

Fall 2016

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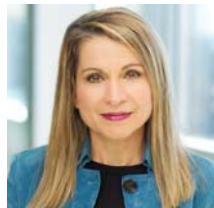
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Fall Newsletter 2016

Message From The Chair



As a leader in the State Bar of Texas, specifically of the Business Law Section, what always weighs on my mind is the question of how the Section can provide value to you for your membership. There is a variety of ways that I think the Section can provide greater value to its members. One of the ways is to provide a better website.

A better Business Law Section website is one that contains a wealth of information about Texas's business law, one that is current, and one that makes it easy for you to find content relevant to you. To meet that challenge, before the end of the year, we are rolling out a new website that we hope will provide easier access to the information posted there. When the website is live, we will send you a link to your new Business Law Section's website. Keep an eye out for that communication.

Our new Section website will provide you with forms useful for your practice; forms that have been developed by some of Texas's brightest minds on the topics and who are in our Business Entities Forms Committee, chaired by Prof. Elizabeth Miller of Baylor University Law School. They are provided in an electronic library, ready to be used when you are ready to use them. Currently, we have the following forms:

- *Bylaws for a Texas Nonprofit Corporation*
- *Policy on Conflicts of Interest and Disclosure of Certain Interests for a Nonprofit Organization*
- *Additional Provisions for Nonprofit Certificate of Formation*

Your membership in the Section provides you with value in the Business Law Journal. In your current Business Law Section website, you will find in digital format, the most recent edition of the Business Law Journal as well as back issues of the Journal. Going forward, you can discard hard-copy back issues that are made available on our new website in digital format. We hope that this will make your goal of going paperless more attainable. Your Business Law Section digital library will store the Journal until you need it. And when you need a hard copy of a Journal article, you can print it from there, easily and cleanly. A post card will be sent to you later this month announcing this new form of delivering the Journal to the Section's members.

Bringing you greater value as a member is the Section's goal, but it is also a challenge. The Section would not be able to meet this challenge without the help of the leaders of the Website Committee, Ron Chichester and Carol Mattick, and of Elena Baer (our administrator) who have worked hard to improve the Section's new website. We would not be able to meet the challenge of bringing you a new digital Journal issue without the leaders of the Journal Committee, Ryan Nayar and Robin Phillips, as well as the South Texas College of Law faculty advisors, Professors David East and Bruce McGovern, and the students who edit the Journal articles, led by Domonique Broadus, and of course, the fine authors of articles in the Journal. Thanks to all of these, we can offer you new value.

We will be looking for more ways to bring you value in your Business Law Section Membership.

Irene Kosturakis
2016-17 Chair, Business Law Section

Texas Journal of Business Law (Digital Edition): Available to Members

As a member of the Business Law Section, you are entitled to the newest edition of the Texas Journal of Business Law. The Summer 2016 Issue of the Journal is now available electronically on the Business Law Section's website by logging in with your Texas Bar Number at www.texasbusinesslaw.org.

Issue 46:3 showcases articles on entity acquisitions, crowdfunding, and entrepreneurship. Mr. Richard A. Tulli & Mr. Daryl B. Robertson analyze entity acquisitions under the Texas Business Organizations Code after the 2015 amendments. University of Tennessee College of Law Professor Joan MacLeod Heminway discusses the effect of the CROWDFUND Act on U.S. securities regulations. Mr. Lawrence Trautman et al. explain the legal considerations for U.S. entrepreneurs interested in pursuing start-ups, ranging from information technology and principal choice of entity considerations to raising capital in compliance with securities laws.

In addition, this issue includes recent business developments summarizing cases involving: (1) privilege in reports regarding possible criminal activity to governmental agencies; (2) a court's authority to determine arbitrability by looking at the relevance of an underlying contract to a claim; (3) an oral agreement to sell goods exception to the statute of frauds; (4) the scope and effect of the Copyright Act's preemption of state law; and (5) whether a board-adopted forum selection bylaw should be upheld by the court of chancery of Delaware.

Stay tuned for the electronic publication of Issue 47:1 with articles discussing shareholder oppression after *Ritchie v. Rupe*, the Texas margin tax, and more!

The National Mortgage Note Repository Act of 2016



Cheryl Crandall Tangen
Vice-Chair, UCC Committee, Business Law Section
Member, Business Law Council

UCC wonks and practitioners representing residential mortgage lenders or those engaged in securitizing mortgage loans should review proposed legislation, still in draft form, promoted by the Federal Reserve Bank of New York, called the National Mortgage Note Repository Act of 2016 (the "Act"). Given today's date, the title may need altering.

Pursuant to its stated purposes, the Act is designed to enhance robust secondary markets for residential mortgage loans and securities backed by such loans, by reducing the somewhat error-prone and costly paper-based practices of the mortgage financial markets. Further, the Act asserts that the repository would provide a quick, simple, and accurate way for borrowers to determine the party with an economic interest in their mortgage notes and whether such party has authorized its servicer to modify their loans. Uncertainty in this regard was seen as a hindrance to resolution of troubled mortgage loans and evidence of the residential mortgage loan industry to independently create such a system. This latter is a less than enthusiastic endorsement of the mortgage related registries operated by MERSCORP Holdings, a non-governmental company that has established four of such voluntary registries over the last 20 years, two of which are currently operating- MERS®System, and MERS®eRegistry.

The Act would create a national mortgage note repository for the voluntary filing and electronic conversion of mortgage notes and mortgages. The repository operator would either be: a federally chartered not-for-profit corporate instrumentality of the United States, with perpetual existence until dissolved by Congress (Alternative A); or a not for profit corporation or cooperative that is licensed by the Federal Housing Finance Agency to develop, maintain, and operate the repository system (Alternative B). Initial funding for both alternatives would be provided by the US government in the amount of \$150 million, subject to repayment over a 10 year period. Also, under both alternatives, the repository operator would be subject to supervision and regulation of the Federal Housing Finance Agency.

The repository would receive mortgage notes submitted through qualified "gateways" that have the requisite transmission capabilities required under system rules established by the operator and consistent with the parameters described in the Act. Persons entitled to submit mortgage notes are the holder of the note or other person entitled to enforce the note under Article 3 of the UCC, if it is a negotiable instrument, or the person with control over the "transferable record" (as defined under 15 USC 7021 – e.g. a note already in electronic form relating to a loan secured by real property) if the mortgage note is a transferable record, or if the note is not a negotiable instrument under Article 3, by a person with power to enforce the note as determined by state law other than Article 3.

The Act does NOT REQUIRE anyone to submit a mortgage note to the repository. However, once submitted, the converted

The National Mortgage Note Repository Act of 2016 (Continued)

electronic note is substituted for the original mortgage note and the original note ceases to have any effect or validity. The original submitter becomes the first registrant. Any payments made by the borrower as directed by the registrant discharges the borrower's obligation to the extent of the payment even if there is an adverse claimant with a superior claim to that of the registrant. A transfer of the mortgage note from one registrant to another is satisfied by a record on the repository system and satisfies state law requirements for recordation of assignments of mortgages. However, submission of the mortgage to the repository (with the original submission of the mortgage note) does not have the legal effect of recording the mortgage. And a notice of a discharge of an electronic note provided to the repository does not have the legal effect of delivering or recording a satisfaction of mortgage. The registry operator must provide borrowers with access (free of charge) to information in the registry on an electronic note on which the borrower is obligated, provide access to the registrant, and also provide access to all records relating to an electronic mortgage note that is the subject of a court proceeding.

Certain warranties are imposed upon the gateways that transmit mortgage notes to the repository relative to the eligibility of the submitter to submit the mortgage note, the eligibility of the mortgage note (e.g. related mortgage has been submitted for recording and a unique identifier is associated with the mortgage note, entire mortgage note has been submitted, as has a copy of the entire mortgage associated with the mortgage note, and other requirements), that the gateway has not previously submitted a copy of the same mortgage note or an identical negotiable instrument or transaction record to the one currently being submitted. Other warranties apply with respect to mortgage notes submitted after 10 days of the execution of the mortgage note.

Confused yet?

What can be said with certainty is that the Act necessarily will require changes to Articles 1, 3 and 9 of the Uniform Commercial Code. The National Conference of Commissioners on Uniform State Laws (NCCUSL) has formed a drafting committee to prepare revisions to these Articles to accommodate the requirements of the Act.

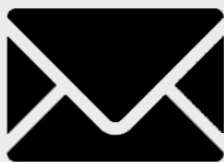
According to Drafting Committee members in a recent discussion with American Bankers Assn representatives, the Act and proposed revisions are probably two (2) years away from completion.

If you'd like to navigate through the maze of the existing draft of the Act and/or the current draft of revisions to the UCC, all may be found on the NCCUSL website at the following links:

http://www.uniformlaws.org/shared/docs/UCC%201,%203,%209/2016sep_UCC%201,%203,%209,%20Revised_Mtg%20draft.pdf

http://www.uniformlaws.org/shared/docs/UCC%201,%203,%209/2016mar_ERRMNA_Nat'l%20Mortgage%20Repository%20Act_Draft.pdf

If you'd like to participate in more local discussions relative to UCC revisions or restated State Bar Commentaries to existing UCC provisions, please consider joining the Business Law Section's UCC Committee.



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.

Statute Of Limitations for the Enforcement of Negotiable Instruments



Jim Leeland
Commercial Code Committee
Business Law Section

The statute of limitations for the enforcement of negotiable instruments is generally governed by the Texas Uniform Commercial Code in Tex. Bus. & Com. Code § 3.118. For example, a six-year statute of limitations is provided for the enforcement of a promissory note payable at a definite time. *See* Tex. Bus. & Com. Code § 3.118(a). But § 3.118 covers differing types of instruments under varying circumstances and must be reviewed in its entirety to determine its application for any given situation. Other statutes of limitation may also need to be considered, as with a suit to enforce a real property lien or to bring an action for a deficiency judgment after a non-judicial foreclosure sale.

The Commercial Code Committee recently updated the State Bar of Texas Business Law Section Comments for § 3.118 to assist the bar in thinking through this sometimes complicated subject. Below is a preview of the revised Comments for § 3.118. We hope you will find this useful in your practice.

State Bar of Texas Business Law Section Comments

“With respect to actions on instruments covered by this Act, the statute of limitations provisions of section 3.118 should be interpreted to supersede, because of their particularity, any conflicting statute of limitations of general applicability under Texas law. *See, e.g.,* Tex. Civ. Prac. & Rem. Code Ann. §§16.003, 16.004 (Vernon 1986).

Because Chapter 3 only applies to negotiable instruments, actions on non-negotiable instruments will not be governed by the provisions of section 3.118 but will be governed by other Texas statutes of limitations. *See, e.g.,* Tex. Civ. Prac. & Rem. Code §§ 16.003(a), 16.004(a)(3) (Vernon 1986). On the other hand, because of their particular nature, the statute of limitations provisions of section 16.035 and 16.036 of the Texas Civil Practice and Remedies Code, relating to actions with respect to debts secured by liens on real property, and section 51.003 of the Texas Property Code, relating to actions to recover deficiencies after non-judicial foreclosures, should be interpreted to control, in appropriate circumstances, over the provisions of section 3.118.

For example, in *Holy Cross v. Wolf*, 44 S.W.3d 562 (Tex. 2001), the Court held that, since the holder of the note took no steps to foreclose on the real property lien for more than four years after the note had been accelerated, the lien was extinguished by the four-year statute of limitations under Tex. Civ. Prac. & Rem. Code § 16.035. The note, however, was still enforceable under the six-year statute of limitations in Tex. Bus. & Com. Code § 3.118.. *See Aguero v. Ramirez*, 70 S.W.3d 372,375 (Tex. App.—Corpus Christi 202, pet. denied). Similarly, under Tex. Prop. Code § 51.003(a), a two-year statute of limitations specifically applies to suits to recover a deficiency judgment after a foreclosure sale has been conducted, notwithstanding the six-year limitations on negotiable instruments provided under § 3.118.

By virtue of Texas Business and Commerce Code §1.103, existing Texas law permitting parties to extend, waive or shorten limitations periods should also apply to limitation periods set forth in section 3.118. *See, e.g.,* Tex. Civ. Prac. & Rem. Code Ann. §16.065, 16.070 (Vernon 1986 and Supp. 1994); *see also Fuqua v. Fuqua*, 750 S.W.2d 238, 241 (Tex. App.—Dallas 1988, writ denied).

Prior Texas case law applicable to demand notes had held that the limitations period began to run on the date the note was made. *See, e.g., G & R Inv. v. Nance*, 683 S.W.2d 727, 728 (Tex. App.—Houston [14th Dist.] 1984, writ ref’d n.r.e). Section 3.118(b) changes this rule to commence the 6-year limitations period upon the date of demand. If no demand is made, the 10-year limitations period commences upon the date of the last payment of principal or interest.

With respect to actions for conversion of instruments, the 3-year limitations period provided by subsection (g) supersedes the 2-year limitations period provided by Tex. Civ. Prac. & Rem. Code § 16.003. *See* Tex. Bus. & Com. Code Ann. §3.420 (Tex. UCC) (Vernon 1994). Nothing in section 3.118 is intended to change existing Texas case law as to when a cause of action for conversion accrues. *See, e.g., Lyco Acquisition 1984 v. First Nat’l Bank*, 860 S.W. 2d 117, 199 (Tex. App.—Amarillo 1993, writ denied); *Southwest Bank & Trust v. Bankers Commercial Life Ins.*, 563 S.W.2d 329, 331 (Tex. Civ. App.—Dallas 1978, writ ref’d n.r.e.) (holding that the discovery rule does not apply to toll the statute of limitations where a bank is sued for conversion on a forged indorsement, absent the bank’s fraudulent concealment). *See also Autry v. Dearman*, 933 S.W.2d 182, 193 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (noting that the discovery rule does not apply to toll the statute of limitations when a bank is sued for conversion on a forged endorsement).”

UPCOMING CLE PROGRAM

Advanced Business CLE, entitled Advanced Business Law 2016: Cutting Edge Trends/Tips/New taking place in Dallas Nov. 17-18, 2016

Register Here:

<http://www.texasbusinesslaw.org/events/advanced-business-law-2016>



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Committee
Spotlight

Committee Spotlight:**Commercial & Consumer Financial Services
Committee**

Jackie Akins

Chair: Jackie Akins

Vice Chair: Cheryl Tangen

Current Priorities:

The Real Estate, Probate and Trust Law Section (REPTL) of the State Bar of Texas plans to introduce another bill designed to revise the power of attorney act in the next session of the Texas Legislature. The committee has been actively attempting over eight months to reach a reasonable accommodation with REPTL to avoid the difficulties surrounding a previous version of this bill in the last session. Despite the dedicated and best efforts of several members of the committee, the efforts to date to reach such an accommodation have not produced a reasonable result. Among the issues that remain outstanding with respect to the proposed legislation:

1. The most contentious issue remains REPTL's insistence on mandatory acceptance of the document. While compromises have been reached as to defenses to such acceptance, they are not absolute and ultimately the proposed acceptor would be either forced to identify the reason(s) for non-acceptance or provide a document that would allow the reason(s) to be inferred. For entities required to file Suspicious Activity Reports (SAR), which, by law, cannot be disclosed, this represents an unacceptable dilemma. Additionally, the mandatory acceptance is not limited to only the statutory version presented in the bill.
2. Certain types of agency or powers are not carved out of coverage from the bill as is the case with the Uniform Power of Attorney Act. This will present other issues such as attempts to revoke powers coupled with an interest, classifying proxies as powers of attorney, and coverage of forms created or prescribed by governmental agencies which may be governed by their own rules which may conflict with the provisions of the proposed legislation.
3. Prior powers of attorney are not specifically revoked under the proposed legislation, thus a proposed acceptor is exposed to competing claims or litigation by the various agents.
4. There is no exception for entities having organizational or governing documents that prohibit compensation or disallow some portion of it to agents. The proposed legislation is also unclear as to situations in which the governing documents of an entity forbid the exercise of certain or all rights and privileges by an agent.
5. The time periods to determine acceptance are very short and may present challenges for smaller entities.
6. This would be yet another change to the power of attorney statute which makes it difficult to determine which version of the statute and form is to be accepted and under what law.

Get Involved:

If you would like to help with the projects or join the Commercial & Consumer Financial Services Committee, please contact Jackie Akins at Jacqueline.Akins@usaa.com or (210) 498-0468.

**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, Louann Fang at louann.fang@bakermckenzie.com

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