Spring 2016 NEWSLETTER

The Strong Firm P.C. Attorneys — Strong Points

The Email Stalker Scam:
The New "Virus" Attacking Professional and Financial Firms

Table of Contents

By: Bret Strong

It used to be that the only protection professional and financial services organizations (i.e. law, accounting, real estate, title and financial firms) needed against "cyber-attacks" was an up-to-date antivirus software and training of staff against opening unfamiliar email attachments. Recently we have seen an unprecedented increase in frequency and sophistication of scam artists focused specifically on professional and financial services organizations.

The "Email Stalker Scam" is one of the most sophisticated frauds we have witnessed and is devastating to its victims. In this scenario, the scammers obtain access to an employee's email account at a professional or financial services firm, generally due to weak password or access protection, or the hacking of an email account or personal device. Once in, the scammer does not strike immediately. They wait and monitor communications of the unsuspecting victim, often for weeks, hoping to glean information about a significant financial transaction, bank account information, personal identity, relationship information and/or additional passwords to more valuable accounts.

Once they have valuable information to use for a big strike, the scammers recreate email accounts for all persons involved in a targeted financial transaction (varying the fake emails only slightly from legitimate email accounts to avoid detection). At the appropriate time, the scammers quickly and unknowingly take over email conversations with the victim using these fake email accounts. Having obtained a solid background on the particular transaction, the scammer easily leads the victim to believe they are continuing to conduct the legitimate business transaction. However, now the scammer is communicating on behalf of all parties in the deal except the victim.

When ready, the scammer promptly requests wire instructions, financial information, the sending of funds and accelerated handling of matters using familiar language and references from prior emails. The messages appear to be legitimately pushing toward closing a deal. Once the scammer has the funds and/or the additional information they need to access funds, tens if not hundreds of thousands of dollars are stolen.

We make three very important recommendations to our clients in this area:

- First, all professional and financial services organizations need to implement the most sophisticated electronic password verification and encryption systems available to protect their own and their clients' financial information.
- Second, strict procedures need to be put in place to monitor and modify external access, verifications and password protocols for all systems.
- Third, acquire insurance coverage for financial protection against potential claims in this area. Common insurance coverage likely do not cover these types of damages.

The Strong Firm stands ready to assist with advice in any of these areas and works closely with clients to protect against and pursue any claims resulting from such scam artists.

Bret Strong

__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

The Strong Firm P.C.
Two Hughes Landing
1790 Hughes Landing Boulevard
Suite 200
The Woodlands, TX 77380
Phone (281) 367-1222
Fax (281) 210-1361
bstrong@thestrongfirm.com

Visit us at: **www.thestrongfirm.com**

To be a Manager-Managed or Member-Managed LLC: That Is the Question

Eric R. Thiergood, Sr.

By: Eric R. Thiergood, Sr.

Choosing the best management structure for your Texas LLC

Choosing to operate your business through properly formed and managed entities, such as a corporation or a limited liability company (an "LLC"), is one of the most effective ways to limit your personal liability for the debts and obligations of the business. Texas began permitting the formation of LLCs in 1991, and since that time, LLCs have quickly surpassed corporations and limited partnerships as the most common type of new entity formed in Texas. The flexible management and operations structure of an LLC make it an ideal fit for many businesses, particularly small businesses that do not require the rigid management structure of a corporation or the strict limitations in a limited partnership.

While an LLC can have officers like a corporation, it is not required to do so. Statutorily, an LLC is managed by either its members (the owners of the LLC) or by its managers (persons elected by the owners to manage the LLC). The managers can be members themselves or a third party who has no ownership at all in the entity. The Texas statutes regarding the operations and structure of an LLC are intentionally flexible regarding the management of the entity. There are a number of factors that help determine whether the LLC should be member-managed or manager-managed. The following factors could make the manager-managed option the better choice for your LLC:

a) **Anonymity regarding the actual ownership of the LLC when forming the entity and filing the annual Texas Franchise Tax Public Information Report ("PIR").** In a manager-managed LLC, only the managers (and not the members) are listed in the Certificate of Formation and the PIR.

b) **Flexibility regarding conveyances of ownership.** As owners are not named in the formation and annual reporting of the LLC, changes in ownership are not reported.

c) **Ability to have nonmembers as managers of the LLC.** Since a manager does not have to be an owner of the LLC, having the entity be manager-managed gives the LLC the flexibility of hiring a non-owner third party to serve as the manager of the entity.

As with any decision regarding the formation and operations of an entity, it is critical that anyone considering forming a new entity meet with a corporate attorney who can discuss the pros and cons of each of the entity types, as well as the management options permitted within the entity type you ultimately choose.

***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

Understanding Office Actions

Brian Albert

By: Brian Albert

The first step in applying for a federal trademark is preparing and filing your application with the U.S. Patent and Trademark Office (USPTO). Once filed, it will be assigned to an examining attorney for review, and this person will act as the single, preliminary decision-maker for your application. If more information is required, or if there are problems with your application, the examining attorney will issue an official letter, known as an Office Action. This notifies you of the need for additional information or the details of the issue(s). While not uncommon, Office Actions can be a tremendous hurdle to the successful registration of your trademark, and your application will be stalled until you respond to the Office Action.

It is important to note there are two types of Office Actions: (1) a non-final Office Action, which informs you of an issue for the first time; and (2) a final Office Action, which is sent if your response to a prior Office Action did not adequately respond to or resolve the issue that was identified. For purposes of this article, we'll focus on non-final Office Actions.

There are several reasons you might receive an Office Action, including, but not limited to: your application having technical errors (e.g., grammatical issues that cause the description to be unclear); inadequate samples (i.e., specimens) showing how the trademark will be used; a determination that your mark will likely cause confusion with an existing registered mark or with a previously applied-for mark; or you may be attempting to trademark something that cannot be trademarked, such as a generic or descriptive name for a product. Regardless of the reason, your response to an Office Action must address the problem(s) to the satisfaction of the examining attorney in order to proceed to publication and registration.

In most cases, you have six months from the mailing date on the Office Action to submit your response to the USPTO, and it is imperative that you respond in a timely manner as this date cannot be extended. If you miss the deadline, your trademark application will be considered abandoned. Due of this, and because the problems with

continued on page 4

Indemnity Provisions:
I'm Responsible for Your Mistakes?

Royce Lanning

By: Royce Lanning

All commercial contracts involve a certain amount of risk allocation between the parties. However, Texas courts have developed special rules for contract provisions that absolve one party of responsibility for its action by forcing another contracting party to pick up that cost. Specifically, the courts have found that waivers, releases and indemnity provisions (collectively known as "exculpatory clauses") must meet the Fair Notice Doctrine in order to be enforceable. The Fair Notice Doctrine requires that exculpatory clauses be conspicuous and expressly state the scope of the risk allocated. If an exculpatory clause does not meet these requirements, the risk will not shift regardless of the contract's terms.

Meeting the conspicuousness requirement means "that something must appear on the face of the [contract] to attract the attention of a reasonable person when he looks at it." The basic concept is that the courts will not use its authority to shift risk between parties when the exculpatory clause is hidden in the middle of the contract. Instead, the party seeking to enforce the exculpatory clause must show that the other party was aware of the exculpatory clause. This rule is generally satisfied by formatting the exculpatory clause in a way that draws attention to the language (e.g., bold text, italics, underlining, all caps) but can also be shown by presenting drafts showing the defending party made changes to the language in the exculpatory clause.

After establishing that the opposing party knew about the exculpatory clause, the enforcing party must also show that the provision expressly states the scope of the risk shifted. Again, the court's concern is that vague and/or broad language may not be used to seek indemnity or waiver of liability for situations that were never envisioned by one or both parties. Accordingly, the courts have found that "a party seeking indemnity from the consequences of that party's own negligence must express that intent in specific terms within the four corners of the contract." Exculpatory clauses should avoid language that simply calls for indemnity or waiver of a party's liability and instead expressly state what type of liability (e.g., negligence) is covered and the scope of that coverage (e.g., mutual/joint negligence or the sole negligence of the enforcing party). This specificity is intended to allow the burdened party an opportunity to properly weigh the level of risk they are willing to incur.

Texas has developed the Fair Notice Doctrine to protect unsuspecting parties from taking on more liability than they anticipated. However, the Fair Notice Doctrine is not shared by every state. Contracts prepared outside of Texas often do not meet these requirements and may not be enforceable under Texas law. Whether you are the enforcing party or the burdened party, it is a good idea to have exculpatory clauses reviewed by a knowledgeable Texas attorney.

---

[1] *Dresser Ind., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993).
[2] *Dresser Ind., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d at (quoting *Ling & Co. v. Trinity Sav. & Loan Ass'n*, 482 S.W.2d 841, 843 (Tex. 1972).
[3] *Enserch Corp. v. Parker, 794 S.W.2d 2, 8 (Tex.1990); Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705, 707-08 (Tex.1987).

***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.*
rlanning@thestrongfirm.com

Seller's Disclosure Notice:
When in Doubt, Disclose!

Kyla Wilder

By: Kyla Wilder

Whether you are selling or purchasing a property, a Seller's Disclosure Notice, a form promulgated by the Texas Real Estate Commission (TREC), will be exchanged between the parties to the transaction. Two questions that frequently arise in practice are whether certain conditions need to be disclosed by a seller completing the Seller's Disclosure Notice, and whether a buyer can prevail in a lawsuit against a seller for failing to disclose certain conditions relevant to the property. Unfortunately, there is not a black and white answer to these commonly asked questions, and the seller's duty to disclose certain conditions depends on the facts and circumstances surrounding each case. This article is intended to provide a basic framework of the legal requirements related to disclosing property conditions in a residential real estate transaction.

If you are selling your property, the legal standard for completing the Seller's Disclosure Notice as set forth in the Texas Property Code obligates a seller to disclose any conditions that "materially affect the health or safety of an individual." The notice also should be completed "to the best of seller's belief and knowledge as of the date the notice is completed and signed by the seller." Thus, a seller **is** required to disclose known conditions that may pose a material risk to the potential buyer's health, safety and welfare. Some of these conditions include, but are not limited to, history of wood-boring insects (e.g., termites) and related treatments, previous fires or flooding, and lawsuits or related legal activity that affect the condition of the property at issue. The seller **is not** responsible for disclosing conditions they are not aware of, including conditions that could have been discovered by a seller during routine maintenance of the property. A lazy, absent or negligent property owner will not be punished for conditions they were not actually aware of at the time of completing the Seller's Disclosure Notice.

continued on page 4

Texas' Open Carry Gun Law

Wendy Lambie

By: Wendy Lambie

House Bill 910 ("HB 910") became effective January 1, 2016. HB 910 amends the Alcoholic Beverage Code, Code of Criminal Procedure, Education Code, Election Code, Family Code, Government Code, Health and Safety Code, Labor Code, Local Government Code, Occupations Code, Parks and Wildlife Code, and Penal Code to authorize a person who is licensed to carry a concealed handgun to also openly carry a holstered handgun.

Here are some important facts to know:

- Not everyone can open carry. If you already have a valid concealed carry license (CHL), you do not need to do anything further. You also are now licensed to open carry if you would prefer. You must have a CHL (now basically just a firearms license) to open carry. A CHL is now referred to as an LTC (license to carry).
- The eligibility criteria to obtain a handgun LTC has not changed. Applicants must be 21 years old, pay a $140 fee, clear a criminal record check and complete a four-hour training course.
- You must use a belt or shoulder holster to openly carry a handgun, even in a vehicle. The handgun must be in a holster while you are driving or otherwise stored from plain view.
- You cannot be arrested or stopped solely for open carrying. However, you can be asked to show your LTC.
- Posting a Penal Code 30.06 sign only means no concealed carry on premises but open carry is allowed. Posting a Penal Code 30.07 sign only means no open carry on premises but concealed carry is allowed. Posting both Penal Code 30.06 & Penal Code 30.07 signs means neither concealed carry nor open carry are allowed on the premises.
- You can generally open carry with an LTC unless it's been prohibited by the private property owner. If you are asked to leave and refuse, you could be charged with criminal trespass and/or unlawful carry.
- Schools, hospitals, sporting events, and nursing homes are still gun-free zones.
- You cannot carry a handgun under any circumstance into an establishment that derives 51 percent of its revenue from alcohol.
- In an airport, licensed gun owners can display guns in the public areas only, which typically includes baggage and ticket areas, garages, and sidewalks. You cannot open carry into security checkpoint areas or boarding areas.
- It's still legal in Texas to carry a long gun without a license. However, police have the duty to stop and ask questions. HB 910 only pertains to handguns, not long rifles.

Sources: Texas House Bill 910, Open Carry Texas, The Texas Rifle Association, The Texas Restaurant Association, Texas Department of Public Safety, Central Texas Gun Works

***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

Understanding Office Actions

continued from page 2

your application may be potentially difficult to resolve, proper legal advice should always be sought before responding to an Office Action. Understanding Office Actions and the nuances and proper procedures for adequate Office Action responses can be the difference between registration and rejection.

***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

Seller's Disclosure Notice

continued from page 3

If you are purchasing a property, a prospective buyer should exercise due diligence and obtain a third-party inspection, as well as a termite/wood-boring insect inspection prior to moving forward with the purchase. In most contracts, a buyer and seller agree to an Option Period, usually 10 days, upon which a buyer is entitled to perform third-party inspection(s) and negotiate any necessary repairs based on the inspection reports. It is in a buyer's best interest to obtain as much information from third-party inspection resources as possible before moving forward with a purchase of real property. Do not fall into the common trap of relying on a Seller's Disclosure Notice in lieu of conducting thorough due diligence on the property's condition.

***Kyla Wilder**, Associate Attorney, joined The Strong Firm in 2013. A Texas native, she spent 8 years of her childhood living in Dubai. In 1999, Kyla's family relocated back to the U.S. in The Woodlands where she attended The John Cooper School. She received her undergraduate degree from Texas A&M University and earned her law degree from South Texas College of Law. During her 2nd summer of law school, she studied abroad at Charles University School of Law in Prague, Czech Republic.*
kwilder@thestrongfirm.com

The Strong Attorneys in Action

Winter, 2015/2016

The Strong Firm defended client that provided materials for oilfield service companies by negotiating a settlement payment equal to only 8% of the value of the materials sued upon.

The Strong Firm assisted buyer/borrower in $5 million commercial property acquisition loan.

The Strong Firm provided legal counsel to borrower in $5.3 million commercial loan modification.

The Strong Firm represented buyer in a $2.5 million acquisition of a communication services company.

The Strong Firm assisted developer in formation of a commercial office condominium project in Fort Bend County.

The Strong Firm represented developer in a $750 thousand acquisition of a commercial property for retail development in Fort Bend County.

The Strong Firm represented borrower in a $2.4 million refinancing and equity withdrawal of a Houston commercial property.

The Strong Firm assisted client in $7 million membership interest redemption.

The Strong Firm represented a developer client in the sale of several commercial tracts via 3 separate sales totaling $8 million.

The Strong Firm negotiated a settlement in client's favor obtaining a substantial reduction on a vendor's claim for materials provided to a local oilfield service company.

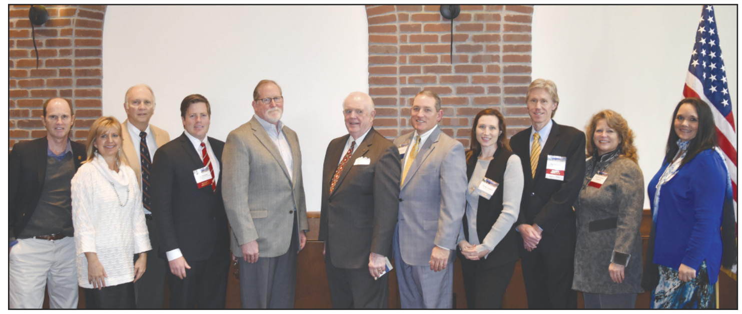
The Strong Firm represented tenant client with regards to negotiation of large restaurant space for client's 2nd location.

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

From left: **Royce Lanning**, Associate Attorney; **Wendy Lambie**, Associate Attorney; **Bret L. Strong**, Attorney, Founder, and Managing Shareholder; **Eric R. Thiergood, Sr.**, Income Shareholder; **Kyla Wilder**, Associate Attorney; **Brian Albert**, Associate Attorney.

The Strong Attorneys in the Community



Above. Wendy Lambie of The Strong Firm PC (4th from right) has been elected to the board of directors of **The Commercial Real Estate Association of Montgomery County (CREAM)** as second vice president officer.

Above. The Strong Firm PC toured **Saddle River Range** and held its staff holiday party there after construction was complete. Pictured from left are Beth Kovacs, Lisa Prado, Eric Thiergood, Renee Glazer, Bret Strong and Brian Albert.

Left. Eric Thiergood of The Strong Firm PC reads to the 4th grade class at **Roth Elementary** during story time.

Above. During "No Snack November" The Strong Firm PC office staff used its snack budget to make donations to **Children's Safe Harbor**. Jessica Caldwell (left), Bret Strong (2nd left), and Laura Davis (far right) presented the collection to Dr. Victoria Constance (2nd right) of Children's Safe Harbor.