January 2013

MAKING YOUR INTERESTS OUR BUSINESS.™

FRIEDMAN & FEIGER
ATTORNEYS AT LAW

BANKRUPTCY + BUSINESS LAW + COMMERCIAL LITIGATION + CONSTRUCTION +CORPORATE +ENTERTAINMENT LAW + FAMILY LAW + HEALTHCARE +HOTEL & HOSPITALITY LAW INTELLECTUAL PROPERTY + LABOR AND EMPLOYMENT + PERSONAL INJURY + PRODUCTS LIABILITY + REAL ESTATE + SECURITIES + TAX + TRANSPORTATION + TRUSTS & ESTATES

Workplace Violence

It is difficult to start the New Year without reflecting on the violent tragedies of the past year: the Newtown, Connecticut shootings; the Aurora, Colorado theater shootings; and the two separate shootings in Wisconsin last September. In fact, since 1982, our country has had 62 mass shootings which occurred in 30 of our 52 states. Twenty-Seven of those shootings took place from 2006 to the present, and *seven of them took place in 2012*. Since 1982, *half* of these incidents took place in the workplace. In addition, more than three quarters of the guns used were obtained legally in these incidents. However, not all workplace violence involves the use of guns – and this is something that all employers must keep in mind.

The United States' Occupational Safety & Health Administration's ("OSHA"), definition of violence states: "Workplace violence is any act or threat of physical violence, harassment, intimidation, or other threatening disruptive behavior that occurs at the work site. It ranges from threats and verbal abuse to physical assaults and even homicide. It can affect and involve employees, clients, customers and visitors."

According to OSHA, the best protection employers can offer their employees is to have a "zero-tolerance policy toward workplace violence against or by their employees." OSHA requires employers to provide a safe and healthful workplace for all its employees. *See* The *Occupational Safety and Health Act's General Duty Clause*. OSHA provides some excellent safety recommendations for employers to incorporate into their employee handbooks along with a "zero-tolerance policy toward workplace violence." OSHA recommends that employers provide safety education for their employees so every employee is clear on what conduct is not acceptable. OSHA also suggests that employers secure their workplace by installing video surveillance, extra lighting and alarm systems. OSHA also believes that providing employees with badges or electronic keys also increases employee safety. Most importantly, employers should have an open-door policy for employees to report any incidents of violence without any repercussions to that employee.

OSHA further states that employees can also contribute to a safe environment. Employees can attend personal safety training courses where they can learn how to recognize, avoid or diffuse potentially violent situations. Employees should be encouraged to report to supervisors any concerns they may have about their safety or security at work, and employees should be encouraged not to enter any location where they may feel unsafe.

As I mentioned earlier, not all workplace violence involves guns, but because of Texas Senate Bill 321, commonly known as the "Employee Parking Lot Bill," that went into effect in September of 2011, Texas employers have an additional duty to amend their workplace violence policies to incorporate those employees who legally carry and store their owned guns in their vehicles while they are at work. In short, this Texas law states that an employer cannot prohibit an employee who has a concealed handgun license or who "otherwise lawfully possesses a firearm" from storing their weapon "in a locked, privately owned motor vehicle in a parking

(Continued on page 3)

INSIDE

In The Spotlight: Shauna Izadi

Your Tenant Is Late With Rent – Now What?

Unless a written lease or a written agreement provides for a shorter or longer notice period, a landlord must give at least three days' written notice to vacate the premises before filing a forcible detainer suit against the following categories of tenants: (1) a tenant who has defaulted or held over beyond the end of the rental term or renewal period under a written lease or oral rental agreement; (2) a tenant at will or by sufferance; and, (3) a tenant of a person who acquired possession by forcible entry. *See* Tex. Prop. Code § 24.005(a); Tex. Prop. Code § 24.005(b); *see Effel v. Rosberg*, 360 S.W.3d 626, 631 (Tex. App.--Dallas 2012, no pet.) (because tenancy was one at will, 10 days notice to vacate was sufficient under § 24.005(b)); and Tex. Prop. Code § 24.005(c). There are no specific requirements under Texas law for the content of a notice to vacate, but it must clearly state the landlord's demand for possession. *See* Tex. Prop. Code § 24.005. If the property or the lease is subject to federal housing law, however, applicable federal regulations may govern the required content of the notice. *See* 24 C.F.R. 247.4. The notice should be clear as to whether the landlord intends to terminate the lease, or only the tenant's right to possession. Carelessly drafted notices may inadvertently terminate any right to unaccrued rentals. There are other rules that must be adhered to along with the terms of the lease agreement. It is important that you know the terms of your lease and confer with your attorney regarding the proper manner in providing notice to recover your outstanding rent, attorneys' fees, and to lawfully evict your tenant.

Shauna Izadi can be reached at (972) 788-1400 or e-mail her at sizadi@fflawoffice.com

Bankruptcy Preferences By Ryan Lurich

What do you do if you receive a letter from a bankruptcy trustee demanding that you return certain payments made for goods or services? Known as "preferences," such claims are a problem because a good faith and innocent recipient may have to refund payments received from a bankrupt debtor before the bankruptcy filing.

Preference law is strict. A trustee must prove six elements to recover the payments made: (1) a transfer of an interest of the debtor in property; (2) to or for the benefit of a creditor; (3) for or on account of antecedent debt; (4) made while the debtor was insolvent; (5) made on or within 90 days before the date of the filing of the bankruptcy petition; and, (6) that enabled the creditor to receive more than it would otherwise have received if the transfer had not been made and the case had proceeded under Chapter 7. A preferential transfer may include money, property, or lien rights.

Thankfully, for the creditor in the goods and services situation, some defenses exist. Even if the trustee can prove all of the preference elements above, three primary defenses still exist: (1) contemporaneous exchange; (2) subsequent new value; and, (3) ordinary course of business.

The contemporaneous exchange defense protects the simultaneous payment by the debtor for goods or services that are provided at the same time. A COD transaction is an example.

The subsequent new value defense reduces the potential preference liability by the amount of goods or services provided to the debtor ***after*** the preferential transfer. This defense encourages creditors to continue doing business with the debtor prior to bankruptcy.

The ordinary course of business defense protects payments that are either consistent with the historical business relationship or conform to the typical industry standard. This defense is often met if the preferential payments correspond with the invoice amounts and due dates.

Here are some tips if confronted with a customer that you believe may be filing bankruptcy:

1. Take the Money: You should always accept payment. Preferential transfers are only voidable if a bankruptcy is actually filed and the preference standard is a difficult standard to meet.
2. Start With a Deposit: A deposit allows you to claim that it was partially secured, perhaps avoiding, the element that the payment allowed the creditor to receive more than it should have in a Chapter 7 case.
3. Go COD: Cash on delivery turns a credit transaction into a substantially contemporaneous exchange so long as the debtor pays at the time you provide the goods or services.
4. Use Broad Contract Terms: Use broad contract terms that allow different types of payment so that any continued payment by the debtor before bankruptcy will be considered in the ordinary course of business
5. But Don't Change Things Too Close to Bankruptcy: Changing the payment terms too close to a bankruptcy filing could be construed as outside the normal course of business.

The foregoing are general comments in order to provide you with some basic information regarding preferential payments. For specific legal advice, always consult a lawyer.

Ryan Lurich can be reached at (972) 788-1400 or e-mail him at rlurich@fflawoffice.com

Continued from Page 1

lot, parking garage or other parking area the employer provides for employees." Although there is a provision in Senate Bill 321 that states that "an employer is immune from liability for injury or death involving a firearm that an employee brought to work," there is, however, disagreement in the legal community whether Senate Bill 321 provides an employee the right to sue for a private cause of action against their employer.

In light of Senate Bill 321, employers should consider implementing more stringent pre-employment background checks as well as increase their vigilance of employees. Without question, employers must require any employee who has a Concealed Handgun License to inform them of that license and provide them with the documentation that shows they are entitled to carry a firearm. Employers also must seriously consider a quick termination for any employee who exhibits the potential for violent behavior.

It is my hope that in 2013 and going forward, that all violent acts, not just in the workplace, decrease in our country and in our world, while acts of kindness dramatically increase by and for all of us.

Larry Friedman can be reached at (972) 788-1400 or e-mail him at lfriedman@fflawoffice.com

Whose Life Insurance Policy Is It Anyway? By LeAnn Diamond

Texas Family Code §7.004 specifies that the Court shall specifically divide or award the rights of each spouse in an insurance policy. One area of property ownership that is subject to much confusion during the divorce process is whether life insurance policies are community property – and therefore subject to division upon divorce or separate property – and therefore not subject to division upon divorce. Upon divorce, a life insurance policy that is not part of an employee benefit plan under ERISA, can be characterized as either separate or community property, depending on the date the policy was issued and under what circumstances the policy was issued.

A life insurance policy provided as part of an employee benefit plan under ERISA is preempted by federal law from being characterized as community property. Consequently, if the Court awards rights in an insurance policy that is subject to ERISA to the non-owner spouse, such award cannot be upheld as it violates federal law. Thus, the life insurance policies owned by either spouse, or both spouses, must be characterized as either community property or separate property, and further identified as either being subject to ERISA, or not, when the estate is analyzed.

In the event the Court does not specifically award a life insurance policy in the Final Decree of Divorce, then a former spouse may assert an ownership interest in an undivided life insurance policy through post-decree proceedings under Texas Family Code §9.201. In any event, the failure to award ownership of a life insurance policy during the divorce proceedings can have a devastating effect where there is subsequently a claim for the life insurance benefits. Under this scenario, if the policy is owned by the community prior to divorce and ownership of the policy has not been determined, then neither spouse has the authority to change the beneficiary of the life insurance policy proceeds.

Texas Family Code §9.301 mandates that a former spouse of an insured may not receive life insurance proceeds even if that former spouse is the designated beneficiary of the life insurance policy unless the insured redesignates the former spouse as the beneficiary after rendition of the decree. If the life insurance policy has not been specifically awarded to either spouse, then the insured does not have the authority to change the beneficiary designation, or even redesignate the former spouse as the beneficiary of the policy. If the beneficiary designation is not effective under §9.301, then the life insurance proceeds will be paid to the alternative beneficiary or to the insured's estate if there is no alternative beneficiary. This mandated statutory result clearly affects undivided property rights in the life insurance policy that neither spouse (nor likely the legislature) probably anticipated.

Consequently, knowing what property exists and how it is owned is of utmost importance prior to and during divorce. When a life insurance policy is not properly identified, a property division may lose its negotiated or awarded value. Similarly, if a life insurance policy is not awarded to one spouse or the other, and post-decree beneficiary designations are not made prior to a claim for the policy proceeds, the unintended and unexpected result may be to deprive the surviving ex-spouse and/or children of the marriage the benefits of the life insurance proceeds. Don't forget to capture and account for these very important assets – your family's future may depend on it.

LeAnn Diamond can be reached at (972) 788-1400 or email her at ldiamond@fflawoffice.com

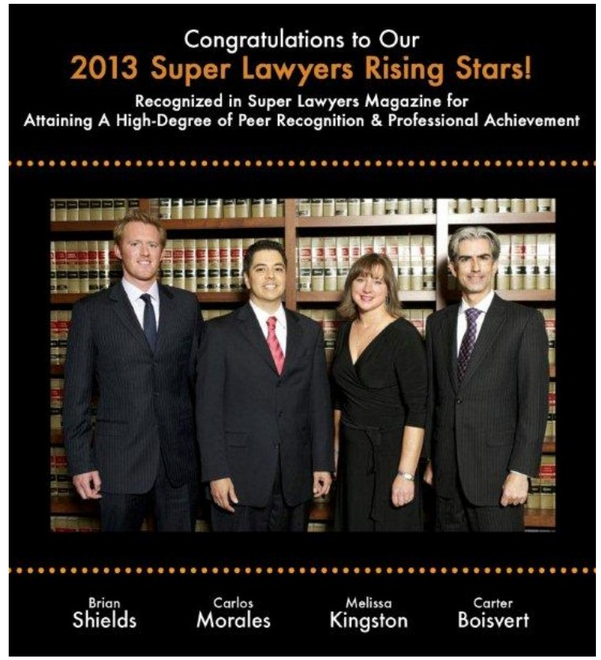
FRIEDMAN & FEIGER
ATTORNEYS AT LAW

5301 Spring Valley Road, Suite 200
Dallas, Texas 75254

Phone: 972-788-1400
Fax: 972-788-2667

PLEASE VISIT OUR AWARD WINNING WEBSITE!

WWW.FFLAWOFFICE.COM



Upcoming Events

Friedman & Feiger Calendar

January 29, 2013	Friedman & Feiger Co-Hosts a Happy Hour Honoring the Dallas Judiciary, 5 p.m. to 7 p.m. at The Belo Mansion Bar, 2101 Ross Ave., RSVP: kzack@dallasbar.org
February 12, 2013	Janelle and Larry Friedman, Co-Chairs, announce the Children's Medical Center "Celebration Of Our Century" benefit gala, to be held on Saturday, November 2nd at the Omni Dallas Hotel. For details: jfriedman@fflawoffice.com
February 13, 2013	Janelle Friedman hosts Essential Energy Business Networking Reception for Women Business Leaders featuring Author & TV Producer **Kim Gatlin** at The Standard Pour, 2900 McKinney Ave. Uptown Dallas, 6 p.m. to 8 p.m. RSVP: clegrand@fflawoffice.com
February 16, 2013	Marla Pittman presents "Financial Planning: The Truth about Child Support and Spousal Support in Texas," 10:45 to 11:45, at the Dallas Divorce Conference, Westin Stonebriar, 1549 Legacy Dr., Frisco, TX
February 17, 2013	Friedman & Feiger supports the "Wheel To Survive" Benefit for ovarian cancer. 9 a.m. to 3 p.m. at the Jewish Community Center. www.bethedifferencefoundation.org/wheel-to-survive/dallas-wheel-to-survive
March 7, 2013	Janelle Friedman hosts Essential Energy Business Networking Reception for Women Business Leaders featuring **Charlotte Jones Anderson** of the Dallas Cowboys organization, at Arlington Hall, 3333 Turtle Creek Boulevard, 6 p.m. to 8 p.m. RSVP: clegrand@fflawoffice.com
April 4, 2013	Janelle Friedman hosts Essential Energy Business Networking Reception for Women Business Leaders featuring **Jil Katz**, Co-Owner Warren J. Katz M.D. Cosmetic Surgery Associates, at The Mercury, 11909 Preston Road, 6 p.m. to 8 p.m. RSVP: clegrand@fflawoffice.com

Contact for Info: jfriedman@fflawoffice.com