Dallas Bar Association

HEADNOTES

April 2020 | Volume 45 | Number 4 | Focus | Bankrtupcy & Commercial Law/Energy Law

DBA Offers COVID Resources Webpage

Visit www.dallabar.org for a list of COVID-19 Resources, closings/safety updates for local courts and legal facilities. We will update this last as information becomes available.

Congress Passes Paid Leave Law: What Employers Need to Know

BY TERAH MOXLEY

On March 18, 2020, President Trump signed the Families First Coronavirus Response Act, which temporarily expands the Family and Medical Leave Act (FMLA) and calls for up to 80 hours of paid sick leave during the COVID-19 pandemic. This Act goes into effect on April 2, and both provisions offer leave benefits through the end of 2020. The Act also provides tax credits to employers that pay these benefits.

Covered Employers

Both provisions apply to private employers with fewer than 500 employees and to most public sector employers regardless of size. Thus, employers that have been below the usual 50-employee FMLA threshold now have to grapple with administering the FMLA under this temporary expansion. However, both provisions offer a possible exemption for small businesses with fewer than 50 employees if compliance would jeopardize the company's viability. It is unclear at this point how this exemption will work, and the possible exemption under the paid sick leave provision is limited.

The FMLA expansion provides some additional relief for small companies. First, only employers covered by the "old" FMLA are subject to penalties in a suit brought by an employee for a violation of the leave entitlement granted by the expansion. Second, employers must typically restore an employee who used FMLA leave to the employee's same position (or one that is substantially equivalent) on return from leave. However, the expansion offers relief from this requirement for employers with fewer than 25 employees under certain circumstances.

Covered Employees

The two leave provisions differ on the class of covered employees, but the status of both full-time and part-time employees is addressed. The FMLA expansion applies to employees who have been on the job at least 30 days (as opposed to one year under the standard FMLA). On the other hand, the paid sick leave benefits must be made available to employees immediately regardless of how long they have worked for the employer. Under both provisions, employers may exclude certain health care providers and emergency responders from these leave benefits.

Reasons Leave May Be Used

Employees may use the emergency paid sick leave when they are unable to work (even from home) for a number of reasons, including a need to comply with an isolation or quarantine order, caring for an individual under such an order, self-care when seeking a diagnosis when experiencing symptoms of COVID-19, or caring for their child whose school or daycare is closed due to the pandemic. The FMLA expansion is more narrow, offering up to 12 weeks of job-protected, partially paid leave only when an eligible employee cannot work (even from home) because the employee must care for the employee's child (under 18 years old) when the child's school or daycare is closed due to COVID-19.

Amount of Paid Leave

How much do employers have to pay out? Under the paid sick leave provision, covered employers must provide 80 hours of paid leave for full-time employees and paid leave for part-time employees equal to the average number of hours the part-time employee works over a two-week period. Generally, this leave must be paid at the employee's regular rate of pay. However, if the employee requires leave to care for another individual (including the employee's child in the case of school closure), the leave can be paid at two-thirds the employee's regular rate of pay. The new law places the following caps on the amount that must be paid:

- $511 per day and $5,110 overall for leave needed for self-care; or
- $200 per day and $2,000 overall for leave needed to care for another.

One important note, this emergency paid sick leave is *in addition to* leave already offered under an employer's existing policy or leave that is mandated under local law, like the Dallas Paid Sick Leave Ordinance enacted in 2019 (for which enforcement begins on April 1, 2020).

Under the FMLA expansion, the first 10 days of leave may consist of unpaid leave, but an employee may elect to substitute any accrued paid leave during that time. After the first 10 days, an employer must provide paid leave of at least two-thirds of the employee's regular rate of pay for the

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Stopping Abuse by Debtors Using LLCs and LPs

BY CLIFF WADE AND GARRETT ROBERTS

Texas is a state that allows bold men and women to take big risks and receive big rewards. The Texas legislature encourages that bold Texas spirit by offering laws that favor new investment and startup businesses. Chief among these are the laws governing the limited liability company (LLC) and limited partnership (LP), which are excellent tools for creating new investment, jobs, and innovation.

Unfortunately, however, some use these *business entities* for purposes that have nothing to do with *business*. Judgment debtors may abusively use business entities as a hiding spot for their assets, allowing them to ignore legitimate debts while living a millionaire lifestyle. For example, creative judgment debtors may conceal non-exempt assets by holding title to an exotic-game ranch, a luxury private plane, or a $3 million personal brokerage account in a non-operating business entity. These schemes put a roadblock before the creditor when the LLC or LP is *technically* a non-debtor even though common sense shows that these "businesses" only exist to hold non-exempt property of the debtor.

To further the use of LLC or LP ownership in their asset-protection schemes, debtors commonly point to a limitation of remedies provided by Texas Business Organizations Code Sections 101.112(d) and 153.256(d), which provide that a charging order is the exclusive remedy to satisfy a judgment out of a debtor's interest in an LLC or LP. The charging order only allows a creditor to reach a debtor's distributions from the LP or LLC, and nothing else. Notably, a charging order does not provide the creditor with access to the assets held by the entity. For an operating business, the charging order may provide a useful tool for the creditor to access profits that are payable to the debtor. However, when the LLC or LP does nothing more than hold title to a debtor's private plane or $3 million brokerage account, the right to receive distributions from the company is useless.

Due to this limited, exclusive remedy against LLC and LP interests, a creditor's primary relief to pursue assets held by an LLC or LP (even a sham LLC) is to "pierce the veil" or pursue a fraudulent transfer claim for asset transfers into the LLC or LP. Both these claims generally require filing a new lawsuit, drawn-out discovery, and perhaps even a jury trial. This adds insult to injury when a creditor has already paid attorney's fees and costs to obtain the underlying judgment.

Fortunately for judgment creditors, courts throughout Texas have begun to recognize the ineffectiveness of charging orders as the exclusive remedy in these circumstances. The most impactful ruling on this subject is *Heckert v. Heckert*, No. 02-16-00213-CV (Tex. App.—Fort Worth 2017, no pet.) (mem. op.).

Heckert involved turnover of a debtor's interests in an LLC and LP created during the underlying lawsuit. The LLC and LP each held publicly-traded stock, and the judgment debtor was the sole member of the LLC and only limited partner in the LP. Outside of owning marketable securities, neither entity had any operations. In a section of the opinion titled "Charging Order Not Exclusive Remedy," the appellate court held that a court may order a debtor to turn over an ownership interests in an LLC and LP to a post-judgment receiver, thereby allowing recovery from the assets of the LLC and LP. The *Heckert* Court cited several other cases that found exceptions to the "exclusive-remedy" rule and thoughtfully analyzed the statutory language of the Texas Business Organizations Code sections addressing the charging order. The court then reasoned that the legislature created the "exclusive remedy" of the charging order to protect non-debtor members and partners from losing control over an operating business. The court recognized, however, that when the entity is not acting as an operating business, the exclusivity of the charging order remedy is not appropriate. In its ruling, the court identified the following three factors as supporting its order for turnover of a judgment debtor's ownership interests: (1) the entity was not an operating business; (2) the entity was formed to hold non-exempt assets of a judgment debtor; and (3) turnover of the interests would not harm strangers to the judgment.

The *Heckert* case, along with others attacking the limitations of charging orders as the exclusive remedy, provide a foothold for the diligent creditor and a useful tool for the creditor's-rights toolbox. Undoubtedly, debtors will continue to skirt the law to shield assets from collection. However, with the willingness of Texas courts to enforce their judgments, creditors can be just as bold in their efforts toward recovery. **HN**

Cliff Wade and Garrett Roberts are attorneys with Baker Lopez PLLC and can be reached at cliff.wade@bakerlopez.com and garrett.roberts@bakerlopez.com, respectively.

Inside

DBA Home Project: Volunteers Needed

The DBA Home Project is in need of volunteers – both individual and firms/organizations.

For more information, go to https://www.facebook.com/DBAHomeProject/

All meetings and events subject to change in connection with the ongoing coronavirus situation. Please check www.dallasbar.org and DBA Online enewsletter for current notices.

Message from DBA President Robert Tobey

I hope this message finds you and your family safe and well. Like all of you, Joann and I are home watching current events surrounding the pandemic and hoping this time passes soon. We know this is a difficult time for many, and I want the Dallas Bar Association to support you in the coming weeks and months.

First, I wanted to let you know that the Belo Mansion will remain closed through April 30. All in person events are postponed or cancelled. Please check our website calendar for updates. We will reassess our need to remain closed past April 30 and communicate changes to you.

Even though we cannot meet in person, I encourage all sections, committees, and other bar groups to meet virtually. If you need help with a virtual meeting, please contact Alicia Hernandez at the Dallas Bar Association, and she and the DBA staff, who are working diligently from home, will assist you.

At the Dallas Bar Association, we are working to provide you as much information as we can to help you and your legal colleagues navigate this period. We are closely following the various mandates issued by local, state and national officials. We are also collecting and reviewing the various orders issued by the state and federal courts, locally and beyond. I have appointed a Task Force to help synthesize this information and deliver it to you in a helpful manner. To this end, our website is now a place for you to acquire the information you need.

Go to www.dallasbar.org and you will be easily directed to our informational pages dedicated to the effects of the Covid-19 Pandemic. Of course, this is a unique event and we need your help identifying what you need from us. You can email us your questions and areas of concern at covid19@dallasbar.org. We will do our best to address them.

In addition to posting orders and other official information, we will soon be providing online CLE webinars addressing legal issues raised by this crisis. We will also host podcasts and interviews with local officials and judges to help clarify how we will move forward. We will be sending emails announcing some of these events, but we encourage you to routinely check the website for new information and announcements.

Finally, I'd like to address our role as the legal community during this crisis. There is a lot of fear in our City and justifiably so. Orders have been put in place directing almost all of us to work from home. The legal profession in North Texas has a long history of setting an example and leading in difficult times. We are in one of those historic moments now. There is a lot of pressure on many of us to get back into the office to continue the hard work for our clients. Please remain at home and do your best to serve your clients from there. We will provide you with helpful tips on how to navigate this time from home. We are also working with local judges and officials to help keep the wheels of justice moving while we work from home.

Your example of remaining calm, following directives, and thoughtfully navigating this difficult time will help your neighbors, friends, and colleagues do the same. We will emerge from this crisis. We will no doubt have some scars to show from it, but we will emerge stronger because of it. Please know the DBA is here for you. Please communicate with us through our website and email. In the meantime, please know you and your families are in our thoughts and prayers.

Sincerely,

Robert L Tobey

Robert Tobey, President, Dallas Bar Association

RENEW YOUR MEMBERSHIP DUES

Don't risk being dropped from the DBA membership - renew your dues!

Renew TODAY in order to continue receiving all your member benefits including access to FREE online CLE programs.

Look for an email reminder with links to renew online if you have not done so already or go online now and click on My DBA to log in to check your status and renew your Membership!

Thank you for your support of the Dallas Bar Association!

Texas Lawyers' Assistance Program

TLAP provides confidential help for lawyers, law students, and judges who have problems with substance abuse and/or mental health issues. In addition, TLAP offers many helpful resources, including:

- Live Ethics CLE presentations
- TLAP Newsletter
- Request of specific educational materials
- 1-1, group telephone calls on topics
- Friday noon AA telephone meeting 1-800-393-0640, code 6767456

Find out more at www.texasbar.com.

If special arrangements are required for a person with disabilities to attend a particular seminar, please contact Alicia Hernandez at (214) 220-7401 as soon as possible and no later than two business days before the seminar.

All Continuing Legal Education Programs Co-Sponsored by the DALLAS BAR FOUNDATION.

For confirmation of State Bar of Texas MCLE approval, please call Grecia Alfaro at the DBA office at (214) 220-7447.

*****For information on the location of this month's North Dallas Friday Clinic, contact yhinojos@dallasbar.org.***

President's Column

A Crisis Can Bring Us Together

BY ROBERT TOBEY

There is an old expression: *May you be cursed to live in interesting times*. In my 63 years, I never have seen anything like the COVID-19 crisis. Over the last two weeks we have seen not just daily but hourly changes in how we live. When we decided to close the Belo on March 12, I thought we were ahead of the curve. But just hours later, officials declared a state of emergency in Dallas County.

As I write this article on March 19, every restaurant, bar, and gym in Dallas County is closed and gatherings of more than 50 people are prohibited. Jury trials have been postponed and the functioning of our justice system is being challenged by the need to maintain public safety. Everyone is being urged to stay home for the next 14 days and practice "social distancing," which no doubt will become the catch-phrase for 2020. By the time you read this article in a week or so, it may already be outdated.

In the midst of this chaos, we are in an election year. Rarely has our country been more divided. Many people meet someone and when they learn the other person supports "the other side" that ends conversations and the potential for friendship. My hope is that when we emerge from the grip of COVID-19, we will be more united as a community and country. Here is why I think that could happen.

My parents grew up during the Great Depression. They never said this to me, but they were very poor. To survive, people worked long hours for little money. Putting food on the table and having shelter was something most people could not take for granted. My parents were the toughest people I have known.

On December 7, 1941, Japan bombed Pearl Harbor and America joined World War II. The country united in the fight against the Axis powers. When the war ended, the country remained united until divisions returned in the 1960s with the Civil Rights movement, the Vietnam War, and the assassinations of Dr. Martin Luther King Jr. and Robert Kennedy. I was a kid then and remember thinking the country would burst at the seams. The one event that brought everyone together was the first Moon landing in 1969.

Fast forward to September 11, 2001. Barely removed from the divisive Bush v. Gore election, we still rallied together after the events of that terrible day.

I hope that COVID-19 will have a similarly unifying effect. It should—we all are in this mess together. At the DBA, we have 11,500 members of all ages and practice areas, employed by large and small firms, companies, and the government. But these differences strengthen us and make us the best metro bar association in the country. They also position us to be an integral part of the uniting process.

A few years ago, **Justice Douglas Lang** (1991 DBA President) and **Michael Hurst** (2018 DBA President) came up with the idea of the Day of Civility. It has been a huge success. Late last year, Justice Lang asked me if we could take the idea of a Day of Civility and use it to promote civil discourse in the community at large. We are moving forward on this idea in 2020. On May 11, the DBA Public Forum Committee will host a Together We Lunch program on civil discourse. This terrific program was brought to the DBA by 2017 DBA President **Rob Crain.** I encourage everyone to participate in this program—I promise you will learn about others and yourself.

The Conference of the Professions has focused on issues that are important to lawyers, doctors, and the clergy for more than 30 years. In 2020, the Conference will discuss the loss of trust that the public at large has for these professions. We will publicize the Conference when the date is set.

The important work of the DBA will continue. The Belo is closed through at least March 31. But we have virtual resources through Zoom to allow our sections and committees to meet and continue their work virtually. If you have questions about the available resources, please contact **Alicia Hernandez**,ahernandez@dallasbar.org, or **Jessica Smith**, jsmith@dallasbar.org, and they can help. When the Belo reopens, we need everyone to come back. While we are all learning to adapt to virtual law practice and life during this crisis, we are better when we see each other in person as the Dallas legal community.

We will get through this and will be better for the experience. I look forward to seeing everyone back at the Belo!

Robert

HEADNOTES

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2101 Ross Avenue
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The DBA's purpose is to serve and support the legal profession in Dallas and to promote good relations among lawyers, the judiciary, and the community.

Headnotes serves the membership of the DBA and, as such, editorial submissions from members are welcome. The Executive Editor, Editor, and Publications Committee reserve the right to select editorial content to be published. Please submit article text via e-mail to jsmith@dallasbar.org (Communications Director) at least 45 days in advance of publication. Feature articles should be no longer than 750 words. DISCLAIMER: All legal content appearing in Headnotes is for informational and educational purposes and is not intended as legal advice. Opinions expressed in articles are not necessarily those of the Dallas Bar Association.

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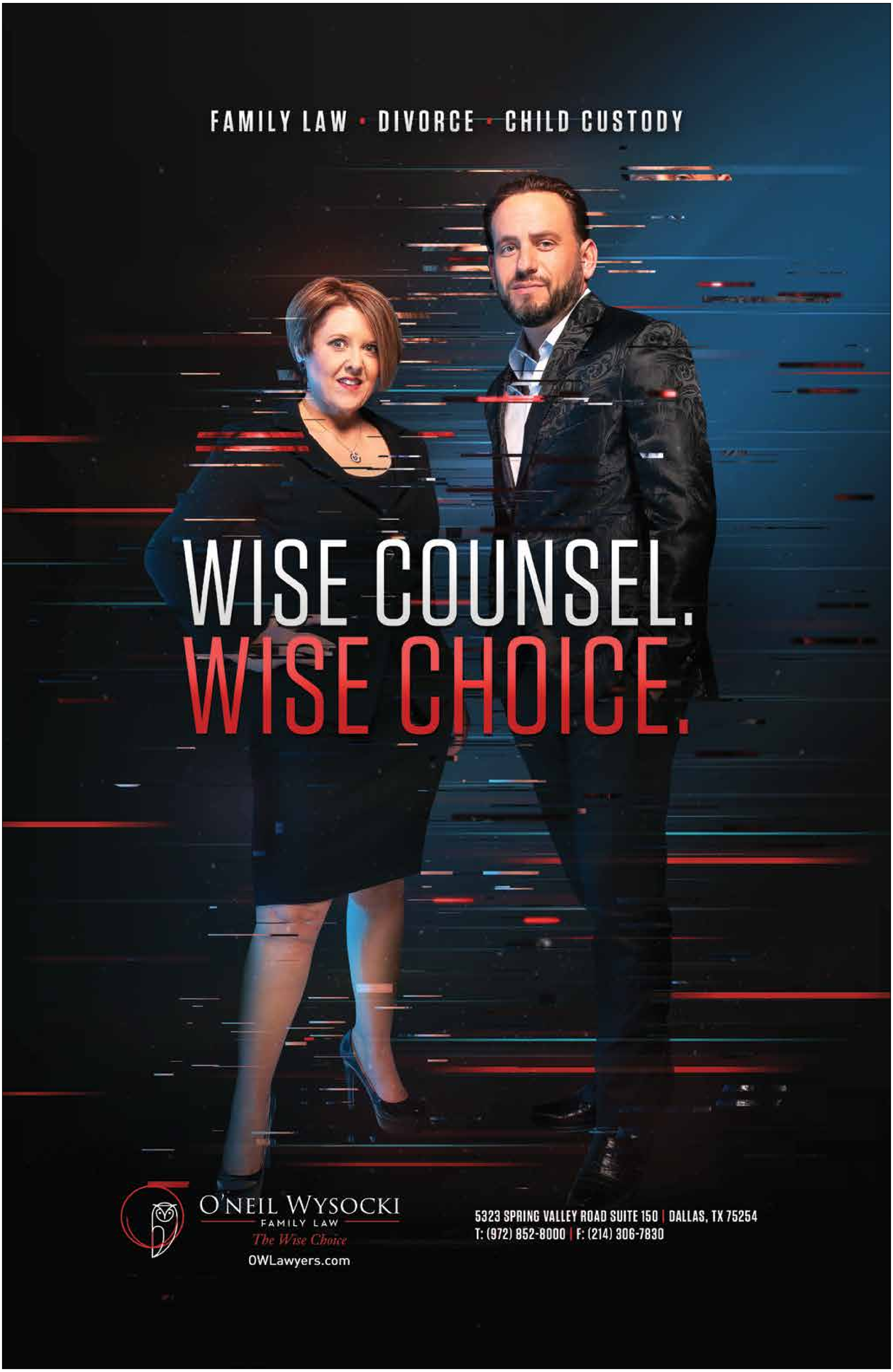
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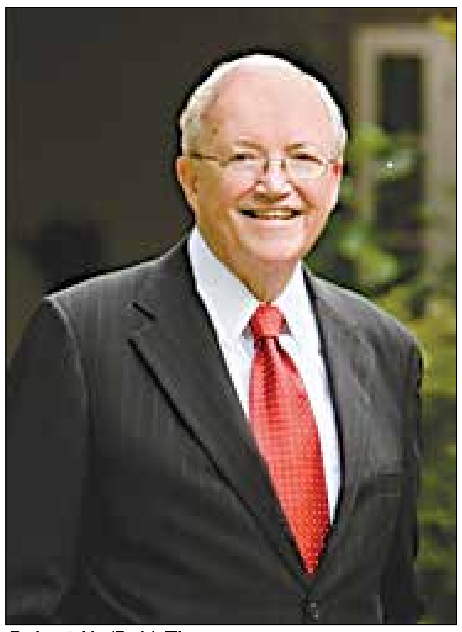
Dallas Bar Association Loses Past President Robert Thomas

STAFF REPORT


Robert H. (Bob) Thomas

"The Bar was great in '78!"

The Dallas Bar Association lost its 69th president on February 9, 2020, at the age of 88. **Robert H. (Bob) Thomas** was president of the DBA in 1978.

Mr. Thomas was a third-generation Dallas lawyer, following in the footsteps of his father and grandfather. He graduated from Highland Park High School, earned his bachelor's degree, with high honors, from SMU in 1953, and his law degree from the SMU School of Law in 1957, after his studies were interrupted by a two-year term in the U.S. Navy. During the Korean War, Mr. Thomas served in the Far East as legal officer aboard the aircraft carrier U.S.S. Wasp. After his active duty, he spent more than 20 years in the Naval Reserve, retiring with the rank of Commander.

Mr. Thomas returned to Dallas to practice law with his father. Two years later, Mr. Thomas joined the law firm of Strasburger & Price, where he enjoyed a career spanning more than 55 years. One of his most prominent cases was representing the Dallas Independent School District for more than 20 years as lead counsel in the desegregation case, *Tasby v. Estes*. He was described as a calming force during the complicated case.

We have Mr. Thomas to thank for helping to acquire the DBA's home—the Belo Mansion. He took a leading role in the acquisition of the Belo mansion in the late 1970s and was often described as "the father of the Belo mansion" and the "Belo Hero." The purchase and renovation of the building occurred during his presidency.

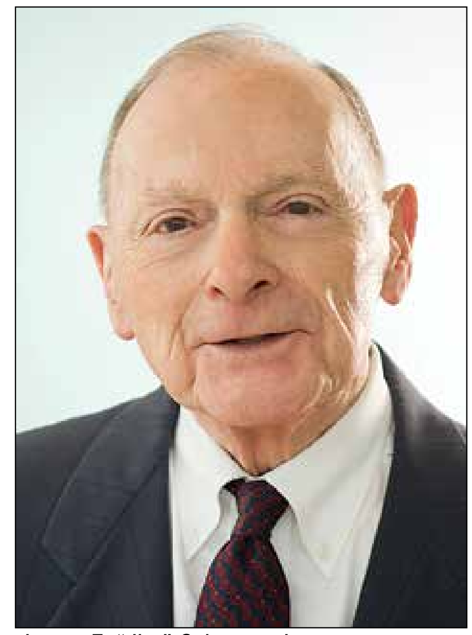
Throughout his career, Mr. Thomas held numerous leadership positions within the legal profession. In addition to serving as President of the Dallas Bar Association, he also held positions with the Dallas Junior Bar Association (currently the Dallas Association of Young Lawyers), and the Dallas Bar Foundation; Director, State Bar of Texas; Chair, Texas Board of Legal Specialization; and Member of House of Delegates of the American Bar Association.

He was awarded Dallas Bar Foundation Fellow of the Year (1999) and the Justinian Award from the Dallas Lawyers Auxiliary (2002). In 2007, he received the 50-Year Outstanding Lawyer Award from the Texas Bar Foundation and was also named Trial Lawyer of the Year by the Dallas Bar Association.

Mr. Thomas is survived by wife, Gail, their three children Tori Mannes, Stewart Hyer Thomas, and Electra Harelson, and their spouses, as well as 10 grandchildren and one great-grandchild. **HN**

Jim Coleman Passes Away

STAFF REPORT


James E. "Jim" Coleman, Jr.

Founding member of Carrington Coleman, **James E. "Jim" Coleman, Jr.**, passed away on February 22, 2020.

Mr. Coleman practiced for more than six decades, helped to break gender and race barriers along the way, and built a reputation of being one of the "most respected lawyers in Texas."

Throughout his 60-plus years of practicing law, he had many intense and lengthy trials. He represented plaintiffs, defendants, individuals, corporations, banks and partnerships in trials involving civil disputes of all levels of complexity and in a wide range of matters. He tried cases in both state and federal courts in Texas, and has acted as arbitrator in business disputes.

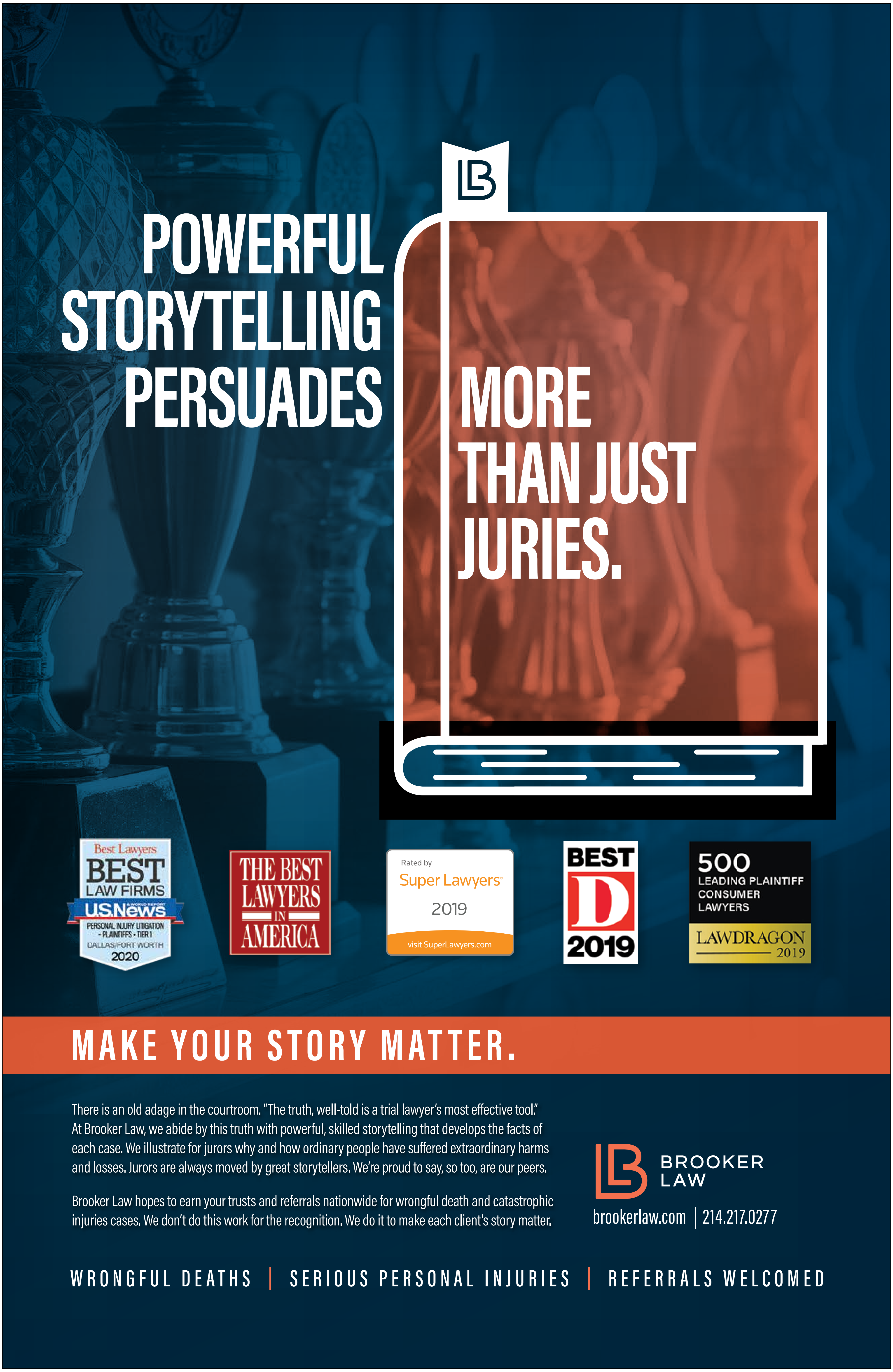
He received many awards including: Dallas Bar Association Trial Lawyer of the Year, Dallas Bar Foundation Fellows Award, State Bar of Texas Presidents' Award, American Inns of Court Foundation Professionalism Award, Texas Bar Foundation Lola Wright Award, American College of Trial Lawyers Samuel E. Gates Litigation Award, Texas Bar Foundation Outstanding 50 Year Lawyer Award and the State Bar of Texas, Litigation Section, Luther H. Soules, III Award.

In recent years, he had numerous recognitions, including: *Texas Monthly's* Texas Super Lawyers in business litigation each year since that award began in 2003; *The Best Lawyers in America* from 1983 to the present; *Texas' Best Lawyers; D Magazine* as a Best Lawyer in Dallas; and he is listed as a leading individual of Texas commercial litigation in Chambers & Partners 2009 *USA Client's Guide*.

He is survived by his three children, Hank Coleman and his wife Janie, Hon. Margaret Sutherland Coleman Keliher and her husband Lester, and Jim Coleman III; and by his grandchildren whom he adored, Katie Coleman, Margaret Sutherland Keliher Hughes, Sarah Jane Coleman Fox, Joseph Keliher, Jim Coleman IV, and Alexander Keliher.

Look what's Happening at the DBA!

The DBA has been busy! Just a few events from the past months: hosting Dr. Eric Foner to speak on the 15th Amendment, Minority Participation Committee panel speaking on board service, celebrating our new members at the DBA New Member Reception, and representing the bar at the National Conference of Bar Presidents. Get involved! Find out about upcoming events at www.dallasbar.org.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Focus Bankruptcy & Commercial Law/Energy Law

New Bankruptcy Law Designed to Help Small Businesses

BY HON. HARLIN D. HALE, ANDREW EDSON, AND SHANNON MCKELVIE

A new bankruptcy law may give distressed small businesses a greater opportunity to preserve jobs, pay creditors, and successfully restructure—an often unaffordable option before. On February 19, 2020, the Small Business Reorganization Act of 2019 (SBRA) went into effect and is designed to make Chapter-11 bankruptcy a more realistic option for small businesses in financial distress. The SBRA created a new subchapter V under Chapter 11 of the Bankruptcy Code that defines a small business debtor as an entity with an aggregate of no more than $2,725,625 of noncontingent liquidated debt. This is an important development because previously many small businesses could not afford to reorganize under Chapter 11. The SBRA should simplify and streamline Chapter 11 by making the process quicker and less expensive.

So how does this new law make Chapter 11 more feasible and advantageous for small businesses? First, the SBRA eliminates some of the more expensive features of Chapter 11. The new law eliminates the requirements to file a disclosure statement and solicit the votes of creditors. A debtor under the SBRA is not responsible for the quarterly United States Trustee payments. The SBRA shortens the time to file the plan to 90 days from 120 days. The SBRA also shortens the traditional Chapter 11 process by permitting only the debtor to propose and confirm a plan. Further, a creditors' committee is not appointed "unless the court for cause orders otherwise." A plan may be confirmed without the consent of impaired creditor classes so long as it "does not discriminate unfairly, and is fair and equitable." The plan length must be three to five years, and all disposable income must be dedicated to the plan. The SBRA also removes the requirement that a debtor pay administrative expenses on the effective date of the plan. Instead, the debtor may now stretch out payment of administrative expenses over the life of the plan.

Second, the SBRA requires the United States Trustee to appoint a standing trustee for every small-business bankruptcy to ensure that the reorganization stays on track. Much like a trustee in a Chapter-13 case, a trustee in a subchapter-V small-business case will (1) assist the debtor with formulating a plan of reorganization; (2) ensure that the debtor makes timely payments under that plan; and (3) hold status conferences concerning plan confirmation, plan modification, the value of property, and sale of estate property.

Third, the SBRA also allows the debtor to modify the rights of certain creditors. Under the SBRA, a plan may change the terms of home equity loans and second mortgages secured by the principal residence of the debtor if the new value received from the loan was not used to acquire the residence and was used mainly in connection with the small business. This change departs from the previous general prohibition on individuals from modifying their residential mortgages. The new law also eliminates the absolute priority rule, which requires full payment to senior creditors before payments can be made to any junior creditors or interests. Under the SBRA small business owners may keep their ownership interest without having to pay unsecured creditors in full or provide new capital to the reorganization. This makes Chapter 11 much more attractive to small businesses whose owners may be trying to keep their equity interests throughout reorganization.

There are some limitations. Discharge is not granted until the debtor completes all plan payments. The discharge applies to all debts addressed in the plan except (1) any debt on which the last payment is due after the first three years of the plan or another time determined by the court which cannot exceed five years; or (2) debts that are otherwise non-dischargeable under section 523(a). The debt ceiling of approximately $2.7 million will also limit businesses who may otherwise qualify as small businesses outside of the Bankruptcy Code. Further, be aware of any local rules or required forms established by bankruptcy courts.

The policy behind the SBRA recognizes that traditional Chapter 11 might be unworkable for many small business debtors. The SBRA could also have an impact on lenders because it may cause more filings by debtors who previously could not afford the Chapter 11 process. These debtors should obtain plan confirmation more easily, even over objecting creditors. It should be a faster process and provide a higher chance of repayment to creditors due to a trustee's involvement.

Consider the SBRA as a viable asset in counseling small business clients with liquidity concerns. **HN**

Judge Hale serves as a bankruptcy judge in the Northern District of Texas. Andrew Edson is a member in the firm of Clark Hill Strasburger. Shannon McKelvie is a law student at SMU and an extern for Judge Hale. They can be reached at judge_harlin_hale@txnb.uscourts.gov, aedson@clarkhill.com, and shannon_mckelvie@txnb.uscourts.gov, respectively.

Focus | Bankruptcy & Commercial Law/Energy Law

Bankruptcy Removal: with Strings Attached

BY CHRIS ROBISON AND KYLE MANDEVILLE

As first-year law students, we learned about the general removal statutes—28 U.S.C. §§ 1441 and 1446—which allow a defendant to remove certain civil actions filed in state court to federal court on the basis of complete diversity or federal question.

Turn a page or two further in Title 28 and you will find another removal statute—28.U.S.C. § 1452—which provides for removal of claims over which a bankruptcy court has jurisdiction. Whereas the general removal statutes allow for removal of an entire civil "***action***" provided there is diversity or a federal question, the bankruptcy removal statute allows the removal of "***any claim or cause of action***" over which a bankruptcy court has jurisdiction. For example, in a complex lawsuit involving multiple claims and parties, a party might only remove a counterclaim over which the bankruptcy court has jurisdiction, leaving the balance of the case in state court.

So what is "bankruptcy jurisdiction"? As a general rule, bankruptcy courts have original, but not exclusive, jurisdiction over civil proceedings arising under title 11, and proceedings arising in or related to cases under title 11 (28 U.S.C. § 1334).

"Arising under" jurisdiction applies to claims created or determined by a statutory provision of the Bankruptcy Code. "Arising in" jurisdiction, on the other hand, is not based on a right expressly created by the Bankruptcy Code, but instead is based on claims that have no existence outside bankruptcy. "Related to" jurisdiction exists if the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.

For cases filed in state court by a trustee, debtor, or debtor-in-possession, "related to" is the most likely basis for bankruptcy jurisdiction, since the claims will typically have an effect on the bankruptcy estate. For example, a dispute between the debtor and one of its customers based on a pre-petition contract might give rise to "related to" jurisdiction because the outcome could enlarge or deplete the bankruptcy estate.

Rule 9027 of the Federal Rules of Bankruptcy Procedure governs the procedure for bankruptcy removal. Like the general removal statutes, the removing party bears the burden of establishing the bankruptcy court's jurisdiction. Whether the bankruptcy court will ultimately decide the removed claims does not, however, solely hinge on the existence of the bankruptcy court's jurisdiction.

The doctrines of mandatory and discretionary abstention (28 U.S.C. § 1334(c)), and equitable remand (28 U.S.C. § 1452(b)) provide a means for the bankruptcy court to remand the case to state court, even when the bankruptcy court unquestionably ***has*** jurisdiction. Mandatory abstention applies when: (1) the plaintiff makes a timely motion for abstention; (2) the removed claim is based wholly upon state law; (3) the removed claim does not "arise under" the Bankruptcy Code and is not dependent upon the construction or application of bankruptcy law; (4) the claim could not have been commenced in federal court absent bankruptcy jurisdiction; and (5) the claim can be timely adjudicated in state court.

If mandatory abstention applies, the bankruptcy court ***must*** remand the claim to state court.

If the requirements for mandatory abstention are not satisfied, the bankruptcy court may nevertheless exercise its discretion to abstain and remand the case under the doctrines of discretionary abstention or equitable remand.

In determining whether or not to exercise its discretion, the court will likely consider: (i) the existence of two closely related proceedings based upon state law or a state law cause of action; (ii) the absence of any basis for jurisdiction other than bankruptcy jurisdiction; (iii) the likelihood of timely adjudication in state court; (iv) the predominance of state law issues; and (v) the degree of relatedness of the proceeding to the bankruptcy case. The court may also consider the burden on its docket, the likelihood that the commencement of the proceeding in bankruptcy court involves forum-shopping by one of the parties, the existence of the right to a jury trial, and the inclusion of non-debtor parties in the proceeding. The bankruptcy court is not required to address each factor, and permissive abstention and equitable remand may be warranted even where some of the factors are absent.

If your client finds itself adverse to a trustee, debtor, or debtor-in-possession in an unfavorable state court forum, consider whether it makes sense to remove all or some of the asserted claims to bankruptcy court under the bankruptcy removal statute. Don't get too comfortable though, because you may not be there for long. **HN**

Chris Robison and Kyle Mandeville are shareholders at Passman & Jones. They can be reached at robisonc@passmanjones.com, and mandevillek@passmanjones.com, respectively

Congress Passes Paid Leave Law: What Employers Need to Know

CONTINUED FROM PAGE 1

remainder of the leave period, subject to a $200 per day cap and a $10,000 cap overall.

While our collective "new normal" continues to change at a rapid pace, employers should carefully review their existing policies and implement new policies and procedures to comply with these new leave requirements, which both have anti-discrimination and anti-retaliation provisions. The Department of Labor should be issuing regulations to aid in the interpretation of these provisions, but the timing on what that will happen is unclear. **HN**

Terah Moxley is partner at Estes Thorne & Carr PLLC. She is Board Certified in Labor & Employment Law by the Texas Board of Legal Specialization and can be reached at tmoxley@estesthornecarr.com.

Sports Venue Naming Rights: Maximizing Value for the Sponsor

BY JOHN R. SIGETY

No matter how you feel about it, corporate sponsorship names on your favorite athletic venues are big business, and they are here to stay. What the casual sports fan does not consider are the terms, conditions, and requirements to be discussed when a venue owner and sponsor sit down to negotiate a naming agreement. Given the increasingly high prices of such deals, it is imperative for the sponsoring-company's attorney to ensure that the agreement protects the company and helps the sponsoring company maximize the value to be gained from putting its name on the venue.

Name of the Venue

The name of a stadium or arena is a touchy subject for many fans. Create a name that seems too corporate or convoluted, and a team or venue owner risks angering the fan base. But public opinion notwithstanding, the decision on the official name and logo is ultimately up to the sponsor and venue owner.

The attorney's role is to ensure that the official name and logo are used as often as possible in reference to the venue. The agreement should include a provision that the venue owner refer to the official name in all references to the venue and require different events to do the same. This is essential for venues that already have a well-known name. For example, Mercedes-Benz will not get the maximum value of its naming-rights deal if the Mercedes-Benz Superdome is simply referred to as the 'Superdome' at events held there.

Further, the agreement should require the venue owner to use all reasonable efforts to encourage local and national media to refer to the venue by its official name in broadcasts and publications.

Signage and Prominence of the Sponsor

The attorney must work to ensure that the naming sponsor obtains prominence among other sponsors throughout the venue. This can be achieved not only through use of temporary and digital signage, but also through fixed additions that become part of the venue itself. Take for example the home of the Dallas Cowboys, AT&T Stadium. "AT&T Stadium" and the AT&T logo are displayed prominently on the top of the stadium, allowing for prime exposure for AT&T anytime an overhead view of the stadium is shown on national TV broadcasts featuring the Cowboys.

The agreement should also address less permanent signage in as much detail as possible to ensure the naming sponsor's prominence among other sponsors. Items to be considered include: location of the signage, size of the signage, how often the signage will be displayed (*e.g.* on digital screens that cycle through different advertisers), and whether certain events at the venue will result in the sponsor's signage not being visible.

Category Exclusivity

It is essential that a naming-sponsor's attorney seek category exclusivity. Category exclusivity dictates that the sponsor is the only company in its product or service category within the venue. For example, American Airlines will want to ensure that the City of Dallas, which owns the American Airlines Center, makes no sponsorship deals with any other airlines because any such deal would diminish the value of American Airline's sponsorship.

The agreement should include a definition of the naming-sponsor's category to make it clear whether a potential sponsor falls within the naming-sponsor's exclusive category.

Although it is ranked as one of the most valuable sponsorship benefits, recent trends show some companies do not seek category exclusivity because the price is too high. Though, for companies willing to pay large amounts for venue-naming rights, category exclusivity should be considered essential.

Termination

What if the primary sports tenant in the venue moves to another location? A well-prepared attorney will know when a team's lease with the facility ends, but such moves are not always predictable at the beginning of an agreement. The agreement should therefore include a provision allowing the sponsor to terminate it if the team moves to another venue.

The attorney may also want to include a clause allowing termination if the venue owner or anyone associated with the venue engage in behavior harmful to the sponsor's reputation. Last year, this issue arose when Houston Rockets GM Daryl Morey tweeted support for Hong Kong protestors, angering the Chinese government and the Rockets' Chinese sponsors. Instances like these show the importance of termination language to protect the client's reputation with its customer base.

Conclusion

A company should do all it can to maximize the value that comes from a naming-rights deal. To ensure that happens, the sponsoring-company's attorney must address the factors addressed herein, among others, to enable the client to use the sponsorship to market itself and improve its reputation and brand both inside the venue and beyond.

John R. Sigety is a Partner at Kane Russell Coleman Logan PC. He can be reached at jsigety@krcl.com

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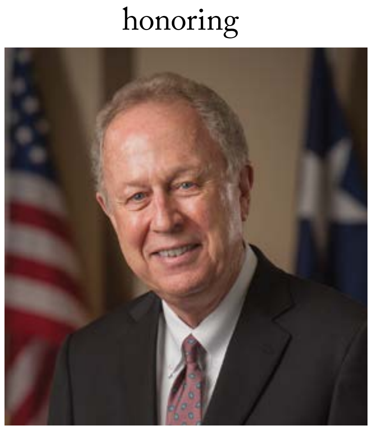

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Friday, May 1, 2020
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DBA We Lead 2020

On February 19, the 2020 DBA WE LEAD class met for their introductory program. The half-day program included sessions by speakers Katherine Bock and Shelly Slater.

Genetic Testing and Heirship: A Misunderstood but Valuable Tool

BY BLAKE O. SPENCER

Genetic testing may not be a probate litigator's first concern when taking a case, but one should at least understand its availability and usefulness in heirships. To avoid the common mistakes associated with genetic testing in this context, one should be acquainted with the governing rules and permissible applications.

When someone dies intestate, a determination of heirship is necessary to pass title of the decedent's property and establish standing in certain proceedings. Normally, the determination is simple and the heirs are decedent's family. However, issues may arise if an outsider asserts his right to inherit from the decedent. The purported heir must prove his relationship to the decedent by clear and convincing evidence. The probate litigator who understands genetic testing knows it is the most efficient and economical method for a purported child to establish such proof.

The availability and admissibility of genetic testing to establish inheritance rights is governed by Texas Estates Code (TEC) §201.052, Chapter 204, and Texas Family Code (TFC) Chapter 160. Under TEC §201.052, only purported biological children (or their descendants) can petition the probate court to establish inheritance rights from a father.

It was the Texas Legislature's intent to make genetic testing a legal means for children to establish paternal inheritance rights. The statutes dictate the only class of persons to whom genetic testing is available in the heirship context—children, and their descendants, establishing a right to inherit from their biological father. The logic behind the law is that a child cannot be punished for the nature of her birth, thus genetic testing is available to establish her paternity, even after her father's death. However, a father who failed to acknowledge his child during her life cannot use genetic testing to benefit himself after the child's death.

The Legislature also knew a father's right to inherit from a child was already governed by TEC §201.001(c). The father's inheritance right must be established during the child's life through paternity by presumption, adjudication, adoption, or acknowledgement. TFC Chapter 160. A purported father cannot petition to establish inheritance rights from a purported biological child, even if he is decedent's biological father.

In the hypothetical death of Purported Father (PF), PF died intestate survived by his son, Sam. Sam applied to determine PF's heirs claiming to be his only heir-at-law. Donna, purporting to be PF's daughter, contested Sam's application and asserted she was also PF's heir-at-law. Donna requested genetic testing under TEC §204.051 to prove PF's paternity. PF was cremated, so the court ordered Sam and Donna to submit genetic samples. The sworn report of the genetic testing results from the accredited laboratory was self-authenticating and sufficient to establish a reliable chain of custody because it included the following: (1) Sam's and Donna's names and photos; (2) the name of each individual who collected the specimens; (3) the location and date of the specimens taken; (4) the name of each individual who received the specimens in the testing lab; and (5) the dates the specimens were received. TFC §160.504. The report was offered as evidence of the truth of the facts asserted therein. The results indicated a 99.9998 percent likelihood that PF was Donna's father. The Court entered a judgment declaring Sam and Donna the heirs of PF's Estate.

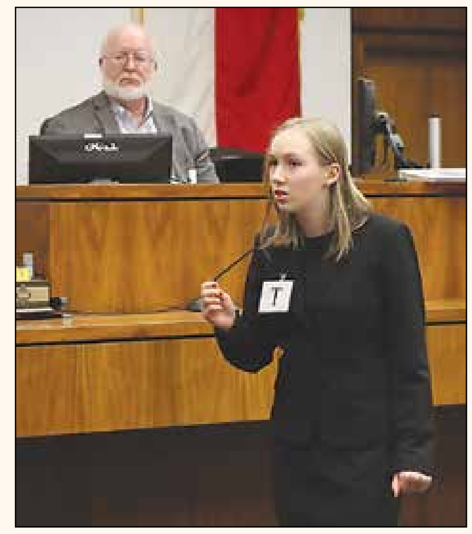
In the hypothetical death of Purported Child (PC), PC died intestate survived by her Mother, Brother, and father, Frank. Mother petitioned to determine PC's heirs, asserting herself, Brother, and another individual, Paul as heirs-at-law. Mother claimed Paul, not Frank, was PC's biological father. Frank, who was adjudicated PC's father during her life, contested Mother's assertion. Paul and Mother requested that the Court order genetic testing determine PC's paternity. Frank responded asserting his established paternity of PC and that neither Mother nor Paul could establish Paul's right to inherit from PC because of the prior adjudication and PC's death. The Court denied the Mother's request, affirming Frank's assertion that neither Mother nor Paul had standing to establish Paul's inheritance right from PC. The Court entered a judgment declaring Mother, Brother, and Frank as PC's heirs.

When used properly, genetic testing is a valuable tool for litigators representing purported children in heirship proceedings, providing the most direct method to establish paternity by clear and convincing evidence. However, the governing statutes are complex and easily misunderstood by practitioners who overlook genetic testing because of its relative rare use. Ultimately, the most important aspect to understand is that it is only available to children attempting to prove a father's paternity, but not to a father attempting to show his paternity of a child. HN

Blake Spencer is an Associate at Spencer & Johnson. He can be reached at blake@dallasprobate.com.

Thank You Mock Trial Judges

Covenant Classical, of Fort Worth, won the State High School Mock Trial Championship. Dallas Bar Association members presided over and served as "jurors" for the final competition on March 7. From left to right are: (Back Row): Justin Gobert, Brenda Hight, Robert Tobey, Hon. John Sholden, Tom Goranson, Kevin Anders. (Front Row): Jim Young, Dennis Saumier, Hon. Lana Myers (presided), Gaylynn Gee, and Allison Reppond. Congratulations to all the participants of the Mock Trial program. And a big Thank You to all the members who volunteered their time.



Focus Bankruptcy & Commercial Law/Energy Law

Top Five Tax Considerations for Renewable Energy Investors

BY JOSHUA D. SMELTZER

What are the tax implications for renewable-energy investors? The answer to this question may make or break a potential investment decision. The government offers billions of dollars in tax incentives for renewable energy investments, but only if taxpayers follow specific rules related to the investments. If the rules are not followed an investor risks not only denial of the tax benefits sought, but faces potential tax penalties. Investors, and their advisors, should consider these top five tax issues when evaluating their investment in renewable energy.

Safe-Harbor Provisions Have Limits

The two tax credits primarily used by investors in renewable energy are the Production Tax Credit (PTC) and the Investment Tax Credit (ITC). The PTC allows a credit for producing and selling renewable electricity, refined coal, and Indian coal. The ITC allows a credit for a portion of the expenditures made in placing certain renewable energy property "in service." There are also potential reductions in the tax benefit and certain phase-outs that should be evaluated when investing.

The IRS has published a safe harbor for electricity generated from wind involving the PTC. The approved structure allocates the bulk of tax credits (i.e. dollar-for-dollar tax savings) to the investor until an agreed rate of return is reached. The approval by the IRS of this structure's tax benefits resulted in several duplications of the structure for other renewable energy sources using both the PTC and ITC. The same treatment has since been applied to other renewal energy sources. However, the IRS has indicated that the safe harbor is limited to wind and the PTC. The duplicated structures may still be valid, but they must rely on the other tax rules and doctrines outside of the safe harbor.

Tax Benefits Cannot be Sold to Taxpayers

Except in certain statutorily authorized situations, a tax benefit cannot be sold. If the sole reason for the investment is tax savings, the IRS and the courts can deny the tax benefits using several doctrines designed to avoid abuse. One thing that will usually draw additional scrutiny is the lack of a pre-tax economic profit. Investors in partnerships must also be aware of the passive activity and at-risk rules.

The business purposes, economics of payments, conduct of the parties, and any guarantees or other provisions governing their relationship to the project all could be important to the analysis. Any term in the agreement or statement during negotiations showing specific intent to confer tax benefits for investing, or to avoid taxes, may doom the desired tax benefits.

Investors Must have a Real Stake in the Transaction

The investor must be a real partner with meaningful upside and downside potential, outside of any tax benefit, or the investor risks recharacterization of the transaction and denial of potential tax benefits.

IRS guidance—in response to similar tax-credit transactions considered abusive—specified factors that may indicate no meaningful stake in the transaction. These factors include direct or indirect guarantees of the investor being able to claim tax credits, cash equivalents of the tax credits, guaranteed repayment of capital contributions because the tax credit cannot be claimed, or guarantees of repayment or indemnification if tax credit is challenged by the IRS. Although an investor may desire such guarantees or indemnifications, any such guarantees may give the IRS and courts reason to question the transaction as lacking a real business purpose or economic substance.

Authorized Tax Benefits Still Require Economic Substance

The judicial doctrine of economic substance requires both a meaningful change in the taxpayer's economic position (apart from tax benefits) and a substantial non-tax purpose for the transaction. The Joint Committee on Taxation has specifically said that if the tax benefit comports with the congressional purpose, then economic substance should not disallow the benefits. However, at least one court has stated that the economic-substance analysis must still be done. That court denied alternative fuel-mixture credits despite the argument that the economic substance doctrine should not apply. Therefore, investors should expect to show the economic substance of the transaction as well as how the benefits follow congressional intent.

Both Written Terms and Negotiations Matter

The IRS and, if necessary, the courts will look at all the facts related to the transaction. This includes the written agreements involved and statements made during negotiations. Whenever significant tax benefits are involved, such as those for renewable energy, the discussions surrounding those benefits is delicate. If the actions of the parties, or oral side agreements, change the nature of the written terms, those additional facts may invalidate an otherwise acceptable written agreement. Tax benefits are narrowly construed, and taxpayers bear the burden of showing entitlement. Therefore, avoiding close calls regarding what agreement terms mean is advisable. Despite potential concerns, taxpayers can still invest in renewable-energy investments successfully and receive the tax benefits intended—if the taxpayers are careful. **HN**

Joshua Smeltzer is a partner at Brown Fox PLLC and former U.S. DOJ Tax Division Honors Trial Attorney. He can be reached at joshua@brownfoxlaw.com.

Column | *SBOT President's Update*

The State Bar of Texas—A Friend, Not a Foe.

We Are Your Bar!

RANDY SORRELS

While campaigning for President-elect in 2018, I spent a significant amount of time in Dallas talking with lawyers about what the State Bar did well and not so well. You are not a shy bunch! But it made a difference. Over the last eight months our bar—myself as president, the board of directors and our State Bar professionals have been laser focused on two goals:

Improving and expanding on what the State Bar is doing well; and

Doing better in areas that need improving.

In short, our State Bar serves many people and purposes, but we are first a bar that is by, of, and for the lawyers of Texas. In other words, we look to partner with the lawyers of Texas, not be an opponent. As a partner, we are asking for your participation in reaching our goals.

Dallas Leaders Are Out Front. We Need You Too.

Not surprisingly, many Dallas lawyers have already stepped to the forefront in this effort. **Jerry C. Alexander** was elected to serve as the Chair of the State Bar Board of Directors for 2019-2020. He presides over a board of 60 directors, judicial and out-of-state lawyer liaisons, section representatives and public members. Jerry has embraced these goals and has made it his mission to improve the personal and professional lives of all Texas lawyers.

Randy Sorrels

Third-year District 6 (Dallas) Director **David Kent** is the Chair of our Strategic Planning Committee, as well as working with the Discipline & Client Attorney Assistance Program. Second-year director **Rob Crain** takes a leading role on statewide diversity issues looking for inclusion of all lawyers in Texas. We are fortunate to have the steady hand and strategic guidance on legal issues from second-year director and Litigation Committee member **Michael K. Hurst. Rebekah Steely Brooker** was appointed to the Executive Committee—a rare appointment for a first-year director, but her experience as a former Texas Young Lawyers Association president has been invaluable. **Alan Sims** is a public member with a career in city management, and last served as the City Manager of Cedar Hill. He understands management. **Matthew Kolodoski** serves as a State Bar section representative. Sections are vital to our bar, and Matthew ensures all sections are properly served.

Dallas lawyers also dominate our TYLA leadership team and serve on the SBOT board. **Sally Pretorius** continues her legacy of exemplary and dedicated service to our profession as the TYLA Immediate Past President. She has the ear of thousands of lawyers. Rising star **Britney Harrison** (TYLA President-elect) provides the energetic insight she gains traveling the state representing our young lawyers.

Where Are We Now?

While each of these Dallas leaders is committed to work on your behalf, the State Bar of Texas really wants your input and feedback. Innovations and improvements made over the last year have been member driven. The State Bar is listening more than ever to our more than 105,000 active members. You can contact your directors, the State Bar office or even me on my cellphone (713-582-8005). We have recently established a Social Media Engagement Team that helps respond to questions and issues posted in various social media outlets. This team also tries to spot ideas and problems that need addressing. Many Texas lawyers use social media as a primary communication tool.

Moving Forward!

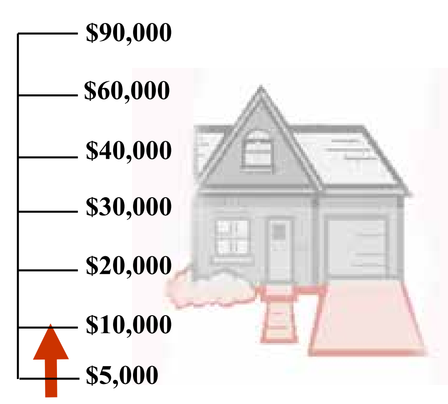
I am in the last quarter of my year as president and rather than list what has been accomplished so far, I would rather use this space to reassure you that the next president has the same focus and agenda—working for the lawyers of Texas. This is not a one-year effort. My successor, Larry McDougal (a small firm criminal defense lawyer from Richmond), has been helping me this year and vows his full efforts to improving the well-being of lawyers. He will take over the president's role in June, but he now stands ready to listen to lawyers across the state. Call him or email him. Or catch him on Facebook.

Thank you, Dallas Bar Association

The Dallas Bar Association continues to be one of the best local bar associations in the country. Dallas lawyers have a local organization that does it right. The State Bar of Texas appreciates the relationship with the lawyers of Dallas, but we look forward to an even more productive partnership with Dallas lawyers moving forward. Know the State Bar of Texas is a friend of Dallas lawyers and the lawyers of Texas.

Randy Sorrels is the 2019-2020 president of the State Bar of Texas and a partner in the Houston law firm of Abraham, Watkins, Nichols, Sorrels, Agosto, Aziz & Stogner.

Habitat House



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Moms in Law Events April

Being a working mom can be challenging. Being a working lawyer mom can be a different ballgame with its own unique challenges. Moms in Law is a no pressure, no commitment, informal, fun, support group for lawyer moms. The April event is:

Friday, April 24: Noon, Ida Claire (5001 Belt Line Rd., Addison)*
To attend, RSVP cpleatherberry@gmail.com.
*subject to change

Email cpleatherberry@gmail.com to join the Moms in Law email listserv.

Focus Bankruptcy & Commercial Law/Energy Law

New Bankruptcy Law Impacts Preference Litigation

BY HON. STACEY G.C. JERNIGAN AND ERIC M. VAN HORN

"Why am I being sued to return payments for goods I sold to a customer who is now in bankruptcy—especially when the customer still owes me money?"

"Why am I being sued in Delaware when I did business with the debtor in Dallas?"

These are questions often asked by clients sued in preference (clawback) litigation under section 547 of the Bankruptcy Code (Code). While intended to promote equality among creditors, preference litigation is one of the most frequent (and frustrating) ways creditors and lawyers encounter our bankruptcy system.

2019 SBRA Changes to Preference Litigation

Two important changes that address some of the perceived imbalances in preference litigation are now in effect pursuant to the Small Business Reorganization Act of 2019 (SBRA), which requires (i) certain due diligence be performed by a plaintiff (often a trustee) before commencing preference litigation (Diligence Requirement) and (ii) suing a creditor in its home jurisdiction if the preference suit seeks to recover under $25,000 (Home Venue Requirement).

The Diligence Requirement now prohibits preference lawsuits from being commenced unless the plaintiff has engaged in "reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses" under section 547(c) of the Bankruptcy Code. For example, plaintiffs should perhaps be more closely examining defenses like the "subsequent new value" defense, based upon all relevant information, including proofs of claim filed by creditors, and not just based upon a review of the debtor's books and records (which may be inaccurate). These changes may have been inspired by a 2007 Dallas bankruptcy court which required a trustee to perform a preference defense analysis and submit a preliminary report to the court before commencing litigation. *In re Brook Mays Music Co.*, Case No. 06-32816-11-SGJ, Docket Nos. 854 & 880.

This Diligence Requirement presents a variety of questions as to how and when it will be applied and enforced by courts and parties. For example:

- How much diligence is required?
- Is a simple pre-suit demand letter that puts the burden on targets to respond with defenses enough? Or should demand letters include defense analyses?
- Must complaints detail what diligence plaintiffs performed, what defenses they evaluated, and what amount, if any, plaintiffs gave defendants credit for?
- How far does the Diligence Requirement stretch? While it certainly applies to all defenses under section 547(c), what about other defenses that could apply—like a creditor whose executory contract was assumed under section 365—which would have required curing pre-petition amounts owed?
- Will courts *sua sponte* ask plaintiffs about the due diligence conducted and determine whether it was reasonable? Or will courts wait for a creditor-defendant to raise the issue?
- If a court finds that the Diligence Requirement was not met, what is the remedy? May courts dismiss the lawsuit? What if the dismissal would be after the statute of limitations had expired?
- Can courts shift fees and award sanctions? Should creditor-defendants invoke Bankruptcy Rule 9011 and provide notice to the plaintiff's counsel if there is a potential the plaintiff did not comply?

The Home Venue Requirement under 28 U.S.C. § 1409(b) now mandates preference lawsuits seeking $25,000 or less to be brought against defendants where they are located, rather than where the bankruptcy case is pending. The new amount is subject to regular adjustment for inflation. Creditors who receive a demand letter seeking less than $25,000 may now be able to negotiate a more favorable settlement if a lawsuit would have to be filed in their home court, possibly requiring the plaintiff to incur more costs and fees to litigate. Further, combined with the Due Diligence Requirement, creditors who, for example, received $100,000 of payments, but have defenses that may prevent recovery of $75,000 or more of the payments, might now have to be sued in their home court.

The questions and issues will undoubtedly be litigated and the subject of future court rulings and opinions. However, in the meantime, plaintiffs may want to err on the side of caution and attempt to over-comply with the Diligence Requirement, and creditor-defendants and their counsel may want to raise, and seek strict compliance with, the Due Diligence Requirement and Home Venue Requirement in any threatened or commenced litigation. **HN**

The Honorable Stacey G.C. Jernigan is a United States Bankruptcy Judge for the Northern District of Texas, Dallas Division. Eric M. Van Horn is a partner in the business bankruptcy, restructuring & creditors' rights section at Spencer Fane LLP. They can be reached at judge_stacey_jernigan@txnb.uscourts.gov and ericvanhorn@spencerfane.com, respectively.

Clark Will and Daryl Sinkule in the Madi Museum located in the Kilgore Law Center.

How Lawyers are Optimizing Cash Flow and Workflow

BY JOHN LEHMAN

The convenience of paying for your services online goes a long way in fostering satisfaction in your clients. But what's in it for you? How does an online payment tool help make your workday easier, save you time, or deliver valuable business insights? Here, we will dig into both process and operational benefits to see how online payments are being used in successful firms to boost cash flow and save time.

Stop Waiting for Checks in the Mail

Consider for a moment just how much time is eaten up waiting for your client's check to arrive in the mail. First, you mail your client your itemized bill, which itself can take as much as a week or more to arrive. Your client then writes their check and sends it through the mail, so add another week on top of that. When you finally get the check in your hands, you will then have to take it down to the bank to deposit it (or process it through your phone). All in all, from writing your bill to receiving funds, you are looking at as much as two to three weeks!

And then, there is online payment, where this entire process is handled within a few days. In fact, one survey of legal industry professionals found that those who accept payments online get paid 39 percent faster on average. You send your client a payment link, your client can pay it instantly, you get a near-immediate confirmation email when payment is submitted, and the transaction shows as pending on your bank account within seconds.

Automate Your Cash Flow

You can make your billing process even simpler by setting up recurring payments with an online payment solution. This is in effect like putting your cash flow on autopilot, kicking your feet up, and just watching revenue flow in. Of course, you could also use the time you are saving on billing towards something more productive, such as working on additional cases or adding new services to your practice. Want to streamline this process further? Include credit card authorization forms in your onboarding paperwork so your client can consent to automated payments from the get-go.

Let Your Tech Tools Work Together

Another big benefit of an online payment platform is that many integrate with the software you already use and love. Rather than having to bounce between multiple browser tabs or software windows, you can keep all of your practice management narrowed down to one program.

Plus, integrated software can often supplement each other with shared data and features, providing you with smarter business insights as well as more efficient workflow. For example, an integrated payment tool can offer tagging functionality to your invoices to make organizing and tracking your billing easier and help you see precisely where income is coming from. You can also dig into who your top-paying clients are, and maybe look for ways to offer them additional services or reach out to them requesting a referral.

Alleviate Your Security Burden

With high-profile events like the 2019 Capital One breach and more targeted ransomware attacks against law firms, legal professionals and their clients are naturally on edge. But in spite of it all, people are still favoring paying for goods and services electronically. In fact, in a recent survey by TSYS, more than half of respondents said they believe credit or debit is the safest payment type.

One of the greatest perks of using an online payment solution is, your clients enter their card information into a secure portal themselves. Their information is then stored within an encrypted card vault protected by your online payment solution, which lets you effectively shift much of the related security burden off of your firm. When comparing vendors, be sure to choose one with PCI Level 1 security, as this represents the highest level of internet security possible. **HN**

John Lehman is a Content Writer at LawPay. He can be reached at jlehman@lawpay.com.

Be Sure to Visit Your E-Communities

E-Communities on the DBA website are a great place to view current information on your Sections and Committees.

Officers use these Communities to post and send announcements.

To access, log in to your My DBA Page and find your E-Communities under the My E-Communities tab.

What You Need to Know About Required Minimum Distributions: Especially the #1 Tax Tip

Speaker: Susan Jennings, Erhard & Jennings, P.C.

Tuesday, April 28, Noon at Belo | MCLE 1.00

RSVP at www.dallasbar.org. | Sponsored by the Senior Lawyers Committee

Sustaining Members of the Dallas Bar Association

The DBA sincerely appreciates the following Sustaining Members whose financial contributions enhance the preservation of the historic Belo Mansion. Thank you!

As of 3/12/2020

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WILL CRAVEN

Will Craven is an associate attorney at Cozen O'Connor.

1. How did you first get involved in pro bono?
My first involvement with pro bono came after joining Cozen O'Connor in October 2015. It is well known, both inside and outside of the firm, that Cozen enjoys a strong tradition of pro bono contributions to the community. Cozen supports and encourages its attorneys to participate in pro bono matters, and immediately upon joining the Dallas office, I began working with other attorneys and independently to develop a pro bono practice.

2. Why do you do pro bono?
At heart, pro bono is about giving back to those that are less fortunate. Not everyone has the means to afford an attorney, and nobody (including myself) is perfect. Often, my pro bono cases involve helping someone that made a mistake, or simply was in the wrong place at the wrong time, but wants to move forward and create a better life for themselves and their families. They often need guidance on a legal procedure than can seem overwhelming. Helping those during their most trying times get back on their feet and make the life they seek is the number one reason I do pro bono.

3. What impact has pro bono service had on your career?
Pro bono service has had a significant impact on my career. Most importantly, it gave me the first opportunity to select my own cases and run with them as my own. Working a case by yourself as a young attorney can be stressful, but also, at times, the best way to learn. Pro bono also gave me opportunities to get into a courtroom and increase my comfort level. Those increased repetitions have greatly benefited me in my career. I know my pro bono work has greatly improved by advocacy, writing, and courtroom skills.

4. What is the most unexpected benefit you have received from doing pro bono?
The most unexpected benefit of pro bono work for me has been helping combat the stereotype, associated by some, that practicing law is only about making money to the exclusion of all else. Others outside of the field might have preconceived notions or stigmas about attorneys that are not always pleasant. Engaging in pro bono work, and speaking to others in my network about that work, has allowed me to correct some of these misinformed opinions. I have had the opportunity to show that we, as attorneys, can use the skills we worked hard to develop in law school, and continue to work hard to develop after graduation, to help others.

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An Update on Texas Fraudulent Transfer Law

BY RUSSELL MILLS AND KENT LOVE

Texas adopted its version of the Uniform Fraudulent Transfer Act (TUFTA) in 1987. The law was designed to prevent debtors from prejudicing creditors by improperly moving assets beyond their reach. TUFTA permits creditors and bankruptcy trustees to "claw-back" payments or other transfers of property from a debtor's estate if such transfer was made "with actual intent to hinder, delay, or defraud" the debtor's other creditors. Because fraudulent intent is seldom susceptible to direct proof, TUFTA provides a non-exclusive list of eleven "badges" of fraud that may be used to infer that a debtor actually intended to defraud creditors.

Under TUFTA, however, a transferee is not required to relinquish the transfer if the transferee can prove it received the property "in good faith" and "for a reasonably equivalent value." Although often litigated, the term "good faith" is not defined by TUFTA and, until December of last year, had yet to be examined by the Supreme Court of Texas. In *Janvey v. GMAG, LLC*, No. 19-0452, 2019 WL 6972237 (Tex. Dec. 20, 2019), the Texas Supreme Court held that, to be entitled to TUFTA's good-faith defense, a transferee must show that its conduct was "honest in fact, reasonable in light of known facts, and free from willful ignorance of fraud."

The Texas Supreme Court answered a question certified to it by the Fifth Circuit by holding that a transferee on "inquiry" notice of the transferor's fraudulent intent cannot achieve good faith status unless it can show that it diligently investigated its suspicions. In *Janvey*, an investor in Stanford International Bank (which had operated as a Ponzi scheme and been placed into receivership because of it) was found to have received fraudulent transfers of almost $80 million and was denied good faith status. The Texas Supreme Court held that a transferee is on inquiry notice when he or she takes property with knowledge of such facts as would "excite the suspicions of a person of ordinary prudence" regarding the fraudulent nature of the transfer. In other words, a transferee is on inquiry notice when he or she knows facts that should be considered "red flags" that a reasonable person would have investigated prior to accepting the transfer.

Some courts in other jurisdictions follow the rule that a transferee on "inquiry notice" who fails to conduct an investigation can still achieve good faith status if the investigation would have been "futile." The lasting impact of the Court's decision in *Janvey* will be from its rejection of that "futility" exception in Texas law. The jury had found that a diligent inquiry by the *Janvey* investor, had one been undertaken, would not have revealed that Stanford was operating a Ponzi scheme because of its complexity. Yet, the Court held that a transferee on inquiry notice cannot achieve good faith status *even if the transferee's hypothetical investigation would have been fruitless and would not have revealed any fraudulent purpose*. The Court reasoned that imposing such a requirement on transferees negates any incentive a transferee may have to remain willfully ignorant of fraud.

Janvey was well-intentioned and reaches what seems to be a reasonable conclusion. However, the Court did not define what set of circumstances would constitute a "diligent investigation" sufficient to establish good faith, and its failure to define "diligent investigation" only produces more questions than answers. In order to have attained good faith status, must the *Janvey* investor have retained counsel to issue subpoenas to Stanford International Bank and fought with them over the production of confidential financial records all in an attempt to uncover what was "inherently undiscoverable"? Or would a simple Google search of their public records have been enough? And, what did the Court expect the *Janvey* investor to have done with the information he found in this investigation? Was he also expected to retain an accountant to parse through the complex scheme in an effort to uncover what the SEC, independent auditors, and 18,000 investors had not uncovered in 20 years? Is he expected to conduct his own review of the "badges" of fraud? What if the results of his "diligent" investigation found no fraud but this conclusion was simply incorrect? Can an investigation be "diligent" if it reaches the wrong result? In the end, the *Janvey* investor no doubt wishes he had done more, but it is hardly clear exactly what was expected of him.

While *Janvey* may have legitimately attempted to better define fraudulent transfer law in Texas, the Supreme Court instead produced more uncertainty. At a minimum, *Janvey* imposes a greater burden on transferees to perform a "diligent investigation" into potential wrongdoing. Practitioners should advise transferee clients to document the known circumstances, the parameters of any additional investigation, the results of the investigation, and the actions taken on those results. While these efforts may prove insufficient in hindsight, they would at least show that the transferee did attempt an investigation unlike the *Janvey* investor. **HN**

Russell W. Mills and R. Kent Love are attorneys at Bell Nunnally & Martin LLP. They can be reached at rmills@bellnunnally.com and klove@bellnunnally.com, respectively.