May 2008 Newsletter of the Business Law Section of the State Bar of Texas

Message from the Chair

"***The check's in the mail***."

Okay, I admit it. We're behind on a few things this year. In particular, we are late in getting to you this Newsletter and the latest issues of the Texas Journal of Business Law, as well as the launch of our new Website. As outlined below, we are taking steps to move in the right direction, starting with this Newsletter.

The Section's goal each year is to publish three (3) issues of the Texas Journal of Business Law. You should receive Volume 42, Issue No. 1 of the Journal very soon. Issue No. 1 contains articles on the Texas margin tax and choice of entity. Shortly thereafter, you should receive Issue No. 2 with articles on insurance carriers' duties to defend and policyholders' right to select counsel under insurance policies, amendments to the Texas Business Organizations Code, and UCC Article 9 search and filing issues. So that you have plenty to read over the summer, you should also receive in June Issue No. 3 with articles on the use of special committees in merger and acquisition transactions and Sarbanes-Oxley. As the old saying goes, "Better late than never."

We also began the year with an aggressive plan to upgrade our Website by the middle of the year. Our Website Committee has been working very hard to select the right technology to make our new website functional, easy to utilize, and easy to update. The committee has recently made their selection and we will now work very diligently over the next several months to get the new Website up and running. Once we launch, we think you will find our new Website useful, informative, and, most importantly, current.

Our many substantive committees have worked hard this year on several projects including (a) the E-Commerce Committee, which is working on anti-spam legislation for the upcoming legislative session, (b) the Securities Law Committee, which has been reviewing the SEC's revamping of Regulation D, and (c) the Partnership and LLC Laws Committee, which has been working on form limited liability company agreements to be published by the State Bar.

I encourage you to become involved with one of our committees.

We hope you have a safe and enjoyable summer and look forward to seeing you at the Annual Meeting in Houston.

Scott G. Night

Chair, Business Law Section, 2007-2008

2008 State Bar of Texas Annual Meeting

The State Bar of Texas Annual Meeting will be held at the George R. Brown Convention Center in Houston, Texas, on June 26-27. The Business Law Section and Corporate Counsel Section are co-sponsoring the following CLE programs at the Annual Meeting:

On Thursday, June 26th, the Business Law Section and Corporate Counsel Section will co-sponsor the following CLE presentations:

(i) Ethics by Thomas H. Watkins, 9:00 AM to 10:00 AM;

(ii) Panel Discussion Regarding In-House and Outside Counsel, panelist include Michael C. Barron, David Finck, Manuel Pelaez-Prada, Todd Silberman, Dulcie Wink, 10:00 AM to 11:15AM;

(iii) Internal Investigations by Spencer Barasch, 1:30 PM to 2:15 PM;

(iv) What the TBOC and TBCA Don't Tell You About Conducting Shareholder Meetings by Richard A. Tulli and Gregory R. Samuel, 2:15 PM to 3:00 PM;

(v) Franchise Tax Update by Cynthia Ohlenforst, 3:00 PM to 3:30PM;

(vi) Transition Issues Under the Business Organizations Code: Opting In, Preparing for the Expiration of the Pre-Code Statutes, and Other Concerns by Daryl B. Robertson, 3:45 PM to 4:30 PM.

The Business Law Section will hold its section meeting at 4:35 PM on Thursday, June 26th after the conclusion of the CLE presentations.

On Friday, June 27th, the Business Law Section and Corporate Counsel Section will co-sponsor the following CLE presentations:

(i) Panel Discussion Regarding Litigation Management, panelist include Richard Hogan and Sonya Sigler, 9:00 AM to 10:30 AM;

(ii) When the Feds Come Knocking: Dealing with Federal Investigations and Qui Tam Claims by Joel Androphy, 10:30 AM to 11:15 AM.

For more information concerning the meeting, please see http://www.texasbar.com

Report of the Nominating Committee of the Business Law Section of the State Bar of Texas

A Nominating Committee was appointed by the current Chair of the Business Law Section Council, Scott G. Night, and consisted of Gail Merel, J. Scott Sheehan and Daryl B. Robertson. Mr. Night appointed Mr. Robertson to serve as Chair of the Nominating Committee.

The members of the Committee met via telephone conference call on one occasion and communicated numerous times via electronic messages. The members of the Committee discussed and contemplated various nominees for members of the Council and for the officers of the Business Law Section for the 2008-2009 year. The Nominating Committee determined to nominate the following persons for election by the members of the Business Law Section to a two-year term, commencing at the close of the Section's 2008 Annual Meeting, as members of the Council of the Business Law Section:

David Keyes

John Podvin

Thomas E. Felger

Irene Kosturakis

Gregory R. Samuel

The term of outgoing Council Chair, Scott G. Night, as a member of the Council automatically ends effective as of the close of the Section's 2008 Annual Meeting. To fill the resulting vacancy, the Committee determined to nominate Carol Bavousett Mattick for election by the members of the Business Law Section to serve the remaining one-year term of that vacancy, commencing at the close of the Section's 2008 Annual Meeting, as a member of the Council of the Business Law Section.

The Committee also determined to nominate for election by the members of the Council the following as officers of the Business Law Section, to serve commencing at the close of the Council's meeting immediately following the Section's 2008 Annual Meeting:

Elizabeth S. Miller, Chair

Roger A. Bartlett, Chair Elect

Richard A. Tulli, Vice Chair

Jennifer C. Lindsey, Secretary-Treasurer

Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions

The Business Law Section has joined the Section of Business Law of the American Bar Association and at least fifteen other state bar groups in approving the "Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions".

Over the years, attorneys giving and receiving closing or third-party legal opinions in business transactions have developed common understandings about the meaning of certain commonly-used words and phrases and about the nature of the work (both factual and legal) that lawyers are expected to perform in order to give particular opinions. These common understandings, which

are referred to in the Statement as "customary practice", are reflected in bar association reports (including the 1992 Report of the Legal Opinions Committee of the State Bar of Texas Business Law Section Regarding Legal Opinions in Business Transactions and the supplements thereto, which are available on the Business Law Section's website) and other relevant authorities. Customary practice permits the omission of lengthy lists of procedures, definitions, exceptions, limitations and assumptions and has the effect of reducing the number of words needed to communicate complex thoughts.

The "Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions" provides that closing or third-party legal opinions rendered in business transactions are to be understood in accordance with the customary practice of lawyers who regularly give and review such legal opinions. The Statement was adopted in order to make judges and other members of the legal community aware of the role of customary practice in understanding and interpreting such legal opinions.

Venture Capital and Private Equity Committee

The Venture Capital and Private Equity Committee is in the process of planning, coordinating and effecting several interesting projects for 2008. These activities are designed to (i) focus on issues relevant to members of the State Bar who practice in this area and (ii) increase participation in and the visibility of the Committee.

The first order of business of the Committee in 2008 was to establish three sub-committees. The sub-committees are as follows:

(i) Education - Charged with updating the group regarding any emerging trends or developments in the VC Industry (currently chaired by Aaron Woo);

(ii) Legislation and Policy - Charged with reviewing legislation and policy changes (on both the state and Federal level) that affect the VC Industry; and

(iii) Presentation and Events - Charged with planning, coordinating and effecting presentations to the State Bar of Texas.

The Committee is actively looking for a chairman for the Legislation and Policy Sub-Committee and the Presentation and Events Sub-Committee. As well, the Committee is looking for someone who would be interested in heading up a quarterly newsletter.

The second order of business of the Committee in 2008 was to plan and host an event, which aired on the State Bar's Online Network on April 15, 2008 (10:00 a.m. CST) and focused on conflict of interest transactions from the venture investor's perspective. There was very strong interest in this program and it was a well attended event.

Finally, the Committee undertook the steps necessary to change the name of the Committee from the "Venture Capital Committee" to the "Venture Capital and Private Equity Committee."

Upcoming CLE Programs

In addition to the CLE program sponsored at the State Bar of Texas Annual Meeting, the Section sponsors or co-sponsors a number of other continuing legal education seminars each year. In some instances, discounts on registration fees are available to members of the Section. Upcoming CLE programs include the following:

Choice of Structuring Entities After Margin Tax First Filing Season and Texas Business Organizations Code

San Antonio, Texas – May 23, 2008

Presented by TexasBarCLE and co-sponsored by Business Law Section. A $30 discount is available for all Business Law Section members. The program will be held at the Hyatt Regency Hill Country Resort and Spa, 9800 Hyatt Resort Drive. A Video Replay of this program will be held at Cityplace Conference Center, Dallas, Texas on July 11, 2008 and at the Holiday Inn Select—Greenway, Houston, Texas on July 25, 2008

2008 Partnerships, Limited Partnerships and LLCs

Austin, Texas – July 18-19, 2008

Presented by University of Texas School of Law CLE. A $30 discount is available for all Business Law Section members. The program will be held at the Four Seasons Hotel, 98 San Jacinto Boulevard, Austin, Texas on July 18-19, 2008.

Advanced In-House Counsel Course 2008

Dallas, Texas – July 24-25, 2008

Presented by TexasBarCLE and co-sponsored by Corporate Counsel Section and Business Law Section. A $30 discount is available for all Business Law Section members. The program will be held at Westin Stonebriar Resort Hotel, 1549 Legacy Drive, Frisco, Texas on July 24-25, 2008.

Electronic Signature Case Summaries, provided by Irene Kosturakis, Chair of the E-Commerce Committee, from a more detailed summary by Amanda Witt of Nelson Mullins Riley & Scarborough, LLP

The following is a summary of several recent electronic signature cases:

Kloian v. Domino's Pizza (Mich. COA 12/28/06)

L/L sued tenant, Domino's Pizza, for back rent. Defendant's attorney sent email to Plaintiff's attorney with an offer of settlement: Defendant would pay $48K for a release of all Plaintiff's claims. Plaintiff's attorney responded that Plaintiff would accept. Defendant's attorney responded "Domino's accepts your offer." The attorneys exchanged settlement documents, and Plaintiff's attorney requested a mutual release. Defendant said needed to modify the agreement to include it, but subsequently moved to enforce the original settlement agreement without the mutual release.

Tr. Ct. H: by Defendant attorney response "Domino's accepts your offer", parties entered into a binding settlement agreement during the email exchanges.

Plaintiff alleged on appeal that another law, Michigan's Statute of Frauds (SOF) required any agreement between parties' attorneys not binding unless in writing, subscribed by the party's attorney to whom the agreement is offered.

COA H: the original settlement agreement is enforceable because it had both parties' attorneys names appended to the bottom of the email messages, but when requesting the mutual release, Plaintiff's attorney did not similarly type his name at the bottom. While under Michigan UETA, 2 parties can reach a legally binding agreement using email, if a law other than ESIGN requires extra steps for an e-record or e-signature to be effective (such as certain placement of a signature or method of delivery), that other law must also be complied with. Therefore, the modification to the settlement agreement is not enforceable because it did not satisfy Michigan's SOF law, but the original agreement was enforceable.

Shroyer v. New Cingular Wireless Services, Inc. (9th Cir. 8/17/07)

Defendant was created out of the 2004 merger with AT&T. Class Action plaintiffs claimed deterioration of service after the merger. The plaintiffs had, over the telephone, using an IVR process, said yes to the following statement, "You agree to the terms as stated in the Wireless Service Agreement and terms of service", which incorporated by reference Cingular's Ts & Cs Booklet, and bound them to binding arbitration and a class action waiver.

Tr. Ct. H: Granted Defendant's motion to compel arbitration and dismiss action with prejudice.

COA H: Plaintiff, consumers, effectively executed the agreements, using electronic signature over the phone, but applicable contract law rendered such agreements unenforceable. The class action arbitration waiver was unconscionable and unenforceable as a consumer contract of adhesion. Although a valid e-signature can be created over the phone, contract principles (such as unconscionability) can render an e-contract unenforceable.

Labajo v. Best Buy Stores, et al., (S.D.N.Y. 3/15/07)

Best Buy consumers signed up at the computer pad at the cash register agreeing to a free magazine subscription to Sports Illustrated. After the consumers received the free issues, the subscriptions were automatically renewed. This was a class action by consumers who claimed they were improperly charged for the magazine subscriptions. There was nothing provided in the computer pad where the consumers registered, nor was anything stated by the store clerk about having to call to cancel the subscription, but there was a brochure in the consumer's bag describing the offer terms. Also, the cash register receipt stated that "if within 8 issues you do not want the magazine call Sports Illustrated or go on line and you will NOT be charged."

Tr. Ct. H: Refuses to grant the Defendant's Motion for Summary Judgment because further evidence is required to determine whether Plaintiff signed the signature pad containing the promotion disclosure. The primary issue relates not to whether an electronic signature can be valid, but rather to whether Plaintiffs signed the electronic signature pad containing the disclosure and whether Plaintiffs received information about the terms of the agreement prior to signing the alleged agreement.

Wike v. Vertrue, Inc. (M.D. Tenn. 3/20/07) Re: $200 membership program giving members access to discounts on various consumer goods and services that were widely available to the public free of charge. Claim under the Electronic Fund Transfer Act (EFTA)

Class action by consumers claiming harm by "unlawful and deceptive 'membership billing' practices" of Defendant. Alleged deceptive practices included use by defendant of various methods to disregard or obstruct customers' attempts to contact Defendant, cancel memberships, and remove unauthorized or questionable charges from their credit card bills and bank accounts. Complaining Plaintiff purchased first program by credit card authorization off an AOL banner that directed consumer to Defendant's website, then purchased a second program by telephone call to AOL. Plaintiff alleged Defendant made unauthorized electronic fund transfers and that the Electronic Fund Transfer Act, 15 U.S.C. 1693 et seq. (EFTA) applied. Defendant claimed the charges were "preauthorized electronic fund transfers," authorized by Plaintiff with an e-signature in a recorded phone conversation under federal ESIGN law, which satisfied EFTA's requirement of a written authorization.

Tr. Ct. H: The EFTA is deemed to apply, but the Defendant's Motion for Summary Judgment is denied because of the incomplete and disputed factual record, which does not permit the court to rule on the legal questions presented.

EPCO Carbondioxide Products, Inc. v. JP Morgan Chase Bank, N.A. f/k/a Bank One (W.D. La 5/8/07)(rev'd and remanded by 5th Cir 10/6/06)

Plaintiff sued Defendant for refusal to renew certain letters of credit. Plaintiff claimed that Defendant made a written offer to Plaintiff to restructure its debts and extend a letter of credit and that Defendant "accepted" such offer and created a "binding agreement" electronically via email as permitted under Louisiana's UETA.

5th Cir. H: reversed and remanded this case in order to permit the Plaintiff to present additional evidence regarding whether acceptance was in the form necessary to satisfy the Credit Agreement Statute either by submitting evidence that the agreement with the Defendant was written and signed or proof that Plaintiff submitted its acceptance of Defendant's offer electronically and that both parties had agreed to conduct business electronically.

On remand, Tr. Ct. H: for Defendant that no contract was formed and contract formed via email not enforceable because not signed in writing or electronically. Plaintiff rejected Plaintiff's email counteroffer; Plaintiff failed to produce sufficient evidence that the parties agreed to conduct business electronically, even though historically, the parties would negotiate by email and telephone, but then reduce the agreement to a written document signed by the parties in writing. Therefore, the parties did not agree to transact business electronically, did not reach an agreement, and did not sign their agreement in accordance with past practices.

Poly USA, Inc. v. Trex Company, Inc. (W.D. Va. 3/1/06)

Plaintiff sued alleging fraud and unjust enrichment relating to Plaintiff's sale of raw plastic material. Defendant emailed a settlement agreement with a note stating "Read and give me a call". Plaintiff claimed that it had reached an oral settlement regarding their dispute, which was memorialized in a settlement agreement emailed to Plaintiff's president and signed by him. Defendant claimed it was only a draft proposal.

Tr. Ct. H: the communications between the parties did not constitute an enforceable settlement agreement. Use of an email account to send an email does not necessarily constitute an e-

signature under federal ESIGN law, 15 U.S.C. Sec. 7006, and Defendant did not intend to electronically sign the emailed document.

Verizon Communications, Inc. v. Christopher G. Pizzirani, (E.D. Pa 11/7/06)

Plaintiff sued Defendant, a former employee who had been a highly-compensated executive, seeking enforcement of a 12-month non-competition restriction covenant in award agreements delivered via email by Plaintiff's HR department to Defendant. Defendant had been advised in bold language in the emails that it was important that he read and understand the terms and conditions of the award agreements and that by accepting the award on-line, he was acknowledging having read the agreements, the Plan document, including the terms and conditions regarding *restrictive covenants*, which prohibited Defendant from engaging in competitive activities for a period of 12 months after termination of employment. Defendant clicked the button acknowledging having read the restrictive covenants. Later, Defendant claimed not having read the restrictive covenants until after he had acknowledged that he had.

Tr. Ct. H: the restrictive covenants were enforceable, and Defendant could not work for Plaintiff's competitor. A valid contract is formed by manifesting assent by checking a box or clicking a button on a screen. Parties are bound by contracts they sign regardless of whether they have read them or not. Furthermore, Defendant was under no time pressure to read and sign the agreements, Plaintiff having provided more than a month for Defendant to do so. The fact that the contracts could only be viewed on a computer screen did not help Defendant's case because Defendant could have printed out the agreements.

Bell v. Hollywood Entertainment Corporation (Ohio App. 8/3/06)

Plaintiff sued for hostile work environment, sexual harassment, and civil battery. Plaintiff completed the employment application electronically. Defendant's electronic application presented a series of disclosures and consents required by the federal ESIGN law and the Fair Credit Reporting Act, then informed Plaintiff that all claims would be submitted to arbitration pursuant to Defendant's Employment Issue Resolution Program (EIRP). It directed Plaintiff to a different website to review an entire copy of the rules. The screen required Plaintiff to acknowledge or deny she knew how to access that link. The next screen asked Plaintiff whether she agreed to arbitrate all disputes with Defendant. Plaintiff clicked "Yes."

Tr. Ct. H: Plaintiff confirmed her agreement to submit all claims against Defendant to arbitration because she clicked "Yes," and also acknowledged she knew where to obtain the more complete arbitration policy. Quoting *Campbell v. General Dynamics*, the Court reiterated the legal effect of electronic signatures.

COA: Affirmed because Plaintiff had legal capacity, signed the agreement, and was sufficiently informed regarding Defendant's arbitration program.

Collins v. Missouri Electric Cooperatives Employee Credit Union (U.S. District 7/26/06)

Plaintiff sued Defendant for failing to deliver periodic account statements, unauthorized transfers from his bank account, and failure to investigate such unauthorized transfers pursuant to the Electronic Funds Transfer Act (EFTA). Plaintiff also alleged that Defendant had failed to satisfy the federal ESIGN law's consumer disclosure requirements. Plaintiff alleged he had not agreed to receive electronic account statements and did not authorize his ex-girlfriend to use his bankcard while he was incarcerated.

Tr. Ct. H: ESIGN did not apply because the EFTA does not require that periodic account statements be in writing.