Fall 2016

StrongPoints

Vote!

More (Not Less) of Us Need to be Shaping the Future!

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 a Juris Doctorate, cum laude, from South Texas College of Law, and a B.S. in Business Finance from 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 Woodland Area Chamber of Commerce and currently serves on the Board of Leadership Montgomery County.* **bstrong@thestrongfirm.com**

In the midst of the U.S. presidential election period, it seems like a very simple task for each of us to take the time to get educated and vote. Each time we step into a voting booth, we honor the sacrifice of those that made our democracy possible, so when the polls open on Nov. 8, 2016, do not skip your opportunity to help decide our future.

A study published by the U.S. Department of Commerce in July 2015 detailed voting patterns in the United States over a 36-year period (See: *Who Votes? Congressional Elections and the American Electorate: 1978-2014*). The results are telling. In general, voting rates (the percentage of the population voting) have fallen regardless of how you look at it (see report for various measures). According to the report, the voting rate dropped from a high of nearly 70 percent in the 1992 presidential election year to a dismal 41.9 percent in the 2014 non-presidential election year. Historically, the voting rate in presidential election years (like 2016) increases by nearly 20 percent (i.e., the voting rate for 2012 was 61.8 percent for a presidential election year followed by 41.9 percent for 2014 a non-residential election year).

The report also shows a pattern of voting rates increasing with age. In every national election since 1978, voting rates for 18- to 34-year-olds have trailed voting rates for older Americans. Simply put, younger people appear to vote at a lesser rate, which seems counter intuitive because it is my belief that younger people have the responsibility of protecting their future.

So what does this mean for those of us living and working in The Woodlands, Texas? Local elections in November will get a boost from the presidential election in the number of voters. As politics become more polarized and political views more extreme, it is my wish that people educate themselves on the true issues and facts at the local, regional, state and federal level. Younger people need to become more, not less, involved in the issues of today as they will be their issues tomorrow. Only with higher levels of fact-based information and involvement will our community and country continue to be the greatest place on earth.

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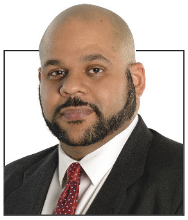

When is a Texas Business Required to Register in a Different State

Eric R. Thiergood, Sr., *Income Shareholder, joined The Strong Firm P.C. in 2005. Eric graduated from South Texas College of Law and is licensed to practice in Texas and in the United States Federal District and Bankruptcy Court for the Southern District of Texas. He lived a large portion of his life in Asturias, Oropesa Del Mar and Madrid, Spain and is fluent in Spanish.* **ethiergood@thestrongfirm.com**

Social media and e-commerce has allowed even the smallest of small business retailers to market and sell goods outside their home state. In fact, many "one-person shop" retailers that rely solely on distribution through popular e-commerce platforms, such as eBay and Etsy, attribute the majority of total annual revenue to sales made outside their respective home states. And with so many of our Texas-based small and midsize clients following suit – and even marketing through social media sites like Facebook, Twitter and Instagram – the question we are increasingly asked is, "Do I have to register my business in California [insert applicable state] if I am doing business in that state?" The answer, like many legal questions, is not a firm "yes" or a solid "no," but rather a tepid "it depends."

Each state has very specific laws and regulations outlining when a company transacting business in that state (the "Host State") through an entity that was not formed in the Host State (a "Foreign Entity") is required to register the Foreign Entity in the Host State. In Texas, these regulations are contained in Section 9.001 of the Texas Business Organizations Code (the "Code"). While each Host State's rules differ slightly, most states' regulations on foreign registration are fairly similar to that of the Texas Code.

Unfortunately, the Texas Code does not explicitly define what "transacting business" encompasses, leaving open the question of when registration is actually required. The Code does, however, in Section 9.251 provide a list of activities that do not, in and of themselves, constitute transacting business in Texas. Therefore, an entity does not have to register in Texas if the following are the **only** activities that take place in Texas: filing a lawsuit, maintaining a bank account, entering into a contract with an independent contractor, collecting a debt, conducting an isolated and non-repeating transaction within 30 days, or only owning real estate in Texas.

On the flipside, activities likely to be deemed as transacting business in Texas and requiring registration include: maintaining an office or having ongoing operations in Texas, having employees in Texas, having items that are delivered to customers in Texas using company-owned vehicles, maintaining inventory in Texas or manufacturing items in Texas. As with the aforementioned list, these activities are not all-inclusive or dispositive, but rather provide certain factors that could be used when determining whether an entity is transacting business in Texas and, by extension, whether said entity needs to register in Texas.

The potential penalties for failing to timely register your foreign entity in the Host State can be significant. As such, it is critical if your business is operating in a state other than the state in which it was formed that you discuss with your attorney whether or not those activities trigger additional registration requirements. At the Strong Firm, P.C. we pride ourselves in helping many of our clients navigate these sometimes nebulous registration requirements, and, when necessary, complete the foreign registration process. We would be more than happy to assist you in any of your registration needs.

Entity Formations for the Professional

Brian Albert, *Associate Attorney, joined The Strong Firm P.C. in 2012. His areas of practice include oil and gas, commercial real estate, business law and contracts, and trademark law. He received his Juris Doctorate from the University of Houston Law Center and a B.S.in Business Administration with a specialty in Finance from American University in Washington, D.C. He has previously worked for Baker Hughes, Inc.'s and Hewlett-Packard's in-house legal departments.* **balbert@thestrongfirm.com**

When an entrepreneur first sets out to establish a registered business, the initial consideration is often first choosing the type of entity: corporations, partnerships or limited liability companies (LLC). Each entity has specific liability protections and tax advantages. When the entrepreneur happens to be a licensed professional seeking to open a new practice, however, they also need to consider the laws governing professional entities.

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Arbitration: Hoskins' Choice

Royce Lanning, *Associate Attorney, joined The Strong Firm, P.C. in 2013. He received his Juris Doctorate from the University of Hawaii, William S. Richardson School of Law and obtained immediate trial experience as a Deputy Prosecuting Attorney with the Department of the Prosecuting Attorney, Maui. He is licensed to practice law in the State of Texas, the State of Hawaii and all Federal District Courts in Texas.*
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Courts have historically been protective of arbitration awards and reluctant to overturn them. However, the level of deference to arbitration awards was significantly increased by the Texas Supreme Court's recent decision in *Hoskins v. Hoskins.*[1] The court expressly overruled two common law bases for challenging arbitration rulings and found that an arbitrator's ruling[3] could not be overturned even if it manifestly disregarded Texas law, unless a contract's arbitration provision expressly limited the arbitrator's authority to the application of Texas law.[3] This ruling means businesses must carefully consider their goals before deciding to include an arbitration provision in their commercial contracts and choosing the language used in that arbitration provision.

Arbitration is often touted as a more efficient and cost effective means of solving legal disputes. Many commercial contracts have a general provision calling for all related disputes to be resolved by arbitration. The goal of adding this provision is to ensure that no dispute is subject to all of the costs and delay associated with litigating in the court system. Viewed in this light one might think that all contracts should contain an arbitration provision. Who doesn't want faster, cheaper resolution of disputes so we can focus on running our business?

However, the decision in *Hoskins* means that unless the arbitration provision expressly includes limitations on the arbitrator's authority to decide a dispute, the arbitrator can resolve the dispute in any manner they deem appropriate. For example, an arbitrator could issue an award for a "claim" that is not recognized under Texas law. Accordingly, an arbitration provision may introduce uncertainty in the contract and open the business up to liabilities and risks that were never even considered when negotiating the contract.

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Personal Guarantees for Commercial Leases:

A Negotiation Inside a Negotiation

Wendy Lambie, *Associate Attorney, joined The Strong Firm, P.C. in 2013. Wendy received her Juris Doctorate from South Texas College of Law and is licensed to practice law in the State of Texas and in the United States Federal District Court for the Southern District of Texas. During her career, she has gained valuable experience with Houston area firms, focusing her practice on estate planning and probate. In addition, she has in-depth experience in oil and gas matters, with special emphasis on title issues.* **wlambie@thestrongfirm.com**

When the economy is down, it is no surprise that commercial tenant defaults increase. During those periods, it also is not surprising to see landlords become more firm about requiring personal guarantees of commercial leases to hedge against a default. Typically, the individual signing a commercial lease is doing so in their capacity as an officer of an entity and has no personal legal obligation. If the entity goes out of business, or worse, into bankruptcy, the landlord's only remedy is to file against the failed entity, which likely won't result in much recovery for the landlord. Enter the personal guarantee, which requires an individual to promise their personal assets (in addition to the entity's assets).

In the current economic climate, unless a tenant is a major corporation with very stable financials, few landlords will negotiate a lease without a personal guarantee; however, these guarantees can be negotiated to provide terms reasonably acceptable to both landlords and tenants. The key is finding the middle ground that gives the landlord the reassurance it needs while allowing the tenant to feel comfortable as well.

The most common ways to modify a full personal guarantee are: (1) a cap on the total amount of liability for the guarantee; (2) a cap on the length of time for the guarantee; (3) a sliding scale where the amount of liability starts at the full liability of the lease and over time gets "reduced for good behavior"; or (4) a sharing of liability percentages between more than one person.

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Entity Formations for the Professional

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In Texas, depending on the professional license and services performed, professionals may have the option to choose between PCs (professional corporations), PLLCs (professional LLCs), and PAs (professional associations), and there are certain critical requirements for each entity type, but who exactly qualifies as a "professional" under Texas law?

Generally speaking, a professional is a person that provides a "professional service," which is defined by the Texas Business Organizations Code as "any type of service that requires, as a condition precedent to the rendering of the service, the obtaining of a license in this state, including the personal service rendered by an architect, attorney, certified public accountant, dentist, physician, public accountant, or veterinarian." Such professionals are prohibited from rendering services in Texas through a standard corporation or an LLC and instead must operate through a professional entity, such as the aforementioned PC, PLLC, or PA. Conversely, people who do not qualify as professionals may not operate through a professional entity.

Additionally, while most licensed professionals in Texas may choose between the professional entity types, certain professional entities are limited to certain professions. For example, PAs may only be used by doctors of medicine, doctors of osteopathy, podiatrists, mental health professionals (such as psychologists, family therapists, and licensed professional counselors), optometrists, therapeutic optometrists, chiropractors, dentists, or veterinarians.

Beyond the choice of entity issues, Texas also limits the ownership and governance of professional entities, so the entrepreneur needs to consider proper structuring of their professional entity. In order to account for these requirements, you must have proper governing document prepared for your professional entity, which will ensure that co-owners and/or governing persons (if any), as well as outside companies and businesses (e.g., banks, insurers, etc.), understand what the internal rules are for the business. Altogether, this isn't much different than a standard, non-professional business, but special attention must be given to the formation and structuring of professional entities.

Arbitration: Hoskins' Choice

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While arbitration provisions still serve a valid strategic purpose, they should not be considered a proper provision for every contract. Businesses should carefully consider their goals before including an arbitration provision and consult with qualified counsel to ensure that proper language is used to outline the arbitrator's authority.

[1]2016 Tex. LEXIS 386; 59 Tex. Sup. J. 895; 2016 WL 2993929

[2]The first being gross mistake of the law (a mistake so significant as to imply bad faith or a lack of honest judgment) and the second being manifest disregard of the law (when the arbitrator recognized the law but chose to ignore or apply it incorrectly).

[3]*Id.* at *11-12

Personal Guarantees for Commercial Leases

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Another option is a landlord and tenant could agree on an alternative to a personal guarantee, such as: (1) a letter of credit; (2) an increase above the standard pre-paid rent; (3) an increase above the standard security deposit; or (4) a tenant's contributions to improvements.

Again, the key to this negotiation is to align the landlord and the tenant at a place where both are comfortable with the level of liability they are entering into under the lease. Both parties should evaluate their opinions on this matter in consultation with experienced legal counsel to negotiate a mutually agreeable guaranty.

Strong in Action

SUMMER 2016

The Strong Firm represents seller in the sale of a $2.1 million commercial property in Harris County.

The Strong Firm assists landlord client in negotiation of two office building leases.

The Strong Firm represents buyer in $1.1 million purchase of improved property in Liberty County.

The Strong Firm provides defense of a wrongful disclosure suit in connection with a home sale resulting in a settlement of less than 20% of the damages claimed by plaintiff.

The Strong Firm represents lender in $3.1 million commercial loan.

The Strong Firm assists accredited investor in the evaluation and due diligence of a potential pharmaceutical related investment.

The Strong Firm provides legal counsel to developer in the $1.2 million sale of an undeveloped tract of property.

The Strong Firm represents oilfield service related client in the negotiation and drafting of a multi-million dollar license and distribution agreement.

The Strong Firm defends client against a suit seeking an injunction prohibiting client from using their property for a commercial purpose.

The Strong Firm defends client in breech of contract claim ultimately settling case for 25% of stated contract price.

The Strong Firm obtains complete dismissal of the county's claims against client for covenant violations.

The Strong Firm assists client in negotiating an exclusive, multi-year distribution agreement with an international supplier.

We provide legal services in all of the following areas:

- Business Law and Contracts
- Financing, Trademarks, and General Corporate
- Corporations, Partnerships, and LLCs
- Real Estate
- Commercial Litigation
- Wills, Probate, Trusts, and Estates
- Mergers, Sales, and Acquisitions of Businesses
- Oil, Gas, and Energy
- International Business Investment

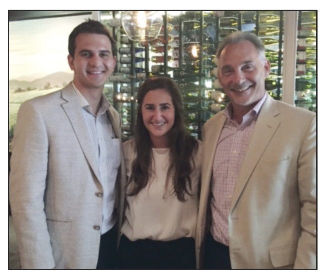
Bret L. Strong, Attorney, Founder, and Managing Shareholder;
Royce Lanning, Associate Attorney;
Brian Albert, Associate Attorney;
Wendy Lambie, Associate Attorney;
Eric R. Thiergood, Sr., Income Shareholder

Strong in the Community

Above. In June, Bret Strong joined 9 other cyclists to ride over 400 miles through Colorado's Rocky Mountains to support the **American Cancer Society**. Riding with Bret Strong (shown 3rd from right) on the H5 Cycling Team were Joe Schumacher, Rick Maires, Randy Keir, Josh Agnew, Chris Osborne, Dan Stoddard, Chip Brunk, Aaron Finch and Mike Michealis. The team raised $22,491.

Left. **In support of the Education for Tomorrow Alliance's** "Trivia Night" in August, The Strong Firm was a sponsor and volunteered for the event. Bret Strong, who served as MC as well as a sponsor, is pictured with Monica Bomkamp Enia, president of EfTA (left) and Ann Snyder, Ed.D., EfTA board member (right).

Right. The Strong Firm was a sponsor of **The Woodlands Area Chamber of Commerce's Chairman's Ball** in August themed "Havana Nights." Pictured are Royce Lanning with his wife Illima, and Eric Thiergood with his wife Ashleigh.



Left. The Strong Firm P.C. celebrated farewell happy hour at Crisp in The Woodlands to mark the end of a successful **summer program** with law clerk Ian Brown and law intern Alexa Vitucci, who are pictured with Bret Strong.

Right. In August, The Strong Firm P.C. attended the "Real Men of Montgomery County Style Show" held at Big Sky Barn benefiting **Assistance League of Montgomery County** and hosted by the **Conroe/Lake Conroe Chamber of Commerce**. We were proud to see Brian Albert step out as a fashion model!