

Summer 2020

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Haynes and Boone, LLP

Christina Marshall (Chair Elect)

Haynes and Boone, LLP

Brent Benoit (Vice Chair)

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Abby Johanson (Secretary/Treasurer)

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Reidel Law Firm



**BUSINESS
LAW SECTION**
OF THE STATE BAR OF TEXAS

Summer Newsletter 2020

Message From The Outgoing Chair



Our Newsletter for this summer is in a different format. Because of the vast effects of the COVID-19 pandemic crisis, we have included links to alerts and other articles issued by Texas law firms on various legal matters relating to the pandemic. On another topic, we have also included a link to Byron Egan’s recent excellent article on “*Joint Venture Governance and Co-Ownership Agreements*”.

As many of you know, because of the pandemic crisis, the State Bar of Texas authorized the Business Law Section to hold its 2020 Annual Meeting and election of Council members by email and by casting ballots on a website. The voting period concluded on July 9, 2020, and I am pleased to announce that the following individuals have been elected by the members of our Section to serve as Council members:

Council Members – Terms To Expire in 2022

Jacqueline Akins
Robin Phillips

Rick Jordan
Schuler “Rocky” Reidel

Christina Marshall

Council Member – Term To Expire in 2021 -Brent Benoit (filling the remaining one year of Stephen C. Tarry’s term; Stephen C. Tarry will continue to serve as a member of the Council as its immediate past Chair)

I am also pleased to report that the Council (including its newly elected members) has chosen the following persons to serve as Officers of our Section for 2020-2021:

Frank Z. Ruttenberg, Chair
Christina Marshall, Chair Elect

Brent Benoit, Vice Chair
Abby Johanson, Secretary– Treasurer

Although, because of the pandemic, this has been a challenging and unusual year, I have been privileged and honored to have served as the Chair of your Section for 2019-2020. The pandemic has transformed the lives of many of us and made us all the more aware of the personal connections that sustain us.

In this context, the recent protests over the death of George Floyd have reminded us of our role as lawyers in working for justice and equality. [The Statement on George Floyd and equal access to justice](#) issued by former State Bar President Randy Sorrels and by State Bar Executive Director Trey Apffel on June 9 exhorts us all to greater efforts in this regard:

“As our nation struggles with the events of the day which include the senseless killing of Texan George Floyd, the State Bar of Texas remains committed to the principle that all people are entitled to equal access to justice. This principle includes the commitment to honor the exercise of every American’s Constitutional rights, including the right to freedom of speech and freedom to protest peacefully.

“As the administrative arm of the Supreme Court of Texas, the State Bar of Texas is prohibited from taking a stance on specific political or ideological issues outside of the regulation of the legal profession or improvements to the quality of legal services. We understand the reasons behind this prohibition. Still, all lawyers who take the oath to defend the Constitution of this state and of the United States surely share a common pursuit of equality under the law.

“We must always work to do better in all we do, as lawyers, but more importantly as people. Where there is inequality, we must work for equality. Where there is injustice, we must work for justice. Where there are shortcomings in the law, we must work to improve those laws. Where there is racism, we must work to end it.”

Stephen C. Tarry
Chair of the Business Law Section 2019-2020



COVID 19

I. LEGAL ISSUES RELATING TO COVID-19

A. INTRODUCTION

The COVID-19 pandemic emergency has presented numerous challenges for attorneys who provide legal advice to businesses. The breadth and scope of the legislative, regulatory and other developments relating to the pandemic have made it difficult for attorneys to keep up. Texas law firms have issued numerous alerts and other articles regarding the new legal developments relating to COVID-19. With the hope that many of these alerts and other articles may be of use to our Section's members, this issue of the Newsletter includes an outline of some of the more prevalent topics and links to related law firm materials

B. LEGISLATIVE DEVELOPMENTS

1. CARES ACT

On March 27, 2020, President Trump signed the Coronavirus Aid, Relief, and Economic Security ("CARES") Act into law. The CARES Act provides for \$2 trillion in various aid and relief packages relating to the financial impacts of COVID-19, including the Paycheck Protection Program and aid to small businesses through loans made by the Small Business Administration. A general overview of the CARES Act can be found on the [Jackson Walker \(Update #3, July 15, 2020\)](#) and [Haynes & Boone \(March 29, 2020\) firm websites](#).

Since it was adopted, there have been numerous developments regarding the implementation of the CARES Act, some of which are described in the following articles:

[The Paycheck Protection Program and Bankruptcy \(Vinson & Elkins, July 16, 2020\)](#)

[Paycheck Protection Program: Timeline of Important Regulatory Announcements \(Hunton Andrews Kurth, July 14, 2020\)](#)

[SBA Issues Fresh Guidance and Streamlined Forgiveness Application \(Bracewell, June 17, 2020\)](#)

[Federal Reserve Releases Updated, Detailed Terms of Main Street Lending Program \(Hunton Andrews Kurth, June 10, 2020\)](#)

[Paycheck Protection Program Reforms Give Borrowers More Time to Use Funds and Make it Easier to Have Loans Forgiven \(Baker & Botts, June 5, 2020\)](#)

[Paycheck Protection Program: Loan Audits \(Thompson & Knight, May 11, 2020\)](#)

2. FAMILIES FIRST CORONAVIRUS RESPONSE ACT

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act (the "FFCRA"). The FFCRA amends the Family and Medical Leave Act of 1993 to provide up to twelve weeks of job protected leave—ten of which are paid, subject to a cap—to employees who have a qualifying need related to a public health emergency. The FFCRA also creates a requirement for employers with fewer than 500 employees to provide up to ten days of paid sick leave at the employee's regular rate of pay to quarantine or seek treatment related to COVID-19. The FFCRA also provides employers certain tax credits with respect to payments required under the new law. General descriptions of the FFCRA can be found on the websites of [Bracewell \(March 19, 2020\)](#) and [Baker & Botts \(March 3, 2020\)](#). The following articles further discuss some developments regarding the FFCRA:

[Employer Obligations Under The Families First Coronavirus Response Act \(Thompson & Knight, April 3, 2020\)](#)

[Summary of Business Income Tax Provisions in the CARES Act \(Vinson & Elkins, March 31, 2020\)](#)

[Department of Labor Explains 500-Employee Threshold, Provides Other Guidance on Coronavirus Response Act \(Hunton Andrews Kurth, March 27, 2020\)](#)

C. FORCE MAJEURE AND MATERIAL ADVERSE EFFECT CLAUSES

A significant number of contracts contain provisions excusing performance in the event of a force majeure. However, under Texas law, whether COVID-19 pandemic may excuse performance under a contract depends upon the specific provisions of that contract. If a contract does not contain force majeure provisions or if contractual force majeure provisions are not broad enough to cover the pandemic, parties to contracts may nevertheless attempt to rely upon non-contractual remedies excusing performance, including concepts such as frustration or purpose, impossibility of performance and commercial impracticability. For further information, please see the following:

[COVID-19 and Force Majeure: Jurisdictional Comparison and Practical Legal and Commercial Considerations \(Hunton Andrews Kurth, April 23, 2020\)](#)

[Your Contracts and Covid-19: Force Majeure and Impossibility \(Carrington, Coleman, Sloman & Blumenthal, March 23, 2020\)](#)

Agreements relating to merger and acquisition transactions frequently contain material adverse effect (“MAE”) clauses that permit an acquiror to walk away from a transaction between signing and closing if the seller’s business incurs a significant deterioration that threatens the fundamentals of the deal. Attempts to invoke MAE clauses in M&A deals based upon the COVID-19 pandemic may be challenging, particularly under Delaware case law:

[US Private M&A Drafting Considerations in Light of COVID-19 \(Norton Rose Fulbright, June 29, 2020\)](#)

[Material Adverse Effect Clauses in an Economic Downturn \(Vinson & Elkins, April 3, 2020\)](#)

Credit agreements frequently contain provisions that restrict the ability of a borrower to obtain loans and letters of credit under a credit facility if a material adverse effect or a material adverse change has occurred. In connection with those assessments, lenders and borrowers alike will need to consider whether the COVID-19 pandemic and attendant economic disruption have caused a “material adverse effect” or “material adverse change” under their credit facilities:

[Does the Current COVID-19 Crisis Threaten Borrower Access to Credit Facilities? \(Vinson & Elkins, March 19, 2020\)](#)

D. WORKPLACE SAFETY

The U.S. Department of Labor’s Occupational Safety and Health Administration (“OSHA”) has issued a number of statements regarding the obligations of employers to protect workers from hazards relating to the coronavirus:

[OSHA Issues Guidance for Oil and Gas Industry Workers and Employers \(Vinson & Elkins, July 21, 2020\)](#)

[OSHA Reminds Employers to Continue Assessing Employee Safety Regarding COVID-19 Hazards, While Also Not Neglecting Common Workplace Hazards \(Haynes & Boone, June 17, 2020\)](#)

[Summary of OSHA COVID-19 Compliance Guidance \(Jackson Walker, April 20, 2020\)](#)

[Coronavirus Health & Safety Guidance: OSHA Gives New Direction to Employers \(Vinson & Elkins, March 12, 2020\)](#)

[US: Critical COVID-19 Labor and Employment Issues for Employers \(Norton Rose Fulbright, March 2020\)](#)

COVID 19

E. CORPORATE GOVERNANCE

Many companies that host in-person annual stockholder meetings are now faced with the options of switching to virtual-only stockholder meetings or of adding a virtual component to an in-person meeting:

[Taking the Meeting Out of Annual Meetings: Exploring Virtual Meeting Options in the Age of Coronavirus \(Vinson & Elkins, March 17, 2020\)](#)

[Coronavirus/COVID-19: Considerations for Shareholder Meetings \(Hunton Andrews Kurth, March 16, 2020\)](#)

F. TRACKING COVID-19 RELATED LITIGATION

Hunton Andrews Kurth is monitoring all federal and state litigation filed in connection with COVID-19 claims and has developed a [COVID-19 Complaint Tracker](#) to track this litigation.

G. SIGNING CONTRACTS DURING THE COVID-19 PANDEMIC

Given the requirements for social distancing and the fact that key employees for many companies continue to work remotely, signing contracts and other documents during the pandemic can present challenges. In this connection, Hunton Andrews Kurth has issued a paper about [Using Electronic Signatures in the Age of COVID-19 \(March 26, 2020\)](#).

In addition, the TriBar Opinion Committee has published a [Comment Concerning the Use of Electronic Signatures and Third-Party Opinion Letters \(March 24, 2020\)](#).

II. NON-COVID-19 TOPIC—JOINT VENTURE GOVERNANCE

In addition to the COVID-19 materials that are discussed above, we wanted to bring to your attention an excellent article recently published by Bryon Egan (who is a partner with Jackson Walker and who is one of our most distinguished and prolific CLE authors) on another topic. The article is entitled “*Joint Venture Governance and Co-Ownership Agreements*”. You may read Byron’s article [here](#). The article covers the following topics:

- the benefits and drawbacks in choosing a type of legal entity (e.g., general partnership, limited partnership, limited liability company or corporation) as a vehicle for forming a joint venture;
- preliminary agreements relating to joint ventures, including confidentiality agreements, exclusivity agreements, and letters of intent;
- the scope and purpose of a joint venture’s business;
- mechanisms for funding a joint venture’s activities;
- the allocation and distribution of a joint venture’s profits, losses and other items;
- the governance and management of joint ventures;
- events of default in joint venture agreements;
- restrictions on transfers of joint venture interests;
- dispute resolution;
- the termination of joint ventures;
- antitrust considerations, including pre-merger notification filings under the Hart-Scott-Rodino Antitrust Improvements Act of 1976;
- intellectual property;
- transferring assets to a joint venture; and
- legal representation of a joint venture.



Keeping Your Email Address Updated

With the electronic distribution of the newsletter, it will be important for every Section member to keep an updated email address with the State Bar of Texas since that agency will distribute the email on behalf of the Section. You may update your email address at the [MyBarPage](#) of the State Bar's website. Please note that the Section will not sell or distribute your email address to anyone, including the State Bar's CLE Division.



Newsletter Submissions

If you would like to submit an article for inclusion in the Business Law Section's Newsletter, please email it to our Newsletter Committee Chair, [Diana Bando](#)

The Newsletter Committee reserves the right to edit contributions for clarity and content.

