

# LAM, LYN & PHILIP, P.C.

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**Community & People**

- **Kurt L. Lyn** was recently appointed to the board of Children at Risk, GE Capital's Diversity Board and Co-Chair of Wesleyan University Fund.
- **Lowri Thomas** represented Lam, Lyn & Philip at HBA's 15th house for Habitat for Humanity
- **Angela C. Garcia** was awarded President's Award for her outstanding service to HisBA and the community

## COMMERCIAL COLLECTIONS LITIGATION: WHAT'S THAT?

Clients and colleagues are often surprised by the type of matters we refer to or categorize as commercial collection litigation. The insertion of "collection" between commercial litigation can be perplexing and genuinely confusing. Here at *Lam Lyn Philip* we define commercial collection litigation as any claim involving a debt that arises in the course of a business to business transaction or interaction. Commercial debts arise through a variety of ways including failure to pay invoices for products or services ordered and or failure to fulfill terms of a contract.

Perhaps the type of claims that are most easily recognized as commercial collection matters are those for products or services offered. For more than 10 years, *Lam Lyn Philip* has represented **Dell** on matters where a customer, often a wholesaler, ordered products and failed to pay **Dell**. Our firm also represents **TXU Energy**, the largest provider of electricity in Texas, on matters where business customers—typically restaurants and apart-

ment owners— have failed to pay their utility bills.

By far, the largest portion of our commercial collection litigation docket involves Breach of Contracts. For our financial institution clients this covers a broad gamut of financial instruments. **GE Philip** we define commercial collection litigation as any claim involving a debt that arises in the course of a business to business transaction or interaction. Commercial debts arise through a variety of ways including failure to pay invoices for products or services ordered and or failure to fulfill terms of a contract. Perhaps the type of claims that are most easily recognized as commercial collection matters are those for products or services offered. For more than 10 years, *Lam Lyn Philip* has represented **Dell** on matters where a customer, often a wholesaler, ordered products and failed to pay **Dell**. Our firm also represents **TXU Energy**, the largest provider of electricity in Texas, on matters where business customers—typically restaurants and apart-

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ments or services that they agreed to. *Lam Lyn Philip* represents **Shell** on matters involving Jiffy Lube franchisees or other retailers of their products who are in breach of their agreements to purchase products. Similarly, we have represented **Centerpoint Energy** on matters where they had contractually reserved capacity in their pipeline for customers who refused to utilize their pipeline for transport.

Commercial collection litigation may also arise in the context of a failure to meet a particular duty. For several years, *Lam Lyn Philip* has represented **Centerpoint** on matters where commercial excavators damage their pipelines. In a typical case, we are seeking full recovery for the cost of repairing pipelines and loss of gas. We have also represented **Valero Energy** on matters where products delivered by a vendor for a particular purpose were defective.

Some of our more interesting commercial collection litigation involves the trading and swaps market. *Lam Lyn & Philip* has assisted **Shell** and **Valero** with these matters.

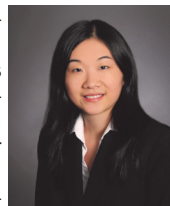
## SHARON YIN NAMED NEW PARTNER

*Lam Lyn Philip* is proud and excited to announce that **Sharon Yin** is now a partner with the firm. Sharon is in her fifth year with the firm and was previously a senior associate.

Sharon graduated from the University of Texas at Austin with a BBA in Finance and received her law degree from South Texas College of Law in Houston. Sharon practices exclusively in the area of Creditor's Rights and Commercial Collections Litigation. She is adept at managing a large case load, restructuring

loans and workouts.

Sharon is an active member of the Asian American Bar Association, where she currently serves as the Vice President of Development, and also serves on the National Asian Pacific American Bar Association (NAPABA) Bankruptcy, Restructuring, and Creditor's/Debtor's Rights Committee. Sharon is highly regarded as being very professional and



knowledgeable. Sharon's professionalism is best reflected by the fact that over the last few years she has been retained by clients such as **American Airlines, Weingarten Realty, CiCi's Pizza, Parker Drilling and Logan International**.

As per Managing Partner, **Kurt Lyn**, "Sharon has consistently demonstrated her commitment to the profession, willingness to work hard, and the importance of understanding our clients' business and their goals".

## GARNISHMENT ACTIONS: PREJUDGMENT VS. POST-JUDGMENT

Garnishment is an action taken by a creditor where money, property, or other assets in the hands of a third party, but belonging to the debtor, is sought by the creditor. Once the third party, the garnishee, is served with a Writ of Garnishment, they may not deliver any assets they are holding to the debtor or anyone else. A Writ of Garnishment may be brought either prior to or after obtaining a judgment.

The use of Garnishment is generally considered harsh and should be utilized with caution. Pre-Judgment garnishments are particularly harsh since it seeks a relief prior to the granting of a judgment on the creditors pleadings. *Lam Lyn Philip* does not recommend the use of pre-Judgment garnishment. A pre-

Judgment Writ of Garnishment will often have a significant impact on a defendant's business and possibly result in the closing of their business. If this occurs the creditor/clients may find itself defending counterclaims for themselves relating to the destruction of the debtor's business or economic loss. For the most part, it simply is not worth it.

Unlike other post Judgment remedies, a post- Judgment Garnishment may be filed from and after the date that the judgment is signed. This procedure is pursuant to C.P.R.C § 63.001 (3) which specifically states that a judgment is deemed final and subsisting for the purpose of issuing a post-judgment Writ of Garnish-

ment immediately upon signing of the judgment.

Post Judgment Garnishments are one of the most effective tools a creditor has in obtaining a meaningful recovery. *Lam Lyn Philip* strongly recommends the filing of post Judgment Garnishments.

Although a judgment debtor could make allegations regarding the destruction of their business, it is much less likely they will have a sympathetic ear from a judge or jury. This is because at this point in the litigation there would have already been a clear finding of liability. Additionally, it should be noted that the creditor will not be required to file a bond.

## LYN INVITED TO JOIN GE CAPITAL'S DIVERSITY BOARD

**Kurt L. Lyn**, managing partner of *Lam Lyn & Philip* has been invited to serve as a member of **GE Capital Americas (GECA)** diversity board Project Hola!



The board is a mixture of select

outside law firms and GECA in house counsel members. The goals of Project Hola! is to increase the number of diverse relationship partners and qualified diverse outside counsel in a variety of expertise areas on the **GECA** counsel preferred provider list. Mr. Lyn has been outside counsel on GE related matters for more than eight years and for

the last four years has been on their preferred provider list. He regularly conducts training sessions at GE facilities and represents various GE platforms including, GE Franchise, GE Equipment and Leasing, GE Commercial Distribution Finance, GE Capital Technology and GE Transportation. Mr. Lyn will serve on the board for two years.

## CORPORATIONS PLEDGE TO SPEND \$139 MILLION WITH MWBE LAW FIRMS IN 2012

The Inclusion Initiative- a group of law departments at some of the largest corporations in the U.S.- recently announced a commitment to spend at least \$139 million in 2012 with minority and women owned law firms. The Inclusion initiative members include: Accenture, AETNA, Allstate, **American-Airlines**, Bank of America, Comcast, **Dupont**, Exelon, General Mills, GlaxoSmith-Kline, Google, **JP Morgan Chase**, Macy's, McDonalds, Microsoft, Prudential Sempra, **Shell Oil Company**, **UPS**, Verizon, Walmart, and **Xerox**.

The Inclusion Initiative will work closely with the National Association of Minority and Women Owned Law Firms (NAMWOLF) to identify best practices in maximizing relationships with high quality minority and women owned law firms. This program is not designed as a "set aside" program. Rather, it is intended to encourage members to take additional measures to ensure that diverse law firms are among the pool of firms considered for work. "The fact is, that the single most de-

terminative factor in whether a company will hire an attorney or their firm is whether the company's in-house attorney knows you or your firm and is comfortable working with you," adds **Kurt Lyn** of *Lam Lyn Philip*. "Initiatives such as these open doors and it is up to the outside counsel to demonstrate value and competence to maintain their clients." Several of the member firms (**Dupont**, **JPMorgan Chase Bank**, **Shell**, **UPS**, **Xerox**) are long term clients of *Lam Lyn Philip*.

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## ENFORCEMENT OF JURY WAIVER

These days more and more contracts contain language through which the signator contractually waives their right to a jury trial if a dispute arises. But is this legal? This would seem to conflict with a party's constitutional right to a jury trial. Tex. Const. art. I, § 15. Texas Courts allow parties to contractually agree to arbitration whereby the parties not only waive their right to trial by jury but also their right to appeal (and strongly favor such arbitration agreements). So is there a difference? Texas Courts notice the similarities and have held that the contractual jury waivers are permissible and enforceable under certain circumstances. The right to a jury trial is so strongly favored in Texas that the con-

tractual jury waiver is strictly construed and will not be lightly inferred or extended. *In re Credit Suisse First Boston Mortg. Capital, L.L.C.*, 257 S.W.3d 486 (Tex. App. Houston 14th Dist. 2008). Before a jury waiver will be enforced, such waiver "must be found to be a knowing, voluntary, and intelligent act that was done with sufficient awareness of the legal consequences". *Id* at 490. Waiver requires intent, either the "intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right." *Jernigan v. Langley*, 195 S.W.3d 91 (Tex. 2006).

Texas Courts have found that a conspicuous waiver is prima facie evidence of a knowing and voluntary waiver. *In re GE Capital Corp.*, 203 S.W.3d 314 (Tex. 2006). But what is

"conspicuous"? Section 1.201 (b)(10) of the Texas Business and Commerce Code provides that "conspicuous ... means so written, displayed or presented that a reasonable person against which it is to operate ought to have noticed it." Some courts have found conspicuous to be bold print, capital letters, clearly identified, or separated from surrounding text. Texas Courts have also found that if the waiver stated on its face that it was given knowingly and voluntarily, then the burden shifts to the opposing party to show that it was not. Courts will enforce the waiver if it is conspicuous although, Courts have not held that there is a requirement that the clause be conspicuous.

*"conspicuous ... means so written, displayed or presented that a reasonable person against which it is to operate ought to have noticed it...."*

## DID YOU KNOW SWORN ACCOUNTS ARE SELF AUTHENTICATING IF NOT DENIED UNDER OATH

Texas Civil Procedure Rule 185 allows a creditor to present a prima facie case validating certain types of claims by adhering to a particular set of pleadings. This type of pleading, called a suit on sworn account, creates a presumption in favor of the creditor and a defendant must file a sworn denial. The presumption, which results from the defendant's failure to deny the account under oath, constitutes complete proof of the creditor's case and bars the defendant from offering contrary proof. *Airborne Freight Corp. v. CRBG Mktg., Inc.*, 566S.W.2d573,574 (TEX. 1978).

TRCP 185 provides that the following claims are within its scope:

1. A claim founded on an

open account or other claim for goods, wares and merchandise "including any claim for a liquidated money demand based upon written contract or founded on business dealings between the parties."

2. A claim for personal services rendered

3. A claim for labor done

4. A claim for labor furnished

5. A claim for material furnished

A creditor's petition on a sworn account must contain a systematic, itemized statement of the goods or services sold, reveal offsets made to the account, and be supported by an affidavit stating that the claim is within the affiant's knowledge,

and that it is just and true. TRCP 185 requires strict adherence to its provisions and deficiency in creditor's sworn account will not constitute prima facie evidence of the debt. *Nguyen v. Short, How, Frels & Heitz, P.C.*, 108 S.W.3d.558 (TEX. APP.- Dallas 2003, petition).

When a defendant files a properly verified answer denying the account under oath, the presumption created by TRCP Rule 185 disappears and the creditor must prove all the elements of their case with competent evidence. When a defendant fails to file a proper verified denial- such as filing a general denial, the creditor may proceed with a summary judgment.

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*Results Oriented*

**Lam, Lyn & Philip, PC**

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**Lam Lyn Philip** is a Texas-based law firm. Lam Lyn Philip's core area of practice is the handling of Commercial Collection Litigation matters. The firm also specializes in Insurance and Business Immigration law. Among the firm's clients are Governmental entities and private companies, including more than a third of the Fortune 100. Our representation spans across a broad range of industries, including oil & gas, power, financial institutions, and manufacturing companies.

The firm has a uniquely flexible and entrepreneurial culture that fosters mutually-beneficial relationships with our clients. Our attorneys make it their job to understand our clients' business goals while utilizing the law to achieve real results. We have consistently earned a reputation for being a trusted business partner who is willing to share the risks of litigation. Our commitment to superb client service is unyielding and permeates throughout the firm. We are cognizant of the fact that we are often the face of our client in the eyes of the public and we must carry and conduct ourselves in a manner that reflects the expectations of our clients.

Consistent with the principles of the founding partners, the firm **requires** its attorneys to actively participate in bar associations and community-based organizations. The firm has funded scholarships for numerous local schools, not-for-profit entities, and other organizations in Houston.