

MESSAGE FROM THE CHAIR

As I end my year as Chair of the Business Law Section, I am proud of the work done this year by our council members, committee members, and volunteers. Their goals have been to enhance our law practices and to continue improving Texas business law. Details of some of their work are in this newsletter. Here are some highlights:

We have sponsored and planned a new CLE offering, Essentials of Business Law, which recently was presented live in Dallas and will be presented by video in Houston on June 3-4. We also sponsored and planned the 7th Annual Advanced Business Law Course, which was presented live in Houston last October, and planning has begun for this fall's course. Both courses were presented through TexasBarCLE, and Section members were entitled to a discount on the registration fee. We also have sponsored several other courses presented by TexasBarCLE and the University of Texas, and in many cases Section members were entitled to a discount on the registration fee for them as well. Some of our committees have produced webinars that are available on the TexasBarCLE website.

We also will present, jointly with the Corporate Counsel Section, a day and a half of CLE at the State Bar of Texas Annual Meeting, which will be June 10-11 at the Fort Worth Convention Center. Section members who register for the Annual Meeting may attend this program at no additional charge and receive MCLE credit; Section members who do not register may attend at no charge but will not receive MCLE credit or a copy of the course materials.

As the 2011 legislative session approaches, several of our committees are working on legislative proposals affecting, for example, the Texas Business Organizations Code and the Texas Business and Commerce Code (particularly the Uniform Commercial Code). In addition our committees will monitor developments before, during, and after the session and will provide legislative reports for Section members. This work is a continuation of legislative service the Section has provided its membership for decades.

The Section published *Texas Business Entities Forms Manual: Corporations* through TexasBarBooks in 2005 and updated it in 2008. This year the council formed a permanent committee to expand the manual to cover other forms of business entities, to provide practice notes and additional forms, and to provide supplementation for the manual as developments warrant.

If you are interested in participating in any of these projects or in other Section work, please contact me or our Chair-Elect, Richard (Rick) Tulli of Dallas.

Thank you for the privilege and pleasure of serving as Chair of the Section. Best wishes to you all.

Roger A. Bartlett, Austin

Chair, Business Law Section, 2009-2010

2010 STATE BAR OF TEXAS ANNUAL MEETING

The Annual Meeting of the State Bar of Texas will be held at the Fort Worth Convention Center and Omni Hotel in Fort Worth, Texas, on June 10th and 11th, 2010. The Business Law Section and the Corporate Counsel Section are co-sponsoring a CLE program for a day and a half at the Annual Meeting.

On Thursday, June 10th, the CLE program is currently scheduled to include the following presentations:

- (i) 9 a.m. – 9:45 a.m. Dealing with Financially Troubled Businesses;
- (ii) 9:45 a.m. – 10:30 a.m. Social Networking Websites in the Workplace;
- (iii) 10:45 a.m. – 11:30 a.m. Don't Get Burned: "Boilerplate" Provisions in Contracts;
- (iv) 11:30 a.m. – 12:00 p.m. Intellectual Property Representations and Due Diligence;
- (v) 1:30 p.m. – 2:30 p.m. Developments, Trends and Expectations in Securities Fraud Investigations and Prosecutions;
- (vi) 2:30 p.m. – 3:15 p.m. Preparing an Entity for Venture Capital Investment;
- (vii) 3:45 p.m. – 4:30 p.m. Ethics for Corporate Counsel;
- (viii) 4:30 p.m. Award Presentation by the Texas Access to Justice Commission.

The Business Law Section will hold its annual meeting of the members of the Section at approximately 5:00 p.m. on Thursday, June 10th, immediately following the award presentation.

On Friday, June 11th, the CLE program is currently scheduled to include the following presentations:

- (i) 9 a.m. – 9:45 a.m. Confidentiality Agreements and Letters of Intent;
- (ii) 9:45 a.m. – 10:15 a.m. Margin Tax Update;
- (iii) 10:30 a.m. – 11:15 a.m. Privacy Policies and Related Privacy Law;
- (iv) 11:15 a.m. – 12:00 p.m. Insurance and Indemnity Provision in Contracts.

Admission to this CLE program is free for each person who registers for the Annual Meeting. For more information concerning the Annual Meeting, please visit www.texasbar.com/annualmeeting.

NOTICE OF ANNUAL MEETING OF THE BUSINESS LAW SECTION OF THE STATE BAR OF TEXAS AND REPORT OF THE NOMINATING COMMITTEE

Pursuant to Article IV of the Section's bylaws, the Nominating Committee of the Section notifies the members of the Section that the following persons have been nominated to be members of the Council of the Section to succeed those Council members whose terms will expire at the close of the Section's annual meeting, and to fill vacancies, if any, then existing for unexpired terms:

For two-year terms:

- (i) E. Steve Bolden II, Dallas
- (ii) Thomas R. Felger, Austin
- (iii) David R. Keyes, Houston
- (iv) John Podvin, Dallas
- (v) Gregory R. Samuel, Dallas

For a one-year term to complete the remainder of the term currently being served by Roger A. Bartlett, Austin, who will be serving as Immediate Past Chair during the 2010-2011 year:

- (i) Stephen C. Tarry, Houston

No other nominations were received by the deadline imposed by the bylaws.

The Section's annual meeting will be held at 5:00 p.m., Thursday, June 10, 2010, at the Annual Meeting of the State Bar of Texas, in the room in which the Section and the Corporate Counsel Section will have presented their joint continuing legal program that day, and the newly-elected Council members' terms will commence at the close of the Section's annual meeting.

PARTNERS OF LAW FIRM LLP HELD PERSONALLY LIABLE ON JUDGMENT ENTERED AGAINST FIRM AFTER DISSOLVED AND LLP REGISTRATION EXPIRED

By: Professor Elizabeth Miller

Baylor University School of Law

Evanston Insurance Company v. Dillard Department Stores Inc., No. 09-20261, 2010 WL 148650 (5th Cir. Jan. 15, 2010).

Dillard Department Stores, Inc. (“Dillard’s”) sued a law firm, Chargois & Ernster, L.L.P., in 2003 for federal and state trademark infringement, cyberpiracy, and various business torts based on the law firm’s use of the Dillard’s name and logo on a website developed by the law firm to solicit clients with claims against Dillard’s. The law firm was registered as a Texas LLP. Early in 2004, while the litigation with Dillard’s was ongoing, the partners executed a separation agreement providing for dissolution of the partnership, and they did not renew the firm’s LLP registration when it expired in July, 2004. In November, 2004, the court entered a final judgment against “Chargois & Ernster, L.L.P.” Dillard’s was unable to collect the judgment, and Dillard’s filed a complaint against the two partners of the law firm in 2008. Each partner was served, and Dillard’s sought summary judgment declaring that the partners were personally liable on the judgment against the law firm. The district court granted summary judgment, and the partners appealed. The partners argued that they were protected from liability under the provisions of the Texas Revised Partnership Act and that the action was barred by the statute of limitations.

The court first rejected the partners’ argument that they were protected from liability under the LLP provision of the Texas Revised Partnership Act that provides a partner is not liable for a debt or obligation of the partnership incurred while the partnership is an LLP. (This provision is now found in Section 152.801 of the Business Organizations Code.) The partners argued that the law firm’s debt was incurred when the infringing website was created in 2003, at which time the firm was registered as an LLP. Noting that the terms “debt” and “incurred” are not defined in the statute, the court found, however, that a plain reading of the statute supported the argument of Dillard’s that the debt was incurred when the judgment was entered in 2004, at which time the LLP registration had expired. The court stated that the underlying conduct gave rise to the possibility of a future debt, but that a debt was not incurred at that time because the conduct might have gone undetected, might have been adjudged innocent, or Dillard’s might have opted not to sue. The parties did not rely on another provision of the LLP statute that states a partner is not personally liable for “errors, omissions, negligence, incompetence, or malfeasance committed” by another while the partnership is a registered LLP, but the court considered it significant that liability of a partner is limited in that provision for malfeasance “committed” while the partnership is an LLP. The court stated that the legislature’s use of different language created a regime in which partners could be held liable for debts and obligations incurred when the partnership is not a registered LLP but would not bear liability for one another’s independent malfeasance committed while it is an LLP. Thus, the court concluded that the partners in this case were not protected from personal liability because the law firm was not registered as an LLP at the time its debt was incurred. The parties apparently did not raise, and the court did not address, commentary to the LLP provision of the Revised Uniform Partnership Act stating that

“[p]artnership obligations under or relating to a tort are generally incurred when the tort conduct occurs” so as to prevent a culpable partnership from engaging in wrongful conduct and then filing an LLP registration to sever vicarious liability of the partners for future injury or harm caused by conduct prior to the filing. Uniform Partnership Act (1997) (U.L.A.) § 306, cmt.3. The court also did not discuss how its interpretation relates to or affects the liability of an incoming partner or a withdrawing partner. See Tex. Bus. Orgs. Code §§ 152.304(b), 152.505(a).

The court rejected the argument that the Texas Revised Partnership Act required that Dillard’s sue the partners themselves in 2003 on the trademark and tort claims in order to later hold them liable. The statute provides that a judgment against a partnership is not itself a judgment against a partner, but the court pointed out that Dillard’s relied upon its 2008 judgment obtained against the partners in a different action which the partners lost after vigorously defending their individual interests.

Finally, the court rejected the partners’ argument that the 2008 action against them was barred by the statute of limitations. The partners argued that the causes of action against them were for tort and trademark infringement accruing in 2003, but the court agreed with Dillard’s that its cause of action was a suit to impose liability on the partners for a partnership debt, which accrued at the earliest upon entry of the judgment in 2004, and that the action was brought within the four-year statute of limitations applicable to a suit for debt.

TEXAS FEDERAL COURT CONCLUDES THAT ARBITRATION AGREEMENT IS UNENFORCEABLE DUE TO AMENDMENT CLAUSE IN--"HARRIS V. BLOCKBUSTER INC."

By: Yvette Ostolaza

Weil, Gotschal & Menges, LLP

A recent decision in the Northern District of Texas, *Harris v. Blockbuster Inc.*, 622 F. Supp.2d 396 (N.D. Tex. 2009), raises issues regarding the ability to amend arbitration agreements. This decision makes clear that arbitration provisions that permit a "sponsor" to unilaterally modify or terminate the arbitration agreement without limitation will be considered illusory and render the arbitration agreement unenforceable. In addition, simply adding a requirement that the modifications to an arbitration agreement are “effective upon posting” is not a sufficient limitation to avoid this result.

In this case, a Plaintiff claimed that Blockbuster violated the Video Privacy Protection Act, 18 U.S.C. § 2710, when it entered into an agreement with Facebook that caused Blockbuster’s customers’ movie rental choices to be disseminated on the customers’ Facebook accounts through a Facebook application. The arbitration provision at issue provided that all disputes would be referred to and determined by binding arbitration.

Specifically, the arbitration provision, located in the “Terms and Conditions” section, provided, in pertinent part, as follows:

Blockbuster may at any time, and at its sole discretion, modify these Terms and Conditions of Use, including without limitation the Privacy Policy, with or without notice. Such modifications will be effective immediately upon posting. You agree to review these Terms and Conditions of Use periodically and your continued use of this Site following such modifications will indicate your acceptance of these modified Terms and Conditions of Use. If you do not agree to any modification of these Terms and Conditions of Use, you must immediately stop using this Site.

In reaching its decision, the Harris court applied the Fifth Circuit decision, *Morrison v. Amway Corp.*, in which a similar arbitration provision was held to be illusory, because there was no express exemption on the defendant business’s ability to unilaterally modify all rules with the exception that an amendment was not effective until published. 517 F.3d 248 (5th Cir. 2008). The Fifth Circuit observed in *Morrison* that there was nothing to suggest that, once published, the amendment would be inapplicable to disputes arising out of events occurring before such publication.

The *Morrison* court also distinguished a Texas Supreme Court decision, *In re Halliburton Co.*, 80 S.W.3d 566 (Tex. 2002). In that decision, the Texas Supreme Court held that an arbitration clause was enforceable because it specifically limited the defendant’s ability to apply changes to the agreement with what the Fifth Circuit characterized as a “savings clause.” The clause provided that: “[N]o amendment shall apply to a dispute of which the [defendant Halliburton] had actual notice on the date of the amendment.” The Fifth Circuit concluded that since the *Morrison* agreement contained no “Halliburton type savings clause,” which would “preclude application of such amendments to disputes which arose (or of which [the defendant] had notice) before the amendment,” the agreement in *Morrison* was illusory.

Applying these cases, the Harris court concluded that the Blockbuster arbitration provision was illusory because, as in *Morrison*, there was nothing in the Terms and Conditions that prevented Blockbuster from unilaterally changing any part of the contract other than providing that such changes would not take effect until posted on the website. Similarly, there were no “Halliburton type savings clauses,” that would limit the application of modifications to earlier disputes that arose out of events occurring before such publication. In reaching this conclusion, the Northern District observed that the fact that the *Morrison* contract was a stand-alone agreement and the defendant in that case was actually attempting to apply retroactively the arbitration agreement to events that happened before the agreement was effective, did not change the result for Blockbuster. The court held that since Plaintiffs’ challenge was to the arbitration provision, and not to the contract as a whole, the challenge was properly before the court. In addition, the Northern District held that the rule in *Morrison* applies even where there was no attempt to apply a retroactive amendment. As a result, the Harris court held that the arbitration agreement in the Blockbuster contract was illusory and unenforceable, and denied Defendant’s Motion to Compel Individual Arbitration.

Texas practitioners should be aware of Harris and the Fifth Circuit decisions in drafting or amending arbitration agreements on behalf of their clients.

JURY WAIVER AND FORUM SELECTION CLAUSES POPULAR ALTERNATIVE TO ARBITRATION

By: David Harrell

Locke Lord Bissell & Liddell LLP

Parties to transactions have long sought ways to increase control over potential disputes, while reducing dispute resolution costs. For a decade, practitioners advocated arbitration, but recent legislative assaults on arbitration, coupled with high costs resulting from attorneys treating arbitration as private litigation, have caused attorneys to return to the drawing board to focus their future dispute resolution efforts.

One popular alternative to arbitration is a simple jury waiver and forum selection, where the parties to a transaction simply agree to resolve their dispute in a selected court, without a jury. Jury waivers allow parties to save the cost of arbitrators and governing parties, provide judges who are experienced in dispute resolution, and allow parties a future appeal. Forum selection clauses give parties certainty as to the locale where their dispute will be resolved. But attorneys advising parties about these clauses should be aware of recent Texas Supreme Court cases that addressed those clauses.

In re: Int'l Profit Assocs., 286 S.W.3d 921 (Tex. 2009). In *In re Int'l Profit Assocs.*, the Court held that forum selection clauses will be enforced unless the provision is unreasonable or unjust, the clause is invalid because of fraud or overreaching, enforcement of the clause with contravene a strong public policy of the forum where suit is brought, or the selected forum would be “seriously inconvenient” for trial. 286 S.W.3d at 923; *see also In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 675 (Tex. 2009). In addition to enforcing forum selection clauses, the Supreme Court has also affirmed that mandamus relief is available where a trial court fails to enforce a forum selection clause.

In 2004, the Supreme Court enforced a jury waiver, but commentators suggested that with its opinion, the Court created a presumption against jury waivers. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 130-33 (Tex. 2004) (enforcing jury waiver). Five years later, *in In re Bank of Am., N.A.*, 278 S.W.3d 342 (Tex. 2009), the Supreme Court corrected that notion and confirmed that with its prior *Prudential* opinion, it did not create a presumption against jury waivers.

UCC COMMITTEE UPDATE

By: Susan E. Collins

Vice President and Assistant General Counsel, JP Morgan Chase Bank, N.A.

and

By: James H. Leland

Hoover Slovacek LLP

The Texas Uniform Commercial Code Committee is one of the more active committees as to legislative matters within the Business Law Section. It welcomes new members, who can show their interest by emailing the chair or vice chair (their email addresses are given below) and then by choosing to be active in the work of the Committee. UCC uniform legislation is promulgated by the Uniform Law Commission (formerly known as "NCCUSL"), which then is studied by the Texas UCC Committee. The Texas UCC Committee may provide the results of its study to the Texas legislature, to provide input and assistance to legislators in their consideration of adoption of such uniform laws. The Texas UCC Committee's study may include possible non-uniform amendments for consideration by the Texas legislature, as well as suggestion of non-uniform accompanying comments for publishers, when appropriate.

The input of the Texas UCC Committee was instrumental in Texas being the first to provide increased certainty for secured parties extending credit to individual debtors. Under Revised Article 9, since it became effective in 2001, secured parties have enjoyed the certainty provided in Revised Article 9 regarding the names of registered organizations. No such certainty was provided for individual debtors, even though roughly half of all filings in Texas are for individual debtors. Three states subsequently followed Texas's non-uniform lead. As a result, ULC/NCCUSL formed an R9 Joint Review Committee ("R9 JRC"), jointly sponsored by the American Law Institute and by the American Bar Association, in the fall of 2008, to study the issues. The Texas UCC Committee was again instrumental and successful in suggesting to the R9 JRC promulgation of an "only if" approach for the names of the roughly 90% of individuals who have a driver's license, while preserving current law intact for those who do not. See "Texas Bar Memorandum, 2010 January 9" and the subsequent "Draft for March 26-28, 2010, Drafting Committee Meeting" ("March 2010 R9 JRC Draft" at page 35) which can be found in the ULC/NCCUSL archives at <http://www.law.upenn.edu/bll/archives/ulc/ulc.htm#ucc9>, under "U.C.C. Article 9. Secured Transactions." The R9 JRC is also promulgating other non-uniform provisions adopted by Texas in 2007, such as increased certainty for registered organization names (March 2010 R9 JRC Draft, at page 32) and allowing secured parties as well as debtors to file correction statements (March 2010 R9 JRC Draft, at page 48). Additionally, there are new provisions providing increased certainty for trust debtors (for example, March 2010 R9 JRC Draft, at page 40), which were initially studied and suggested by the Texas UCC Committee.

Comments on the March 2010 R9 JRC Draft would be welcome. Please email the chair of the Texas UCC Committee, Jim Leeland, at leeland@hooverslovacek.com.

It is anticipated that the R9 JRC final draft will be sent for approval soon to its joint sponsors, to the American Law Institute in May 2010 and to the American Bar Association in the summer of 2010.

LAW OF LAWYERS COMMITTEE UPDATE

By: John Podvin

Haynes and Boone, LLP

The Law of Lawyers Committee has been monitoring the Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct that were approved by the Supreme Court of Texas on October 20, 2009. We are listing below links to various resources published by the Supreme Court of Texas website concerning the proposed amendments for your reference and urge you to review the proposed changes.

- Approval of Proposed Amendments: <http://www.supreme.courts.state.tx.us/MiscDocket/09/09917500.pdf>
- Redlined Version of the Proposed Amendments: <http://www.supreme.courts.state.tx.us/MiscDocket/09/09917501.pdf>
- Overview of the Proposed Amendments (written by Kennon L. Peterson): http://www.supreme.courts.state.tx.us/advisories/Overview_102909.htm

UPCOMING CLE PROGRAMS

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

Essentials of Business Law

- Crowne Plaza – River Oaks, Houston, Texas (video replay) – June 3-4, 2010
- Presented by State Bar of Texas
- Section members get \$25 discount

Choice and Acquisition of Entities in Texas

- Westin Oaks Hotel, Houston, Texas – May 28, 2010
- Doubletree Campbell Centre, Dallas, Texas (video replay) – June 25, 2010
- Presented by State Bar of Texas
- Section members get \$25 discount

Free CLE at State Bar of Texas Annual Meeting

- Fort Worth Convention Center/Omni Fort Worth Hotel, Fort Worth, Texas
- June 10-11, 2010
- Presented jointly by the Business Law Section and the Corporate Counsel Section
- Admission is free to all members of either section

LLCs and Partnerships

- Four Seasons Hotel, Austin, Texas – July 22-23, 2010
- Video replay not yet set
- Presented by University of Texas CLE
- Section members get \$30 discount

Advanced In-House Counsel Course

- Westin Riverwalk Hotel, San Antonio, Texas – July 22-23, 2010
- Doubletree Campbell Centre, Dallas, Texas (video replay) – Sept. 2-3, 2010
- Presented by State Bar of Texas
- Section members get \$25 discount

Advanced Business Law Strategies Course

- Hyatt Lost Pines Resort & Spa, Austin/Bastrop, Texas – October 21-22, 2010
- Presented by State Bar of Texas
- Section members get \$25 discount