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BUSINESS LAW

REAL ESTATE LAW

OIL, GAS & ENERGY LAW

ESTATE PLANNING & PROBATE

COMMERCIAL LITIGATION

BUSINESS MEDIATION

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# SPRING 2019
# STRONG POINTS NEWSLETTER

Founded in 2004 by Attorney Bret L. Strong, The Strong Firm P.C. is dedicated to serving the legal needs of The Woodlands, Greater Houston and beyond. Since The Woodlands business attorneys at The Strong Firm understand the business environment at a local, state and national level, we are able to give people practical, knowledgeable advice on all aspects of their business transactions and disputes.

We understand that in a tough, competitive, global marketplace, timely and cost effective legal advice about business transactions and those taking place throughout the state and the world is important. Our business law firm in The Woodlands, Texas stands ready to help you and your business tackle legal issues ranging from the common to the complex every step of the way. We are dedicated to providing you with high-quality, personalized service that is unparalleled in the legal market.

The articles and other information contained in this newsletter are not legal advice, and this letter is not a solicitation for legal employment if you are currently represented by an attorney in a given matter. You should consult with an attorney of your choosing for advice regarding your individual situation. We invite you to contact us and welcome your calls, letters, and emails. Your receipt of this newsletter and/or contacting our firm does not create an attorney-client relationship.

To retain our services please contact us and we will send you a written engagement letter for your consideration and execution in order to hire our firm and create the attorney-client relationship. Please do not send confidential information to us until such an attorney-client relationship has been established.

Not certified by the Texas Board of Legal Specialization

## THE WOODLANDS ECONOMIC OUTLOOK CONFERENCE

The Strong Firm P.C. was proud to participate as a Platinum Sponsor at the Economic Outlook Conference held at The Woodlands Waterway Marriott Hotel & Convention Center on Friday, February 8, 2019. As a firm, we look forward to supporting the growth of our community and are proud to partner with other local businesses and organizations to further such endeavours.

## THE WOODLANDS CHRISTIAN ACADEMY COLOR RUN

Bret Strong and his family were thrilled to be able to volunteer and participate in the first annual community wide Color Run held by The Woodlands Christian Academy (TWCA) sponsored by Hunter Family Orthodontics and benefiting the school's athletics and fine arts initiatives. The Strong Firm P.C. team loves supporting our next generation of leaders!

## LMC & ANGEL REACH RENOVATE ANGELS LOFT

Royce Lanning of The Strong Firm P.C. is proud to be a part of the Leadership Montgomery County - Texas (LMC) Class of 2019. LMC Class of 2019 recently partnered with Angel Reach to re-create a furniture re-sale store known as Angels Loft. Angel Reach is a non-profit organization in Conroe, which is committed to helping at-risk youth transition to better lives!

## THE WOODLANDS MARATHON 2019

Christina Harughty, Lisa Prado, Jessica Caldwell, Alyssa Payne and Bethany Kovacs of The Strong Firm P.C. were pleased to participate and receive finisher's medals for completing the 5k race on February 23, 2019 as part of The Woodlands Marathon, Half Marathon, 5k and 2k.

## 2019 MONTGOMERY COUNTY HEART BALL

Bret and Angela Strong were pleased to attend the 2019 Montgomery County Heart Ball with Jenny Taylor of Market Street - The Woodlands. The event brought the community together with many influential leaders from the communities to raise funds and promote the lifesaving work of the American Heart Association. The event was held Saturday, February 16, 2019 at The Woodlands Waterway Marriott.

## MCCF GIFTS OF THE VINE WINE DINNER

The Strong Firm P.C. participated as a Merlot Table Sponsor at the Montgomery County Community Foundation's Gifts of the Vine Wine Dinner on Thursday, February 28, 2019. Bret Strong performed as the Master of Ceremonies for the evening. Pictured are Ashleigh Thiergood, Bret Strong, Brian Albert, Angelina Albert and Angela Strong.

STRONG POINTS: SPRING 2019

# “RIGHT TO DISCONNECT” LAWS

This country was built on hard work and ingenuity. The industrial revolution, vast land and available resources propelled the United States of America into a capitalist juggernaut in the first century of our existence. In the 1900s, labor unions and various government legislation began to push and enact needed protections for manual laborers. These protections were designed to protect workers from unsafe and unfair practices.

Fast forward to 2019. According to the Bureau of Labor Statistics, the number of jobs in the United States that require moderate physical activity has plummeted from 50 percent of all jobs in 1960 to less than 20 percent of all jobs by 2010. One of the obvious reasons for this change is technology. Not only have many manual labor jobs been replaced by computers and automation (in addition to less expensive labor in other countries), many of the new jobs created in the past few decades involve creating value through use of technology. Much of this technology resides in your hand or on a tablet or laptop that you can carry with you anywhere.

This brings us to the current trend in trying to protect the modern worker. Under the guise of “Anti-Stress Laws,” several European countries have established strict requirements related to a worker’s right to disconnect from their employer on off-work hours. In France the “El Khomri” law suggests that every employee contract must include a negotiation of obligations regarding how connected they are required to be outside of office hours. Certain German companies have set email systems to not deliver incoming emails at certain times of the day and on holidays to avoid after-hours emails. And most recently, in January 2019, a New York City council member introduced a measure to prohibit local employers from requiring employees to respond to work-related, after-hours emails or face hefty fines. Some believe Amazon’s recent decision to no longer locate their offices in Long Island, New York, may have been prompted by these sorts of agendas.

From a legal perspective, we know many cases associated with failure to pay overtime to non-exempt employees have been based upon, or at least supported by, the claim they are working overtime when having to respond to after-hours requests via email. At a minimum, employers are going to have to start implementing practices and policies to protect workers based in part on wellness, stress relief and overtime concerns, especially those that are non-exempt. It is our belief that a generalized approach by employers to emphasize overall well-being and work/life balance will help the employees (rather than the government) begin to address issues associated with the use of technology outside of work hours. We continue to develop these and other types of policies with our clients to help better align processes with the modern work environment.

Bret Strong
Managing Shareholder

***Bret Strong is the founder and Managing Shareholder of The Strong Firm P.C. His areas of practice include oil, gas and energy; commercial real estate; mergers, acquisitions, and sales; and business law and contracts. He earned his Juris Doctorate, cum laude, from South Texas College of Law, and a B.S. in Business Finance form the University of Colorado at Boulder. He is admitted to practice law in Texas, Colorado and before the United States Supreme Court. Bret is a founding board member of The Woodlands Bar Association, former Chairman of The Woodlands Area Chamber of Commerce and four time Ironman Triathlete.***

# CORPORATE CREDIT: REAL OR CREATION?

Eric R. Thiergood, Sr.
Shareholder

Throughout my almost 15-year tenure at the Strong Firm, P.C., I have had the opportunity to work on a wide array of commercial loans in many different capacities. I have represented both borrower and lender in everything from small signature loans, midsize revolving lines of credit, commercial real estate acquisitions, construction loans to commercial mortgage-backed securities, and complex multi-lender syndicated loans with multiple lenders on one side and sometimes up to 20 or more debtors and guarantors on the borrower side. These loans have ranged from as little as $350,000 to $2 billion. Below is an example of conversations I have had with several existing and potential clients regarding the idea of "corporate credit."

***Client:*** *I would like to start a new corporation so that I can get some corporate credit and take out a loan through that new company.*

***Attorney:*** *Ok. How is your personal credit?*

***Client:*** *My personal credit is great, but I don't want to use my personal credit. I want to use the credit of my new company.*

***Attorney:*** *Short of being a publicly traded company or an existing company with years, and sometimes decades, of solid financials and valuable assets, a company generally cannot obtain "credit" apart from the credit worthiness of the principals of the company, often in the form of personal guaranties.*

***Client:*** *But I heard I could form a new company, immediately get credit in the name of that company and not have to guarantee anything personally.*

***Attorney:*** *Really? Did an attorney or a lender tell you that?*

***Client:*** *No, actually I heard it on an infomercial one evening.*

***Attorney:*** *Let me guess, that infomercial also told you that you needed to buy their book, program or business "system," for the low, low price of $19.99 or $49.99 or even $199.99, right?*

***Client:*** *Yeah. Well when you say it that way, it makes it sound kind of silly…*

The fact is no legitimate lender will lend money to a brand-new company with no proven financials, solid assets or a credit worthy principal or two backing the venture. The myth of instant corporate credit for a brand-new company with no personal guaranty is a creation of radio and late-night infomercial hucksters trying to sell their latest and greatest ploy to new business owners. While there are some legitimate ways to build the credit worthiness of an existing company, there are no magic steps or instant tricks that bypass the lender's standard requirements, and almost all of these methods require the personal guaranty of a credit worthy principal in the company, solid financials and a proven business track record for the company. At the Strong Firm, P.C., we have assisted hundreds of clients in navigating the often confusing area of commercial lending and borrowing and would be glad to do the same for you.

***Eric R. Thiergood, Sr., Shareholder, joined The Strong Firm P.C. in 2005 as a law clerk and was promoted to associate attorney upon being licensed by the Texas State bar in 2007. In 2015, Eric was promoted to income shareholder. Eric has served as lead counsel for borrowers in successfully negotiating and closing complex commercial loans ranging from $10 million to $2.1 billion. Eric is fluent in Spanish and uses his skill in his work with some of the firm's international Spanish-speaking clients.***

# STRONG POINTS: SPRING 2019

# CAN NON-COMPETE PROVISIONS BE TOO AGGRESSIVE?

In 1989, Texas enacted the Covenant Not to Compete Act (the "Act") authorizing the enforcement of non-compete agreements. The Act goes a step further and expressly requires Texas courts to reform any unreasonable restrictions in the non-compete agreement to make them reasonable and then enforce the non-compete agreement as reformed by the court. The temptation is to use the statute's reformation requirement as a safety net and use the most aggressive, overreaching non-competition provision that you can get on paper. Why not? If a court finds the non-compete agreement overly broad, then it is required to reform it and enforce it, right?

There are some arguments in favor of this tactic, but it's important to realize it comes at a cost. First, the Act expressly prohibits the court from granting monetary damages against a defendant for past violations of a non-compete agreement reformed by the court. In other words, the business owner has forfeited his or her right to money damages for the employee's past actions and can only seek an order prohibiting future competitive behavior.

Second, if the non-compete agreement arises out of a contract for personal services, such as an employment contract, a court that reforms the non-compete agreement is authorized to award the defendant (e.g., a former employee) his reasonable and necessary costs in defending the suit, including attorney's fees. The practical result of such an award is that the business owner is now paying two sets of attorney's fees even though he won the case.
A properly drafted non-compete agreement is a powerful tool when properly written but can become less useful when it is crafted with an overly heavy hand.

***Royce Lanning, Managing Counsel of Probate & Estate Planning, joined The Strong Firm P.C. in 2013. He received his Juris Doctorate from the University of Hawaii, William S. Richardson School of Law in 2003 and moved to Spring, TX in 2006. Royce's practice focuses primarily on oil & gas transactions, general and complex business transactions, corporate transactions, corporate formation and administration, estate planning, probate and real estate development and financing.***

**Royce Lanning**
Managing Counsel of Probate & Estate Planning

# STRONG IN ACTION

The Strong Firm aids borrower in **$31.7 million** HUD construction loan for multifamily real estate development in Nueces County, Texas.

The Strong Firm represents borrower in **$42.3 million** HUD construction loan for multifamily real estate development in Walton County, Florida.

The Strong Firm acts as legal counsel for borrower in **$32.1 million** HUD construction loan for multifamily real estate development in Conroe, Texas.

The Strong Firm provides legal counsel to seller in **$7 million** sale of franchise restaurant holdings.

The Strong Firm defends an International oil rig equipment manufacturer in a suit alleging a joint venture in Texas and negotiated a **$0 settlement agreement** for our client.

The Strong Firm represents borrower in the refinancing of a **$3.57 million** commercial mortgage-backed security for a commercial office facility in Montgomery County, Texas.

# MISCONCEPTIONS OF TRADEMARK APPLICATIONS

Whether trying to preserve a newly designed logo or protecting a long-standing brand name, pursuing a federal trademark application can offer businesses a host of benefits. The process of applying for a federal trademark registration, however, is not widely known or understood, and some of the biggest misconceptions when discussing this application process revolve around timing and the potential for ongoing involvement.

Applicants are often surprised to hear the typical federal application process will take no less than five months and often more than that. The typical federal application process looks something like this (depending on the applicant):

**Step 1:** Preliminary due diligence, application preparation, and filing
- ***One to two weeks***

**Step 2:** Application queue and assignment to examining attorney
- ***Three to four months***

**Step 3:** Issuance and/or response to examining attorney's initial review (either clearance or office action)
- ***One to four weeks***

**Step 4:** Publication in the Official Gazette and objection period
- ***30 days***

**Step 5:** Clearance for registration and issuance of registration certificate
- ***One to three weeks***

The real potential time hurdles come into play during steps 3 and 4. If there are deficiencies in the application, the office action process can involve multiple back-and-forth exchanges with the examining attorney, which may include additional time for research and preparation of argument materials. Even after that, all applications are always subject to potential opposition proceedings from third parties (step 4), meaning there may be even more time dedicated to overcoming the opposition.

The second misconception lies within the commonly encountered "set it and forget it" mentality of many applicants. The federal application process can sometimes include the need for secondary legal intervention beyond the initial application preparation and filing. While some applications do proceed through the registration process without an office action or third-party opposition, many do not, and applicants may be surprised to find they must again get involved to advance their application forward. This may include amendments to the application, the preparation of secondary specimens or even contesting infringement claims tied to an opposition.

Before you decide to pursue a federal trademark registration, it is important to make sure you understand and are ready for the lengthy timeline and secondary involvement that may be required.

***Brian Albert, Shareholder, originally joined The Strong Firm P.C. in 2012 having prior experience with multiple Fortune 500 companies. After a brief departure from the Firm to spend time working for a large, publicly-traded waste management company as in-house counsel handling a variety of commercial and municipal transactions and litigation matters, Brian rejoined the Firm as a Shareholder in 2018. Brian's practice focuses on the Firm's corporate and business transactions practice groups where he utilizes his skills and experience in representing clients in a variety of business transactions and counseling on general corporate, real estate, and other business matters.***

Brian Albert
Shareholder

## STRONG POINTS: SPRING 2019

# SELLER'S DISCLOSURE NOTICE IN REAL ESTATE

When I practiced law in California, I used to provide training to newly licensed real estate agents and brokers about their duties as representatives of residential real estate buyers and sellers. A familiar question in those sessions was how thorough a seller's disclosure notice had to be, and what the broker or agent's role might be in those disclosures, particularly when there was a concern the disclosures might torpedo a sale. My response was always the same: when in doubt, disclose, and counsel your clients to err on the side of providing more information than you believe necessary. The reason is simple: if the facts you are concerned about disclosing are significant enough to kill the sale, you can bet they are likewise significant enough for the buyers to sue you about *after* the sale.

In Texas, Real Property Code Section 5.008 governs seller disclosures in residential real estate transactions, and in addition to the specific categories of information listed in the statute, courts interpreting Section 5.008 have held that sellers must "disclose material facts within their knowledge that would not be discoverable by the exercise of ordinary care and diligence by the purchaser, or that a reasonable investigation and inquiry would not uncover."[1] Moreover, an agreement from the buyer to purchase the property "as is" does not absolve sellers of their disclosure duties.[2] While sellers must only disclose facts about which they have actual knowledge, a hyper-technical reading of the statute may subject a seller to liability. This is because a seller must disclose material facts affecting the property even if they do not fall neatly within specific categories enumerated by the statute. Further, if a broker has reason to believe the seller's disclosures to be false or inaccurate, he also has a duty to come forward.[3]

Thus, my advice to California real estate agents and brokers also holds true in Texas – when in doubt, disclose, and err on the side of disclosing more than may be strictly required under the real property statutes. This is certainly a circumstance in which an ounce of prevention is worth a pound of cure.

***Laura F. Dumas, Managing Counsel of Litigation, joined The Strong Firm P.C. in 2016 after practicing in San Francisco/Silicon Valley since 2006. She graduated from the University of the Pacific, McGeorge School of Law, and has a wide variety of experience in real estate and commercial litigation. Laura also handles corporate governance and business disputes. She is licenced in Texas and California, and in Federal Court for the Northern District of California.***

Laura Dumas

Managing Counsel of Litigation

1 Myre v. Meletio, 307 S.W.3d 839, 843-44 (Tex.App.—Dallas 2010, pet. denied).

2 See, e.g., Prudential Ins. v. Jefferson Assocs., 896 S.W.2d 156, 161-62 (Tex.1995); Williams v. Dardenne, 345 S.W.3d 118, 124 (Tex.App.—Houston [1st dist.] 2011, pet. denied).

3 Sherman v. Elkowitz, 130 S.W.3d 316, 321 (Tex.App.—Houston [14th Dist.] 2004, no pet.).

## STRONG POINTS: SPRING 2019

# SELF-HURT, SELF-HELP: ONLINE LEGAL FORMS

In our current day and age, the internet seems to be the oracle for all of life's questions, big and small. It is the modern-day town square where anything imaginable is at our fingertips. We research about faraway lands and people of the past, we can buy any worldly item and even discover new, exotic recipes. It is where we find our news, gossip, sports scores, advice, medical treatments and even legal advice. However, just as any medical professional would caution you against trusting online treatments, a lawyer would advise you to tread carefully when googling online legal advice or documents. It is all too common for people to end up in a sticky situation because they decided to simply download an online legal document rather than paying for legal counsel from an attorney. In some instances this may be fine, but in many cases it can end up costing you much more than you ever bargained for.

There are some online forms that, in my opinion, you can use. Below are a few popular online documents, some of which need legal counsel and others that can be trusted:

**Demand letter:** A demand letter is the preferred pre-lawsuit tool used to address a dispute and explore resolution before either side invests substantial time and money in litigation. Websites present an array of demand letters for a multitude of varying disputes. For the most part, online demand letters are a good resource for individuals or companies looking to send a quick but effective message to an opposing party. However, certain demand letters, such as notices of default under a lease or other contract, may require special language.

**Documents on court websites:** Forms found on an official public website are generally very user-friendly. For example, if you want to bring a lawsuit in small claims court, a copy of the petition can be found online, or if you are sued in district court, a sample answer can be found online. Most Texas courts have user-friendly forms and instructions available to the public and can be trusted.

**Real property deed:** Real estate deals are one of the most common legal transactions. Most states have specific requirements for documents relating to real property records, and failing to use correct forms or language could result in your document being invalid and ineffective. For documents dealing with real property, I always recommend consulting with an attorney to ensure the intended result is accomplished.

**Wills:** A will is one of the most common legal documents offered by online document preparation websites. Unfortunately, similar to real property documents, many states have specific requirements for wills. Online websites may be able to comply with general drafting guidelines, but the websites cannot account for specific situations. If the online website fails to comply with the state requirements for a will, or if changes are made to it by an individual after it is downloaded, it can be rendered invalid. This means that after someone passes, if heirs attempt to enforce an invalid will, the court will not accept it. Simple mistakes can cause expensive and time-consuming trouble for heirs. As such, I always recommend consulting with an attorney about drafting a will or other estate planning documents.

If you ever have a question about whether to use an online legal form, you can call an attorney for a free consultation. It is consult to ask a professional to ensure your self-help solutions do not end up hurting you in the end.

***Kristen Bates, Associate Attorney, joined The Strong Firm P.C. as an experienced associate in August 2017. Prior to joining The Strong Firm P.C., she was an associate attorney at Hughes Watters & Askanase, L.L.P. in Houston where she represented business clients in civil litigation, real estate and bankruptcy matters. She received her Juris Doctorate from the University of Houston Law Center. Kristen is licensed to practice law in the State of Texas and in the U.S. District and Bankruptcy Courts for the Northern, Western, Southern, and Eastern Districts of Texas***

Kristen Bates

Associate