

Fall 2014

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Business Law Section Newsletter



Message From The Chair



Fellow Section Members:

I am pleased to report in this newsletter that the Committee is working to make the Business Law Section even more robust and user-friendly for our 4,260 members. The Section has been active in seeking ways to revise its offerings. Please be sure to stay tuned for updates.

Upcoming events:

Advanced Business Law 2012 at the Crowne Plaza River Oaks, near the Galleria, Houston, November 1-2, 2012 (Section members get a \$25 discount); **Choice and Acquisition of Entities in Texas 2013** in San Antonio, March 24, 2013; **Essentials of Business Law 2013** in Dallas, March 14-15, 2013; and **State Bar of Texas Annual Meeting** at the Anatole Hotel in Dallas, June 20-21, 2013 (presented jointly by the Business Law Section and the Corporate Counsel Section).

We welcome a new president for the State Bar of Texas. Buck Files was sworn in as president on June 15. We look forward to his contributions to the Bar and congratulate him on his new position.

I hope that you find this newsletter interesting and useful.

Greg Samuel

Chair of the Business Law Section, 2011-12

TEXAS SUPREME COURT'S RECENT SHAREHOLDER OPPRESSION OPINIONS REAFFIRM PRIMACY OF COMMON LAW FIDUCIARY DUTIES

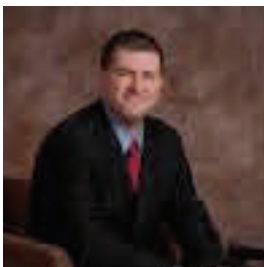


By: Professor Elizabeth Miller

Professor of Law, Baylor Law School

Shook v. Walden, __ S.W.3d __, 2012 WL 895946 (Tex. App.—Austin 2012, pet. filed).

Holding: the common law standard for piercing the veil of a Texas LLC (i.e., the standard before the 2011 adoption of a legislative standard for LLCs) was the same as the legislative actual fraud standard governing veil piercing of corporations rather than the more liberal standard for corporate veil piercing set forth in *Castleberry v. Branscum*.



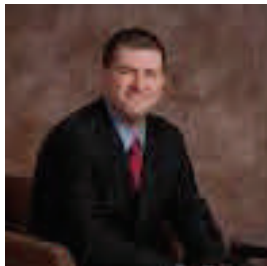
The principal issue in this appeal was the appropriate standard for piercing the veil of a limited liability company before the 2011 amendment to the Business Organizations Code extending the statutory standards governing veil piercing of corporations to LLCs. The court concluded that, assuming veil-piercing principles can be applied to LLCs, a claimBy: Professor Elizabeth Miller

TEXAS SUPREME COURT'S RECENT SHAREHOLDER OPPRESSION OPINIONS REAFFIRM PRIMACY OF COMMON LAW FIDUCIARY DUTIES UNDER GEARHART

By: Byron F. Egan, Partner, Jackson Walker, LLP and Michael L. Laussade, Partner, Jackson Walker, LLP



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 prospective 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 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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Byron F. Egan is a partner of Jackson Walker L.L.P. in Dallas, Texas. Mr. Egan is Senior Vice-Chair and Chair of the Executive Council of the ABA Business Law Section’s Mergers and Acquisitions Committee and former Co-Chair of its Asset Acquisition Agreement Task Force, which published the *ABA Model Asset Purchase Agreement with Commentary* (2001). He is also a member of the American Law Institute. Mr. Egan is also Chair of the Texas Business Law Foundation and is former Chairman of the Business Law Section of the State Bar of Texas and of that Section’s Corporation Law Committee.

Austin Court of Appeals Analyzes Standard to Pierce the Veil of a Limited Liability Company (Continued from Page 2)

Michael L. Laussade is a partner of Jackson Walker, L.L.P. in Dallas, Texas. Mr. Laussade is Secretary of the Texas Business Law Foundation.

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.

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.

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

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.

- 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.



Contracts Committee

Chair:
Nick Peters

Description:
The Contracts Committee is currently working on project regarding boilerplate provisions in Texas.

Get Involved:

If you would like to help with the project or join the Contracts Committee please contact Nick Peters at nick.peters@meritenergy.com

Texas Pattern Jury Charge on Trade Secret Misappropriation Near Completion (Continued from Page 5)

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.

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, Shanna Nugent, at snugent@slnlegal.com or Vice Chair, Wendy Curtis, at wcurtis@akingump.com. The Newsletter Committee reserves the right to edit contributions for clarity and

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.

CFPB Targets Law Firm with First Civil Enforcement Action

By: Justin M. Long, Partner, Bracewell & Giuliani, and John Podvin, Partner, Haynes & Boone LLP



The Consumer Financial Protection Bureau (the "CFPB") that was created under Title X of the Dodd-Frank Act has filed its first ever civil enforcement action targeting - a Los Angeles law firm. The complaint was filed on July 18, 2012 and is leveled at Charles Gordon and his law firm, The Gordon Law Firm, P.C., and centers on allegations that the firm charged advance fees to provide mortgage assistance relief services and then provided "little, if any, meaningful assistance" to home owners.



The CFPB alleges that Mr. Gordon and his firm made false and misleading representations to consumers that constituted a deceptive act or practice in violation of Sections 1031 and 1036 of the Consumer Financial Protection Act of 2010 (the "CFPA"). The complaint also alleges that the defendants were "mortgage assistance relief service providers" violated Regulation O which constitutes an "unfair, deceptive, or abusive act or practice under the CFPA."

The CFPB is seeking injunctive relief, the refund of money's paid by consumers and costs for bringing the action. A copy of the original complaint can be reviewed by following this link: <https://texasbusinesslaw.org/committees/newsletter/Charles%20Gordon.pdf/view>

HOUSTON PRO BONO JOINT INITIATIVE

between the Houston Pro Bono Network and In-House Counsel

The pro bono coordinators from Houston firms (large and small) have come together informally as the "Houston Pro Bono Network", or HPBN. HPBN has joined with its in-house colleagues. The goal of the Houston Pro Bono Joint Initiative or HPBJI is to coordinate pro bono education and activities across all firms and corporate legal groups in an effort to better serve the pro bono legal needs of the greater Houston area.

NEXT EVENT – SEPTEMBER 10TH

Houston Pro Bono Joint Initiative presents:
Non-Profit Series –
HR Considerations for Non-Profits and
Managing Employees & Volunteers

Presenters:

Becky L. Baker
Bracewell & Giuliani LLP

Frances R. Broussard
Thompson & Horton LLP

Lunch & Texas MCLE Accreditation (1.0 hours)
As always, there is no charge for this HPBJI event.

Wednesday, September 10, 2014

Lunch Available: 11:30 a.m.

Program: 11:45 a.m. - 1:00 p.m.

Hosted by:

Baker Botts L.L.P.
 One Shell Plaza
 910 Louisiana St., 32nd Floor
 Houston, Texas 77002

RSVP by Friday, September 5, 2014

Jill Schmidt at jill.schmidt@bakerbotts.com

Stay in touch.

Join the Houston Pro Bono Joint Initiative group on [LinkedIn.com](https://www.linkedin.com/company/houston-pro-bono-joint-initiative).

If you have questions, please contact any of the following members of the Houston Pro Bono Joint Initiative Coordinating Committee:

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CLE Credit:

Don't miss the
Business Law
Section sponsored
CLE's listed on the
back cover and on
the Website!



Judicial CLE Committee Update: Helping Strengthen Texas Courts



*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.

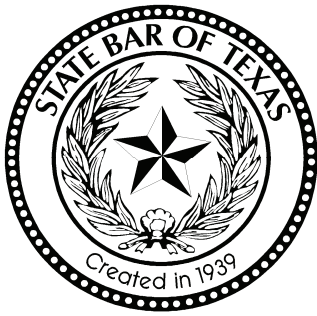
Business lawyers, of course, never want to be in court. But every transaction carries the seeds of litigation, and when judicial resolution is inevitable, our clients depend on judges who understand business and business law. Sometimes, clients are almost as anxious that the dispute be resolved quickly 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 upon 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>.



We're on the Web!
www.texasbusinesslaw.org

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



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

