



9-1-1982

Article 7.12 of the Texas Business Corporation Act is the Exclusive Expression of the Trust Fund Theory in Texas Case Note.

Drew R. Fuller Jr.

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>



Part of the [Environmental Law Commons](#), [Health Law and Policy Commons](#), [Immigration Law Commons](#), [Jurisprudence Commons](#), [Law and Society Commons](#), [Legal Ethics and Professional Responsibility Commons](#), [Military, War, and Peace Commons](#), [Oil, Gas, and Mineral Law Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Drew R. Fuller Jr., *Article 7.12 of the Texas Business Corporation Act is the Exclusive Expression of the Trust Fund Theory in Texas Case Note.*, 13 ST. MARY'S L.J. (1982).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol13/iss3/9>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

CORPORATIONS—Stockholder Liability—Article 7.12 of the Texas Business Corporation Act is the Exclusive Expression of the Trust Fund Theory in Texas.

Hunter v. Fort Worth Capital Corp.
620 S.W.2d 547 (Tex. 1981).

In May of 1975, Theodore Olin Moeller was struck and permanently disabled by a falling elevator. The elevator had been installed in 1960 by the Hunter-Hayes Elevator Company. Hunter-Hayes serviced the elevator until 1964, when it sold its assets to the Dover Corporation for 25,000 shares of Dover stock. Hunter-Hayes subsequently changed its name to the H. H. Hunter Corporation, distributed the Dover stock to its shareholders, and was issued a certificate of dissolution in March of 1964. Since the corporation had been dissolved eleven years earlier, Moeller relied upon the "trust fund theory" in a suit against the former shareholders of Hunter-Hayes.¹ The trial court granted a summary judgment for the defendant shareholders because the suit had not been brought within three years of dissolution of the corporation, as required by article 7.12 of the Texas Business Corporation Act.² The Fort Worth Court of Civil Appeals reversed and remanded, holding that Texas law allows recovery from the former shareholders of a corporation under the trust fund theory.³ Moeller appealed to the Texas Supreme Court. Held—*Reversed*. Article 7.12 of the Texas Business Corporation Act is the exclusive expression of the trust fund theory in Texas.⁴

At common law, all pending claims against a corporation were abated upon dissolution of the corporation.⁵ To relieve the inequities created by

1. *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 548 (Tex. 1981). The other defendants unsuccessfully cross-claimed against the former shareholders of Hunter-Hayes and were denied this relief. *Id.* at 553.

2. *See id.* at 548-49.

3. *Fort Worth Capital Corp. v. Hunter*, 608 S.W.2d 352, 354 (Tex. Civ. App.—Fort Worth 1980), *rev'd.*, 620 S.W.2d 547 (Tex. 1981).

4. *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 552 (Tex. 1981).

5. *See Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120, 125 (1937); *Life Ass'n. of America v. Goode*, 71 Tex. 90, 95-96, 8 S.W. 639, 640 (1888); 15A W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* §§ 8127, 8142 (rev. perm. ed. 1979); Schoone, *Shareholder Liability Upon Voluntary Dissolution of Corporation*, 44 MARQ. L. REV. 415, 416 (1961); 48 IOWA L. REV. 1006, 1006-09 (1963). The most common explanation given by earlier courts for this doctrine is the analogy of the corporation to a dead man.

It follows, therefore, that as the death of the natural person abates all pending litiga-

this rule, the judiciary created the artifice of the trust fund theory to preserve the claims of legitimate creditors which were not brought until after the debtor corporation's dissolution.⁶ Under this theory, courts of equity imposed an equitable lien on the distributed assets of the dissolved corporation to enable creditors, who had claims which had come into being before the corporation had been dissolved, to pursue their claims after the corporation had been dissolved.⁷ The trust fund theory was, therefore, created for, and limited to, the assertion of claims originating prior to dissolution.⁸

Texas courts have consistently recognized the existence of the trust fund theory, although they have never allowed its use as a means of circumventing the restrictions imposed by equivalent statutory provisions.⁹

tion to which such person is a party, dissolution of a corporation at common law abates all pending litigation in which the corporation is appearing either as plaintiff or defendant. To allow actions to continue would be to continue the existence of the corporation *pro hac vice*. But 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.

Oklahoma Nat. Gas Co. v. Oklahoma, 273 U.S. 257, 259 (1926).

6. See Wood v. Dummer, 30 F. Cas. 435, 435 (C.C.D. Me. 1824) (No. 17,994).

7. See, e.g., Hollins v. Brierfield Coal and Iron Co., 150 U.S. 371, 382-84 (1893); Wabash, St. Louis & Pac. Ry. v. Ham, 114 U.S. 587, 594 (1885); Gaskins v. Bonfils, 79 F.2d 352, 355 (10th Cir. 1935). At least one author argues that despite the name "trust fund theory," this doctrine is in fact a type of equitable lien. Norton, *Relationship of Shareholders of Corporate Creditors Upon Dissolution: Nature and Implications of the "Trust Fund" Doctrine of Corporate Assets*, 30 BUS. LAW. 1061, 1067-72 (1975). *But cf.* Hollins v. Brierfield Coal & Iron Co., 150 U.S. 371, 383 (1893) (actual effect of doctrine explained as "a trust in the administration of assets after possession . . . rather than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder"); Graham v. Railroad Co., 102 U.S. 148, 161 (1880) (Court implies the doctrine actually creates a trust fund).

8. See, e.g., Hollins v. Brierfield Coal & Iron Co., 150 U.S. 371, 383-84 (1893) (discussion of the true nature of the trust fund theory); Curran v. Arkansas, 56 U.S. 304, 307-08 (1853) (trust fund created for unpaid creditors after dissolution of debtor corporation); Stewart v. United States, 327 F.2d 201, 202 (10th Cir. 1964) (United States allowed to recover from dissolved corporation for overcharges on transporting government property). Claims originating prior to dissolution are those which can trace some basis to the pre-dissolution era of the corporation. Otherwise, if a claim can find no existence in the pre-dissolution era of the corporation, it is a post-dissolution claim which can not be asserted under the trust fund theory. Compare Bishop v. Schield Bantam Co., 293 F. Supp. 94, 96 (N.D. Iowa 1968) (post-dissolution claim) with Snyder v. State-Wide Properties Inc., 235 F. Supp. 733, 742 (N.D. Ill. 1964) (pre-dissolution claim).

9. See, e.g., Nardis Sportswear v. Simmons, 147 Tex. 608, 616, 218 S.W.2d 451, 455 (1949) (trustees of dissolved corporation allowed, within three years of dissolution, to enforce option contract acquired by corporation before dissolution); McBride v. Clayton, 140 Tex. 71, 76-78, 166 S.W.2d 125, 128 (1942) (action by stockholder of dissolved corporation to acquire proceeds of life insurance policy of president of corporation); Burkburnett Ref. Co. v. Ilseng, 292 S.W. 179, 180 (Tex. Comm'n App. 1927, judgment adopted) (directors of dis-

The first set of statutes embodying the trust fund theory in Texas were enacted in 1871.¹⁰ Those statutes permitted creditors to sue the stockholders of the dissolved debtor corporation for its unpaid debts to the extent of assets received upon dissolution.¹¹ The statutes were amended in 1907 to provide a three year time limit in which causes of action arising prior to dissolution could be brought after dissolution.¹² In *Lyon-Gray Lumber Co. v. Gibraltar Life Insurance Co.*,¹³ the Texas Commission of Appeals explained the effect of these statutes as constituting a continuation of the corporate entity strictly for the purpose of satisfying its outstanding debts.¹⁴ In 1955 these early statutes and their successors were superseded by article 7.12 of the Texas Business Corporation Act, which is patterned after section 105 of the Model Business Corporation Act.¹⁵

solved corporation suing to collect debt acquired before dissolution). There are cases in which Texas courts have allowed recovery on the basis of the trust fund theory, without discussing the equivalent statutory embodiment of the theory, but these cases seem to allow the trust fund theory to be used only as it could be used under the relevant statute. See *Waggoner v. Herring-Showers Lumber Co.*, 120 Tex. 605, 614, 615, 40 S.W.2d 1, 5 (1931) (dissolved corporation's assets held trust fund for payment of creditors, suit would also meet statutory requirements); *Orr & Lindley Shoe Co. v. Thompson*, 89 Tex. 501, 502-03, 35 S.W. 473 (1896) (creditor of dissolved corporation cannot exclude other creditors from participation in assets set up as trust fund).

10. 1871 Tex. Gen. Laws, ch. 80, §§ 39-43, at 75, 76, 7 H. GAMMEL, LAWS OF TEXAS 76 (1898).

11. See *id.* §§ 39-43, at 75, 76, 7H. GAMMEL, LAWS OF TEXAS 76 (1898). The statutes provided:

Upon the dissolution of any corporation already created by or under the laws of this state, . . . the president and directors or managers of the affairs of the corporation at the time of its dissolution, . . . shall be trustees of the creditors and stockholders of such corporation . . . and for this purpose they may maintain or defend any judicial proceeding.

Id. § 39, at 75, 7 H. GAMMEL, LAWS OF TEXAS 76 (1898).

If any corporation created under . . . statute of this state, . . . , be dissolved, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, . . . for the recovery of the portion of such debt for which they were liable . . .

Id. § 41, at 75, 7 H. GAMMEL, LAWS OF TEXAS 76 (1898). These statutes embody the trust fund theory in three respects: 1) they allow claims arising before dissolution to be asserted afterward, 2) they allow creditors to follow the distributed assets to the stockholders, and 3) they limit the liability of the corporate officers and shareholders to the amount of distributed assets received upon dissolution. Compare *Drew v. United States*, 367 F.2d 828, 830 (Ct. Cl. 1966) (discussion of trust fund) with 1871 Tex. Gen. Laws, ch. 80, §§ 39-43, at 74, 7 H. GAMMEL, LAWS OF TEXAS 76 (1898) (statutory embodiment of trust fund theory).

12. 1907 Tex. Gen. Laws, ch. CLXVI, § 7, at 312; see *Burkburnett Ref. Co. v. Ilseng*, 292 S.W. 179, 181 (Tex. Comm'n App. 1927, judgment adopted); *Lyon-Gray Lumber Co. v. Gibraltar Life Ins. Co.*, 269 S.W. 80, 81 (Tex. Comm'n App. 1925, judgment adopted).

13. 269 S.W. 80 (Tex. Comm'n App. 1925, judgment adopted).

14. *Id.* at 82.

15. See TEX. BUS. CORP. ACT ANN. art. 7.12 (Vernon 1980). Article 7.12 provides:

Courts which have directly considered the question of whether extension statutes based on the Model Act operate to the exclusion of the trust fund theory have held that the theory does not exist outside these statutes.¹⁶ These courts have also held that extension statutes, such as article 7.12 of the Texas Business Corporation Act, do not allow for the recovery of claims arising after dissolution of the offending corporation.¹⁷ There are jurisdictions, however, including some with statutes similar to article 7.12, which have recognized the viability of the trust fund theory outside its statutory embodiment.¹⁸ Nevertheless, no court has ever recognized the validity of a claim arising after dissolution of the corporation under

A. The dissolution of a corporation either (1) by the issuance of a certificate of dissolution by the Secretary of State, or (2) by a decree of court when the court has not liquidated the assets and business of the corporation as provided in this Act, or (3) by expiration of its period of duration, shall not take away or impair any remedy available to or against such corporation, its officers, directors, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within three years after the date of such dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name. The shareholders, directors, and officers shall have power to take such corporate or other action as shall be appropriate to protect such remedy, right, or claim. If such corporation was dissolved by the expiration of its period of duration, such corporation may amend its articles of incorporation at any time during such period of three years so as to extend its period of duration.

Id.; see MODEL BUS. CORP. ACT ANN. § 105 (1971) The only difference between article 7.12 and the Model Act is that article 7.12 extends the two year limitation on claims in the Model Business Corporation Act to three years. Compare TEX. BUS. CORP. ACT ANN. art. 7.12 (Vernon 1980) with MODEL BUSINESS CORP. ACT ANN. § 105 (1971). The annotations to section 105 classify the state statutes based on the section according to their degree of similarity to the text of the Model Act. Those classified as having identical provisions are: Alaska, North Dakota, South Dakota, Utah, and Washington. See MODEL BUS. CORP. ACT ANN. § 105, ¶ 3.01 (1971). Those classified as having provisions "identical in substance" are: Tennessee, Wisconsin, Wyoming, and the District of Columbia. *Id.* ¶ 3.01. Those classified as having comparable provisions are: Colorado, Georgia, Illinois, Iowa, Kentucky, Mississippi, Montana, Nebraska, New Mexico, Oregon, South Carolina, Texas, and Virginia. *Id.* ¶ 3.02.

16. See, e.g., *Reconstruction Fin. Corp. v. Teter*, 117 F.2d 716, 727-28 (7th Cir. 1941) (suit brought on guarantee of dissolved debtor corporation on trust fund theory dismissed because brought after two years); *Gary Furniture & Appliance Co. v. Skinner*, 264 So.2d 174, 179-80 (Ala. 1972) (suit brought during extension period but still pending at end of period abated); *Blankenship v. Demmler Mfg. Co.*, 411 N.E.2d 1153, 1156 (Ill. App. Ct. 1980) (strict liability action based on trust fund theory not brought within statutory extension period).

17. See, e.g., *Reconstruction Fin. Corp. v. Teter*, 117 F.2d 716, 726-27 (7th Cir. 1941); *Gary Furniture & Appliance Co. v. Skinner*, 264 So.2d 174, 179-80 (Ala. 1972); *Blankenship v. Demmler Mfg. Co.*, 411 N.E.2d 1153, 1156 (Ill. App. Ct. 1980).

18. See, e.g., *Stewart v. United States*, 327 F.2d 201, 203-04 (10th Cir. 1964); *Snyder v. State-Wide Properties, Inc.*, 235 F. Supp. 733, 742 (N.D. Ill. 1964); *Drew v. United States*, 367 F.2d 828, 830-31 (Ct. Cl. 1966).

either the trust fund theory or relevant statutory extensions.¹⁹

In *Hunter v. Fort Worth Capital Corporation*,²⁰ the Supreme Court of Texas held that article 7.12 operates to the exclusion of the trust fund theory.²¹ The court recognized that article 7.12 is analogous to a survival statute in its operation,²² and thus provides relief for only those claims arising prior to dissolution.²³ A survey of Texas cases construing the predecessor statutes to article 7.12 revealed that the trust fund theory had never been extended beyond its many previous statutory embodiments.²⁴ The court reasoned that because article 7.12 incorporates the trust fund theory, recognition of this doctrine outside the statute would infer that the legislature had enacted a meaningless and repetitious law.²⁵ The court refused to allow the post-dissolution claim,²⁶ since to do so would require judicial amendment of article 7.12.²⁷

Justice Spears, joined by Justice Ray, vigorously dissented.²⁸ The dissenting justices accused the majority of judicially amending article 7.12 by extending its three year limitation to post-dissolution claims, instead of limiting it to pre-dissolution claims.²⁹ The dissent argued that early Texas cases recognized the trust fund theory independent of statutory

19. See generally Norton, *Relationship of Shareholders to Corporate Creditors Upon Dissolution: Nature and Implications of the "Trust Fund" Doctrine of Corporate Assets*, 30 BUS. LAW. 1061, 1074-77 (1975); Schoone, *Shareholder Liability Upon Voluntary Dissolution of Corporation*, 44 MARQ. L. REV. 415, 425-27 (1961); Wallach, *Products Liability: A Remedy in Search of a Defendant—The Effect of a Sale of Assets Subsequent Dissolution on Product Dissatisfaction Claims*, 41 MO. L. REV. 321, 331-35, (1976).

20. 620 S.W.2d 547 (Tex. 1981).

21. *Id.* at 551.

22. *Id.* at 549. By using the term "survival statute" the court seems to be perpetuating the common law analogy of a dissolved corporation to a dead person. See generally *Chicago Title and Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120, 125 (1937); *Life Ass'n of America v. Goode*, 71 Tex. 90, 95-6, 8 S.W. 639, 640 (1888); 15A W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS*, §§ 8127, 8142 (rev. perm. ed. 1979); Schoone, *Shareholder Liability Upon Voluntary Dissolution of Corporation*, 44 MARQ. L. REV. 415, 416 (1961); 48 IOWA L. REV. 1006, 1006-09 (1963).

23. *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 549 (Tex. 1981).

24. *Id.* at 550.

25. *Id.* at 551.

26. *Id.* at 552. The term "post-dissolution claim" means those claims which can find no basis in the corporation's existence before dissolution, and arise solely out of circumstances occurring after the dissolution of the corporation. Compare *Bishop v. Schield Bantam Co.*, 293 F. Supp. 94, 96 (N.D. Iowa 1968) (tort claim arising eighteen months after dissolution of corporation and filed three and one-half years after dissolution, dismissed) with *Snyder v. State-Wide Properties, Inc.*, 235 F. Supp. 733, 742 (N.D. Ill. 1964) (pre-dissolution creditor allowed to recover from stockholders holding distributed assets of corporation).

27. *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 552 (Tex. 1981).

28. *Id.* at 553-56 (Spears, J., dissenting).

29. *Id.* at 553 (Spears, J., dissenting).

law, and that article 7.12 has not affected this rule.³⁰ Justice Spears predicted that persons wishing to assert a claim arising after dissolution will be left without a remedy, and that "innocent parties" will be left with the loss.³¹

The court in *Hunter* had a choice of basing its ruling either on the inapplicability of the trust fund theory,³² since this was the basis of plaintiffs recovery, or on article 7.12. Since Theodore Moeller's claim arose after the dissolution of the Hunter-Hayes Corp.,³³ a traditional application of the trust fund theory would have barred the claim,³⁴ as this doctrine has been uniformly limited to claims that can be traced to the pre-dissolution existence of the named corporation.³⁵ Instead, the court in *Hunter* went further by basing its decision on the three year limitation period of article 7.12.³⁶ The legislative intent underlying the extension of the life of

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

31. *Id.* at 555 (Spears, J., dissenting). "Innocent parties" refers to the other defendants in a suit, such as the building owner in this suit. *Id.* at 555 (Spears, J., dissenting).

32. *Id.* at 550-51; *cf.* *Hollins v. Brierfield Coal & Iron Co.*, 150 U.S. 371, 383-84 (1893) (applicability of trust fund theory); *Curran v. Arkansas*, 56 U.S. 304, 307-08 (1853) (trust fund theory created for assertion of pre-dissolution claims); *Gaskins v. Bonfils*, 79 F.2d 352, 355 (10th Cir. 1935) (applicability of trust fund theory).

33. *Fort Worth Capital Corp. v. Hunter*, 608 S.W.2d 352, 354 (Tex. Civ. App.—Fort Worth 1980), *rev'd*, 620 S.W.2d 547 (Tex. 1981). Moeller's claim was based on the alleged faulty installation of an oil line shut-off valve installed in the elevator pit in June of 1961 when Hunter-Hayes was still servicing the elevator. *Id.* at 354. Since Moeller sued on the basis of strict liability and negligence, his claim had no basis in the pre-dissolution existence of the corporation. *See Linkenhoger v. American Fidelity & Cas. Co.*, 152 Tex. 534, 537-38, 260 S.W.2d 884, 886 (1953) ("before the act becomes wrongful there must be an invasion of the rights of the plaintiff"); *Adler v. City of Farmer's Branch*, 526 S.W.2d 238, 240 (Tex. Civ. App.—Tyler 1975, writ *ref'd n.r.e.*) (limitation runs on tort claim when an injury gives rise to a cause of action, i.e., an invasion of plaintiff's rights); *Sims v. Southland Corp.*, 503 S.W.2d 660, 663 (Tex. Civ. App.—Tyler 1973, writ *ref'd n.r.e.*) (cause of action does not accrue until actual injury sustained).

34. *See Bishop v. Schield Bantam Co.*, 293 F. Supp. 94, 96 (N.D. Iowa 1968); *cf. Stewart v. United States*, 327 F.2d 201, 202 (10th Cir. 1964) (creditor recovers for pre-dissolution claim on basis of trust fund theory); *Snyder v. State-Wide Properties Inc.*, 235 F. Supp. 733, 742 (N.D. Ill. 1964) (creditor uses trust fund theory to recover pre-dissolution claim from stockholders holding distributed assets of corporation).

35. *See, e.g., Stewart v. United States*, 327 F.2d 201, 203-04 (10th Cir. 1964); *Snyder v. State-Wide Properties, Inc.*, 235 F. Supp. 733, 742 (N.D. Ill. 1964); *Drew v. United States*, 367 F.2d 838, 830 (Ct. Cl. 1966). *See generally*, 15A W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 7369-71, 7376-77, 7380-86 (rev. 1979); Norton, *Relationship of Shareholder to Corporate Creditors upon Dissolution: Nature and Implications of the "Trust Fund" Doctrine of Corporate Assets*, 30 Bus. LAW. 1061, 1061-64 (1975); Wallach, *Products Liability: A Remedy in Search of a Defendant—The Effect of a Sale of Assets and Subsequent Dissolution on Product Dissatisfaction Claims*, 41 Mo. L. REV. 321, 327-29 (1976).

36. *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 552-53 (Tex. 1981). The origi-

corporations under article 7.12 is found in its predecessor statutes.³⁷ One such statute³⁸ recites that the three year extension is for the "purpose of enabling those charged with the duty, to settle up its [the corporation's] affairs,"³⁹ referring to the existing affairs of the corporation upon dissolution. By basing its ruling on article 7.12, and construing the legislative intent of this article as excluding post-dissolution claims, the court cleared up the confusion surrounding the proper application of this statute.⁴⁰

While *Hunter* appears to foreclose all avenues of recovery for claims arising after dissolution,⁴¹ the vast majority of claims can be found to have originated in the pre-dissolution era of the named corporation. For

nal application of the trust fund theory placed no limitation on the time within which a pre-dissolution claim could be brought, other than laches. *Compare* *Curran v. Arkansas*, 56 U.S. 304, 307-08 (1853) (claim allowed under trust fund theory without time limitation) *with* *Reconstruction Fin. Corp. v. Teter*, 117 F.2d 716, 727 (7th Cir. 1941) (suit dismissed when brought after two year limitation imposed by statutory embodiment of trust fund theory).

37. See 1907 Tex. Gen. Laws, ch. 166, § 4(7), at 312 (corporate life extended to settle business of corporation); 1871 Tex. Gen. Laws, ch. 80, §§ 39-43, at 73-74, 7 H. GAMMEL, LAWS OF TEXAS 75-76 (1898) (corporate life extended for maintenance and defense of pre-dissolution creditor suits).

38. 1919 Tex. Gen. Laws, 1st Spec. Sess., ch. 56, § 31, at 140-41.

39. *Id.* at 140-41; see *Nardis Sportswear v. Simmons*, 147 Tex. 608, 611, 218 S.W.2d 451, 455 (Tex. 1949) (ruling based on article 1389); *McBride v. Clayton*, 140 Tex. 71, 75-76, 166 S.W.2d 125, 127 (1942) (ruling based on article 1389).

40. *Hunter v. Forth Worth Capital Corp.*, 620 S.W.2d 547, 552 (Tex. 1981) Several cases upheld recovery under the trust fund theory without ruling on whether the statute excluded its use. *Cf. Stewart v. United States*, 327 F.2d 201, 203-04 (10th Cir. 1964) (creditor recovers for pre-dissolution claims on basis of trust fund theory); *Snyder v. State-Wide Properties, Inc.*, 235 F. Supp. 733, 742 (N.D. Ill. 1964) (recovery of distributed assets of dissolved corporation allowed under trust fund theory); *Drew v. United States*, 367 F.2d 828, 830 (Ct. Cl. 1966) (stockholders of dissolved corporation liable for income taxes of corporation under trust fund theory).

41. *Hunter v. Forth Worth Capital Corp.*, 620 S.W.2d 547, 556 (Tex. 1981) (Spears, J., dissenting). The majority states, "a provision was included to provide creditors with a statutory remedy for pre-dissolution claims. A similar provision could have been included to encompass post-dissolution claims as well." *Id.* at 552. There are several alternative theories of recovery to the trust fund theory. One alternative is the "continuation or successor theory" used in *Cyr v. B. Offen & Co.*, 501 F.2d 1145, 1154 (1st Cir. 1974), where the successor corporation was held liable in tort for an oven sold by a dissolved corporation. Another alternative is the "de facto merger" theory under which the court held a successor corporation liable in *Shannon v. Samuel Langston Co.*, 379 F. Supp. 797 (W.D. Mich. 1974). The most unique theory is the "subsequent duty to warn" theory which creates a duty to warn where a danger from a product is discovered after it is placed on the market. *Shane v. Hobsam, Inc.*, 332 F. Supp. 526, 528-30 (E.D. Pa. 1971). *Contra* *Chadwick v. Air Reduction Co.*, 239 F. Supp. 247, 250 (N.D. Ohio 1965). For a general discussion of these and other claims against a dissolved corporation, see Wallach, *Products Liability: A Remedy In Search of a Defendant—The Effect of a Sale of Assets and Subsequent Dissolution on Product Dissatisfaction Claims*, 41 Mo. L. Rev. 321, 335-44 (1976).

example, in a breach of warranty claim, the plaintiff brings suit when there has been some breach of an express or implied warranty.⁴² If the corporation which produced or marketed the product has been dissolved since the sale of the product, the plaintiff appears to be bringing a post-dissolution claim. Such a suit is, however, a pre-dissolution claim, since the warranty attached at the time of sale.⁴³ The plaintiff can, therefore, find a basis for his suit in the pre-dissolution era of the defendant corporation. Article 7.12 would allow such a claim, if brought within the three year time limitation, because it operates only to exclude those claims with no basis in the pre-dissolution era of the named corporation.⁴⁴

The dissenting justices in *Hunter* based much of their argument on what appears to be a misuse of the term "post-dissolution" and its application in Texas cases.⁴⁵ The many early Texas cases which discuss the trust fund theory and its applicability were decided squarely within the statutory embodiment of this doctrine.⁴⁶ While the suits in these cases were not commenced until after the dissolution of the named corporation, they are distinguishable from the claim in *Hunter* in that they were all derived from a right arising prior to the corporation's dissolution.⁴⁷ These

42. See TEX. BUS. & COM. CODE ANN. §§ 2-313 to 2-316 (Tex. U.C.C.) (Vernon Supp. 1982).

43. *Id.* §§2-313 to 2-316; accord *Darr Equip. Co. v. Owens*, 408 S.W.2d 566, 569 (Tex. Civ. App.—Texarkana 1966, no writ) (implied warranty contractual in nature and collateral to purpose of sales contract); *Western Tank & Steel Corp. v. Gandy*, 385 S.W.2d 406, 409 (Tex. Civ. App.—Texarkana 1964, no writ) (implied warranty arises on part of seller in connection with contract of sale); *Gates Rubber Co., v. Wood*, 374 S.W.2d 785, 788 (Tex. Civ. App.—Beaumont 1964, no writ) (implied warranty is an inherent term of contract).

44. *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 552 (Tex. 1981).

45. See *id.* at 553-55 (Spears, J., dissenting); see also *Nardis Sportswear v. Simmons*, 147 Tex. 608, 218 S.W.2d 451 (1949) (trustees of dissolved corporation allowed to exercise lease option right acquired before dissolution); *McBride v. Clayton*, 140 Tex. 71, 166 S.W.2d 125 (1942) (action by stockholders of dissolved corporation to acquire proceeds of life insurance policy of corporate officer where premiums had been paid by corporation); *Burkburnett Ref. Co. v. Ilseng*, 292 S.W. 179 (Tex. Comm'n App. 1927, judgment adopted) (directors of dissolved corporation suing to collect debt acquired before dissolution).

46. See *Nardis Sportswear v. Simmons*, 147 Tex. 608, 616, 218 S.W.2d 451, 455 (1949) (claim to option right acquired before dissolution "to be disposed of in accordance with articles 1388 and 1389"); *McBride v. Clayton*, 140 Tex. 71, 75-76, 166 S.W.2d 125, 128 (1942) (case decided on basis of wording in predecessor statute to article 7.12); *Burkburnett Ref. Co. v. Ilseng*, 292 S.W. 179, 182 (Tex. Comm'n App. 1927, judgment adopted) (case decided on basis of wording in statute preceding article 7.12)).

47. Compare *Nardis Sportswear v. Simmons*, 147 Tex. 608, 611, 218 S.W.2d 451, 455 (1949) (basis of action was lease option right acquired before dissolution) and *McBride v. Clayton*, 140 Tex. 71, 75-76, 166 S.W.2d 125, 128 (1942) (action for proceeds of life insurance policy of corporate officer paid by corporation before dissolution) and *Burkburnett Ref. Co. v. Ilseng*, 292 S.W. 179, 181 (Tex. Comm'n App. 1927, judgment adopted) (basis of action debt acquired before dissolution) and *Lyon-Gray Lumber Co. v. Gibraltar Life Ins. Co.*, 269 S.W.

cases, therefore, involved pre-dissolution rather than post-dissolution claims and were decided within the statutes upon which the majority position, limiting the applicability of the trust fund theory to pre-dissolution claims, is founded.⁴⁸

The trust fund doctrine was originally created for, and limited to, the assertion of claims arising before dissolution of a corporation, but which are brought after the corporation's subsequent demise. As the supreme court in *Hunter* observed, the legislature enacted article 7.12 as an embodiment of the trust fund theory and provided a logical limitation of three years for this remedy. Ruling that article 7.12 operates to the exclusion of the trust fund theory, the *Hunter* court has now provided guidance to the courts and to the directors of corporations as to the extent of shareholder liability after corporate dissolution.

Drew R. Fuller, Jr.

80, 81-82 (Tex. Comm'n App. 1925, judgment adopted) (mechanic's lien acquired before dissolution) *with* *Litts v. Refrigerated Transport Co., Inc.*, 375 F. Supp. 675, 676-77, (M.D. Pa. 1973) (defendant corporation in tort suit not allowed to implead dissolved corporation for contribution and indemnity) *and* *Bishop v. Bantam Co.*, 293 F. Supp. 94, 96 (N.D. Iowa 1968) (tort claim arising eighteen months after dissolution of corporation and filed three and one-half years after dissolution dismissed) *and* *Blankenship v. Demmler Mfg. Co.*, 411 N.E.2d 1153, 1155-56 (Ill. App. Ct. 1980) (strict liability action accruing after dissolution dismissed) *and* *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 548 (Tex. 1981) (tort claim arising eleven years after dissolution dismissed).

48. See *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 550-51 (Tex. 1981). The court stated, "Therefore, Article 7.12 expresses a legislative policy to restrict the use of the trust fund theory to pre-dissolution claims, and to protect shareholders, officers and directors of a dissolved corporation from prolonged and uncertain liability." *Id.* at 550-51; see also *Reconstruction Fin. Corp. v. Teter*, 117 F.2d 716, 727 (7th Cir. 1941) (trust fund theory cannot be used to assert claim after expiration of statutory period); *Bishop v. Shield Bantam Co.*, 293 F. Supp. 94, 96 (N.D. Iowa 1968) (tort claim arising after dissolution of named corporation and asserted after statutory period dismissed); *Blankenship v. Demmler Mfg. Co.*, 411 N.E.2d 1153, 1155-56 (Ill. App. Ct. 1980) (strict liability action accruing after dissolution dismissed).