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StrongPOINTS

FRANCHISING: THE KEYS TO SUCCESS

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**

Everybody wants to be a part of the "next big thing." Today's consumer-driven economy pushes out new retail market concepts daily and they fail just as often. If timed correctly, an entrepreneur can ride the wave of a new retail concept to a very profitable and sustainable franchise-based business. Some franchise concepts last what seems like forever (McDonald's), while others never get off the ground.

Having represented franchisees and franchisors in a wide array of retail markets, from fitness facilities to frozen yogurt, we've seen the good, the bad and the ugly of these relationships. The agreements behind franchises are every bit as complicated and complex as the markets in which they compete. Every franchise arrangement should be reviewed in detail with legal counsel before venturing into these waters, but we have found three key questions to be critical to every deal:

- **Does the franchise model work for both parties?** The first and most important matter is deciding if the business model provides a reasonable return for both parties, as otherwise the franchise will never last. The general economics of the concept, from building out of the location to product and/or service delivery, need to be analyzed in detail to make sure there is sufficient profit on both sides of the ledger to support the franchise business for the long term.
- **What are the specific deliverables of the parties?** It is critical to understand what the franchisor will be providing and what the franchisee must deliver in return. The most obvious is the franchise fee due from the franchisee to the franchisor for supporting the concept. But what other deliverables are there in the deal? What specific marketing has to be provided? What materials? What services? What are the performance metrics for the franchise? The more detail the better in this area in order for everyone to understand their respective roles and responsibilities in exchange for payment of fees.
- **What remedies are available if it doesn't work?** Most franchise agreements, for the stability of the business, last a long time (up to 10 years or more). Specific remedies if one party fails to perform all or a portion of their responsibilities must be clear from the very beginning. If the franchisor doesn't provide the promised support, how does the franchisee receive compensation or get out? If the franchisee doesn't perform, how does the franchisor step in to protect its interests?

These are just a few of the more salient points when looking at franchising. Please give us a call if you are considering franchising or are in a current franchise arrangement that you need to better understand. We can help you be successful in your franchising venture!

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I Just Learned My Entity was "Forfeited" by the Texas Secretary of State

What Does that Mean and What Do I Do Now?

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While forming an entity (a limited liability company or a corporation) to shield a business owner from personal liability is important, it is equally important that the entity be properly and regularly maintained to preserve the protection provided by your new company. Failure to timely file a company's Annual Franchise Tax Report and Public Information Report is the most common reason an entity is forfeited in Texas. A forfeited status with the Texas Secretary of State means the business is no longer permitted to transact business in the state of Texas. Additionally, the forfeiture of an entity's good standing means:

- **Company is not permitted to file a lawsuit.** An entity must be duly formed and in good standing with the State of Texas in order to file and maintain a lawsuit in a Texas court. Forfeiture, however, does not prevent the company from being sued and named as a defendant in a lawsuit.
- **Problems with Banks and Loans.** Lenders may opt to close or suspend an account of a company that has been forfeited as it is not lawfully permitted to transact business in Texas while forfeited. Also, most loans contain covenants that require the company to remain in good standing through the term of the loan. The forfeiture of the entity's status is typically cited as an event of default under the entity's loan.
- **Risk losing the company's name.** Once an entity has been forfeited, the company's name is available for use by an other newly formed entity. If another entity forms using the forfeited entity's name, the forfeited entity loses its right to that name via the Texas Secretary of State.

Fortunately, the steps to reinstate an entity that has been forfeited are relatively straight forward so long as not much time has passed since the forfeiture. The longer an entity remains forfeited, the more challenging the reinstatement process is and the more risks the forfeited business and owner face. At The Strong Firm, P.C., we regularly assist clients whose entities have been forfeited for various reasons. If you find yourself in the same position, give us a call and we will be glad to assist you in reinstating your entity.

Effectiveness of Legal Fees Provisions in Contracts:

What is a Prevailing Party?

Laura F. Dumas, *Of Counsel, 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. She also handles corporate governance and business disputes. She is currently licensed in California, and in Federal Court for the Northern District of California.* **ldumas@thestrongfirm.com**

Contracts typically contain provisions outlining what happens if one of the parties does not fulfil his or her obligations. These provisions often include arbitration or other methods to resolve disputes, and frequently provide for the recovery of attorneys' fees if legal action becomes necessary when a deal goes south. But how are those provisions drafted? How likely is it that you can really recover your fees if you have to sue (or defend yourself) under a contract?

Provisions are commonly worded to provide for the recovery of attorneys' fees if you are the "prevailing party" in any legal proceeding. However, determining who is the prevailing party is not as straightforward as it sounds. Courts vary greatly in their interpretation of the term, and it is often difficult to predict how a judge or jury might view it. For example, in one Texas Supreme Court case, the court found that the defendant real estate developer had breached the contract, but nevertheless the plaintiff builder was not the "prevailing party" under the contract and was not entitled to attorneys' fees[1]. Similarly, a party who successfully defends a lawsuit may not be considered the "prevailing party," depending on how the

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How to Avoid Having Undue Influence Invalidate Your Parent's Will

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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If your elderly parent has no will, it can be difficult to make them understand why they need one. Without a will, the estate passes according to the state's laws of inheritance. This means certain types of property may be treated differently than others, which can result in certain loved ones being left out entirely. To avoid unfair results and unintended consequences, every adult should have a will. However, if you push too hard to get your mother or father to make a will, you could be exposing the will to a challenge in court where it might be ruled invalid.

It's important to remember that for a will to be valid it must be entirely voluntary. If a will is the product of coercion, compulsion or *undue influence* on the signer, the court has the authority to invalidate the will. The law is especially skeptical of efforts to have elders, who may not be of sound mind and body, execute wills at the urging of a caregiver who enjoys exclusive access and stands to benefit from the will. You might have the best of intentions in urging your parent to make a will (i.e. to prevent problems following their passing) but you could wind up arousing enough suspicion to provoke a fight challenging the will.

Here are a few tips to help you avoid a challenge to the will:

- **Tell your siblings.** Transparency is very important. Tell your siblings you are going to set up a meeting between your parent and an estate planning attorney. If possible, give them enough time to voice their concerns to you and your parent.
- **Don't hire your own lawyer.** Ask for a referral to a reputable attorney with whom you have never done business. Make it clear that you are not the client – your parent is.

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Commonly Negotiated Commercial Lease Provisions

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**

Commercial lease negotiation is a fairly large portion of my day-to-day activities, so at some point in the process I inevitably get a variation of the same questions: "Is this language change a deal breaker?" or "What are the most important provisions for us to 'win' on?" or "How bad is that for me if I accept that change?". This can be a hard question for an attorney since what is vital to one landlord or tenant may be of little consequence to another, especially with regards to day to day operations type provisions. However, there are some areas that attorneys can universally identify as important from a legal standpoint and are significant to both parties…just in slightly different ways.

From the landlord's perspective:

- **Liability** – We want to ensure the landlord's liability is limited to areas they control (i.e., outside the premises) and that a tenant's recovery does not extend beyond the asset of the building. Hand in hand with this liability limit is the indemnification from tenants for claims occurring inside the premises.
- **Default Provisions** – We scrutinize how much onus is on the landlord to provide notice or perform other acts before the tenant is in default. Any situation that would damage the building or its profitability should be events of default. There should be clear remedies for the landlord, such as lock out and acceleration of rents.
- **Assignment** – It is very common for lease assignments to require a landlord's consent and for good reason: land lords want to maintain control over the tenants in their building.

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Effectiveness of Legal Fees Provisions in Contracts

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provision is drafted and how the courts interpret it[2]. Moreover, if the right to recover attorneys' fees is predicated on a judgment or verdict, they will rarely be recovered as the vast majority of cases settle before trial.

To avoid these issues and other confusion, it is much better to provide that attorneys' fees may be recovered if one party must resort to legal action against another to enforce the contract. If you are presented with a contract with the prevailing party language already included, at minimum the term "prevailing party" ought to be defined under the contract so there is no uncertainty regarding the term's application should you find yourself in litigation. As in most cases, an ounce of prevention is worth a pound of cure. It is far better to have a qualified professional assist you with these and other potential issues *before* the deal is signed.

[1] *Intercontinental Group P'ship v. KB Home Lone Star L.P.,* 295 S.W.3d 650, 654-655 (Tex.2009)
[2] *Wal-Mart Stores, Inc. v. Sturges,* 52 S.W.3d 711, 729 (Tex.2000)

How to Avoid Having Undue Influence

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- **Don't sit in on discussions.** It serves no purpose for you to be in the room when your parent speaks to the attorney. If your parent can't handle the meeting alone, that may be sufficient evidence your parent lacked the mental capacity to make the will, which would be grounds to invalidate it.
- **Don't ask your parent to reveal the will's contents unless he or she is willing to tell everyone.** The less private knowledge you have about the details of the will, the better for its validity.

If your parent is in a nursing home or assisted living facility and you are the primary contact for your family, you occupy the classic position of the person who acts with undue influence. If you want your parent's will to be upheld in probate court, you need to behave in a way that's above suspicion. The best way to achieve that is by helping your parent locate *an experienced estate planning* attorney that they are comfortable with and then removing yourself from the process as much as possible.

Commonly Negotiated Commercial Lease Provisions

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From the tenant's perspective:

- **Liability** – Conversely, tenants wants to be liable only for those items that occur inside the premises under the control of the tenant. Tenants will want to be indemnified for causes of action that occur outside the premises, such as common areas.
- **Default Provisions** – As a tenant it is very important to receive notices for events of default and have a reasonable period to cure such default. Tenants also want to ensure there is a reciprocal option for notice and remedies related to landlord defaults.
- **Assignment** – Oftentimes a tenant can negotiate a permitted assignment to a party that meets certain predefined criteria. More importantly to review for (and delete) is any recapture clause where the landlord can terminate the lease if the tenant requests to assign the lease.

There are many key commercial lease provisions not discussed here, and this brief article is not intended to suggest other provisions are not important parts of a lease. However, these few are often the subject of heavy negotiation and should be considered both in context and with the assistance of an experienced real estate attorney.

Strong in ACTION

FALL 2016

The Strong Firm represents lender in $1.6 million commercial loan secured by a Houston petroleum fill up station and convenience store.

The Strong Firm represents buyer in the acquisition of Woodlands tutoring and academic training center.

The Strong Firm assists physician in partnership dispute regarding medical treatment spa.

The Strong Firm assists client in obtaining full payment following borrower's breach of Deed of Trust.

The Strong Firm advises client in creation of an irrevocable life insurance trust for estate tax planning.

The Strong Firm assists client in formation of a new entity structure for the planned opening of a new local business.

The Strong Firm assists client in formation of multiple entity structures in order to properly partition the client's real estate assets, business operations and personal assets.

The Strong Firm obtains a negotiated settlement recovering funds that were stolen from client as part of an email scam.

The Strong Firm defends client against a claimed breach of a partnership/joint venture agreement and unfair competition.

We provide legal services in all of the following areas:

- Real Estate
- Mergers, Acquisitions, and Sales
- Business Law and Contracts
- Corporations, LLCs, and Partnerships
- Trusts and Estate Planning
- Business Disputes
- Commercial Disputes
- Lending and Borrowing
- Trademarks
- Oil, Gas and Energy

Bret L. Strong, Attorney, Founder, and Managing Shareholder;
Royce Lanning, Associate Attorney; **Katherine Wilcox**, Associate Attorney;
Wendy Lambie, Associate Attorney; **Laura F. Dumas**, Of Counsel;
Eric R. Thiergood, Sr., Income Shareholder

Strong in the COMMUNITY

Above. Wendy Lambie and the rest of the **CREAM** sponsorship team accepting the 2016 award on Oct. 20.

Left. We were a presenting sponsor of the **Houston Business Journal's "The Woodlands Means Business"** power breakfast held Oct. 7. Pictured are Bret Strong with panelists Shannon Wilson of The Cynthia Woods Mitchell Pavilion and Dr. Debbie Sukin of Houston Methodist The Woodlands Hospital.

Right. The Strong Firm hosted a meet-and-greet for **Supreme Court Justice Eva Guzman** on Nov. 1.

Left. Bret Strong presented a "Connecting with Clients in The Woodlands" seminar at **The Woodlands Area Chamber of Commerce** on Sept. 27. Pictured from left are Valeri Maksym (JP and Associates Realtors), Bret Strong, Tammy Schroder (Veritas Title) and Lindy Johnson (Interfaith of The Woodlands).

Above. On Nov. 2 we hosted the **Montgomery County Legal Aid** Collaborative Volunteer Training Meeting.

Right. On Oct. 1, we served as a "Community Leader" sponsor of **The Woodlands Celebration of Excellence Gala** which honored the 2016 Hometown Heroes and benefitted **Interfaith of The Woodlands**. Bret Strong was recognized as a 2014 Hometown Hero. Pictured are Laura and Ryan Davis.