

Fall 2014

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Business Law Section Newsletter



Message From The Chair



Fellow Section Members:

“How did you go bankrupt?” Bill asked. “Two ways,” Mike said. “Gradually and then suddenly.” -- Ernest Hemingway, *The Sun Also Rises*, 1926.

We live in interesting times. While some find “interesting” times to be a curse, others see opportunities. Without doubt, however, our profession is changing. The world is undergoing something of a second industrial revolution. While the first industrial revolution automated and enhanced physical power, the second aims to automate mental tasks – and that encompasses legal work and the practice of law. While many cannot imagine how the work of lawyers can be automated, others can so imagine, and they are working feverishly to do exactly that. So long as the price of legal work remains high, that work is ripe for automation and provides a lucrative opportunity for some. While we may decry the trend, we cannot stop it. The Business Law Section is starting several initiatives to help ameliorate the effects of automation. These initiatives are aimed at the vast majority of Texas lawyers who do not have the infrastructure of large law firms. Look for them in the coming months.

Ron Chichester
Chair of the Business Law Section, 2014-15

Business Law Section Honors Lorna Wassdorf for Her Dedication to Public Service



The Business Law Section is a voluntary section of the State Bar of Texas that monitors and develops Texas business law through committees covering corporations, limited liability companies, partnerships, non-profit organizations, securities, intellectual property, commercial and consumer finance, Uniform Commercial Code, and other areas.

The Texas Business Law Foundation is a separate non-profit corporation organized in 1988 and supported by businesses, law firms, professors of business law, and individuals throughout Texas. The Foundation's objective is to support a favorable business climate in Texas through the development and maintenance of a modern system of business laws.

In these efforts, the Business Law Section and the Texas Business Law Foundation have had to good fortune to work with an uncommonly gifted and dedicated public servant, Lorna Wassdorf.

Lorna, to you, congratulations and our many thanks!

We could not let your recent retirement from public service go by without saying thank you.

Business Law Section Honors Lorna Wassdorf for Her Dedication to Public Service (Continued from Page 1)

Lorna, job well done! Over several decades we have watched your dedication and exceptional service as Director of the Business & Public Filings Division of the Office of the Secretary of State. Your work has been instrumental to the State of Texas' success in developing and implementing public filing systems and new types of business entities to promote business and finance in the State of Texas. We also thank you for your service to the Business Law Section's UCC Committee and Business Organizations Code Committee.

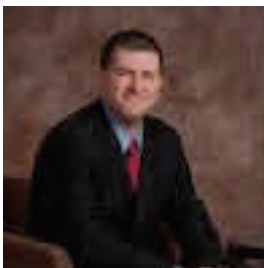
Appreciation announcement was given to Lorna by Business Law Section Chair, David Keyes and Texas Business Law Foundation Chair, Byron Egan. The presentation of the plaque was made by J. Scott S. Sheehan during the Section Council Dinner during the State Bar of Texas Annual Meeting in June, 2014.

Texas Supreme Court's Recent Shareholder Oppression Opinions Reaffirm Primacy of Common Law Fiduciary Duties Under Gearhart



By: Byron F. Egan, Senior Vice Chair, Executive Council of the ABA Business Law Section's Mergers and Acquisitions Committee, Chair, Texas Business Law Foundation, Partner, Jackson Walker, L.L.P. and Michael L. Laussade, Secretary, Texas Business Law Foundation, Partner, Jackson Walker, L.L.P.

In three recent cases, the Texas Supreme Court has made it clear that for claims of "minority shareholder oppression"—essentially, acts of a majority shareholder group that are harmful to a minority shareholder without necessarily harming the corporation itself—the sole remedy available under Texas law is a statutory receivership. The Court also emphasized that common law fiduciary duties (including the business judgment rule), as articulated in *Gearhart Indus., Inc. v. Smith Intern., Inc.*, are still the appropriate lens through which to evaluate the conduct of directors of Texas corporations.



In *Ritchie v. Rupe*, the respondents appealed a judicially enforced buyout of a minority shareholder's shares in a closely held corporation in order to provide a remedy for alleged acts of shareholder oppression. The minority shareholder had alleged that a failure by the majority shareholders and management to either buy out her shares at a fair price, or meet with prospec-

tive outside buyers, constituted shareholder oppression in that it unfairly deprived her of an opportunity to obtain liquidity for her shares.

The Court overturned the decisions of the lower courts, holding that: (1) the receivership statute under which oppression was being claimed did not allow for a forced buy-out as a remedy, (2) that the alleged wrongs did not rise to the level necessary to overcome the business judgment rule and justify the appointment of a receiver, and (3) that a common law cause of action for shareholder oppression does not exist in Texas, due in part to the availability of other remedies.

In a second case, *Cardiac Perfusion Servs., Inc. v. Hughes*, the Court overturned a similarly granted buy-out, and in a third ruling, *Argo Data Resource Corp. v. Shagrithaya*, the Court declined to hear an appeal from a minority shareholder whose claims for oppression had been denied by the lower appellate court.

In declining to either (a) provide remedies other than receivership for statutory claims of shareholder oppression, or (b) recognize a common law cause of action for shareholder oppression, the Texas Supreme Court has confirmed that the threshold for statutory claims of oppression is a high one, requiring that a claim of oppressive conduct be accompanied by

Texas Supreme Court's Recent Shareholder Oppression Opinions Reaffirm Primacy of Common Law Fiduciary Duties Under *Gearhart* (Continued from Page 3)

a showing of conduct that is “inconsistent with the honest exercise of business judgment and discretion by the board of directors.”

Ritchie v. Rupe, combined with the Texas Supreme Court's actions in *Cardiac Perfusion* and *Argo Data*, clarifies the rights of shareholders in relation to actions of a corporation's board of directors. These cases also provide guidance to practitioners advising directors and shareholders regarding fiduciary duty matters.

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1. 741 F.2d 707, 723–24 (5th Cir. 1984).
2. For more information regarding the fiduciary duties of officers, directors, and majority shareholders of Texas corporations, as well as a more detailed discussion of common law fiduciary duties under *Gearhart*, please see Byron F. Egan, *How Recent Fiduciary Duty Cases Affect Advice to Directors and Officers of Delaware and Texas Corporations* (February 14, 2014), available at <http://images.jw.com/com/publications/1945.pdf>.
3. 2014 Tex. LEXIS 500 (Tex. June 20, 2014).
4. 2014 LEXIS 532 (Tex. June 27, 2014) (per curiam).
5. 380 S.W.3d 249 (Tex. App.—Dallas 2012, pet. denied).
6. *Ritchie v. Rupe* at *28 (citing *Texarkana College Bowl, Inc. v. Phillips*, 408 S.W.2d 539, 539 (Tex. Civ. App.—Texarkana 1966, no writ)).

Texas Pattern Jury Charge on Trade Secret Misappropriation Near Completion



By: Joseph F. Cleveland, Jr., Chair, Trade Secrets Committee, State Bar of Texas, Brackett & Ellis, PC

This fall, the State Bar of Texas is set to publish the latest edition of the Texas Pattern Jury Charges, which will include for the first time jury instructions and questions for misappropriation of trade secrets cases. Texas Pattern Jury Charges is a series of books published by the State Bar of Texas to assist the bench and bar in preparing the court's charge in jury trials. The pattern charges are suggestions and guides for providing definitions, instructions, and questions to a jury in a variety of cases under Texas law. Each year, the Committee on Texas Pattern Jury Charges surveys Texas law to prepare jury charges on new subjects for publication in the Texas Pattern Jury Charges.

In 2013, during the 83rd Legislature, members of the Trade Secrets Committee of the Intellectual Property Section and the Business Law Section of the State Bar of Texas formed a working group to participate in the review of the proposed bill and the bill analysis for what is now known as the Texas Uniform Trade Secrets Act (TUTSA), Tex. Civ. Prac. & Rem. Code § 134A.001, *et seq.* (2013). The bill was enacted on May 2, 2013 and became the governing law for misappropriation of trade secrets cases in Texas on September 1, 2013.

At the request of the Committee on Pattern Jury Charges, the Trade Secrets Committee along with members of the working group held several meetings to consider and discuss the draft pattern charge for claims submitted under TUTSA and to prepare recommendations and a report. The following is a summary of the committee's unanimous recommendations.

Texas Pattern Jury Charge on Trade Secret Misappropriation Near Completion (*Continued from Page 3*)

I. Separate Jury Questions on the Existence of a Trade Secret and Misappropriation of a Trade Secret.

Under Texas Rule of Civil Procedure 277, broad-form jury instructions must be submitted “whenever feasible.” The committee did not believe, however, that it was feasible for the liability question under TUTSA to be submitted in this fashion for two reasons.

First, plaintiffs who file misappropriation of trade secrets claims almost without exception seek both damages and an injunction. Under Texas Rule of Civil Procedure 683, every order granting an injunction must “be specific in terms; [it] shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained” Likewise, under TUTSA, “[i]n appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.” Tex. Civ. Prac. & Rem. Code § 134A.003(c). The committee concluded that in order to enter a permanent injunction, the trial court would need jury findings on what constitutes the plaintiff’s trade secrets so that the acts sought to be restrained could be described in specific terms. Without a separate question on whether a claimed trade secret exists, it would be impossible for courts to determine the appropriate scope of any injunction, particularly where multiple trade secrets are involved.

Second, if the plaintiff claims that two or more of its trade secrets were misappropriated, a reviewing court would be unable to determine which of the plaintiff’s trade secrets the jury found the defendant misappropriated. If the appellate court were to find any error, it would have no choice other than to reverse and order a new trial.

For these reasons, the committee recommended that the liability question be broken into two separate questions. The first question would ask the jury to decide whether trade secrets exist and the second question would ask whether the defendant misappropriated any of those trade secrets. The proposed jury question submits the issue of the existence of a trade secret where multiple trade secrets are claimed. Where only one trade secret is claimed, a broader form of the question that combines the issues of both the existence of a trade secret and misappropriation of a trade secret would be appropriate. Only those trade secrets supported by the pleadings and the evidence, however, should be submitted.

II. Is Ownership of a Trade Secret required under TUTSA?

The committee considered whether a person must own a trade secret to have standing to bring a claim under TUTSA and whether a question on ownership should be submitted to the jury. In the recent case *LBDS Holding Co., LLC v. ISOL Tech. Inc.*, 2014 U.S. Dist. LEXIS 31444 (E.D. Tex. 2014), the district court observed that “[t]he Texas Uniform Trade Secrets Act does not require ownership of trade secrets to sustain a misappropriation claim or to recover damages.” *Id.* at *3. The committee therefore recommended that the following comment be adopted:

Own or possess a trade secret. If the plaintiff does not own the trade secret, but there is evidence that the plaintiff possesses the trade secret through a license agreement or otherwise, the court may find that the plaintiff has standing to assert a claim under the Act, in which case the word “possess” should be substituted for “own” in the liability question.

III. Damages Available under TUTSA.

TUTSA provides for three measures of damages: (1) the actual loss caused by the misappropriation; (2) unjust enrichment caused by misappropriation that is not taken into account in computing actual loss; and (3) in lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator’s unauthorized disclosure or use of a trade secret. The committee drafted instructions on each element of damages to guide the jury in awarding damages under TUTSA.

Texas Pattern Jury Charge on Trade Secret Misappropriation Near Completion (Continued from Page 4)

- A. **Actual Loss.** Actual loss is usually measured by the plaintiff's lost profits caused by the misappropriation. Lost profits are damages for the loss of net income to a business. They represent income from lost-business activity less the expenses attributable to that activity.
- B. **Unjust Enrichment.** In many cases, the defendant has used the plaintiff's trade secret to his advantage with no obvious effect on the plaintiff save for the relative differences in their subsequent competitive positions. In such cases, TUTSA provides that a claimant is entitled to recover the unjust enrichment caused by misappropriation of a trade secret that is not taken into account in computing actual loss. Unjust-enrichment damages may be measured by the defendant's actual profits from the use of the trade secret or the development costs the defendant avoided incurring through misappropriation,
- C. **Reasonable Royalty.** TUTSA also authorizes the recovery of a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret. A reasonable royalty is the amount of money the plaintiff and defendant would have agreed upon at the time of the misappropriation as a fair price for the use of the trade secret—in other words, what the parties would have agreed upon, if both parties were reasonably trying to reach an agreement.

The Trade Secrets Committee was greatly assisted by members of the bar who were willing to share their expertise and time on a project that will promote the development of the law of misappropriation of trade secrets in Texas. The committee's report and recommendations were submitted to the Honorable Brett Busby, Chair of the Committee on Pattern Jury Charges. The pattern jury charge on misappropriation of trade secrets is expected to be published in the 2014 edition of the Texas Pattern Jury Charges.

Joseph F. Cleveland, Jr. practices in the area of intellectual property and commercial litigation at Brackett & Ellis, PC. Mr. Cleveland is the Chair of the Trade Secrets Committee of the Intellectual Property Section of the State Bar of Texas and was a member of the working group responsible for drafting the bill, the bill analysis and testifying in support of the adoption of the Texas Uniform Trade Secrets Act.

What Happened to TrueCrypt?



By: Ron Chichester, Chair, Business Law Section, State Bar of Texas, Law Office of Ronald Chichester, P.C.

For those of you who put client information on the "cloud," this article is for you. More specifically, if you use an encryption application to protect the information on the cloud (as you *should*), then you ought to lend an ear (or eyeball).

TrueCrypt is (was) a much-beloved open source encryption application that is particularly useful for storing information safely on the cloud. The application has won several contents



Membership Committee

Chair:

Shanna Nugent

Vice Chair:

Christina Marshal

Description:

The membership committee recommends and assists with the implementation of policies, procedures, and strategies for enhancing the membership in the Business Law Section both numerically and qualitatively.

Together with the chair and vice chair of the committee, membership committee members help generate new ideas, plan programs and events, and support the overall effort to increase the number of members and ensure that membership in the Business Law Section is informative and rewarding.

Get Involved:

If you would like to join the Membership Committee please contact Shanna Nugent at snugent@slnlegal.com

What Happened to TrueCrypt? (Continued from Page 5)

and was considered by many security professionals to be a first-rate security application. It had entered its seventh major version and was regarded as a mature program. Indeed, it was (and still is) undergoing a major security audit and the initial reports identified only minor problems. Attorneys have entrusted client information into TrueCrypt-created containers because that information is both encrypted and segregated, typically by client if the attorney was judicious about using containers. The encryption algorithms provided by TrueCrypt allow the storage of client confidences on the cloud so that the theft of a container by a hacker would not require disclosure of the security breach to the client because encrypted data does not fall under the breach/notification provisions of Texas or other states.

Then, suddenly, in May of this year the original website on trucrypt.org was redirected to a page on SourceForge. The SourceForge page had some rather shocking text, notably “WARNING: Using TrueCrypt is not secure as it may contain unfixed security issues” and “[t]he development of TrueCrypt was ended on 5/2014...”. The SourceForge page provided instructions for migrating TrueCrypt-encrypted partitions to Microsoft's Bitlocker – even though partition encryption was but one of the capabilities of TrueCrypt and ignoring its other main use, namely encrypted containers.

The SourceForge page provided no reason for this action. Was the TrueCrypt page hijacked by some miscreant? If there was a particular vulnerability, why couldn't it be fixed and a new version released in the normal course of business as had happened previously in the normal course of business? What was the vulnerability? How can they say that TrueCrypt was vulnerable when they don't even know why it was vulnerable? Was there a work-around available (which happens often in these types of situations)? Were the developers simply sick of the project and wanted out? Why couldn't they just tell us? The behavior was seemingly aberrant and led to much speculation on Internet websites, blogs and chat rooms.

Some of the speculation centered around the National Security Agency (“NSA”). Such speculation was fueled, in part, because some of the NSA documents disclosed by Edward Snowden mentioned Truecrypt expressly. The fear was that the NSA was forcing the TrueCrypt developers to install a “back door” into the source code to enable the NSA to easily decrypt Truecrypt containers and disk partitions. This speculation was fueled by none other than Cory Doctorow on the BoingBoing.net blog when he repeated an observation that a cryptic sentence in the SourceForge page (specifically: “Using TrueCrypt is not secure as it may contain unfixed security issues”) when reduced to their respective first letters can be an anagram for the Latin phrase “uti nsa im cu si” which translates roughly to “If I wish to use the NSA.” The speculation is that the TrueCrypt developers were pressured by the NSA to compromise the application and the aberrant SourceForge page was a way for those developers to immolate the project rather than allow the NSA to impose a compromise, but in a way that was plausibly deniable that they were doing so because the developers were fearful of federal prosecution.

Who knows? We don't. The developers know (presumably), but they aren't talking. It has been several months since the switchover of the website. That's long enough for the developers to have gained control of the website from a miscreant. It is also long enough for the developers to provide some insight. Unfortunately, no more information is forthcoming. The goodwill of the project is being fatally squandered, so some attorneys may feel the need to begin a careful migration of documents to another encryption application of their choice. That would be a sad end to a great product. However, because TrueCrypt was released under an open source license (meaning that the code base was publically available), a Swiss-based organization had taken it upon themselves to make the application available to the public once more. If you still want to use TrueCrypt (or just try it out), you can find it at <https://trucrypt.ch/>.

Judicial CLE Committee Update: Helping Strengthen Texas



*By: Evan Young, Partner
Baker Botts*

The Business Law Section has long supported efforts to ensure that our state's judges have the necessary resources to be fully current on the law and as efficient as possible in resolving matters before them.

Business lawyers, of course, never want to be in court. But every transaction carries the seeds of litigation, and when judicial resolution is inevitable, our clients depend on judges who understand business and business law. Sometimes, clients are almost as anxious that the dispute be resolved quickly as that it be resolved correctly; the need to move on from under the cloud of pending litigation generates interest in speedy resolution.

The Business Law Section shares those interests, and therefore has worked to facilitate continuing legal education for our state's judges. Like practicing attorneys, judges must receive annual CLE. For a state as large as Texas, this is a heavy duty. From the justices of the Texas Supreme Court to the state's trial judges, the Texas judiciary is about 1,100 strong. (That number triples if one includes municipal and justice courts.) Most of them preside over district courts and county courts-at-law, the primary trial courts where business disputes in Texas are resolved in the first instance.

The need for judicial CLE is great. District judges have an average tenure of only 8 years. Most new judges may be expert in certain areas in which they previously practiced, but most need resources to get up to speed on the many other areas of law in which they will be called up on to rule. Government budgets are tight, but the need for well-informed judges is only growing.

The Business Law Section has tried to help in various ways. It recruits and offers experts to provide seminars for no compensation. It suggests topics that are growing in importance and might justify special judicial CLE treatment. And for the past two years, it has made a grant to the Texas Judicial Foundation, which has been used in both years to sponsor a Civil Justice Conference for judges across Texas. These conferences include a "business law track," and many of the speakers were suggested by the Judicial CLE Committee on recommendations from members of the Section. Reviews from attendees at both conferences have been glowing, and the Section hopes that the program will expand.

If you are interested in being part of the Texas Judicial Foundation's effort to bring high-quality judicial CLE to all Texas judges, visit its website at <http://texasjudicialfoundation.org>.



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, Wendy Curtis, at

wcurtis@akingump.com.

Submission should comply with the Author Guidelines for the Business Law Section of the State Bar of Texas Quarterly Newsletter Articles.

The Newsletter Committee reserves the right to edit contributions for clarity

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.





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Business Law*

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the Website!*



Join the Business Law Section of the State Bar of Texas

Why Join?

TOP 7 REASONS TO JOIN THE BUSINESS LAW SECTION OF THE STATE BAR OF TEXAS

1. Receive useful periodic emails and quarterly electronic newsletters on hot topics for business lawyers.
2. Free subscription to the Texas Journal of Business Law, a scholarly publication specifically designed to keep its readers abreast of current developments in Texas business law.
3. Access to the Business Law Section website, which features helpful links, form documents, Texas legislative updates and other members-only benefits.
4. Opportunities for active and meaningful involvement in shaping Texas legislation affecting business organizations and non-profits.
5. Discounted registration fee for any Section sponsored or co-sponsored business law-related CLE programs.
6. Participation on smaller subcommittees specific to your business law practice or interest.
7. Extensive networking opportunities with some of the most knowledgeable and well-respected attorneys in the State of Texas.

How to Join

Contact Shanna Nugent at snugent@slnlegal.com; or

Sign up online or print a paper enrollment form at <https://www.texasbusinesslaw.org/join/how-to-join-the-business-law-section>.

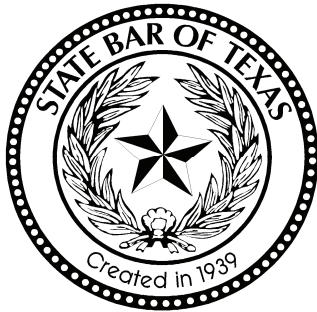
Dues

Dues are \$30. Membership to the Section is free for first and second year licensed attorneys and law students.

Get involved - Join a committee, contact Shanna Nugent at snugent@slnlegal.com

Committees

Business Entities Forms, Business Organizations Code, Commercial Code, Commercial & Consumer Financial Services, Donated Legal Services, General Practice, Investment Funds, Journal, Judicial CLE, Law of Lawyers, Legal Opinions, Litigation, Membership, Mergers and Acquisitions, Newsletter, Non-profit Corporations, Privacy Data Security and eCommerce, Partnerships & Limited Liability Company Law, Securities Law, and Website.



UPCOMING CLE PROGRAMS

Advanced Business Law 2014: (12.75 Hours/2 Ethics)
Hilton Park Cities Hotel - Dallas, Houston, Texas,
November 6-7, 2014
Section members get a \$25 discount

Litigation Update
San Antonio— January 15-16, 2015

Advanced Employment Law
Dallas - January 22-23, 2015

State Bar of Texas Annual Meeting
San Antonio, Texas—June 18-June 19, 2015
Presented jointly by the Business Law Section and the Corporate Counsel Section



David Keyes and Ron Chichester

*Scott Sheehan and
Lorna Wassdorf*



*Business Law Section members
at the State Bar of Texas
Annual Meeting, Austin—
June, 2014.*



John Fahy

*Al Harrison and
Ron Chichester*

