey's case on the grounds that Vanscot had ceased to exist upon the merger with Hoveringham USA, Inc. and thus, Bailey had sued the wrong party. The trial court held for Bailey and the court of appeals reversed.

[19] *Id.* at 759.

[20] *Id.* (citing Vulcan Materials Co. v. United States, 446 F.2d 690, 694 (5th Cir. 1971)).

[21] *Id.*

[22] *Id.*

provisions.[23] Few Texas courts have had the chance to interpret the effect of a merger on anti-assignment or anti-transfer provisions, thus, the current state of the law in Texas is reflected by *TXO*. Furthermore, because the Texas Supreme Court denied review, and the opportunity to create binding precedence for this issue, *TXO* remains the most widely used precedent on this issue.[24]

In *TXO Production Co. v. M.D. Mark, Inc.*, the 14th District Court of Appeals in Houston determined whether the merger of Marathon and TXO constituted a transfer of data in violation of the anti-transfer and other non-disclosure provisions of the contract originally entered into by TXO and PGI.[25] TXO Production Co. ("TXO") was an oil and gas exploration company and a wholly-owned subsidiary of Marathon Oil Co. ("Marathon").[26] PGI, a geophysical consulting firm, and TXO entered into a series of contracts from 1979 to 1989 allowing TXO to use certain data from seismic surveys conducted by PGI.[27] Each contract contained the following provision: "[The data] shall not be sold, traded, disposed of, or otherwise made available to third parties."[28] Following the series of contracts, Marathon and TXO merged, and TXO informed PGI that the data would be automatically transferred to Marathon pursuant to the applicable merger statutes.[29] M.D. Mark, Inc., the assignee of PGI, eventually brought suit against TXO.[30]

The trial court held that the merger was a transfer of the seismic data and constituted a breach of the parties' agreements and TXO appealed.[31] The court of appeals first analyzed *PPG Industries, Inc v. Guardian Industries Corp.*[32] and *Nicolas M. Salgo Associates v. Continental Illinois Properties*[33] before distinguishing the reasoning and outcome of both because the corporations in *PPG* and *Salgo* merged into unrelated entities,

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[23] TXO Prod. Co. v. M.D. Mark, Inc., 999 S.W.2d 137 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

[24] *Id.*

[25] *Id.* at 143.

[26] *Id.* at 138.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] 597 F.2d 1090 (6th Cir. 1979).

[33] 532 F. Supp. 279 (D.D.C. 1981).

and *TXO* involved the merger of a subsidiary and a parent.[34] Next, the *TXO* court provided analysis of Article 5.06 of the Texas Business Corporation Act, which states that the rights, title, and interest in property of the merging corporations vest in the surviving corporation upon merger without further act or deed and without any transfer having occurred.[35] Based on the language of the statute and the legislative history pertaining to Article 5.06, the *TXO* court concluded:

> Under the merger statutes[36] it is clear that all of TXO's interests vested in Marathon immediately upon the merger. Further, under these provisions there is no transfer of the rights of the merging corporation; rather, the rights vest automatically and without further action . . . . [W]e will not imply a violation of the non-disclosure agreement in light of the parties' failure to address this situation.[37]

While *TXO* holds that mergers do not trigger anti-assignment or anti-transfer language in contracts based on Texas law, the court's holding was narrow enough that variations could occur in the future. First, the court noted, "The parties could have easily specified that the non-disclosure provision was implicated by a statutory merger, but they chose not to do so."[38] Recognizing that, in situations where the parties want to include effective anti-transfer or anti-assignment provisions, carefully drafted provisions dictating when and how the clauses are enforceable will allow the parties to circumvent the holding of *TXO*. Second, the court specifically distinguished the *PPG* and *Salgo* courts because the corporations in those cases merged into unrelated entities.[39] Thus, an argument based on *PPG*, and against *TXO*, could be made when a corporation in a lawsuit merges into an unrelated entity. Furthermore, in a situation causing a similar outcome to the *Salgo* case, the equity of a holding which forces a partnership to accept a partner it does not want may cause a Texas court to

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[34] *TXO Prod. Co.*, 999 S.W.2d at 141 ("We disagree with the reasoning and outcome of *PPG* and *Salgo*. . . . [T]hose cases are distinguishable because there, the corporations merged into unrelated entities.").

[35] Tex. Bus. Corp. Act Ann. art. 5.06, § A(2) (Vernon Supp. 2008).

[36] DEL. CODE ANN., tit. 8 § 259 (2001); OHIO REV. CODE ANN. § 1701.82(A)(3) (LexisNexis 2008); Tex. Bus. Corp. Act Ann. art. 5.06, § A(2).

[37] *TXO Prod. Co.*, 999 S.W.2d at 142–43.

[38] *Id.* at 143.

[39] *Id.* at 141.

feel reluctant in applying *TXO* due to express language regarding admittance as a partner under Texas law.[40] For further discussion on the intended result under Texas law, see Section IIIB and the discussion on the official comments to Article 5.06 of the Texas Business Corporation Act.[41]

3. The Reach of the Term "Merger": The Effect of *McAleer*

In *McAleer v. Eastman Kodak Co.*, the Amarillo Court of Appeals determined whether Eastman Kodak Co. ("Kodak") had the ability to freely assign rights received under an easement agreement (the "agreement") with McAleer to Kodak's newly formed corporation—the Eastman Chemical Company ("Chemical")—as part of a stock spin-off.[42] The main issue in the case was whether the term "merger" as defined in the easement agreement between McAleer and Eastman Kodak included a "stock spin-off" or just the traditional merger in which two entities become one.[43] *McAleer* is important to the resolution of the issues in this Comment because it recognizes the effect that efficient drafting can have on the resolution of a conflict involving an anti-assignment provision.

Kodak and McAleer entered into an easement to provide Kodak the ability to build and operate a pipeline across certain real property owned by McAleer.[44] The agreement stated that permission to enter the property, "may not be assigned or conveyed," but also stated that if Kodak merged or consolidated with another corporation or was otherwise acquired, "the resulting or succeeding corporation shall succeed to this permit and shall be personally liable."[45] The conflict arose when Kodak formed Chemical and allowed Chemical to succeed to the interests that Kodak owned under the easement.[46] Because Chemical was formed through a stock spin-off, McAleer argued that the transaction was an unwarranted assignment because use of the term "merger" was not intended to mean anything other

[40] Tex. Bus. Orgs. Code Ann. § 152.201 (Vernon 2007) ("A person may become a partner only with the consent of all partners.").

[41] *See infra* Part III.B.

[42] No. 07-02-0015-CV, 2002 WL 31686682, at *4 (Tex. App.—Amarillo Dec. 2, 2002, no pet.) (not designated for publication).

[43] *Id.*

[44] *Id.* at *1.

[45] *Id.*

[46] *Id.*

than, "the combination of two entities into one."[47] The court, however, determined "the definition of merger should be a broad one and [because the law does not favor forfeitures] that a merger should not violate a non-assignability clause."[48] The court held that "the only reasonable construction" of the contract was finding the stock spin-off did not violate the anti-assignment provision.[49]

McAleer provides further emphasis on the rule that a Texas court will only construe a contract to end in forfeiture if there is no other reasonable interpretation of the contract.[50] When drafting anti-assignment and anti-transfer provisions, the Texas practitioner must understand that Texas courts are not willing to enforce anti-assignment and anti-transfer language when there is a reasonable interpretation of the contractual language that results in a holding similar to *TXO*. Thus, when drafting the definition sections of an agreement involving anti-assignment or anti-transfer provisions, the Texas practitioner must use tedious foresight to include all possible explanations of the term "merger" that may be able to trigger the enforcement of such a provision. The *McAleer* court implies that had the parties wanted stock spin-offs to trigger anti-assignment and anti-transfer provisions, the parties to the contract simply needed to expressly state, "a merger will not include a stock spin-off."[51] *McAleer*, like *TXO*, recognizes that when a court is not forced to use Texas statutory language to fill in the gaps or resolve an ambiguity within a contract or agreement, the contracting parties have the ability to choose the effect a merger will have upon any assignments or transfers of rights and privileges contracted for under the agreement.

4. Expanding the Reach of the Modern View: The *Allen* Holding

Recently, in *Allen v. United of Omaha Life Insurance Co.*, the Fort Worth Court of Appeals determined the effect of a merger on the

[47] *Id.* at *4.
[48] *Id.*
[49] *Id.* at *5.
[50] *Id.* at *4; *see* TSB Exco, Inc. v. E.N. Smith, III Energy Corp., 818 S.W.2d 417, 422 (Tex. App.—Texarkana 1991, no writ); Cambridge Oil Co. v. Huggins, 765 S.W.2d 540, 543 (Tex. App.—Corpus Christi 1989, writ denied).
[51] *See McAleer*, 2002 WL 31686682, at *4.

beneficiary designation of a "key-man" life insurance policy.[52] While there was no anti-assignment or anti-transfer clause at issue in this case, *Allen* provides insight into one Texas court's interpretation of the effect of a merger on the transfer of a life insurance contract from the non-surviving entity to the surviving entity. *Allen* is important to the Texas practitioner because in some instances, life insurance contracts may be overlooked when expressly drafting the effect of a merger on specifically defined rights, privileges, and properties. The *McAleer* decision should also be considered when looking at *Allen*, as *McAleer* made clear that careful drafting and meticulous focus on the scope of the term "merger" in a contract or other agreement can have a tremendous impact on the efficiency of a merger.[53]

Fred Allen was the CEO of CreditWatch Services, L.P. and the president of CreditWatch Services, L.P.'s general partner, Stoneleigh Financial L.L.C.[54] CreditWatch Services, L.P. purchased a "key man" life insurance policy on Fred's life in the amount of $1 million.[55] Fred signed the application in both his individual and official capacities and designated CreditWatch Services, L.P. as the policy's sole beneficiary.[56] One year later, CreditWatch Services, L.P. merged with CreditWatch Services, Ltd., an Ohio limited liability company and changed its name to CreditWatch Services LLC, but the insurance policy's beneficiary designation was never changed from CreditWatch Services, L.P.[57] Following Fred's death, United of Omaha Life Insurance Company, one of the named defendants in the case, issued a check payable to "CreditWatch Services" and CreditWatch Services LLC deposited the check into one of its accounts.[58] Judy Allen, the decedent's wife, brought suit for tortious interference with an inheritance and conspiracy to commit fraud, and argued that because the policy's designated beneficiary did not exist when Fred died, United should

[52] 236 S.W.3d 315, 319 (Tex. App.—Fort Worth 2007, pet. denied); 34A AM. JUR 2D *Fed. Taxation* ¶ 143,770 (2009) ("Many corporations and partnerships carry key-man life insurance policies on top executives and officers-stockholders. The key man usually takes out the policy, and then assigns it to the corporation. The policy proceeds are typically excluded from the key man's estate [at death, with some exceptions]").

[53] *See McAleer*, 2002 WL 31686682, at *1, *4.

[54] *Allen,* 236 S.W.3d at 319.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

have paid the policy proceeds to Fred's estate.[59] The court held that, "CreditWatch Services, L.P.'s rights as the life insurance policy's beneficiary vested in CreditWatch Services, Ltd. when the two entities merged."[60] The court specifically reiterated and made reference to the basic Texas merger rule from the holding in *Bailey v. Vanscot Concrete*, stating that the surviving entity succeeds to all privileges, powers, rights, and duties originally held by all parties to the merger.[61]

5. Drawing Conclusions from the *TXO* Line

What does the practitioner gain from the *TXO* line of cases? One gains the understanding that in Texas state courts, the language of the contract will most often be interpreted to reach a conclusion that reflects the basic rule—that a merger does not trigger an anti-assignment or anti-transfer clause—but also avoids forfeiture, even if such avoidance requires the court to stretch for reasoning. Whether that means the court has to expand the interpretation of the term "merger" or "consolidation," shift blame to the failure of the contracting parties to foresee possible business transactions and changes in control, or extend the beneficiary designations in a life insurance policy, the court will take every opportunity to circumvent provisions that trigger "anti" provisions and preclude the surviving entity from realizing the benefits of the contract(s) at issue. The *TXO* line of cases presents only one side of the conflict over this issue across the United States. The other side of the conflict is built on a foundation established in *PPG Industries Inc., v. Guardian Industries Corp.* exactly twenty years prior to the decision in *TXO*.[62] Analysis of the *PPG* line of cases provides the practitioner with knowledge of the jurisdictions and factual circumstances that lead some courts to reach holdings entirely antithetical to *TXO*.

[59] *Id.* at 319–20.
[60] *Id.* at 322.
[61] *Id.*
[62] 597 F.2d 1090 (6th Cir. 1979).

B. PPG Industries, Inc. *and Its Lineage: When and Why Courts Outside of Texas Interpret Mergers To Violate Anti-Transfer and Anti-Assignment Provisions*

Outside of Texas, state and federal courts have aligned themselves with both sides of the controversy. However, in jurisdictions that conclude a merger does constitute a transfer or assignment, the reasoning has often mirrored the Texas courts' yet resulted in antithetical conclusions. While the courts composing the *PPG* line seem to take a hard line approach, the courts cannot seem to resist providing more justification as to why. Whether its strict adherence to the basic tenets of intellectual property rights, an inequitable outcome for a partnership, or an uneasy feeling about causing unwarranted risk, the *PPG* line provides numerous holdings that may be used to cause reluctance towards *TXO* in Texas.

1. The Foundation: *PPG Industries, Inc. v. Guardian Industries Corp.*

PPG Industries, Inc. v. Guardian Industries Corp. is the cornerstone case holding that a merger is an assignment and transfer and violates anti-assignment and anti-transfer language in a contract.[63] The *PPG* court decided the issue of whether the surviving or resultant corporation in a statutory merger acquires patent license rights of the constituent corporations when the patent license has specific anti-assignment language.[64]

In 1964, PPG Industries, Inc. ("PPG") entered into a patent license agreement with Permaglass, Inc. ("Permaglass"), which allowed Permaglass to make use of PPG's "Gas Hearth Systems."[65] The licensing agreement contained the following anti-assignment provision, "9.2 This Agreement and the license granted by PPG to PERMAGLASS hereunder shall be personal to PERMAGLASS and non-assignable except with the consent of PPG first obtained in writing."[66] In 1969, Permaglass and Guardian Industries, Corp. ("Guardian") merged pursuant to Ohio and Delaware laws.[67] In the merger agreement, Permaglass represented that,

[63] *Id.* at 1096.
[64] *Id.* at 1091.
[65] *Id.* at 1091–92.
[66] *Id.* at 1092.
[67] *Id.*

"Permaglass is the owner, assignee or licensee of such patents, . . . [A]nd Permaglass has not received any notice of conflict with the asserted rights of third parties relative to the use thereof."[68] Following the merger, PPG filed suit for patent infringement against Guardian.[69] Guardian asserted that it had succeeded to all the rights, powers, and ownerships of Permaglass, and as Permaglass' successor was legally entitled to operate under the licensing agreement.[70] The district court determined that no transfer or assignment had occurred, but rather that "Guardian acquired these rights by operation of law under the merger statutes of Ohio and Delaware," and PPG appealed.[71]

The *PPG* court, like the *TXO* court, interpreted Ohio and Delaware merger statutes to bring resolution to the issue of the effect of a merger on assignments and transfers. However, unlike the *TXO* court, the *PPG* court found the "shall be vested" language in the Delaware statute to mean, "the underlying property of the constituent corporations is *transferred* to the resultant corporation upon the carrying out of the consolidation or merger . . . ," ultimately finding that the merger was effected by the parties and the transfer was a result of their act of merging.[72] The *PPG* court also noted whether or not the merger takes place by operation of law or otherwise, it still effects a transfer in violation of anti-assignment and anti-transfer language.[73] Notably, in *PPG*, the 6th Circuit interpreted merger statutes from two of the same states as the *TXO* court did, but came to an entirely different interpretation. *PPG* dictates that different courts of appeals throughout the country, and perhaps even in Texas, could come to different conclusion about the effect of merger statutes on anti-assignment and anti-transfer provisions post-merger.

2. Careful Drafting: The Salgo Court's Business Experience Analysis

Nicolas M. Salgo Associates v. Continental Illinois Properties, is another of the oft-cited cases holding a merger does constitute a transfer and

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[68] *Id.* at 1093.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.* at 1096 (quoting Koppers Coal & Transp. Co. v. United States, 107 F.2d 706, 708 (3d Cir. 1939)) (emphasis added by *PPG* court).

[73] *Id.*

assignment in violation of anti-assignment and anti-transfer provisions.[74] *Salgo* expands upon the holding from *PPG* by introducing the factors of business experience and drafting abilities of the parties to the merger. *Salgo* appears to be unique in making use of such factors in reaching a conclusion, but also serves to reiterate the proposition that practitioners must be extremely careful when drafting contracts as their effect on future business transactions is often vital.

Nicolas M. Salgo Associates ("NMSA") and Continental Illinois Properties ("CIP") were the general partners in Watergate Improvement Associates ("WIA").[75] Section 21.0 of the limited partnership agreement of WIA stated, "[N]o Partner shall sell, assign, pledge, hypothecate or otherwise encumber or dispose of all or any part of its interest in this Partnership (including any beneficial interest therein), except by will or by operation of law on death, without prior written consent of both General Partners . . . ."[76] In 1979, Bouverie Properties, Inc. ("BPI") acquired all the outstanding common stock of CIP and gained effective control of CIP.[77] Two years later, CIP merged into BPI and became Pan American Properties, Inc. ("PAP").[78] At no time prior to execution did CIP seek NMSA's consent to the stock sale or the merger, and this resulted in NMSA filing suit against CIP and PAP.[79]

The defendants, CIP and PAP, argued that, even though the term "transfer" was used in the heading of Section 21.0, the parties' (NMSA and CIP) failure to include the actual term "transfer" in the body of the Section indicated that 21.0 was not meant to apply to a "transfer" of interest, but only an "assignment" or "disposition" of interest.[80] The court determined that the scope of Section 21.0, when taking the entire contract into consideration, did include transfers of interest.[81] Having determined that a transfer of interest took place, the court raised another important issue,

[74] 532 F. Supp. 279, 282–83 (D.D.C. 1981).
[75] *Id.* at 280.
[76] *Id.*
[77] *Id.*
[78] *Id.* at 280–81.
[79] *Id.*
[80] *Id.*
[81] *Id.* at 282.

whether a merger by operation of law constitutes a transfer of interest for purposes of Section 21.0.[82]

The *Salgo* court declared the 6th Circuit's approach in *PPG* to be most rational way to find a resolution to this issue. Following the *PPG* court's analysis, the *Salgo* court interpreted the District of Colombia statute governing the partnership agreement between NMSA and CIP.[83] In analyzing the statute, the court concluded that the lack of consent prior to the merger effectively forced NMSA to accept a new partner without its consent, which ran counter to the language of the statute.[84] The *Salgo* opinion is one of the few to analyze the experience and capacity of the contracting parties, which noted that ". . . both parties involved . . . are extremely experienced business entities and should be savvy to the importance of accurately drafting contracts."[85] Taking the business savvy of the contracting parties into consideration, the *Salgo* court concluded that the parties could have provided for certain exceptions to the language of Section 21.0 if they had intended to protect against certain types of business transactions. Thus, the court concluded that the merger constituted a prohibited transfer in violation of the contract.[86] *Salgo*, much like *PPG*, continues to enforce the fact that different courts are likely to establish different interpretations of linguistically similar contracts.

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[82] *Id.*

[83] *Id.* at 283 (referring to D.C. CODE § 41-317(g): "No person can become a member of the partnership without the consent of all the partners.").

[84] *Id.* While outside the scope of this Comment, I find it incredibly interesting that none of the cases dealing with this issue which involve partnerships include any discussion on the distinction between transfer of a partnership interest (i.e. the economic interest) and the effect on the individual's status as partner. Although a merger may transfer an economic interest to a partner whom the current partners did not wish to accept as their partner (this was one of the reasons that the *Salgo* court concluded the way it did), the economic interest is separate and distinct from the individual's actual status as a partner in the partnership. While a merger can circumvent certain rules, a merger cannot change a person's status from "individual" to "partner" absent a unanimous vote from the existing partners. *See* Tex. Bus. Orgs. Code Ann § 152.201 (Vernon 2007); UNIF. FRAUDULENT TRANSFER ACT § 401(a)(2)(i) (1997).

[85] *Id.*

[86] *Id.*

3. An Intermediate View: Determining Star Cellular's Effect on the Scope of *TXO*

In 1993, the Delaware Chancery Court decided *Star Cellular Telephone Co. v. Baton Rouge CGSA, Inc.*,[87] and while the opinion was not reported, the reasoning of the court lays the groundwork for the possibility that other Texas courts may interpret the Texas merger statute differently than the *TXO* and *Allen* courts have. Star Cellular Telephone Company, Inc. ("Star") and Capitol Cellular, Inc. ("Capitol"; collectively the "Plaintiffs") were limited partners in Baton Rouge MSA Limited Partnership, a Delaware limited partnership (the "Partnership"). Baton Rouge CGSA, Inc. ("Baton Rouge Inc.") was the original general partner (and a limited partner) and was a wholly-owned subsidiary of BellSouth Mobility Inc. ("BellSouth").[88] The partnership agreement contained anti-transfer language which stated that a general partner could only "transfer" its interest as a general partner upon written notice to all the other Partners and a unanimous affirmative vote.[89]

In 1991, seven years after the original partnership agreement was signed, Baton Rouge Inc. was merged into Louisiana CGSA Inc. ("Louisiana Inc."), another wholly owned subsidiary of BellSouth.[90] One year later, the Plaintiffs brought suit against Baton Rouge Inc. and Louisiana Inc. alleging the merger effected a prohibited transfer of Baton Rouge Inc.'s general partnership interest under the Partnership agreement and thus, Capitol was the rightfully elected general partner.[91] The defendants asserted that under Georgia law (which governed the merger) the merger did not constitute a "transfer" under the agreement because the term "merger" was never referenced in the agreement, that even if it was a "transfer" it was authorized under the agreement, and finally that anti-transfer provisions cannot be enforced against a transfer that "has no adverse effect on the other contracting party."[92] The *Star Cellular* court concluded that the merger was not a "transfer" for purposes of the anti-transfer provision because "where an anti-transfer clause . . . does not explicitly prohibit a transfer of property rights to a new entity by a

[87] Civ. A. No. 12507, 1993 WL 294847 (Del. Ch. Aug. 2, 1993) (unpublished op.).
[88] *Id.* at *1.
[89] *Id.* at *5.
[90] *Id.* at *1.
[91] *Id.*
[92] *Id.* at *3.

merger . . . and the transfer itself creates no unreasonable risks for the other contracting parties, the court should not presume that the parties intended to prohibit the merger."[93]

While the *Star Cellular* case seems antithetical to the *PPG* and *Salgo* opinions, it provides an important conclusion stating if the parties had elected to include "merger" in the anti-transfer clause, a merger would have triggered the clause. The court indicated that some mergers could be transfers when such a transfer resulted in a material increase of risk or harm.[94] Additionally, the Georgia statute in use at the time of the merger had language similar to the current merger language in the Texas Business Organizations Code and the unofficial comment to the section mirrored the language expressed in the official comments to the Texas Business Corporation Act as detailed in Section IIIB of this Comment.[95] The Georgia merger statute stated that the property of the disappearing corporation "is vested in the surviving corporation" and the unofficial comment to Section 14-2-1106(a)(2) [the effect of merger section] stated that "[a] merger is not a conveyance or transfer."[96] The *TXO* court interpreted similar language in coming to the conclusion in *TXO*, which leaves open the possibility that a court interpreting "transfer" in a case where the merger presented unreasonable risk, could decide to extend the definition of the term "transfer" to permit anti-transfer provisions to take effect. Thus, while *Star Cellular* follows the reasoning in *TXO,* it is an intermediate view because the court expressly details that other conclusions are possible outside of holding that a merger does not constitute a transfer or assignment.

[93] *Id.* at *8.

[94] *Id.* at *11 ("In these circumstances, the Court will not attribute to the contracting parties an intent to prohibit the Merger where the transaction did not materially increase the risks to or otherwise harm the limited partners.").

[95] *Id.* at *6 (The unofficial comment to the section states that "[a] merger is not a conveyance or transfer[.]"); *see also* Tex. Bus. Corp. Act Ann. art. 5.06 (Vernon 2003) (The official comment to Article 5.06 of the Texas Business Corporations Act, in use during the court's analysis in *TXO Prod. Co. v. M.D. Mark, Inc.*, stated "Article 5.06 was amended to make clear that while a merger vests the rights [and] privileges . . . this is accomplished without a transfer or assignment having occurred.").

[96] GA. CODE ANN. § 14-2-1106(a)(2) cmt. (West 2003 & Supp. 2008).

4. Different Interpretations of the Same Statute: The *Cincom* Court's Analysis of the Ohio Merger Statutes

In January 2007, the United States District Court for the Southern District of Ohio decided *Cincom Systems, Inc. v. Novelis Corp.*[97] The issue in this case was whether the direct merger of Alcan Aluminum Corporation ("Alcan Ohio") into Alcan Corporation, which then merged into its subsidiaries, resulted in an impermissible transfer of a non-transferable computer software license agreement (the "agreement") originally contracted for between Alcan Ohio and Cincom Systems ("Cincom").[98] In 1989, Alcan Ohio entered into a software license agreement with Cincom, which prohibited the transfer of rights under the agreement without Cincom's prior written consent.[99] In 2003, Alcan Ohio merged into its corporate affiliate, Alcan Corporation, who subsequently merged into its three Texas subsidiaries: Alcan Products Corp., Alcan Primary Products Corp., and Alcan Fabrication Corp.[100] The business of Alcan Ohio was predominantly assumed by the Alcan Fabrication Corp. subsidiary (in 2005, Alcan Fabrication Corp. changed its name to Novelis Corporation ("Novelis")).[101]

At no time during any of the aforementioned business transactions did Alcan Ohio, Alcan Corporation, or Novelis make any attempt to obtain Cincom's consent to transfer the agreement, and Cincom sued all three for infringement.[102] The defendants argued that under Ohio's merger statute, the events leading to the creation of Novelis did not result in a transfer of the agreement from Alcan Ohio to Novelis.[103] Ohio's merger statute, modeled after the Model Business Corporation Act §11.07, states: "[t]he surviving or new entity possesses all assets and property . . . rights, privileges, immunities, powers . . . all of which are vested in the surviving or new entity without further act or deed."[104] Persuaded by the *PPG* court's reasoning, the *Cincom* court decided that at the point when Alcan Ohio was

[97] No. 1:05CV152, 2007 WL 128999, at *1 (S.D. Ohio Jan 12, 2007).

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.* at *2–3; OHIO REV. CODE ANN. § 1701.82(A)(3) (LexisNexis Supp. 2008) (emphasis added).

merged out of existence, its rights under the agreement were transferred to Alcan Corporation and under *PPG*, "[t]he merger was effected by the parties and the transfer was a result of their act of merging."[105] The *Cincom* court, interpreting the same Ohio merger statute as the *TXO* court, concluded that the series of events leading to the creation of Novelis Corporation resulted in "an impermissible transfer to Novelis of the License Agreement granted to Alcan Ohio by Cincom."[106] *Cincom* presents a holding entirely antithetical to that of *TXO*, even though the circumstances leading to the lawsuit were substantially similar.

5. Why the Disparity: Reaching Conclusions on the *PPG* Line

PPG, *Salgo*, *Star Cellular*, and *Cincom* provide a second line of cases in opposition to the *TXO* line of cases. The *PPG* line of cases illustrates that in certain jurisdictions, courts do not apply common law analyses preventing forfeiture of contract rights in the merger context when interpreting the scope of anti-transfer or anti-assignment provisions.[107] Rather, the language of the contract controls the court's reasoning to the extent it can, and where this language falls short, the courts are willing to interpret the intent of the parties' regardless of whether the interpretation results in anti-assignment and anti-transfer provisions taking effect or not. It is not unreasonable to hypothesize that aspects of the *PPG* line could influence a Texas court to hold that a merger does constitute a transfer or assignment under similar circumstances as those evident in the *PPG* line of cases.[108] However, in order to fully understand the disparities, it is vital to look at the actual statutory language lending rationality between the antithetical holdings.

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[105] *Cincom,* 2007 WL 128999, at *4 (citing PPG Indus., Inc. v. Guardian Indus. Corp., 597 F.2d 1090, 1093 (6th Cir. 1979)).

[106] *Id.* at *6.

[107] Not all improper assignments or transfers which trigger enforcement of anti-assignment or anti-transfer provisions cause forfeiture of the contract. Depending on the contractual language, there may be fees, liquidated damages, or other remedies provided for. Thus, in some circumstances, regardless of the court's holding, forfeiture is always avoided.

[108] *See infra* note 143.

III. STATE MERGER STATUTE SURVEY: TRACKING THE ABILITY OF THE SURVIVING ENTITY TO EXERCISE CONTRACT RIGHTS OBTAINED VIA MERGER[109]

All jurisdictions provide that the existence of all entities party to the merger agreement, with the exception of the new or surviving entity, cease to exist upon the effective date of the merger.[110] Additionally, all jurisdictions dictate that the surviving or new entity obtains all the privileges, rights, immunities and powers subject to the duties and liabilities inherent in such privileges, rights, immunities and powers.[111] The differences among states that created the conflict at issue in this Comment sometimes arise from the states' selection of different language used to describe and explain the effect of a merger on the ability of the surviving entity to obtain such rights and privileges when outside agreements state otherwise.

State merger statutes can be broken down into four categories depending on the selected language used by the state legislatures. The overwhelming majority of states model their merger statutes on the Model Business Corporation Act §11.07. Texas and Georgia are the only two states whose merger statutes specifically dictate a merger takes effect without any transfer or assignment having taken place.[112] However, cases explained above call into question the willingness of some courts to accept this language as a mandatory bar in all situations. Some courts are willing to stretch the language of the contract in order to circumvent the statutory language. Pennsylvania and Puerto Rico completely avoid using "vesting" language at all.[113] Virginia is the only state which expressly dictates that the statute will not apply when contractual language provides the anticipated result of the parties to the agreement.[114]

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[109] Included in the survey are the 50 United States as well as the U.S. territories of Puerto Rico and the U.S. Virgin Islands. I felt it unnecessary to use the term "states and territories" each and every time I made an assertion.

[110] MODEL BUS. CORP. ACT ANN. § 11.07 note (2008) (statutory comparison).

[111] *Id.*

[112] *See* GA. CODE ANN. § 14-2-1106(a)(2) (West Supp. 2008); *see also* Tex. Bus. Orgs. Code Ann. § 10.008(a)(2) (Vernon 2007).

[113] *See* 7 PA. STAT. ANN. § 1606(c) (West 1995); P.R. LAWS ANN. tit. 26, § 2947(1) (2008).

[114] *See* VA. CODE ANN. § 13.1-721(3) (West 2006).

A. *State Statutes Which Resemble the Model Business Corporation Act's "Vesting" Language*

The Model Business Corporation Act (the "MBCA") §11.07(a) states, "[w]hen a merger becomes effective . . . (3)all property owned by, and every contract right possessed by, each corporation or eligible entity that merges into the survivor is vested in the survivor without reversion or impairment."[115] The following statutes include "is vested", "are vested", or "vested" language similarly to the MBCA:

State	**Language**
Arizona[116]	The title to all real estate and other property owned by each corporation that is a party to the merger is vested automatically in the surviving corporation without reversion or impairment.
Connecticut[117]	All liabilities of each corporation or other entity that is merged into the survivor are vested in the survivor. All property owned by, and every contract right possessed by, each corporation or other entity that merges into the survivor is vested in the survivor without reversion or impairment . . . .
Delaware[118]	[T]he rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts due to any of said constituent corporations on whatever account, as well for stock subscriptions as all

[115] MODEL BUS. CORP. ACT § 11.07(a)(3) (2005).
[116] ARIZ. REV. STAT. ANN. § 10-1106(A)(2) (2004).
[117] CONN. GEN. STAT. ANN. § 33-820(a)(3)–(4) (West 2005).
[118] DEL. CODE ANN. tit. 8, § 259(a) (2001).

	other things in action or belonging to each of such corporations, shall be vested in the corporation surviving or resulting from such merger or consolidation . . . .
Florida[119]	The title to all real estate and other property, or any interest therein, owned by each corporation party to the merger is vested in the surviving corporation without reversion or impairment . . . .
Ohio[120]	The surviving or new entity possesses all assets and property of every description, and every interest in the assets and property, wherever located, and the rights, privileges, immunities, powers, franchises, and authority, of a public as well as of a private nature, of each constituent entity, and . . . all obligations belonging to or due to each constituent entity, all of which are vested in the surviving or new entity without further act or deed.
Tennessee[121]	All property owned by each corporation or limited partnership that is a party to the merger shall be vested in the surviving corporation or limited partnership without reversion or impairment . . .

[119] FLA. STAT. ANN. § 607.1106(1)(b) (West 2007).
[120] OHIO REV. CODE ANN. § 1701.82(A)(3) (LexisNexis Supp. 2008).
[121] TENN. CODE ANN. § 48-21-108(a)(2)–(3) (2002).

Interestingly enough, there is much room for interpretation even amongst the state merger statutes that are very nearly identical in language. The "vesting" language has been interpreted to mean a merger constitutes a transfer and can trigger anti-transfer provisions (*PPG Industries, Inc. v. Guardian Industries Corp.*[122]). The same "vesting" language has also been interpreted to mean a merger does not constitute an impermissible transfer such that anti-transfer provisions were not triggered (*TXO Production Co. v. M.D. Mark, Inc.*[123]). Another issue arising out of interpretation of state merger statutes based on the MBCA is the issue of the meaning of the term "transfer" as it pertains to a merger. This issue was at stake in *Star Cellular Telephone Co. v. Baton Rouge CGSA, Inc.*, discussed in Section III B. The Delaware Chancery Court, interpreting Georgia merger statues, stated that because the current Georgia merger statute did not employ the term "transfer" and the contract at issue did not, "plainly and unambiguously include mergers within the category of prohibited 'transfer[s]'" the intent of the parties at the time of contracting would provide the context for the effect of a merger on anti-transfer language.[124]

The Official Comment to the MBCA expressly states, "A merger is not a conveyance, transfer, or assignment . . . . It does not give rise to a claim that a contract with a party to the merger is no longer in effect on the ground of nonassignability, unless the contract specifically provides that it does not survive the merger."[125] What may, in part, give rise to the conflict between the *TXO* and *PPG* lines of cases is the MBCA's goal of "simplifying language describing the legal consequences of a merger."[126] While simplistic language is great for laymen explanations, it only provides the foundation for litigation between legally sophisticated minds. Thus, when a statute is called upon to fill in the gaps of an ambiguous contract, the fact that different parties view the statutory language itself as ambiguous and in need of further interpretation calls into question the intelligence of simplifying the language describing the legal consequences of a merger.

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[122] 597 F.2d 1090, 1095–96 (6th Cir. 1979) (interpreting statutes from Ohio, Delaware, and Texas).

[123] 999 S.W.2d 137, 142–43 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

[124] Star Cellular Tel. Co. v. Baton Rouge CGSA, Inc., Civ. A. No. 12507, 1993 WL 294847, *6–7 (Del. Ch. Aug. 2, 1993) (unpublished op.).

[125] MODEL BUS. CORP. ACT ANN. § 11,07 official cmt. (2008).

[126] MODEL BUS. CORP. ACT ANN. § 11,07 annot. (2008).

B. State Statutes Based on the Model Business Corporation Act Which Add Specific Statutory Language Regarding Transfer and Assignment

The state merger statutes from Texas and Georgia are unique in that they model the MBCA but add language specifically detailing the effect a merger has on transfers and assignments. Notice that the Texas Business Corporation Act, the Texas Business Organizations Code, and the Georgia Code all specifically state the vesting takes place without (1) reversion or impairment, (2) further act or deed; or (3) transfer or assignment[127] having occurred:

Texas (Texas Business Corporation Act)[128]	[A]ll rights, title and interest to all real estate and other property owned by each domestic or foreign corporation and by each other entity that is a party to the merger shall be allocated to and vested in one or more of the surviving or new domestic or foreign corporations and other entities as provided in the plan of merger without reversion or impairment, without further act or deed, and without any transfer or assignment having occurred . . . .
Texas (Business Organizations Code)[129]	[A]ll rights, title and interest to all real estate and other property owned by each organization that is a party to the merger is allocated to and vested, subject to any existing liens or other encumbrances on the property, in one or more of the surviving or new organizations as

[127] Georgia Code adds "conveyance."

[128] Tex. Bus. Corp. Act Ann. art. 5.06 (Vernon Supp. 2008) (eff. 1955-2010. However, after January 1, 2006, corporations formed prior to 2006 can elect to be governed by the Business Organizations Code).

[129] Tex. Bus. Orgs. Code Ann. § 10.008(a)(2) (Vernon 2007) (eff. Jan 1, 2006).

	provided by the plan of merger without: (A) reversion or impairment; (B) any further act or deed; or (C) any transfer or assignment having occurred . . . .
Georgia[130]	The title to all real estate and other property owned by, and every contract right possessed by, each corporation or entity party to the merger is vested in the surviving corporation or entity without reversion or impairment, without further act or deed, and without any conveyance, transfer, or assignment having occurred . . . .

The 1996 Comment of the Texas Bar Committee on the 1987 amendment to Article 5.06 of the Texas Business Corporation Act states that the amendment was made "to make clear that while a merger vests the rights [and] privileges . . . this is accomplished without a transfer or assignment having occurred. Prior to the 1987 amendment of TBCA, Article 5.06A, it was possible that a merger could have been viewed to constitute a transfer . . . ."[131] From this language it is clear that Texas courts are expected to find no transfer to take place in a merger when the Texas merger statute is used to reach a conclusion.

The "Comment" to the Georgia merger statute also states, "A merger is not a conveyance or transfer, and does not give rise to claims of reverter or impairment of title based on a prohibited conveyance or transfer."[132] While the Georgia statute, like the Texas statutes, also dictates that a merger is not a transfer, there appears to be some uncertainty on the definitiveness of such language. As the *Star Cellular* holding (which was an interpretation of the Georgia merger statutes) dictates, the court may face certain

[130] GA. CODE ANN. § 14-2-1106(a)(2) (West Supp. 2008).
[131] Tex. Bus. Corp. Act Ann. art. 5.06 (Vernon 2003) (Comment of Bar Committee 1996).
[132] GA. CODE ANN. § 14-2-1106(a)(2) cmt. (West 2003).

circumstances in which a material increase in risk or harm resulting from finding the merger to not trigger the anti-assignment or anti-transfer clauses of the contract may result in a different conclusion than intended by the legislature.[133]

The question remains as to whether a court interpreting Texas or Georgia merger law will in fact follow the advice of the *Star Cellular* court and find a reasonable middle ground in opposition to the rule that a merger does not constitute a transfer or assignment. Thus, a Texas court might decide to enforce the provisions in opposition to the legislative intent behind the statutes, where holding otherwise leaves the non-breaching party to the contract in a situation of increased risk or harm due to the court's refusal to enforce the anti-assignment and anti-transfer provisions of the contract. Under such circumstances, one finds the court making a legal conclusion based on what is fair to the non-breaching party, a situation which seems to call on the basic foundations of equitable relief.

C. State Statutes Which Do Not Mention "Vesting"

As the term "vesting" has garnered so much judicial attention, certain state legislatures have discontinued the use of the terms entirely. It is important to note that while these two statutes are grouped together under the same heading, they are in no way similar other than the fact that neither statute makes use of any "transfer" or "vesting" language. Ironically, these statutes constitute two different ends of the spectrum:

Pennsylvania[134]	When a merger or consolidation becomes effective, the existence of each party to the plan, except the resulting institution, shall cease as a separate entity but shall continue in, and the parties to the plan shall be, a single corporation which shall be the resulting institution and which shall have, without further act or deed, all the property, rights,

[133] Star Cellular Tel. Co., v. Baton Rouge CGSA, Inc., Civ. A. No. 12507, 1993 WL 294847, *6–9 (Del. Ch. Aug. 2, 1993) (unpublished op.).

[134] PA. STAT. ANN. § 1606(c) (West 1995).

	powers, duties and obligations of each party to the plan.
Puerto Rico[135]	[A]ll rights and properties of the nonsurviving corporation shall be considered as transferred to the surviving or new corporation without need of further proceedings or conveyance, and the surviving or new corporation is bound to the obligations and liabilities of the merged or consolidated corporations as if contracted directly by such surviving or new corporation itself.

The language utilized in the Pennsylvania merger statute is much different than the Puerto Rico statute because it makes the interpretation of statutory language less open to litigation based on ambiguity. The phrase "shall continue in" is much more direct than the use of "transfer" or "vesting" is. The statute specifically details that each party to the merger plan, except the resulting institution, ceases to exist entirely as a separate entity. However, while the separate existence is technically gone, it continues on in the surviving entity. There is no room for different interpretations, the entire existence of the previous entity—all rights, privileges, properties, debts, powers, etc—continues on within the new entity.

Puerto Rico, on the other hand, uses much more ambiguous language. All the rights, etc. that technically transfer from the non-surviving corporation to the surviving corporation are merely "considered" transferred.[136] They are not just transferred, there is no direction that they "shall be" transferred, the court is just instructed to "consider" the rights and properties to be transferred. According to the Merriam-Webster Dictionary, the term "consider" means "to think about carefully."[137] The major synonyms of "consider" are "study," "contemplate," "weigh," and

[135] P.R. LAWS ANN. tit. 26, § 2947(1) (2008).

[136] *Id.*

[137] MERRIAM-WEBSTER ONLINE DICTIONARY, *available at* http://www.merriam-webster.com/dictionary/consider (last visited Dec 5, 2008).

"deem."[138] These terms, except "deem", mean to give thought to in order to reach a reasonable conclusion.[139] Thus, the court may not be required to hold that a merger is or is not a transfer, the court is only required to give thought to the idea that the rights and properties transfer to the surviving corporation and then reach a reasonable conclusion based on that consideration. However, in the case of the synonym "deem," a court may also interpret the statute to "deem" or "regard" the merger to effect a transfer.[140] Because "consider" can be interpreted in multiple fashions, courts could hold either way, so long as the explanation is reasonable when considering the circumstances of the merger and the language of the contract at issue.

D. State Statutes Which Provide Specific Boundaries Concerning Contractual Language

Virginia[141]	When a merger becomes effective: . . . Property owned by, and, except to the extent that assignment would violate a contractual prohibition on assignment by operation of law, every contract right possessed by, each domestic or foreign corporation or eligible entity that merges into the survivor is vested in the survivor without reversion or impairment . . . .

The Virginia merger statute appears to be the only state statute involving a direct reference to the ability of a contract to circumvent the intended statutory effect of a merger governed by Virginia law. In Virginia, a merger does not constitute a transfer unless holding so would directly

[138] *Id*; MERRIAM-WEBSTER ONLINE DICTIONARY, *available at* http://www.merriam-webster.com/dictionary/deem (last visited Dec 5, 2008).

[139] MERRIAM-WEBSTER ONLINE DICTIONARY, *available at* http://www.merriam-webster.com/dictionary/consider (last visited Dec 5, 2008).

[140] MERRIAM-WEBSTER ONLINE DICTIONARY, *available at* http://www.merriam-webster.com/dictionary/deem (last visited Dec 5, 2008).

[141] VA. CODE ANN. § 13.1-721(3) (2006).

violate a contractual provision between the parties. Thus, the Virginia statute appears to recognize the concept emphasized repeatedly thus far, that parties to a contract always retain the ability to draft contracts that circumvent the vesting effect of a merger statute.

E. What Are the Implications from the Different Language?

The main conclusion arising from this analysis is that the majority of the statutes—those which state the rights vest in the surviving entity—leave courts with the ability to determine whether "transfer" or "assignment" language in a contractual agreement can be interpreted to encompass the merger or business transaction at issue in front of the court. Where the drafters of the contractual agreement at issue had the opportunity to provide that the anti-transfer clause applies to all transfers and did not, the courts may be slow to attribute to the contracting parties the intent to prohibit transfers where the transaction did not materially increase the risks to or otherwise harm the parties involved.[142]

In the cases reviewed for this Comment, the courts that elected to make transfers and assignment impermissible generally did so because the effect of the transfer or assignment created an increased risk of harm to the non-breaching parties. *Salgo* provides such an example. The *Salgo* court chose to deem the transfer impermissible because it forced Salgo to accept a partner he did not consent to include in the partnership, and this would have inequitably harmed Salgo due to the balance of voting rights and control that could be exercised by the stranger third party.[143] On the other hand, in *Star Cellular*, the court concluded that the transfer was permissible because there was no material change in the control of the general partner or in the operations of the partnership.[144] From looking at cases on both ends of the spectrum, it appears fairly consistent that when an impermissible transfer results in forcing partnership or membership in an entity, the court may be more likely to hold that the transfer or assignment before the court was impermissible and subject to anti-transfer or anti-assignment clauses.

[142] *See* TXO Prod. Co. v. M.D. Mark, Inc., 999 S.W.2d 137, 141–43 (Tex. App.—Houston [14th Dist.] 1999, pet. denied); McAleer v. Eastman Kodak Co., No. 07-02-0015-CV, 2002 WL 31686682, at *4 (Tex. App.—Amarillo 2002, pet. denied) (not designated for publication); Star Cellular Tel. Co. v. Baton Rouge CGSA, Inc., Civ. A. No. 12507, 1993 WL 294847, at *11 (Del. Ch. Aug. 2, 1993) (unpublished op.).

[143] Nicolas M. Salgo Assocs. v. Cont'l Ill. Props., Inc., 532 F. Supp. 279, 283 (D.D.C. 1981).

[144] *Star Cellular*, 1993 WL 294847 at *11.

IV. OUTWITTING THE TEXAS MERGER STATUTES: IF A MERGER DOES NOT EFFECT A "TRANSFER" UNDER TEXAS LAW, DOES IT EFFECT A "TRANSFER" UNDER THE UNIFORM FRAUDULENT TRANSFER ACT?

Consider a situation involving a non-traditional merger in which two corporations merge and both survive, allocating assets and liabilities between themselves. Texas appears to be unique in defining a "merger" to include a situation in which two entities enter the merger and the same two entities survive the merger, with the only difference post-merger being the allocation of liabilities and assets among the two entities.[145] Thus, two corporations could legally "merge" with the only difference post-merger being that one corporation is allocated all the liabilities and the other corporation is allocated all of the assets. The issue arises at this point because under the Texas Business Organizations Code, liabilities that entities were liable for at the time of merger remain the liabilities of those entities and "no other party to the merger . . . is liable for the debt or other obligation" unless expressly allocated in the merger agreement.[146] This appears to create a legal loophole because the corporation that is allocated all of the liabilities will not have any assets to pay off creditors existing at the time of merger. Thus, if Corporation A and Corporation B are the surviving entities of a non-traditional merger in which Corporation A is allocated all the debt and Corporation B is allocated all the assets[147], would

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[145] Tex. Bus. Orgs. Code Ann § 1.002(55) (Vernon 2007) dictating that:

> "Merger" means: (A) the division of a domestic entity into two or more new domestic entities or other organizations or into a surviving domestic entity and one or more new domestic or foreign entities or non-code organizations; or (B) the combination of one or more domestic entities with one or more domestic entities or non-code organizations resulting in: (i) one or more surviving domestic entities or non-code organizations; (ii) the creation of one or more new domestic entities or non-code organizations; or (iii) one or more surviving domestic entities or non-code organizations and the creation of one or more new domestic entities or non-code organizations.

[146] *Id.* § 10.008(a)(4).

[147] In Texas assets and liabilities from all parties to the merger end up where the parties dictate in the plan of merger. *See id.* § 10.008(a)(2)–(3) (noting that "When a merger takes effect . . . (2) all rights, title, and interests to all real estate and other property owned by each organization that is a party to the merger is allocated to . . . one or more of the surviving or new organizations as provided in the plan of merger . . . (3) all liabilities and obligation of each organization that is a party to the merger are allocated to one or more of the surviving or new organizations in the manner provided by the plan of merger . . . .").

creditors of Corporation A be precluded from using the Uniform Fraudulent Transfer Act (UFTA) to reach the assets of Corporation B because Texas does not deem a merger to have constituted a "transfer" of assets?[148] To address this issue it is necessary to look at the wording of the UFTA as it appears in the Texas Business and Commerce Code at Chapter 24.[149]

The main contradiction between the Texas Business and Commerce Code and both the Texas Business Corporation Act and Business Organizations Code is the use of the term "transfer." Under the Business and Commerce Code, "'Transfer' means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting of an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance."[150] As it pertains to a merger, both the Business Corporation Act and the Business Organizations Code deem a merger, which is clearly a mode of disposing with an asset or an interest in an asset, to take effect without causing a transfer or assignment.[151] Thus, the issue becomes which statute trumps the other in a situation in which the effect of a merger is to cause a fraudulent "transfer."

Under Section 24.005(a), a fraudulent transfer occurs if the debtor made the transfer or otherwise incurred the obligation:

> (1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or
>
> (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation; and the debtor:
>
> (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

[148] *Id.* § 10.008(a)(2) (stating "all rights, title, and interests . . . is allocated to and vested . . . in one or more of the surviving or new organizations . . . without . . . (C) any transfer or assignment having occurred . . . .").

[149] Tex. Bus. & Comm. Code Ann. § 24 (Vernon 2002).

[150] *Id.* § 24.002(12).

[151] Tex. Bus. Orgs. Code Ann § 10.008(a)(2); Tex. Bus. Corp. Act Ann. art. 5.06(a)(2) (Vernon Supp. 2008).

> (B) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.[152]

Furthermore, under Section 24.006(a):

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value[153] in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.[154]

In the hypothetical situation between Corporation A and Corporation B, it is clear that by allocating all assets to Corporation B, Corporation A did not receive reasonably equivalent value as necessary under Section 24.006(a), and also intended to incur debts beyond its ability to pay as they became due, in violation of Section 24.005(a)(2)(B).[155] Corporation A has made a fraudulent transfer of assets and incurred an obligation without receiving reasonably equivalent value in exchange for the transfer of assets and allocation of obligations. Furthermore, the result of the non-traditional merger between Corporation A and Corporation B caused Corporation A to become insolvent in violation of 24.006(a).[156] However, as the vehicle for the transfer was a merger and a merger does not have the effect of causing a

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[152] Tex. Bus. & Comm. Code Ann. § 24.005(a); The Texas version of UFTA reflects the goals of the original drafters as detailed in the Prefatory Note to the original 1984 UFTA which noted that a transfer is constructively fraudulent if it results in one or more of the following three situations:

> (1) the debtor was left by the transfer or obligation with unreasonably small assets for a transaction or the business in which he was engaged; (2) the debtor intended to incur, or believed that he would incur, more debts than he would be able to pay; or (3) the debtor was insolvent at the time or as a result of the transfer or obligation. UNIF. FRAUDULENT TRANSFER ACT, Prefatory Note (1984).

[153] Tex. Bus. & Comm. Code Ann. § 24.004(d) (stating "'[r]easonably equivalent value' includes without limitation, a transfer or obligation that is within the range of values for which the transferor would have sold the assets in an arm's length transaction.").

[154] *Id.* § 24.006(a).

[155] *Id.* §§ 24.005(a)(2)(B), 24.006(a).

[156] *Id.* § 24.006(a).

transfer or assignment under Texas law, arguably is there any "transfer" which a Texas court can deem fraudulent?[157]

Has Texas dug itself into a hole with *TXO* and the provisions of the Texas Business Corporation Act and the Texas Business Organizations Code? Does "transfer" as it is used in the merger sense trump "transfer" as it is referred to in the fraudulent transfer sense, or vice versa? It remains to be seen how strictly a Texas court will follow the language of the Legislature, and the reasoning in *TXO*, if presented with the chance to interpret the hypothetical situation presented by the merger between Corporation A and Corporation B. Perhaps this is another situation in which the court may be reluctant to follow *TXO* and deem the merger to effect a transfer in order for the Texas Business and Commerce Code to take effect. Or perhaps this is a situation where the court will follow persuasive precedent and hold that a merger does not affect a transfer and leave the Texas Legislature to sort out the loophole. Finally, this may be a situation in which the court will ignore the alleged "transfer" entirely and attack the situation from the viewpoint that Corporation A incurred an obligation to pay debts without receiving reasonably equivalent value and knew it could not pay the debts as they became due—using the "obligation" route to find a fraudulent transfer.[158] For the present time, it seems a party could litigate this matter multiple ways and only time will reveal the true boundaries of the Texas merger statutes and the *TXO* holding.

V. PUTTING TOGETHER THE PIECES: THE POSSIBILITY THAT A TEXAS COURT COULD INTERPRET A MERGER TO EFFECT A TRANSFER OR ASSIGNMENT

Outside the 14th District, Texas courts are not bound by the decision of the Houston Court of Appeals in *TXO Production Co. v. M.D. Mark, Inc.* Thus, in a situation where a Texas court (or any other court interpreting a merger governed by Texas law) is presented with a fact scenario similar to

[157] Tex. Bus. Orgs. Code Ann § 10.008(a)(2) (Vernon 2007) (stating "all rights, title, and interests . . . is allocated to and vested . . . in one or more of the surviving or new organizations . . . without . . . (C) any transfer or assignment having occurred . . . .").

[158] Notably, in the extreme situation in our hypothetical, attacking the obligation would still not provide a remedy. Even if the court set aside the obligations of Corporation A as fraudulent, Corporation A still has no assets. Thus, while creditors of Corporation A would not have to fight for assets with creditors of Corporation B, there are still no assets with which to pay off these remaining liabilities.

TXO that results in an increased risk of harm to the non-breaching party, or presents a conclusion antithetical to partnership laws as noted in *Salgo*, the court will have the opportunity to refuse to apply *TXO*. It must be noted, however, that the practitioner should not expect a Texas court to hold against *TXO* when either the Texas Business Corporation Act or the Texas Business Organizations Code governs the outcome of the merger at issue, as both statutes specifically dictate that a merger does not constitute a transfer or assignment.[159]

Furthermore, the *TXO* court held that *PPG* and *Salgo* were distinguishable because both cases involved a merger between unrelated entities and *TXO* involved a merger between a parent and a subsidiary, a basic change of form.[160] Thus, while the Houston Court of Appeals does not see a change of form as triggering anti-assignment or anti-transfer provisions, it leaves open the possibility that a Texas court could interpret a merger different if the transaction took place between unrelated entities and the end result was not just a change of form, but a new business entity. While the current Texas merger statute specifically states that no assignment or transfer occurs as a result of a merger,[161] in a situation where the merger occurred between two unrelated entities, a Texas court may not apply *TXO*, and instead reach a different conclusion based on the intent of the contract. Consider the fact that the *TXO* court viewed the Texas, Ohio, and Delaware merger statutes as nearly interchangeable.[162] From this interpretation, the *TXO* court concluded that all three states' merger statutes dictated that no transfer or assignment took place when the surviving corporation succeeded to the rights, property, privileges, and obligations of the non-surviving corporations.[163] Yet, this interpretation was directly opposite from the *PPG* court's interpretation of the Ohio and Delaware merger statutes. The *PPG* court (Sixth Circuit) concluded that such transactions did result in prohibited transfers.[164] Because the Sixth Circuit and the Houston Court of Appeals interpreted the same statutes differently, there is a possibility, under the right circumstances, that a Texas court

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[159] *See* Tex. Bus. Corp. Act Ann. art. 5.06(a)(2) (Vernon Supp. 2008); Tex. Bus. Orgs. Code Ann. § 10.008(a)(2).

[160] TXO Prod. Co. v. M.D. Mark, Inc., 999 S.W.2d 137, 141 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

[161] Tex. Bus. Orgs. Code Ann § 10.008(a)(2).

[162] *TXO Prod. Co.*, 999 S.W.2d at 142–43.

[163] *Id.*

[164] PPG Indus., Inc. v. Guardian Indus. Corp., 597 F.2d 1090, 1096 (6th Cir. 1979).

outside the Fourteenth District would choose to follow the Sixth Circuit's reasoning instead of the Houston Court of Appeals' reasoning. The determination left to be made is the weight that will be applied to the Texas merger statute at issue before a Texas court because the *PPG* court did not review any Texas merger statute.

VI. CONCLUSION

In *Cincom Systems Inc.*, the court stated, "[T]he effect of the mergers . . . involves a controlling question of law as to which there is substantial ground for difference of opinion . . . ."[165] That is certainly true from jurisdiction to jurisdiction and practitioner to practitioner, but in Texas, the ground for difference of opinion is small and one-sided. The Official Comments to the Texas Business Corporation Act, the language of that Act, and the current language of the Texas Business Organizations Code weave a difficult web to escape from in the event that the language of an anti-assignment or anti-transfer provision does not explicitly address the effect of a merger.[166] In order to be successful when arguing in front of a Texas court, the practitioner's best options lie first in the contractual language selected, and second, in the equitable reach of the court. Equitable opportunities appear to arise when the anti-assignment and anti-transfer clauses are found in contracts dealing with patent or other intellectual property rights, partnership rights, potentially in some fraudulent transfer cases, and where non-enforcement of the provisions result in unwarranted risk.[167]

From the caselaw, conclusions antithetical to the *TXO* line arise when the factual circumstances contain underlying policies against transfers of interest.[168] The *Salgo* court noted that in cases involving "anti-assignment" clauses in real estate and "anti-transfer" clauses in patent rights, there is an underlying policy against the assignability of such rights and this policy is

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[165] Cincom Sys., Inc. v. Novelis Corp., No. 1:05CV152, 2007 WL 128999, at *6 (S.D. Ohio Jan 12, 2007).

[166] Tex. Bus. Corp. Act Ann. art. 5.06 (Vernon 2003) (Comment of Bar Committee-1996); Tex. Bus. Orgs. Code Ann. § 10.008(a)(2).

[167] *See PPG Indus.*, 597 F.2d at 1096 (intellectual property rights); Nicolas M. Salgo Assocs. v. Continental Ill. Props., 532 F. Supp. 279, 283 (D.D.C. 1981) (partnership rights); Star Cellular Tel. Co. v. Baton Rouge CGSA, Inc., Civ. A. No. 12507, 1993 WL 294847 *11 (Del. Ch. Aug. 2, 1993) (unpublished op.) (unwarranted increase in risk); *supra* Section IV, notes 142–158 (potential fraudulent transfer issues).

[168] *See Salgo*, 532 F. Supp. at 282 n.5.

often the dispositive reason why the court is persuaded to decide the case in favor of enforcement of the non-assignability clause.[169] The *Salgo* court expanded the policy argument to include boundaries of partner admission dictated in the D.C. Code—that no partnership should be forced to accept an individual as a partner against its wishes.[170] Texas partnership law contains the same requirement for partner admission as the D.C. Code and could control the outcome of a case under a similar set of facts to those in *Salgo*.[171] Thus, in situations where a merger under Texas law involves the transfer or assignment of real estate rights, patent rights, or partnership rights, there arises the possibility for a Texas court to conclude that underlying policies against court-ordered transfers of such rights dictate a holding appositive to *TXO*.

Texas courts have not addressed how an increase in risk resulting from a merger or a merger among unrelated entities affects anti-assignment language. However, because Texas courts are likely to construe the merger statutes literally, it is unlikely that arguments based solely on an increase in risk would persuade Texas courts to hold that a merger constitutes an impermissible transfer or assignment. This conclusion is based on the fact that there is no underlying policy or statute that the court can point to in holding against the Texas merger statutes and the persuasive precedent found in *TXO*. That is not to say that practitioners should not use such an argument when the facts of the case are beneficial to their client under an "increased risk of harm" argument. There is always a chance that such an argument may cause a Texas court to be reluctant in applying *TXO*.

In conclusion, while the possibility to dissuade a Texas court from applying *TXO* in cases involving the transfer of intellectual property rights, LLC rights and partnership rights, in cases resulting in an unwarranted increase in risk, and in cases involving a fraudulent transfer, the best protections against unwanted assignments and transfers available to the practitioner are those expressly dictated in the contract. If a client seeks to prevent the transfer or assignment of rights, duties, powers, or privileges under a contract, the practitioner must ensure that the language of an anti-assignment or anti-transfer clause is drafted to reflect the client's wishes.

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[169] *Id.*

[170] *Id.* at 283 (policy notion was based in D.C. CODE § 41-317(g) ("No person can become a member of the partnership without the consent of all the partners.")).

[171] *See, e.g.*, Tex. Bus. Orgs. Code Ann § 152.201 ("A person may become a partner only with the consent of all partners.").

Thus, the contract must be explicit in addressing mergers and their intended effect and provide for the chance to rescind the contract or renegotiate the terms of the contract in the event that one of the parties to the contract is involved in a merger or other change of form.