

A VANISHING REMEDY: QUESTIONING THE CONSTITUTIONALITY OF
THE CURRENT STATE OF SALE OF ASSETS, POST-DISSOLUTION TORT
LIABILITY IN TEXAS

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I. INTRODUCTION

Imagine a situation where X Corporation negligently produces, designs, or maintains an unsafe product. X Corporation sells the product, and it is finally purchased by Charlie Consumer. X Corporation then sells substantially all of its assets to Y Corporation for cash and a substantial sum of Y Corporation stock. Several months after Corporation X files articles of dissolution, Charlie Consumer is seriously injured by the product that he purchased while X Corporation was still in business. Consumer's attorney learns of the sale of substantially all of X Corporation's assets to Y Corporation. He also learns that X Corporation and Y Corporation are both incorporated in Texas and Y Corporation is now run by many of the same officers and directors of X Corporation.

The injuries are severe, the negligence is clear, but Consumer has no chance of recovery. This isn't because limitations has run, a statute of repose has barred recovery, or because X Corporation has any kind of immunity. Had Consumer's product happened to fail before X Corporation sold all of its assets, Consumer would have a great case. Unfortunately for Consumer, and anyone in a similar situation, any cause of action against Corporation X, Y, or any shareholders of the two corporations has been extinguished by a combination of legislative enactment and statutory interpretation. Because of tortfeasor X Corporation's sale of assets and subsequent dissolution, Consumer's remedy has simply disappeared.

Texas Business Corporation Act (T.B.C.A.) Article 7.12 and its successor statute, the Texas Business Organizations Code (B.O.C.) section 11.356, have the effect of barring all claims against a corporation, except "existing claims" brought within three years of dissolution.¹ *Hunter v. Fort Worth Capital Corp.* interprets this statutory language as foreclosing any liability based on the "equitable trust fund theory" apart from liability provided in the statute.² Furthermore, T.B.C.A. Article 5.10(B)(2) and its successor, B.O.C. section 10.254, limit liability of an acquiring corporation to only those liabilities expressly assumed from a corporation selling substantially all of its assets.³ Additionally, *Suarez v. Sherman Gin Co.*⁴

¹TEX. BUS. CORP. ACT ANN. art. 7.12 (Vernon 2003); TEX. BUS. ORGS. CODE ANN. § 11.356 (Vernon 2007).

²620 S.W.2d 547, 551 (Tex. 1981).

³TEX. BUS. CORP. ACT ANN. art. 5.10 § B(2); TEX. BUS. ORGS. CODE ANN. § 10.254.

⁴697 S.W.2d 17, 20–21 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

and *Mudgett v. Paxson Machine Co.*⁵ interpret the language of Article 5.10(B)(2) as eliminating the “de facto merger” doctrine as it existed in Texas. These holdings extend to all other potential equitable doctrines tracing assets and liabilities from a dissolved corporation to a successor corporation.⁶

These provisions have the combined effect of allowing the independent act of a potential defendant to foreclose future liability for tortious acts already committed.⁷ The destruction of liability is independent and apart from any controlling statutes of limitations or repose.⁸ The liability simply disappears.⁹ Before the decision in *Mudgett*, an injured party would have some semblance of a remedy. Now, they certainly do not.¹⁰ Nearly thirty years after these statutes took effect, courts and litigants continue to struggle with the severe inequities that the law imposes on this class of plaintiffs.¹¹ These statutes and decisions have destroyed well-recognized causes of action and declare that while a plaintiff may have a right to relief, there is simply no one against whom they may assert their cause of action.¹²

⁵ 709 S.W.2d 755, 758 (Tex. App.—Corpus Christi 1986, writ ref’d n.r.e.).

⁶ *See id.*

⁷ *See* Robert W. Hamilton, *Corporations and Partnerships*, 36 SW. L.J. 227, 241 (1982) (“This mechanical analysis of the Texas statute effectively leaves remediless all plaintiffs in products liability cases arising from accidents occurring after the dissolution of the corporation. In addition, corporations conceivably could take regular ‘dissolution baths’ to shed themselves of unknown and unwanted contingent product liability claims without a significant change in ownership.”).

⁸ *See* *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 549 (Tex. 1981) (“Article 7.12 provides statutory remedies for pre-dissolution claims only and thus is in the nature of a survival statute.”); *see also* *Gomez v. Pasadena Health Care Mgmt., Inc.*, Nos. 14-06-00605-CV, 14-06-00957-CV, 2008 WL 151827, at *6 (Tex. App.—Houston [14th Dist.] Jan. 17, 2008, pet. filed) (“However, Article 7.12 is a survival statute, not a statute of limitations. The distinction between a statute of limitations and a survival statute is that, a statute of limitations affects the time that a stale claim may be brought while a survival statute gives life for a limited time to a right or claim that would have been destroyed entirely but for the statute.”) (internal citations and quotation marks omitted).

⁹ *See infra* Part II.C–D.

¹⁰ *See* *W. Res. Life Ins. Co. v. Gerhardt*, 553 S.W.2d 783, 786 (Tex. Civ. App.—Austin 1977, writ ref’d n.r.e.), *superseded by statute*, TEX. BUS. CORP. ACT ANN. art. 5.10 (Vernon 2003), *as recognized in* *Shapolsky v. Brewton*, 56 S.W.3d 120 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

¹¹ *See Gomez*, 2008 WL 151827 at *6–7.

¹² *See infra* Part II.C–D; *Hunter*, 620 S.W.2d at 554 (Spears, J., dissenting) (“Persons sustaining post-dissolution loss or injury resulting from the negligence, a defective product, or

While an exploration and discussion of possible theories to circumvent these decisions could be vast, the search would yield very few options for our aggrieved plaintiff, and of those options, none would be certain or satisfactory.¹³ However, Texas has guaranteed an injured plaintiff, such as ours, a right to assert his cause of action in its courts.¹⁴ The Texas Constitution's Article I, section 13 guarantees that access to the courts will not be unreasonably restricted by the legislature.¹⁵ This Comment recognizes that this variety of due process is the remedy for such an abrogation of common law rights of action. It additionally shows how the progression of these decisions has violated that guarantee in a post-dissolution, sale of assets situation. Part II addresses the so-called "equitable" post-dissolution and successor doctrines in Texas. Part III discusses the parameters of the "open courts" guarantee in Article I, section 13. Part IV examines how the current landscape of post-dissolution law violates the "open courts" guarantee and shows how allowing the continued applicability of "de facto merger" in Texas would correct this unconstitutional legal non-sequitur.

II. THE HISTORY OF POST-DISSOLUTION AND SUCCESSOR DOCTRINES IN TEXAS

A. *The Common-Law Rule of Corporate "Death"*

The generally accepted rule at common law was that all causes of action by or against a corporation were extinguished upon its dissolution.¹⁶ This rule was first enunciated by the United States Supreme Court in *Oklahoma Natural Gas Co. v. Oklahoma*.¹⁷ Justice Taft explained that:

[A] corporation which has been dissolved is as if it did not exist, and the result of the dissolution can not be distinguished from the death of a natural person in its effect. It follows therefore, that as the death of the natural

breach of warranty of the dissolved corporation are left completely without a remedy under the rule announced by the majority.").

¹³ See George W. Kuney, *A Taxonomy and Evaluation of Successor Liability*, 6 FLA. ST. U. BUS. L. REV. 9, 18–22 (2007).

¹⁴ TEX. CONST. art. I, § 13.

¹⁵ *Id.*

¹⁶ MODEL BUS. CORP. ACT §§ 78–80 ¶ 3.01 (1960) (historical note).

¹⁷ 273 U.S. 257, 259 (1927).

person abates all pending litigation to which such a person is a party, dissolution of a corporation at common law abates all litigation in which the corporation is appearing either as plaintiff or defendant.¹⁸

The Court closely analogized the “death” of a corporation with the death of a natural person at common law, with the distinction however that, “corporations exist for specific purposes, and only by legislative act, so that if the life of the corporation is to continue even only for litigating purposes it is necessary that there should be some statutory authority for the prolongation.”¹⁹ But, one may ask Justice Taft, what of causes of action not created by statute? When the statutory corporate entity that served as a liability “shield” for shareholders has fallen, do causes against the corporation then vest against the shareholders?²⁰ Recognizing these problems and more, modern courts would soon alleviate the harsh effects of the common-law rule.²¹

B. “Equitable Doctrines” Emerge and Are Adopted in Texas

Equitable doctrines such as “mere continuation,” “the trust fund doctrine,” and “de facto merger” were first created by courts invoking their equitable powers in order to provide post-dissolution and successor liability against dissolved or successor corporations.²² In Texas, a variety of the “de facto merger doctrine” and the “trust fund doctrine” prevailed in allowing plaintiffs to trace the funds of a defunct corporation to its shareholders and successors.²³ The doctrines were never broad sweeping, but where it was clear that the business of the dissolved corporation had not truly ceased, or

¹⁸ *Id.* (citations omitted).

¹⁹ *Id.* at 259–60.

²⁰ As will be discussed in Part IV.A this question was posed in Texas even earlier than Justice Taft’s pronouncement. See *Sulphur Springs & Mt. P. Ry. Co. v. St. Louis, A. & T. Ry. Co.*, 2 Tex. Civ. App. 650, 22 S.W. 107, 108 (Fort Worth 1893, writ denied) (“On the dissolution of a stock corporation its assets become a trust fund for the discharge of its liabilities, and the surplus belongs to the shareholders. Equity will always furnish a means by which debts due a corporation can be collected after its dissolution, for the benefit of parties interested, either creditors or shareholders. . . . That this is the law in this state there can be no question.”) (Internal citations and quotation marks omitted).

²¹ See Kuney, *supra* note 13; *infra* Part IV.D, notes 50, 77, 78, 83, and accompanying text.

²² Kuney, *supra* note 13.

²³ *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 554 (Tex. 1981) (Spears, J., dissenting).

where corporate funds were easily traceable to shareholder distributions, these doctrines afforded aggrieved plaintiffs a remedy.²⁴ With regard to successor liability, the Third Restatement of Torts recognizes both the general rule and its classic exceptions:

A successor business that purchases only the assets of another business is not subject to liability for harm caused by defective products sold commercially by the predecessor unless:

- (a) in acquiring the assets, the successor agrees to assume liability;
- (b) the acquisition results from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor;
- (c) the acquisition constitutes a consolidation or merger with the predecessor; or
- (d) the acquisition results in the successor becoming a continuation of the predecessor.²⁵

For shareholder liability, there developed the “trust fund doctrine.” This doctrine of post-dissolution liability recognized that when the assets of a dissolved corporation are distributed among its shareholders, a creditor of the dissolved corporation may pursue the assets on the theory that, in equity, the shareholders are burdened with a lien in his favor.²⁶ In effect, the doctrine provided that the “successors” of the corporate liability were its shareholders and directors.

Successor doctrines in Texas manifested themselves collectively as the “de facto merger” doctrine.²⁷ Sometimes erroneously referred to as the

²⁴ RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 12 (1998).

²⁵ *Id.*

²⁶ *Hunter*, 620 S.W.2d at 550 (majority opinion).

²⁷ See generally *W. Res. Life Ins. Co. v. Gerhardt*, 553 S.W.2d 783 (Tex. Civ. App.—Austin 1977, writ ref’d n.r.e.), *superseded by statute*, TEX. BUS. CORP. ACT ANN. art. 5.10 (Vernon 2003), as recognized in *Shapolsky v. Brewton*, 56 S.W.3d 120 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); *Suarez v. Sherman Gin Co.*, 697 S.W.2d 17 (Tex. App.—Dallas 1985, writ ref’d n.r.e.); *Mudgett v. Paxson Mach. Co.*, 709 S.W.2d 755, 758 (Tex. App.—Corpus Christi 1986, writ ref’d n.r.e.) (explaining that “the ‘mere continuation’ doctrine is an even more liberal means of imposing liability upon the acquiring corporation in a purchase of assets transaction than is the de facto merger doctrine.”).

“continuation theory” (though as the theory evolved in Texas it is a hybrid of both)²⁸, de facto merger recognized that when a successor corporation continued the business of the dissolved corporation and there existed a continuation in ownership, “liability is imposed on the acquiring corporation as a mere continuation of the former.”²⁹ These two theories alleviated the harsh effects of the “well recognized” common law rule of corporate death, in some form or another, for almost one hundred years in Texas.³⁰ Today, all of these theories have been either partially or entirely abrogated by the Texas courts’ interpretations of the T.B.C.A. and the B.O.C.³¹

C. The Rise and Fall of the “Trust Fund” Doctrine

The Texas Supreme Court, only 14 years after the adoption of the current constitution, first recognized the “trust fund doctrine” pursuant to their equitable powers.³² Quickly thereafter, the doctrine was codified and the court’s role in its development was relegated to interpreting the ever-changing statutory language.³³ The statutes imposed various limitations on the trust fund theory and were expanded in 1909 and again in 1919.³⁴ These codifications were entirely supplanted in 1955 by the T.B.C.A. article 7.12 and have been re-codified by the B.O.C. § 11.356.³⁵

²⁸ See *Suarez*, 697 S.W.2d at 20.

²⁹ *Hunter*, 620 S.W.2d at 556 (Spears, J., dissenting).

³⁰ See *infra* Part IV.D, notes 50, 77, 78, 83, and accompanying text.

³¹ See *infra* notes 50, 77, 78, 83, and accompanying text.

³² See *Panhandle Nat’l Bank v. Emery*, 78 Tex. 498, 15 S.W. 23, 24 (1890).

³³ See *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.*, 86 Tex. 143, 24 S.W. 16, 19–23 (1893).

³⁴ See *Hunter*, 620 S.W.2d at 550 (majority opinion); *Humble Oil & Ref. Co. v. Blankenburg*, 149 Tex. 498, 235 S.W.2d 891, 893 (1951); *Nardis Sportswear v. Simmons*, 147 Tex. 608, 218 S.W.2d 451, 453–54 (1949); *McBride v. Clayton*, 140 Tex. 71, 166 S.W.2d 125, 128 (1942); *Peurifoy v. Wiebusch*, 132 Tex. 36, 117 S.W.2d 773, 775 (1938); *Burkburnett Ref. Co. v. Ilseng*, 116 Tex. 366, 292 S.W. 179, 181 (1927); *Lyons-Thomas Hardware Co.*, 24 S.W. at 20; *Lyon-Gray Lumber Co. v. Gibraltar Life Ins. Co.*, 269 S.W. 80, 82 (Tex. Comm’n App. 1925, judgm’t. adopted); *Krueger v. Young*, 406 S.W.2d 751, 758 (Tex. Civ. App.—Eastland 1966, writ ref’d n.r.e.); *Evons v. Winkler*, 388 S.W.2d 265, 270 (Tex. Civ. App.—Corpus Christi 1965, writ ref’d n.r.e.); see also Tex. Rev. Civ. Stat. arts. 606, 608 (1879); Tex. Rev. Civ. Stat. arts. 1388, 1389, 1390, 1392 (Vernon 1948), *repealed by*, Act of May 24, 1961, 57th Leg., R.S., ch. 205, § 2, 1961 Tex. Gen. Laws 408, 422.

³⁵ See TEX. BUS. CORP. ACT ANN. art. 7.12 (Vernon 2003); TEX. BUS. ORGS. CODE ANN. § 11.356 (Vernon 2007).

The application of the trust fund doctrine in Texas prior to *Hunter v. Fort Worth Capitol Corp.*³⁶ was best articulated by the court in *Fagan v. La Gloria Oil and Gas Co.*,³⁷ holding that the trust fund doctrine applied whenever (1) a corporation became insolvent, and (2) the corporation had ceased doing business. When the two conditions were met, officers, directors and shareholders of the corporation became trustees of any corporate assets.³⁸ The doctrine's effect is to create a fiduciary duty for corporate directors, officers and shareholders "to administer the corporate assets for the benefit of the creditors and to ratably distribute them."³⁹ The court reasoned that the trust fixed at the time that the corporation substantially ceased doing business.⁴⁰ The court viewed the trust fund doctrine, prior to *Hunter*, as a "well recognized exception" to the rule that corporate directors and officers owed no fiduciary duty to creditors.⁴¹ However, a faulty elevator would forever thwart any expansion of the trust fund doctrine to tort law in Texas.⁴²

In 1960, Hunter-Hayes installed an elevator that it inspected and serviced until 1964 when it transferred its assets to Dover Corporation for preferred stock and distributed the assets among its shareholders before it dissolved.⁴³ In 1975, Theodore Moeller was permanently injured when the elevator fell on top of him after a faulty hydraulic system failed.⁴⁴ Moeller asserted causes of action in negligence and strict liability against the former shareholders of Hunter and argued he was entitled to recover damages based on the trust fund doctrine.⁴⁵ The trial court granted summary judgment finding that article 7.12 supplanted the trust fund doctrine but the court of civil appeals reversed and remanded for trial.⁴⁶

³⁶ 620 S.W.2d 547 (Tex. 1981) (eliminating the trust fund theory in tort actions arising post-dissolution); see *infra* notes 42–43.

³⁷ 494 S.W.2d 624, 628–31 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ).

³⁸ *Id.* at 628.

³⁹ *Id.*

⁴⁰ *Id.* at 629–33; see also *Smith v. Chapman*, 897 S.W.2d 399, 402 (Tex. App.—Eastland 1995, no writ), *superseded by statute*, TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(5) (Vernon 2002), as recognized in *Rice v. Louis A. Williams & Assocs., Inc.*, 86 S.W.3d 329 (Tex. App.—Texarkana 2002, pet. denied).

⁴¹ *Fagan*, 494 S.W.2d at 628 ("There is a well recognized exception to that basic rule.").

⁴² See *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 548 (Tex. 1981).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 548–49.

The Texas Supreme Court analyzed the history of the trust fund theory in relation to its statutory embodiments.⁴⁷ The court relied heavily on the proposition that the trust fund theory had never existed apart from its codification in Texas.⁴⁸ As the dissent notes, this assertion is almost certainly inaccurate.⁴⁹ At worst, the trust fund theory pre-dated any statutory codification of its existence. At best, the trust fund theory survived alongside the statutory codifications until 1909 when a comprehensive statute concerning corporate existence was enacted.⁵⁰ The court concluded that the legislature intended to supplant the entirety of the trust fund theory and it provided a remedy only to those plaintiffs that were encompassed by its terms, to wit, existing claimants at the time of dissolution.⁵¹

Justice Spears, in dissent, precisely framed the problem by observing that, “[t]he net effect of the court’s holding is to permit, and even encourage, the evasion of historic common law principles and sound public policy that wrongdoers respond in damages to a person injured as a proximate cause of that wrong.”⁵² The dissent, while disagreeing with the majority’s analysis, also pointed out that future claimants would still have a remedy pursuant to the other equitable doctrines, still in effect, such as de facto merger or the continuation theory.⁵³ Thus, as of 1981 when *Hunter* was handed down there were still reasonable avenues whereby aggrieved parties could find a remedy.⁵⁴ The open courts guarantee had yet to be violated.

In 1991, subsection G was added to article 2.41 of the T.B.C.A.⁵⁵ Subsection G provides that the sole liability of directors and shareholders is for authorizing or receiving wrongful distributions at dissolution of a

⁴⁷ *Id.* at 550.

⁴⁸ *Id.*

⁴⁹ *See id.* at 554 (Spears, J., dissenting).

⁵⁰ *See id.*; *Panhandle Nat’l Bank v. Emery*, 78 Tex. 498, 15 S.W. 23, 24 (1890).

⁵¹ *Hunter*, 620 S.W.2d at 550–52 (majority opinion).

⁵² *Id.* at 554 (Spears, J., dissenting).

⁵³ *Id.*

⁵⁴ *W. Res. Life Ins. Co. v. Gerhardt*, 553 S.W.2d 783 (Tex. Civ. App.—Austin 1977, writ ref’d n.r.e.), *superseded by statute*, TEX. BUS. CORP. ACT ANN. art. 5.10 (Vernon 2003), *as recognized in Shapolsky v. Brewton*, 56 S.W.3d 120 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (holding “de facto merger” as a viable theory of successor liability in Texas).

⁵⁵ *See* TEX. BUS. CORP. ACT ANN. art. 2.41 § G.

corporation.⁵⁶ Commentators and courts have tentatively concluded that the language in article 2.41(G), though restricted to “distributions” was meant to foreclose any remnants of the “trust fund” doctrine that existed in Texas law apart from the liability declared in the statute.⁵⁷ The B.O.C., though with slightly different language, imposes the same restrictions on liability.⁵⁸

The Supreme Court has yet to rule on the continued viability of the trust fund doctrine, though some lower courts have steadfastly adhered to the deeply-rooted “equitable rule.”⁵⁹ Though the ultimate scope of the trust fund doctrine is still in question,⁶⁰ one thing is certain—tort claims arising after the dissolution of a corporation do not become part of the res of the trust under the statutory scheme.⁶¹ Therefore, claimants seeking redress for

⁵⁶ *Id.*

⁵⁷ See Christian Otteson, Comment, *Current Application of the Trust Fund Doctrine in Texas*, 55 BAYLOR L. REV. 313, 327–28 (2003) (“Today the ‘trust fund’ theory and similar common law remedies are superfluous in light of the express statutory liability of directors for authorizing distributions when a corporation is insolvent, which is embodied in Article 2.41 of the TBCA. . . . [T]herefore, Article 2.41 of the TBCA is amended to add a new Section G, which clarifies that these statutory remedies are exclusive.” (quoting Summary of Business Organization Bill (HB 278), Bulletin of the Business Law Section of the State Bar of Texas, June 1991)); see also *In re LaJet, Inc.*, No. 93-3266, 1994 U.S. Dist. LEXIS 15179, at *4 n.4 (E.D. La. Oct. 13, 1994) (“Prior to the enactment of modern business corporation and fraudulent transfer statutes, the courts fashioned remedies for creditors whose claims against an insolvent corporation were not satisfied as a result of dividends and distributions in liquidation to shareholders. Among these remedies was the equitable ‘trust fund’ theory, which allowed holders of pre-dissolution claims against a dissolved corporation to trace the assets that were distributed by the corporation to its shareholders and to recover those assets to the extent of the claims. Today, the ‘trust fund’ theory and similar common law remedies are superfluous in light of the express statutory liability of directors for authorizing distributions when a corporation is insolvent, which is embodied in Article 2.41A of the TBCA, and the express statutory liability of shareholders for receiving such distributions, which is embodied [sic] in Article 2.41E. . . . Therefore, Article 2.41 of the TBCA is amended to add a new Section G, which clarifies that these statutory remedies are exclusive.”)(citing House Comm. on Business and Commerce, Bill Analysis, Tex. H.B. 278, 72d Leg., R.S. § 16 at 4 (1991)).

⁵⁸ See TEX. BUS. ORGS. CODE ANN. § 21.316(d) (Vernon 2007).

⁵⁹ *Kern v. Gleason*, 840 S.W.2d 730, 738 (Tex. App.—Amarillo 1992, no writ); *Smith v. Chapman*, 897 S.W.2d 399, 402 (Tex. App.—Eastland 1995, no writ), *superseded by statute*, TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(5) (Vernon 2002), *as recognized in* *Rice v. Louis A. Williams & Assocs., Inc.*, 86 S.W.3d 329 (Tex. App.—Texarkana 2002, writ denied).

⁶⁰ See *infra* Part IV.D.

⁶¹ See TEX. BUS. CORP. ACT ANN. art. 7.12 (Vernon 2003); TEX. BUS. ORGS. CODE ANN. § 11.356.

post-dissolution injuries sustained through the wrongful acts of a dissolved corporation will find no relief in the assets traceable to the hands of directors and shareholders.

D. The Rise and Fall of De Facto Merger (and Other Successor Liability Doctrines)

One of the first cases recognizing the doctrine of de facto merger in Texas was *National Bank of Jefferson v. Texas Investment Co.*⁶² There, the rule of successor liability was stated as “when one corporation transfers all its assets to another corporation, and thus practically ceases to exist, without having paid its debts, the latter corporation takes the property subject to a lien in favor of the creditors of the old company.”⁶³ Thus, the first iteration of the doctrine emerged as granting a lien in favor of preexisting creditors of a dissolved corporation when its assets were transferred to another corporation.⁶⁴ There is little dispute that the evolution of the doctrine applied only to preexisting liabilities with little application to later discovered torts.⁶⁵ That is, until *Western Resources Life Insurance Co. v. Gerhardt*.⁶⁶

In *Gerhardt*, six plaintiffs purchased insurance contracts from the American Business and Commercial Life (ABC) insurance company as investments.⁶⁷ They alleged that the insurance agents who sold them the contracts represented that the contracts “would reap tremendous profits beyond the benefits afforded by the life insurance which was part of the contract.”⁶⁸ Such benefits never occurred.⁶⁹ After plaintiffs had purchased the contracts, ABC transferred all of its assets to Western Resources Life Insurance Company (WRL) in exchange for 346,240 shares of WRL stock.⁷⁰ Also pursuant to the agreement, WRL’s board of directors was increased from nine to fifteen members with the six new members being

⁶² 74 Tex. 421, 437, 12 S.W. 101, 105 (1889).

⁶³ *Id.*

⁶⁴ *See id.*

⁶⁵ *See, e.g., id.*

⁶⁶ 553 S.W.2d 783 (Tex. Civ. App.—Austin 1977, writ ref’d n.r.e.), *superseded by statute*, Act of May 4, 1979, 65th Leg., R.S., ch. 194 § 1, 1979 Tex. Gen. Laws 422, 422–23 (current version at TEX. BUS. CORP. ACT ANN. art. 5.10 § B).

⁶⁷ *Id.* at 785.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

designated by ABC.⁷¹ WRL also expressed its intention to affiliate ABC's managers and agency force with WRL.⁷² The plaintiffs urged that the consequence of the business arrangement was a de facto merger, and therefore, WRL was liable for the misrepresentation of ABC.⁷³

The *Gerhardt* court quickly recognized modern de facto merger in Texas.⁷⁴ It adopted factors from *Shannon v. Samuel Langston Co.*⁷⁵ and found that WRL was liable to plaintiffs for the misrepresentation committed by ABC.⁷⁶ The factors were stated as:

- (1) There is a continuation of the enterprise of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations.
- (2) There is a continuity of shareholders which results from the purchasing corporation for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing corporation.
- (3) The seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible.
- (4) The purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.⁷⁷

The *Gerhardt* court explained that the policy behind adopting the de facto merger doctrine stemmed from the notion that a tort action's existence shouldn't rely on the later acts of the culpable party:

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 785–86.

⁷⁴ *Id.* at 786.

⁷⁵ *Id.* (citing *Shannon v. Samuel Langston Co.*, 379 F. Supp. 797, 801 (W.D. Mich. 1974)).

⁷⁶ *Gerhardt*, 553 S.W.2d at 787.

⁷⁷ *Id.* at 786.

The imposition of liability upon the succeeding corporation is grounded upon the notion that no corporation should be permitted to commit a tort and avoid liability through corporate transformations or changes in form only. If a corporation continues to exist, or is merged into another corporation, the policy is that liability should be retained.⁷⁸

Four years after *Gerhardt*, the San Antonio Court of Appeals rejected an argument of de facto merger liability without deciding on the viability of the doctrine.⁷⁹ However, the concurring opinion specifically addressed the de facto merger doctrine, not rejecting it, but rather relying on the recently passed statute for the proposition that “it seems apparent that the legislature, in acting so promptly after the *Gerhardt* decision to prevent assumption of all liabilities by a purchasing corporation unless it expressly assumes them, declared the public policy of this State in a manner contrary to that sought by appellant.”⁸⁰ Rather than deciding the case on the common law theory or the statute, the court ultimately punted the question.⁸¹

In its first session following the *Gerhardt* opinion, the legislature amended T.B.C.A article 5.10 to add subsection B, which read:

A disposition of all, or substantially all, of the property and assets of a corporation requiring the special authorization of the shareholders of the corporation under Section A of this article:

- (1) is not considered to be a merger or consolidation pursuant to this Act or otherwise; and
- (2) Except as otherwise expressly provided by another statute, does not make the acquiring corporation responsible or liable for any liability or obligation of the

⁷⁸ *Id.*

⁷⁹ *Castilla v. Trinity Indus., Inc.*, 626 S.W.2d 798, 800 (Tex. App.—San Antonio 1981, writ dismissed w.o.j.).

⁸⁰ *Id.* at 802 (Baskin, J., concurring).

⁸¹ *See id.* at 800 (majority opinion).

selling corporation that the acquiring corporation did not expressly assume.⁸²

This language has been carried over to the B.O.C. section 10.254 under the heading “Disposition of Property Not a Merger or Conversion; Liability” which reads:

(a) A disposition of all or part of the property of a domestic entity, regardless of whether the disposition requires the approval of the entity’s owners or members, is not a merger or conversion for any purpose.

(b) Except as otherwise expressly provided by another statute, a person acquiring property described by this section may not be held responsible or liable for a liability or obligation of the transferring domestic entity that is not expressly assumed by the person.⁸³

The next case to address the de facto merger doctrine was *Suarez v. Sherman Gin Co.*⁸⁴ Under facts similar to the *Gerhardt* case arising before the enactment of T.B.C.A article 5.10(B), the court rejected application of de facto merger.⁸⁵ The court cited three reasons for its rejection on appeal.⁸⁶ First, the Texas Supreme Court declined to adopt the de facto merger doctrine even prior to the enactment of article 5.10(B).⁸⁷ However, the court cited no authority for this proposition and presumably relied on a

⁸² Act of May 4, 1979, 65th Leg., R.S., ch. 194 § 1, 1979 Tex. Gen. Laws 422, 422–23 (amended 1997) (current version at TEX. BUS. CORP. ACT ANN. art. 5.10, § B (Vernon 2003)). The current version of the act was amended slightly in 1997 with no substantive change and provides: “A disposition of any, all, or substantially all, of the property and assets of a corporation, whether or not it requires the special authorization of the shareholders of the corporation, effected under Section A of this article or under Article 5.09 of this Act or otherwise: (1) is not considered to be a merger or conversion pursuant to this Act or otherwise; and (2) except as otherwise expressly provided by another statute, does not make the acquiring corporation, foreign corporation, or other entity responsible or liable for any liability or obligation of the selling corporation that the acquiring corporation, foreign corporation, or other entity did not expressly assume.” TEX. BUS. CORP. ACT ANN. art. 5.10, § B.

⁸³ TEX. BUS. ORGS. CODE ANN. § 10.254 (Vernon 2007).

⁸⁴ 697 S.W.2d 17, 20 (Tex. App.—Dallas 1985, writ ref’d n.r.e.).

⁸⁵ *Id.* at 20–21.

⁸⁶ *Id.*

⁸⁷ *Id.* at 20.

mere lack of case law.⁸⁸ Second, citing the *Castilla* concurrence, the court argued that “the legislature’s prompt action to override *Gerhardt* and statutorily preclude application of the de facto merger doctrine in Texas clearly states a public policy opposed to the doctrine.”⁸⁹ But this rationale doesn’t address the critical question of whether de facto merger existed in Texas before the enactment of article 5.10(B). Once again the court punted the very question it was asked to decide. Finally, the court reasoned that the elements of de facto merger were not met because the corporation was paid for in cash, rather than shares.⁹⁰ This reasoning misconstrues the de facto merger factors as conjunctive elements. The test for de facto merger has always been one based on the totality of the circumstances.⁹¹

The Corpus Christi Court of Appeals made the most broad-sweeping statement recognizing the abrogation of successor liability theories in *Mudgett v. Paxson Machine Co.*⁹² The court used prior cases to summarily reject application of the de facto merger doctrine.⁹³ They also cited the fact that the comment to article 5.10(B) rejects the application of the de facto merger doctrine used in *Gerhardt*.⁹⁴ The court further rejected other theories of post-dissolution liability such as the “mere continuation” theory because it was a “more liberal” standard of liability than the de facto merger doctrine and the “product line” theory because it was “incompatible with ‘the theory of products-liability tort actions’”⁹⁵ as stated in *Griggs v. Capitol Machine Works, Inc.*⁹⁶

Other courts have since recognized the abrogation of the de facto merger doctrine, product line theory, and mere continuation theory in

⁸⁸ *See id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 20–21.

⁹¹ *See* W. Res. Life Ins. Co. v. *Gerhardt*, 553 S.W.2d 783, 786 (Tex. Civ. App.—Austin 1977, writ ref’d n.r.e.), *superseded by statute*, Act of May 4, 1979, 65th Leg., R.S., ch. 194 § 1, 1979 Tex. Gen. Laws 422, 422–23 (current version at TEX. BUS. CORP. ACT ANN. art. 5.10, § B (Vernon 2003)); *Shannon v. Samuel Langston Co.*, 379 F. Supp. 797, 801–02 (W.D. Mich. 1974).

⁹² 709 S.W.2d 755, 758 (Tex. App.—Corpus Christi 1986, writ ref’d n.r.e.).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 758–59 (quoting *Griggs v. Capitol Machine Works, Inc.*, 690 S.W.2d 287, 292 (Tex. App.—Austin 1985, writ ref’d n.r.e.)).

⁹⁶ *Griggs*, 690 S.W.2d at 292 (holding the “products-line” theory of imputing strict product liability onto an acquiring corporation was against public policy).

Texas.⁹⁷ These decisions have finally foreclosed any argument for post-dissolution or successor liability when an injury is based on the pre-dissolution negligence of a corporate entity.⁹⁸ Whether the corporation has continued in another name, is selling the same products, or simply distributed its assets to its shareholders, is of no consequence. Absent fraud in the distribution or an express agreement for another entity to assume these liabilities, the injured party has no remedy.

III. THE “OPEN COURTS” GUARANTEE OF DUE PROCESS

A. Introduction

Article I, section 13 of the Texas Constitution provides that “[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.”⁹⁹ This provision has been interpreted by the Texas Supreme Court as guaranteeing that “persons bringing common-law claims will not unreasonably or arbitrarily be denied access to the courts.”¹⁰⁰ This modern interpretation has its genesis in the landmark case of *Sax v. Votteler*.¹⁰¹

Sax laid the general framework for challenging a statute under article I, section 13.¹⁰² Courts are to first presume that a statute is valid and “that the Legislature has not acted unreasonably or arbitrarily; and a mere difference of opinion, where reasonable minds could differ, is not a sufficient basis for striking down legislation as arbitrary or unreasonable.”¹⁰³ A litigant must show that a “well-recognized” common law right has been abrogated by the statute.¹⁰⁴ Finally, a litigant must show that “the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute.”¹⁰⁵

⁹⁷ *E.g.*, *Lockheed Martin Corp. v. Gordon*, 16 S.W.3d 127, 135 n.6 (Tex. App.—Houston [1st Dist.] 2000, pet. denied); *Shapolsky v. Brewton*, 56 S.W.3d 120, 137–38 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); *C.M. Asfahl Agency v. Tensor, Inc.*, 135 S.W.3d 768, 792 n.19 (Tex. App.—Houston [1st Dist.] 2004, no pet.); *Sitaram v. Aetna U.S. Healthcare of N. Tex., Inc.*, 152 S.W.3d 817, 826 n.8 (Tex. App.—Texarkana 2004, no pet.).

⁹⁸ *See Mudgett*, 709 S.W.2d at 758.

⁹⁹ TEX. CONST. art. I, § 13.

¹⁰⁰ *Shah v. Moss*, 67 S.W.3d 836, 841 (Tex. 2001).

¹⁰¹ 648 S.W.2d 661, 665–66 (Tex. 1983).

¹⁰² *Id.* at 666.

¹⁰³ *Id.* at 664 (quoting *Smith v. Davis*, 426 S.W.2d 827, 831 (Tex. 1968)).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 666.

The purpose of the open courts provision has been explained as ensuring that “the legislature has no power to make a remedy by due course of law contingent on an impossible condition.”¹⁰⁶ Additionally, the open courts provision only applies to legislative action and not the action of courts¹⁰⁷ (the cases discussed in Part II of this Comment are interpretations of legislative action). Therefore, any litigant challenging the constitutionality of the Texas post-dissolution and survival statutes is challenging the statutes as previously interpreted and not the present action of the Supreme Court in interpreting them.¹⁰⁸

The court in *Shah v. Moss* further explained that:

A statute that unreasonably or arbitrarily abridges a person’s right to obtain redress for injuries another person’s harmful act causes is an unconstitutional due-course-of law violation. Consequently, our Constitution’s open courts provision protects a person from legislative acts that cut off a person’s right to sue before there is a reasonable opportunity to discover the wrong and bring suit.¹⁰⁹

Challenges to the constitutional validity of statutes under the open courts provision of the Texas Constitution have traditionally prevailed in a few typical areas, including: statutes of limitations where the plaintiff had no reasonable opportunity to discover the wrong,¹¹⁰ requirements that minors file suit before majority,¹¹¹ requirements that litigants pay filing fees prior to litigation,¹¹² and damage caps.¹¹³

Therefore, the statutory scheme for post-dissolution and successor liability in Texas under articles 7.12, 2.41, and 5.10(B)(2) of the T.B.C.A (B.O.C. sections 11.356, 21.316(d), and 10.254, respectively) will only violate open courts if: (1) there was a well-recognized common law cause of action that was in existence before the statutory scheme and (2) the

¹⁰⁶ *Nelson v. Krusen*, 678 S.W.2d 918, 921 (Tex. 1984).

¹⁰⁷ *See Peeler v. Hughes & Luce*, 909 S.W.2d 494, 499 (Tex. 1995).

¹⁰⁸ *See supra* notes 34, 54, 80, 81 and accompanying text.

¹⁰⁹ 67 S.W.3d 836, 842 (Tex. 2001) (“And the Legislature cannot abrogate the right to bring a well-established common-law claim without showing that the statute’s objectives and purposes outweigh denying the constitutionally guaranteed right of redress.”).

¹¹⁰ *See id.* at 846–47; *Nelson*, 678 S.W.2d at 923–24.

¹¹¹ *See Sax v. Votteler*, 648 S.W.2d 661, 664–67 (Tex. 1983).

¹¹² *See LeCroy v. Hanlon*, 713 S.W.2d 335, 341 (Tex. 1986).

¹¹³ *See Lucas v. United States*, 757 S.W.2d 687, 690 (Tex. 1988).

abrogation of that right was unreasonable and arbitrary when compared with the general statutory purpose.¹¹⁴

B. A Well Recognized Common Law Right

The court in *Sax* was faced with a challenge to the constitutionality of a medical liability scheme which mandated that, regardless of disability, minors under the age of six had to bring a claim against a person covered under the act by the child's eighth birthday or else be barred by limitations.¹¹⁵ The court quickly endorsed the common law right requirement, holding that minors had well-recognized common law rights of action for injuries negligently inflicted by others.¹¹⁶ Within the ambit of causes of action that have been "well recognized" enough to support an open courts challenge are wrongful birth¹¹⁷ and misappropriation of trade secrets.¹¹⁸

¹¹⁴It is implicit in the constitutional challenge being proposed here, as well as most of the cases that have relied on article I, section 13, that this challenge is an "as applied" challenge to the statutory scheme. While there might, theoretically, be a statute that violates the open courts provision for all conceivable litigants, the scheme in the T.B.C.A or B.O.C. is not it. This analysis is restricted to our hypothetical injured person asserting general negligence or gross negligence theory (or any other common-law theory for that matter) against the successors of a dissolved corporation.

¹¹⁵*Sax*, 648 S.W.2d at 663.

¹¹⁶*Id.* at 666 (citing *Tex. & P. Ry. v. Morin*, 66 Tex. 225, 18 S.W. 503 (1886); *Houston & Great N.R.R. Co. v. Miller*, 51 Tex. 270 (1879); *Fall v. Weber*, 47 S.W.2d 365 (Tex. Civ. App.—Dallas 1932, writ ref'd)).

¹¹⁷*Nelson v. Krusen*, 678 S.W.2d 918, 923–24 (Tex. 1984) (holding that action for 'wrongful birth' was recognized in Texas) (citing *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975)). Justice Robertson recognized in his concurrence the short time period between the enactment of the statute creating the unreasonable restriction and the adoption, by the Texas Supreme Court, of the "wrongful birth" cause of action. *Id.* at 926 (Robertson, J., concurring). While Justice Robertson recognized that the "wrongful birth" cause of action only had a four-month existence prior to its abrogation in Texas, he would rest the "well recognized" prong of the open courts analysis on the traditional negligence cause of action. *Id.* This analysis eliminates the requirement that the specific plaintiff complaining of an open courts violation have been able to actually assert their cause of action against the defendant prior to the statutory restriction. *Id.* ("More precisely, the Nelsons' cause of action sounds in negligence and alleges medical malpractice; such a cause of action was well-established in this State long before *Jacobs v. Theimer* and fully merits the protection of art. I, sec. 13 of the Texas Constitution."). Notably, Justice Robertson framed the "open courts" protection more pragmatically as applying, "[w]hen a statute, whether it be termed one of 'limitation' or of 'repose,' eliminates a plaintiff's access to the courts for redress of an injury, despite the exercise of all possible diligence . . ." *Id.* at 927.

¹¹⁸*See Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 458 (Tex. 1996).

The leading case interpreting the “common law” requirement of an open courts challenge is *Moreno v. Sterling Drug, Inc.*¹¹⁹ There, the court considered the constitutionality of the wrongful death statute, which did not provide an avenue for the discovery rule to apply in certain circumstances when the cause of death was difficult to discover before limitations ran.¹²⁰ The court rejected the argument because wrongful death was a purely statutory cause of action.¹²¹ Because the legislature “expand[ed] the rights of the individual beyond those granted by the common law” it had the right to limit the applicability of the cause of action.¹²² The court found that because the legislature itself had expanded the common law by providing a wrongful death statute, while the “elements” of the cause of action parallel other common law claims, the legislature controlled the extent and applicability of the cause of action.¹²³

Much like the situation for corporate death, the common law extinguished all causes of action for the benefit of the deceased and on behalf of his dependents or survivors.¹²⁴ The first wrongful death statute was passed in 1846 in response to the English case of *Baker v. Bolton*.¹²⁵ This statute provided the basis for Texas’s wrongful death statute.¹²⁶ Because of the rapid action of the British Parliament, the common law courts never had an opportunity to reexamine the rule or provide for exception. Thus, a common law right for wrongful death never had time to develop in English or American courts.

Trinity River Authority v. URS Consultants, Inc. further refined the “common law right” requirement.¹²⁷ At issue was a statute of repose that barred a negligence action against architects and engineers after a specified

¹¹⁹ See generally 787 S.W.2d 348 (Tex. 1990).

¹²⁰ *Id.* at 355.

¹²¹ *Id.* at 356.

¹²² *Id.* at 355–56 (quoting *Castillo v. Hidalgo County Water Dist. No. 1*, 771 S.W.2d 633, 636 (Tex. App.—Corpus Christi 1989, no writ)).

¹²³ *Id.* at 356; see also *Baptist Mem’l Hosp. Sys. v. Arredondo*, 922 S.W.2d 120, 121–22 (Tex. 1996).

¹²⁴ *Moreno*, 787 S.W.2d at 356 n.7.

¹²⁵ 1 Camp. 493, 170 Eng. Reprint 1033 (1808); see *Fatal Accidents Act*, 1846, 9 & 10 Vict., c. 93, § 2 (Eng.); see also *Witty v. Am. Gen. Distribs., Inc.*, 727 S.W.2d 503, 504 (Tex. 1987) (recognizing the rule).

¹²⁶ See *Moreno*, 787 S.W.2d at 356 n.7 (citing *Sanchez v. Schindler*, 651 S.W.2d 249, 251 (Tex. 1983); *March v. Walker*, 48 Tex. 372, 375 (1877)).

¹²⁷ 889 S.W.2d 259 (Tex. 1994).

date after a structure was constructed.¹²⁸ The court found that there was no common law right abrogated because the discovery rule had yet to apply to construction or design negligence cases when the statute was passed.¹²⁹

Synthesizing these cases, the rule seems to be that a “well recognized” cause of action had to be cognizable at common law, before any statutory restriction, and the statutory restriction limits, rather than enlarges, the common law right.¹³⁰ It doesn’t matter when Texas courts recognized the cause of action,¹³¹ as long as, under the circumstances presented in the case, the court created the cause of action using its inherent law-making authority,¹³² and the particular cause of action was recognized for the benefit of the claimant against that particular defendant.¹³³

C. An Unreasonable Restriction in Light of the General Legislative Purpose

Sax recognized that children had no right to bring causes of action before their disability had been removed. Therefore, any restriction requiring them to bring actions before that time would necessarily limit their ability to bring those actions.¹³⁴ This restriction was held arbitrary despite an argument that parents could be relied upon to bring minors’ causes of action because that view would entirely destroy the minor’s right to bring her own cause of action.¹³⁵ The legislative purpose articulated in *Sax* was that:

The general purpose of the statute, therefore, was to provide an insurance rate structure that would enable health care providers to secure liability insurance and thereby

¹²⁸ *Id.* at 261.

¹²⁹ *Id.* at 262.

¹³⁰ See *Thomas v. Oldham*, 895 S.W.2d 352, 357–58 (Tex. 1995) (holding that the Texas Tort Claims Act broadened rather than restricted the common law ability to sue the state).

¹³¹ See *Nelson v. Krusen*, 678 S.W.2d 918, 923 (Tex. 1984). *But see id.* at 926 (Robertson, J., concurring) (explaining that timing is crucial in the analysis, but “well recognized” rights of actions flow from the defendant’s conduct that causes a direct injury and not a common law recognition of a right by a particular class of plaintiffs against a particular class of defendants).

¹³² See *id.* at 923 (majority opinion).

¹³³ *Id.*; *St. Luke’s Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 508 (Tex. 1997) (holding that open courts did not apply to a “negligent credentialing” cause of action because lower court authority was scant and split over whether the cause of action was cognizable).

¹³⁴ See *Sax v. Votteler*, 648 S.W.2d 661, 666–67 (Tex. 1983).

¹³⁵ *Id.*

provide compensation for their patients who might have legitimate malpractice claims. The specific purpose of the provision in question was to limit the length of time that the insureds would be exposed to potential liability.¹³⁶

The court acknowledged that the legislative purpose of the statute was valid, but it was outweighed by the total effective abrogation of the minor's right with no adequate substitutes.¹³⁷

Therefore, the key to the court's analysis under the "unreasonableness" portion of the open courts test is that, although there might be some way that the claimant could have circumvented the statutory scheme by relying on third parties, the claimant is not required to rely on the actions of third parties to assert their rights (in *Sax*, the timely action of the minor's parents). Also, a generally permissible legislative purpose will fail in light of a complete abrogation of a common law right of action with no reasonable substitutes.¹³⁸

Nelson v. Krusen extended open courts protection to those situations where injuries could not be reasonably discovered before the end of limitations period.¹³⁹ There the court observed that:

In one respect, the circumstances in the present case are even more compelling than in *Sax* and *McCrary*. In those cases, it was possible for the parents to bring their children's suits in time, even if limitations were allowed to run. In the present case, if the Nelsons' assertions are true, the nature of the injury made it unreasonable to expect that anyone, parent or child, would be able to bring suit within two years.¹⁴⁰

The court described a limitation that required a party to sue before they had any reason to know they should sue as "'shocking' and . . . so absurd and so unjust that it ought not be possible."¹⁴¹ The court felt that "[d]eferring to the legislative imposition of such an unreasonable condition would amount to an abdication of our judicial duty to protect the rights

¹³⁶ *Id.* at 666.

¹³⁷ *Id.* at 667.

¹³⁸ *See id.*

¹³⁹ 678 S.W.2d 918, 923 (Tex. 1984).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* (citations omitted).

guaranteed by the Texas Constitution, the source and limit of legislative as well as judicial power.”¹⁴²

To contrast the “total abrogation” standard of *Sax* and *Nelson* is the case of *LeCroy v. Hanlon*.¹⁴³ At issue was the requirement that a litigant pay a filing fee to be placed in the State’s general revenue.¹⁴⁴ The balance struck by the court is particularly instructive. The filing fee was unconstitutional where it went to the general fund, to wit, non-judiciary activity.¹⁴⁵ But when the filing fee was used only in conjunction with judicial services the fee was presumptively constitutional.¹⁴⁶ The balance was struck based on the policy that the judiciary could limit access of a litigant for institutional support and funding, but a filing fee could not be used in order to support other public programs because that would necessarily entail society supporting itself on the backs of litigants.¹⁴⁷

Importantly, the court countered the State’s argument that the fees were reasonable by noting:

The state argues that a tax on individual litigants is reasonable as long as the amount raised for general revenues is less than the amount spent from general revenues on the judiciary. This argument, however, uses the wrong perspective: a societal perspective. When individual rights guaranteed by the state constitution are involved, an individual rights perspective is used. From that perspective, litigants must pay a tax for general welfare programs as a condition to being allowed their right of access to the courts. This the open courts provision prohibits.¹⁴⁸

For the purposes of this Comment, this reasoning is particularly compelling. For post-dissolution purposes there are societal interests in providing the fair and efficient end of corporate operation and finality at direct odds with individual interests in open courts and full and effective

¹⁴² *Id.*

¹⁴³ 713 S.W.2d 335 (Tex. 1986).

¹⁴⁴ *Id.* at 341.

¹⁴⁵ *Id.* at 342.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

relief for injuries.¹⁴⁹ When viewed from the individual's perspective, a post-dissolution injury resulting from tortious conduct simply has no remedy. Hence, under the rationale in *LeCroy*, when individual rights guaranteed by the Constitution are involved, policy favors the individual's interest in access to relief over society's interest in an end to corporate liability.

Extending the *LeCroy* reasoning even further was *Lucas v. United States*.¹⁵⁰ There the court rejected an argument in defense of the constitutionality of damage caps in medical liability suits that an individual was repaid for the abrogation by a general lowering of insurance coverage for medical practitioners, and thus more affordable health care.¹⁵¹ The court held that these were general benefits that fell in the face of the abrogation of common law rights.¹⁵² In addition, the court in *Computer Associates International, Inc. v. Altai, Inc.* held that having no discovery rule in a misappropriation of trade secrets case did not violate open courts because:

[A] significant purpose of statutes of limitations is to prevent the litigation of stale and fraudulent claims. This policy, combined with the nature of trade secret property rights, which requires an owner to vigilantly guard the secret from the world in order to preserve its rights, makes application of the two-year statute of limitations reasonable under the circumstances.¹⁵³

It's clear from these cases that the general rule seems to be that total abrogation of common law rights will outweigh the legislative purposes

¹⁴⁹ Compare *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 551–52 (Tex. 1981) (“We agree with defendant that extension of the trust fund theory to cover plaintiff’s claim would mean that the corporation could never completely dissolve but would live on indefinitely through its shareholders. We do not believe that this result would be in accordance with the spirit of the laws governing the dissolution of corporations.” (quoting *Blankenship v. Demmler Mfg. Co.*, 411 N.E.2d 1153, 1156 (Ill. App. Ct. 1980))) with *Sax v. Votteler*, 648 S.W.2d 661, 665 (Tex. 1983) (holding “open courts” guarantees that “[a] statute or ordinance that unreasonably abridges a justiciable right to obtain redress for injuries caused by the wrongful acts of another amounts to a denial of due process” (citing *Hanks v. City of Port Arthur*, 48 S.W.2d 944, 948 (Tex. 1932))).

¹⁵⁰ 757 S.W.2d 687 (Tex. 1988).

¹⁵¹ *Id.* at 690 (quoting *Wright v. Central Du Page Hosp. Ass’n*, 347 N.E.2d 736 (Ill. 1976)).

¹⁵² *Id.*

¹⁵³ 918 S.W.2d 453, 458 (Tex. 1996).

invalidating statutes in all but the rarest circumstances.¹⁵⁴ However, the curve comparing the weight of legislative purpose with the abrogation of individual rights drops very sharply. Even the smallest avenues available for a litigant to pursue their rights will weigh heavily in favor of the constitutionality of legislation.¹⁵⁵ Therefore, an analysis of Texas sale-of-assets and dissolution statutes must begin with recognition that, under the current scheme, our hypothetical Consumer has an injury, a cause of action, but no defendant.

IV. THE POST DISSOLUTION AND SUCCESSOR LIABILITY LANDSCAPE IS A VIOLATION OF THE OPEN COURTS GUARANTEE

A. *Negligence, Post-Dissolution and Against a Successor is a “Well Recognized Common Law Right”*

Beginning this analysis poses an unusual problem. Since at common law, actions by or against a dissolved corporation are extinguished, are post-dissolution exceptions to this rule properly regarded as “common law” at all? “De facto merger” and the “trust fund doctrine” have been labeled as “equitable exceptions” to the common law rule.¹⁵⁶ The distinction between a “common-law rule” and an “equitable exception” to that rule only makes any sense if there is some effect to that distinction in the area of tort law.

There is no distinction, in Texas, between courts of law and courts of equity.¹⁵⁷ The distinction between actions at law and actions in equity has been extinguished in the area of tort and contract with respect to liability.¹⁵⁸ To the extent that this distinction exists, it is only in the substantive law of remedies where there exist certain “equitable” remedies of the court such as

¹⁵⁴ *See id.*

¹⁵⁵ *See generally* LeCroy v. Hanlon, 713 S.W.2d 335 (Tex. 1986).

¹⁵⁶ *See* Solomon v. Greenblatt, 812 S.W.2d 7, 19 (Tex. App.—Dallas 1991, no writ) (“The Texas Supreme Court has fashioned an equitable remedy, the trust fund doctrine, for curing situations in which shareholders receive distributions while creditors go unpaid.”); *In re Acushnet River*, 712 F. Supp. 1010, 1019 (D. Mass. 1989) (“However, as de facto merger is an equitable doctrine . . .”).

¹⁵⁷ *See* TEX. CONST. art. 5, § 8; *Voigtlander v. Brotze* 59 Tex. 286, 288 (1883) (“[I]n all cases in which the district court has jurisdiction, by virtue of the grant to it of judicial power by the organic law, that court is fully authorized to administer any measure of relief whatever, whether in law or equity, that could at common law be granted either by a court of law or in equity.”).

¹⁵⁸ *See Brotze*, 59 Tex. at 288.

injunction or specific performance.¹⁵⁹ The Restatement of Torts (Third) makes no mention of this distinction and treats the “mere continuation” and “de facto merger” theories of liability as substantive exceptions to the general rule that dissolved corporations have no liability.¹⁶⁰

The Texas Supreme Court decided long ago in *Douglass Brown & Co. v. Neil & Co.*¹⁶¹ that the merger of courts of law and equity precludes Texas courts from resting decisions in these archaic distinctions. The court stated that:

Chief Justice Hemphill, therefore, was well warranted in laying it down, in *Smith v. Clopton*, that if a party have rights cognizable by either a court of law or a court of equity, he has a case within the jurisdiction of the courts of this State; and equally well warranted in adding that the rule that courts of equity will interfere only where the party is remediless at law, has but little application in this State. *Smith v. Clopton*, just cited, was a suit which Clopton could not have maintained in a “court of law” where the distinctions between law and equity are maintained; but this court held that as our courts are precluded from regarding the distinctions between law and equity, his suit was well brought, though it is obvious that he alleged no other “equity” than the ownership of the instrument sued on.¹⁶²

Whether an “exception” to a traditional common law rule such as de facto merger or the trust fund theory is called an “equitable” exception or is simply part of the substantive common law makes no real difference in modern tort law, and especially not in Texas.¹⁶³

Texas does, however, continue the equitable-legal distinction in the substantive property law by distinguishing between legal and equitable titles and interests.¹⁶⁴ Even around the United States, the distinction

¹⁵⁹ See *O’Bryant v. City of Midland*, 949 S.W.2d 406, 414 (Tex. App.—Austin 1997), *rev’d on other grounds*, 18 S.W.3d 209 (Tex. 2000) (“Historically, the difference between the two types of actions depended upon the nature of the relief desired.”).

¹⁶⁰ See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 12 (1998).

¹⁶¹ 37 Tex. 529, 538 (1872).

¹⁶² *Id.*

¹⁶³ *See id.*

¹⁶⁴ See *Miller v. Howell*, 234 S.W.2d 925, 929 (Tex. Civ. App.—Fort Worth 1950, no writ).

between law and equity has become superfluous.¹⁶⁵ Hence, it is easy to draw the conclusion that the mere moniker of “equitable exception” makes little difference in Texas where a court will apply the substantive rules of decision whether those rules originated in English Common Law, Texas case law, or by statute.¹⁶⁶ A “well recognized common law right” must extend, not only to the general rule, but its exceptions.¹⁶⁷ It would be odd to say that the principles of due process pick and choose among the avenues of relief available to an injured party depending on whether that party’s claim for relief arose from a general rule or an exception.

The question then becomes whether any doctrines of post dissolution or successor liability are “well recognized” enough to warrant an open courts violation. As discussed, whether a cause of action by or against an entity is “well recognized” is largely a question of timing.¹⁶⁸ Using the analogous situation of the Wrongful Death and Survival Statutes above,¹⁶⁹ statutory law allowing for the survival of certain causes of action was enacted almost immediately after the common law rule was announced.¹⁷⁰ There was no time for courts, sitting in equity of that time, to afford aggrieved parties a remedy at common law for any wrong done. The British Parliament quickly provided the remedy, and by that act, along with the continuity of

¹⁶⁵ For example, the “equitable” procedures and exceptions to the finality of judgments have largely been ignored. See Melissa A. Waters, *Common Law Courts in an Age of Equity Procedure: Redefining Appellate Review for the Mass Tort Era*, 80 N.C. L. REV. 527, 558–59 (2002). In fact, exceptions to the “final judgment” rule allowing interlocutory appeal, once recognized by a court, have simply been treated as part of the substantive “law of judgments.” *Id.* Even in Delaware, where there still exists a separate Court of Chancery that has jurisdiction over certain actions by or against a corporation, the distinction between “legal” and “equitable” actions is breaking down. See generally Kurt M. Heyman & Christal Lint, *Recent Developments in Corporate Law: Recent Supreme Court Reversals and the Role of Equity in Corporate Jurisprudence*, 6 DEL. L. REV. 451 (2003). Some commentators argue that the Delaware Supreme Court has expanded the scope of equity to apply to actions where the substantive rules of decision would normally be drawn from statutory substantive law. See *id.* at 484–88.

¹⁶⁶ See *Nelson v. Krusen*, 678 S.W.2d 918, 923–24 (Tex. 1984) (recognizing a “well recognized” common law right of wrongful birth when the cause of action was not recognized traditionally by common law or by statute).

¹⁶⁷ See *id.* at 923 (recognizing the “discovery rule,” a common law exception to limitations, as the remedy for an open courts violation).

¹⁶⁸ See *supra* notes 119–33 and accompanying text.

¹⁶⁹ See *supra* notes 123–24 and accompanying text.

¹⁷⁰ See Fatal Accidents Act, 1846, 9 & 10 Vict., c. 93 § 2 (Eng.).

wrongful death and survival statutes, cut off any “open courts” right to relief that may have come into being.¹⁷¹

The situation for post-dissolution and successor doctrines is slightly different than in the case of wrongful death actions in an important way. Here a remedy was incorporated into the substantive law around the country,¹⁷² in the Restatement of Torts¹⁷³ and in Texas court of appeals precedent,¹⁷⁴ before the legislature acted.¹⁷⁵ The only issue is whether a single year and adoption by a single court in Texas is enough to make the right “well recognized.”

At first blush it seems the answer is “no.” However, it is important to keep in mind that the cause of action at issue here is simple negligence. Justice Robertson, writing in concurrence with the court in *Nelson v. Krusen*, framed the “wrongful birth” cause of action in terms of simple negligence.¹⁷⁶ This was true even though the right to relief by a parent for negligent acts causing the birth of a child wasn’t recognized in Texas until the Texas Supreme Court decided *Jacobs v. Theimer* four months earlier.¹⁷⁷ When our hypothetical Consumer is injured by the negligent acts of a corporation, he is asserting a right sounding in simple negligence.¹⁷⁸ The

¹⁷¹ Whether the “well recognized common law right” requirement as currently formulated is good policy is beyond the scope of this article. While it is true that it would be odd to limit a properly enacted statute based on a “right” that had not yet been recognized at the time that statute was enacted, the “timing” aspect of the analysis is equally odd considering that the principals of equity have eternally afforded full and complete relief.

¹⁷² See Robert W. Hamilton, *supra* note 7 (“While some case law exists in other jurisdictions accepting this general construction, apparently none of these states has abolished the de facto merger doctrine by legislative enactment.”). See generally Joseph Jude Norton, *Relationship of Shareholders to Corporate Creditors Upon Dissolution: Nature and Implications of the “Trust Fund” Doctrine of Corporate Assets*, 30 BUS. LAW. 1061 (1975); Kuney, *supra* note 13.

¹⁷³ RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 12 (1998).

¹⁷⁴ See *W. Res. Life Ins. Co. v. Gerhardt*, 553 S.W.2d 783 (Tex. Civ. App.—Austin 1977, writ ref’d n.r.e.), *superseded by statute*, TEX. BUS. CORP. ACT ANN. art. 5.10 (Vernon 2003), as recognized in *Shapolsky v. Brewton*, 56 S.W.3d 120 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

¹⁷⁵ Act of May 4, 1979, 65th Leg., R.S., ch. 194 § 1, sec. 5.10(B), 1979 Tex. Gen. Laws 422, 422–23 (current version at TEX. BUS. CORP. ACT ANN. art. 5.10 § B).

¹⁷⁶ 678 S.W.2d 918, 926 (Tex. 1984) (Robertson, J., concurring) (“More precisely, the Nelsons’ cause of action sounds in negligence and alleges medical malpractice; such a cause of action was well-established in this State long before *Jacobs v. Theimer* and fully merits the protection of art. I, sec. 13 of the Texas Constitution.”).

¹⁷⁷ See *id.*; *Jacobs v. Theimer*, 519 S.W.2d 846, 850 (Tex. 1975).

¹⁷⁸ See *supra* Part I.

duty that was breached is the duty to use ordinary care in one's affairs.¹⁷⁹ A corporation is recognized under the statutory law of Texas for the primary purpose of shielding the shareholders from liability.¹⁸⁰ Corporate liability is fundamentally different than partner liability in that a partnership's liability is generally not distinct from its members.¹⁸¹ There is nothing mystical or novel about a cause of action being asserted for direct injuries caused by the negligence of another. However, when that negligent act is committed under the protection of a corporation, the law protects owners and shareholders by demanding a plaintiff seek redress from the corporation.¹⁸² The negligence our plaintiff asserts is certainly a well-recognized cause of action.¹⁸³

Additionally, there are several considerations that tend to indicate that de facto merger was "well recognized" enough to support an open courts challenge. *Gerhardt* was the only law in Texas on the subject until T.B.C.A. article 5.10 was passed.¹⁸⁴ The Texas Supreme Court refused a writ of review for *Gerhardt*, no reversible error, a year prior to the passage of T.B.C.A. 5.10(B).¹⁸⁵ Surely, the recognition of a doctrine making a successor corporation liable for the actions of a dissolved corporation would have been "reversible error" had the doctrine clearly not existed in Texas prior to *Gerhardt*. Additionally, de facto merger is recognized in the

¹⁷⁹ See *Tex. & Pac. Ry. Co. v. O'Donnell*, 58 Tex. 27, 39 (Tex. 1882).

¹⁸⁰ 18 C.J.S. *Corporations* § 1 (2007) ("A corporation is an incorporeal creature of the law whose constituent members usually are able to take shelter under its protective shield of limited liability.").

¹⁸¹ 18 C.J.S. *Corporations* § 5 (2007) ("while a corporation is a distinct legal entity, in a partnership there is no legal entity separate and distinct from the members . . .").

¹⁸² See *Tex. Rev. Civ. Stat. Ann. art. 5521(e)* §§ 1.002 (defining "governing person"); 7.001 (narrowly defining the liabilities of governing persons); 21.224 (extinguishing all shareholder liability other than in the Code); 21.223 (narrowly defining the liabilities of shareholders) (Vernon Supp. 2007).

¹⁸³ *Nelson v. Krusen*, 678 S.W.2d 918, 926 (Tex. 1984) (Robertson, J. concurring).

¹⁸⁴ *Suarez v. Sherman Gin Co.*, 697 S.W.2d 17, 20 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

¹⁸⁵ See *W. Res. Life Ins. Co. v. Gerhardt*, 553 S.W.2d 783 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.), *superseded by statute*, TEX. BUS. CORP. ACT ANN. art. 5.10 (Vernon 2003), as *recognized in Shapolsky v. Brewton*, 56 S.W.3d 120 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

Restatement of Torts¹⁸⁶ and has become the law in numerous jurisdictions around the United States.¹⁸⁷

Finally, we know why other courts of appeals and the Texas Supreme Court declined to adopt the doctrine at the critical time.¹⁸⁸ The court in *Suarez* forwarded two reasons for rejecting de-facto merger for occurrences prior to the effective date of T.B.C.A article 5.10: (1) Because the legislature adopted article 5.10 and (2) the Texas Supreme Court's failure to adopt the doctrine before 5.10(B) was passed.¹⁸⁹ However, both of these reasons depend on the rapid action of the legislature and not on whether the substantive rules of equity or stare decisis required the adoption of de facto merger. In other words, the courts failed to answer the question before them: "was de facto merger viable before 5.10(B)?"

In sum, *Gerhardt* formed a cause of action by an aggrieved party and against a successor corporation in a sale-of-assets situation before the legislature passed T.B.C.A 5.10(B).¹⁹⁰ The Texas Supreme Court declined to pass on the validity of the doctrine and the right of action stems from the principal of equity that the negligent conduct directly causing injury deserves redress and may not be extinguished by the unilateral action of the tortfeasor.¹⁹¹ Thus, the inquiry as to whether the de facto merger doctrine is a "well recognized" common law right settles on the fundamental purpose of the "open courts" due process guarantee.¹⁹²

As explained above, the Texas Supreme Court recently explained in *Shah v. Moss* that:

¹⁸⁶ RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 12 (1998).

¹⁸⁷ See Robert W. Hamilton, *supra* note 7 ("While some case law exists in other jurisdictions accepting this general construction, apparently none of these states has abolished the de facto merger doctrine by legislative enactment."). See generally Norton, *supra* note 172; Kuney, *supra* note 13.

¹⁸⁸ See generally *Suarez v. Sherman Gin Co.*, 697 S.W.2d 17 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

¹⁸⁹ *Id.* at 20–21.

¹⁹⁰ See *Gerhardt*, 553 S.W.2d at 786.

¹⁹¹ See *id.* ("The imposition of liability upon the succeeding corporation is grounded upon the notion that no corporation should be permitted to commit a tort and avoid liability through corporate transformations or changes in form only.").

¹⁹² *Sax v. Votteler*, 648 S.W.2d 661, 664 (Tex. 1983) ("As early as 1932, this Court recognized that article I, section 13, of the Texas Constitution ensures that Texas citizens bringing common law causes of action will not unreasonably be denied access to the courts.").

A statute that unreasonably or arbitrarily abridges a person's right to obtain redress for injuries another person's harmful act causes is an unconstitutional due-course-of law violation. Consequently, our Constitution's open courts provision protects a person from legislative acts that cut off a person's right to sue before there is a reasonable opportunity to discover the wrong and bring suit.¹⁹³

Here, the question is slightly different: Whether a common-law cause of action may be cut off by act of legislature in conjunction with the unilateral acts of the tortfeasor?

Certainly a common law negligence cause of action could be brought against a corporation without unreasonable restriction,¹⁹⁴ yet under the current state of the law, the survival of the cause of action extends only to that time that a defendant corporation decides to sell its assets and go out of business, regardless of whether its successor can be regarded as substantially the same entity.¹⁹⁵ While *Gerhardt* itself might not have created a "well recognized" common law right, the principals on which the decision is based are certainly deeply rooted.¹⁹⁶ The later opinions rejecting *Gerhardt* concede as much by relying only on the legislative enactment, rather than principles of stare decisis or equity, to come to their conclusions.¹⁹⁷

¹⁹³ 67 S.W.3d 836, 842 (Tex. 2001) (citations omitted).

¹⁹⁴ *Mooring v. Fram Corp.*, 420 S.W.2d 462, 462 (Tex. Civ. App.—Eastland 1967, no writ) ("It is well recognized that a manufacturer or processor is liable for the proximate results of its negligence in manufacturing or processing its product.").

¹⁹⁵ See *supra* Part II.C–D.

¹⁹⁶ See *Mooring*, 420 S.W.2d at 462; *Sax*, 648 S.W.2d at 664; *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 555 (Tex. 1981) (Spears, J., dissenting) ("There is still an additional reason why the legislature could not have intended the result reached by the court. Persons sustaining post-dissolution loss or injury resulting from the negligence, a defective product, or breach of warranty of the dissolved corporation are left completely without a remedy under the rule announced by the majority. Not even the legislature was so insensitive as to cut off pre-dissolution claims with no remedy at all. . . . A more classic instance of unjust enrichment is difficult to imagine . . .").

¹⁹⁷ See *Suarez v. Sherman Gin Co.*, 697 S.W.2d 17, 20–21 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

B. Unreasonable Restriction in Light of Legislative Purpose

As discussed, a plaintiff who incurs an injury after a sale of assets and dissolution by a corporation has no legal or equitable remedies.¹⁹⁸ The plaintiff has accrued a cause of action, but the combined effect of T.B.C.A. articles 7.12, 2.41, and 5.10(B) is to shield all possible defendants from liability.¹⁹⁹ Following the rationale in *LeCroy*,²⁰⁰ this abrogation of individual rights must be viewed from the plaintiff's perspective.²⁰¹ When viewed from this perspective, certainly the total abrogation of the most basic of common law causes of action is as "shocking" and "absurd" as requiring parties to sue before they had any reason to know they should sue.²⁰² In this context, it's clear that the legislature's total abrogation of, what is at its core a simple negligence action, is an unreasonable restriction on a common law right in light of the standard in *Sax v. Votteler*.²⁰³ A party's right of redress has been totally abrogated by 5.10(B) and its successors. The general legislative purpose of protecting all dissolved corporations upon sale of their assets must fall in light of this total abrogation.²⁰⁴

However, the remedy for such a violation is unclear. No single statute, standing alone, is a violation of open courts. Rather, it is the combination of post-dissolution and successor liability statutes that creates the unreasonable result. A court could not, as the Texas Supreme Court did in *Sax v. Votteler*,²⁰⁵ declare a single statute unconstitutional. Rather, the court would be forced to choose between reviving either the trust fund doctrine or de facto merger in order to provide some defendant for an aggrieved plaintiff to sue.

This Comment focuses on de facto merger for several reasons. First, because the res of any trust under the doctrine fixed at the time a corporation ceased doing business, it is unclear that the trust fund doctrine

¹⁹⁸ See *supra* Part II.C–D.

¹⁹⁹ See *supra* Part II.C–D.

²⁰⁰ *LeCroy v. Hanlon*, 713 S.W.2d 335, 342 (Tex. 1986).

²⁰¹ See *id.*; *supra* notes 143–49 and accompanying text.

²⁰² See *Nelson v. Krusen*, 678 S.W.2d 918, 922 (Tex. 1984); *supra* note 141 and accompanying text.

²⁰³ 648 S.W.2d 661, 664–67 (Tex. 1983).

²⁰⁴ See TEX. BUS. CORP. ACT ANN. art. 5.10, § B (Vernon 2007).

²⁰⁵ *Sax*, 648 S.W.2d at 667.

ever applied to claims arising from post-dissolution injuries.²⁰⁶ Second, de facto merger certainly applied to post-dissolution torts and had a well-recognized existence around the country.²⁰⁷ Finally, all courts concede de facto merger is a narrow doctrine of limited application in specific circumstances.²⁰⁸ The doctrine finds its very basis on the countervailing basic legal principals that (1) a person is generally not liable for the tortious acts of another²⁰⁹, and (2) a mere change in name will not allow a tortfeasor to escape liability.²¹⁰ For these reasons, it would be a much smaller disruption to the statutory purpose and scheme to revive the de facto merger doctrine, rather than the trust fund doctrine. While the answer to the remedy question is unclear, it is clear that any challenge to the statutory scheme should point to the combined effect of the post-dissolution and successor liability statutory bar.

C. Recent Developments

Demonstrating the relevancy and controversial nature of this issue, the Fourteenth Court of Appeals in Houston recently decided *Gomez v. Pasadena Health Care Management, Inc.*,²¹¹ which held that article 7.12, standing alone, was not a violation of the open courts guarantee.²¹² *Gomez* involved a child born with febrile seizures after an allegedly negligent procedure was conducted during his delivery.²¹³ At the time of his birth the

²⁰⁶ See *supra* note 40 and accompanying text.

²⁰⁷ See *W. Res. Life Ins. Co. v. Gerhardt*, 553 S.W.2d 783 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.), *superseded by statute*, TEX. BUS. CORP. ACT ANN. art. 5.10, *as recognized in* *Shapolsky v. Brewton*, 56 S.W.3d 120 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); *supra* notes 175–78 and accompanying text.

²⁰⁸ See, e.g., *Suarez v. Sherman Gin Co.*, 697 S.W.2d 17, 20 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

²⁰⁹ *Tex. Home Mgmt., Inc. v. Peavy*, 89 S.W.3d 30, 34 (Tex. 2002) (“Generally, there is no duty to control the conduct of others. This general rule does not apply when a special relationship exists between an actor and another that imposes upon the actor a duty to control the other’s conduct.”) (internal citations omitted).

²¹⁰ *Ho Wah Genting Kintron Sdn Bhd. v. Leviton Mfg. Co.*, 163 S.W.3d 120, 127 (Tex. App.—San Antonio 2005, no pet.); *Zuniga v. Wooster Ladder Co.*, 119 S.W.3d 856, 862 (Tex. App.—San Antonio 2003, no pet.); *N. Nat. Gas Co. v. Vanderburg*, 785 S.W.2d 415, 421 (Tex. App.—Amarillo 1990, no writ).

²¹¹ Nos. 14-06-00605-CV, 14-06-00957-CV 2008 WL 151827, at *1 (Tex. App.—Houston [14th Dist.] Jan. 17, 2008, pet. filed).

²¹² *Id.* at *4.

²¹³ *Id.* at *1.

hospital was owned and operated by Southmore Medical Center, Ltd., a limited partnership, whose general partner was Pasadena Health Care Management, Inc..²¹⁴ Three years and several days after the plaintiff's birth, the hospital was sold to Memorial Hospital System and pursuant to the sales agreement proffered an insurance policy with a list of potential medical negligence claimants.²¹⁵ The plaintiff was not on the list and soon thereafter Pasadena and Southmore dissolved.²¹⁶ In 2003, the child's father filed an action against Pasadena and Southmore alleging various acts of medical negligence.²¹⁷ The trial court granted Pasadena and Southmore's motions for summary judgment alleging that T.B.C.A article 7.12²¹⁸ barred recovery because more than three years had passed after the dissolution of the entities.²¹⁹ On appeal, Gomez argued that article 7.12 violated the open courts provision of the Texas Constitution.²²⁰

Gomez asserted that article 7.12's three-year survival statute unreasonably extinguished Gomez's cause of action against the dissolved partnership and corporation, and as a remedy to the violation, the trust fund doctrine ought to be applied.²²¹ Echoing *Hunter*,²²² the court held that suits against dissolved corporations, no matter what the basis, were not recognized at common law and thus could not support an open courts challenge.²²³ The court declined to couch the cause of action in terms of medical negligence.²²⁴ Quoting *Hunter*, the court asserted that the trust

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ TEX. BUS. CORP ACT ANN. art. 7.12 § C (Vernon 2007) ("A corporation shall not be liable for any claim other than an existing claim. An existing claim by or against a dissolved corporation shall be extinguished unless an action or proceeding on such existing claim is brought before the expiration of the three-year period following the date of dissolution. If an action or proceeding on an existing claim by or against a dissolved corporation is brought before the expiration of the three-year period following the date of dissolution and such existing claim was not extinguished pursuant to Section D of this Article, the dissolved corporation shall continue to survive (1) for purposes of that action or proceeding until all judgments, orders, and decrees therein have been fully executed. . . .").

²¹⁹ *Gomez*, 2008 WL 151827 at *2.

²²⁰ *Id.*

²²¹ *Id.* at *3.

²²² *See supra* note 47 and accompanying text.

²²³ *Gomez*, 2008 WL 151827 at *4.

²²⁴ *Id.*

fund doctrine had always been a statutory remedy in Texas.²²⁵ Therefore, the court concluded that “a suit against a dissolved corporation is purely a statutory claim.”²²⁶ In addition, the court held that Article 7.12 was not an unreasonable restriction on Gomez’s rights because it: (1) allowed him to bring his claim within three years of dissolution, and (2) afforded him reasonable alternatives, that is, causes of action against the delivering doctors.²²⁷

While this case solely involved a challenge to article 7.12, the court’s analysis is a perfect example of how framing the “open courts” analysis in terms of “suits against dissolved corporations” rather than basing it on a negligence cause of action is problematic. As discussed, the *Gomez* court’s assertion that the trust fund doctrine is purely statutory in Texas is erroneous.²²⁸ Furthermore, it is difficult, if not impossible, to resolve the *Gomez* court’s holding with the holding in *Sax v. Votteler*.²²⁹ Both cases involved statutory enactments that, as applied, restricted a minor from bringing his action for medical negligence to a time when the minor was still legally incapacitated.²³⁰ In *Sax*, medical negligence was well recognized.²³¹ In *Gomez*, it was not.²³² It seems that the controlling distinction for the *Gomez* court is the fact that the defendant partnership and corporation dissolved before the incapacitated minor brought suit. As shown above, this distinction is arbitrary, unreasonable, and unjust,²³³ and the *Gomez* court’s analysis wades post-dissolution law even deeper into an unconstitutional quagmire. Framing the “common law right” prong of the open courts analysis in terms of simple negligence and remedying a violation of open courts using traditional doctrines of successor and shareholder liability (like de facto merger) is both consistent with the purpose of open courts and the public policy of limiting, as much as is constitutional, post-dissolution liability.

²²⁵ *Id.* But see *supra* notes 48–49 and accompanying text.

²²⁶ *Gomez*, 2008 WL 151827 at *4.

²²⁷ *Id.* at *5.

²²⁸ See *supra* notes 31–33, 48–49 and accompanying text.

²²⁹ See *supra* notes 113–16 and accompanying text.

²³⁰ Compare *Gomez*, 2008 WL 151827 at *1–2 with *Sax v. Votteler*, 648 S.W.2d 661, 662 (Tex. 1983).

²³¹ *Sax*, 648 S.W.2d at 666.

²³² *Gomez*, 2008 WL 151827 at *2.

²³³ See *supra* Part II.B–C.

V. CONCLUSION

While the absence of a post-dissolution remedy following a sale of assets has been a reality for nearly 20 years, the result is neither equitable nor constitutional. The Supreme Court has yet to pass upon the continued viability of de-facto merger or other successor liability doctrines. The advent of T.B.C.A. 5.10(B) in conjunction with the remainder of the post-dissolution liability scheme, has severed an injured party from his otherwise viable rights of redress. While the underlying policy for restricting liability in this area might be sound, a total abrogation of these otherwise viable rights, as shown above, impermissibly denies, not just a party, but any injured party in this situation, her constitutionally guaranteed access to Texas courts.

Of course, the legislature giveth and the legislature taketh away. It is, perhaps, much more efficient than challenging the constitutionality of successor and post-dissolution law to seek legislative change in the area. At the heart of de facto merger is a balance of equities that allocates the rights of an injured party above a narrow class of businesses who would, perhaps unintentionally, unilaterally extinguish their own liability. As the magicians who made post-dissolution rights of action vanish in the first place, the legislature may find it wise, constitutional, and ultimately good policy, to make some remedy, any remedy, reappear again.