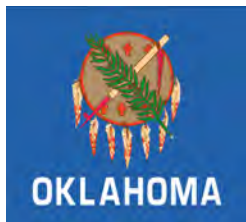




# COVID-19 – Impact on OK and AR



Karen L. Hart

Bell Nunnally & Martin LLP

[karenh@bellnunnally.com](mailto:karenh@bellnunnally.com)

214-740-1444/214-435-6373 (c)



# COVID-19 Hot Topics

- **COVID-19 Orders (OK & AR (?) overview)**
- **Force Majeure**
- **AR/Debt Management in Crisis Mode**
- **CARES Act (highlights)**

# OK Business Closures - Essential Business Exceptions

<https://www.okcommerce.gov/covid19/>

Check local city and county  
regulations/orders



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# Business Closures and Essential Business Information

## Oklahoma Essential Business Guidance

The Governor of Oklahoma has issued Oklahoma Executive Order 2020-07 which requires all non-essential businesses in all 77 counties to close effective 11:59 PM, March 25, 2020.

**Follow the steps below to determine whether your business is considered essential.**

**Business owners self-determine their status by following the guidance of the Executive Order and Memorandum. No certification or documentation from the Department of Commerce is required.**

### Step 1

Review the Executive Order and Memorandum to determine if your business qualifies as part of an essential industry.

[Oklahoma Executive Order 2020-07 – Seventh Amendment](#)

[Amended Executive Memorandum 2020-01](#)

### Step 3

After reviewing the Executive Order, Memorandum, and Oklahoma Essential Industries List, business owners may fill out the [Essential Industries Inquiry Form](#) to request clarification for their industry regarding status as an essential business or to request their industry be considered for inclusion as an essential business.

Individual business exemptions are not granted through this process.

[Essential Industry Inquiry Form >](#)

### Step 2

Review the [Oklahoma Essential Industries List](#) with NAICS codes and business descriptions below that the Oklahoma Department of Commerce developed based on the Executive Order and Memorandum.

 [Oklahoma Essential Industries List](#)

### Essential Business Concerns

If you are concerned that a business is operating unsafely or failing to comply with the Executive Order or a local order, contact your local authorities.

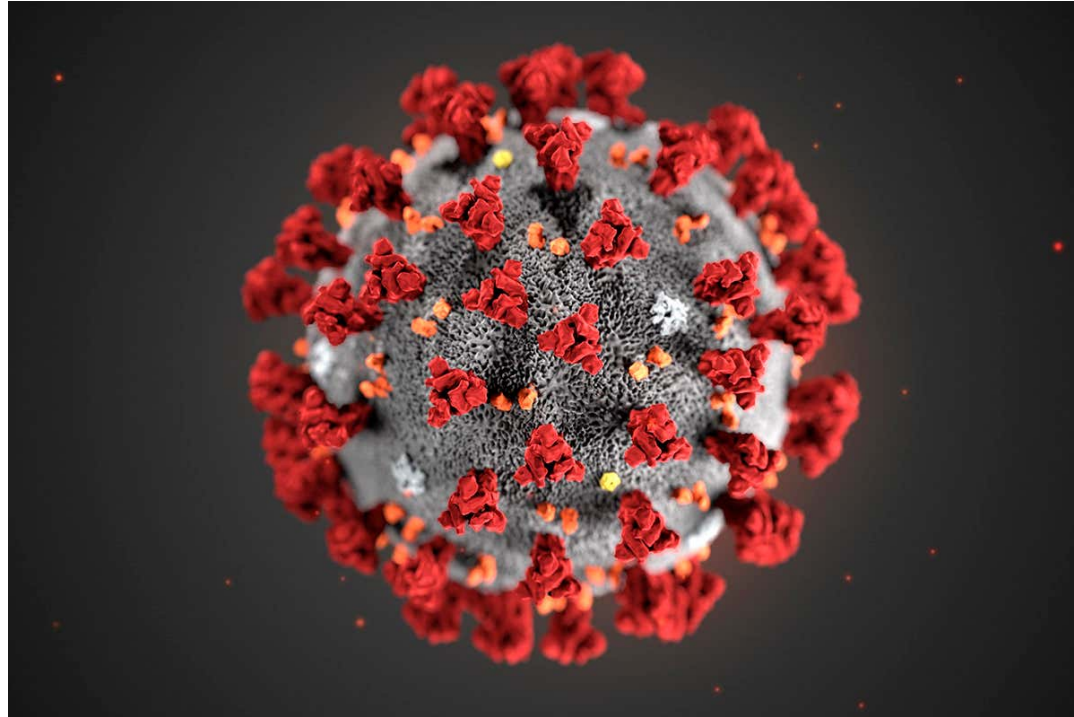
# AR

- One of a handful of states with no shelter in place or essential biz orders (AR, ND, SD, NE, IA)
- No major cities in AR have orders
- Little Rock -- some curfews in place



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# Force Majeure



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# Force Majeure

**Is the COVID-19 outbreak a force majeure?**

**It depends on your contract....**

**So... READ YOUR CONTRACT.**

# Force Majeure

- **No “standard” force majeure (FM) clause.**
- **Negotiated clauses like any other.**
- **FM terms vary by industry & by contract.**



# Force Majeure

**The contract controls.**

# Force Majeure

## Sample clause...

Should performance of any obligation created under this Agreement **become illegal or impossible** by reason of **fire, flood, storm, act of God, governmental authority, labor disputes, war or any other cause** not enumerated herein but which is **beyond the reasonable control** of the Party whose performance is affected, then the performance of any such obligation is suspended during the period of, and only to the extent of, such prevention or hindrance, provided the affected Party provides **reasonable notice of the event of force majeure** and exercises all reasonable diligence to remove the cause of force majeure.



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# Force Majeure

## List of events ...

- Flood
- Earthquake
- Fire
- Storm
- Governmental authority
- Strike or labor stoppages
- Acts of terrorism
- War
- Natural Disaster
- Epidemic ....?
- Pandemic...?
- Virus ...?
- Act of God
- Catch-All



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# Force Majeure

## Act of God....?

- Force or act of nature
- Unforeseeable
- Could not be prevented by reasonable foresight or care
- Global COVID19 pandemic....will be litigated.



# Force Majeure



## Catch-all Clause

- Can be broad or narrow
- “Any like events”
- “Other similar events”
- “Other events beyond the reasonable control”
- Courts often read in unforeseeability requirements
- May be limited by the list of described events in the FM clause (Latin: *ejusdem generis*)

# Force Majeure

## Standard for Non-Performance

- Impossible
- Impracticable
- Illegal
- More than financial hardship

# Force Majeure

## Notice requirements

- What does your clause require? Reasonable? Prompt? Immediate? Within 5 days?
- When did the force majeure begin?
  - When WHO declared a pandemic?
  - When President Trump declared a national emergency?
  - When Governor Abbot declared state disaster?
  - When Dallas County issued shelter in place order, only allowing “Essential Businesses” to operate?



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# Force Majeure

## Common Law Defenses

- Impossibility/Impracticability
  - Where the thing necessary for performance has been destroyed or deteriorated and where the action is prevented by government regulation.
  - The situation must be such that “the thing cannot be done,” not that “[you] cannot do the thing.”
  - Again, more than mere financial hardship.
  - Narrowly construed.



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# Force Majeure

## UCC Defenses - Section 2-615

- Seller did not assume the risk of the event.
- The non-occurrence of the event was a basic assumption.
- Performance “commercially impracticable” as a result of the event.

# Force Majeure

## Risks and Benefits

- To take advantage of FM, contract may require you to provide notice.
- But if you are wrong or premature, you could be in breach of the contract... for your failure to perform or for wrongfully invoking FM...
- Are there specific carve-outs for payments or monetary obligations?
- What if you are on the receiving end of a FM notice? Then what?

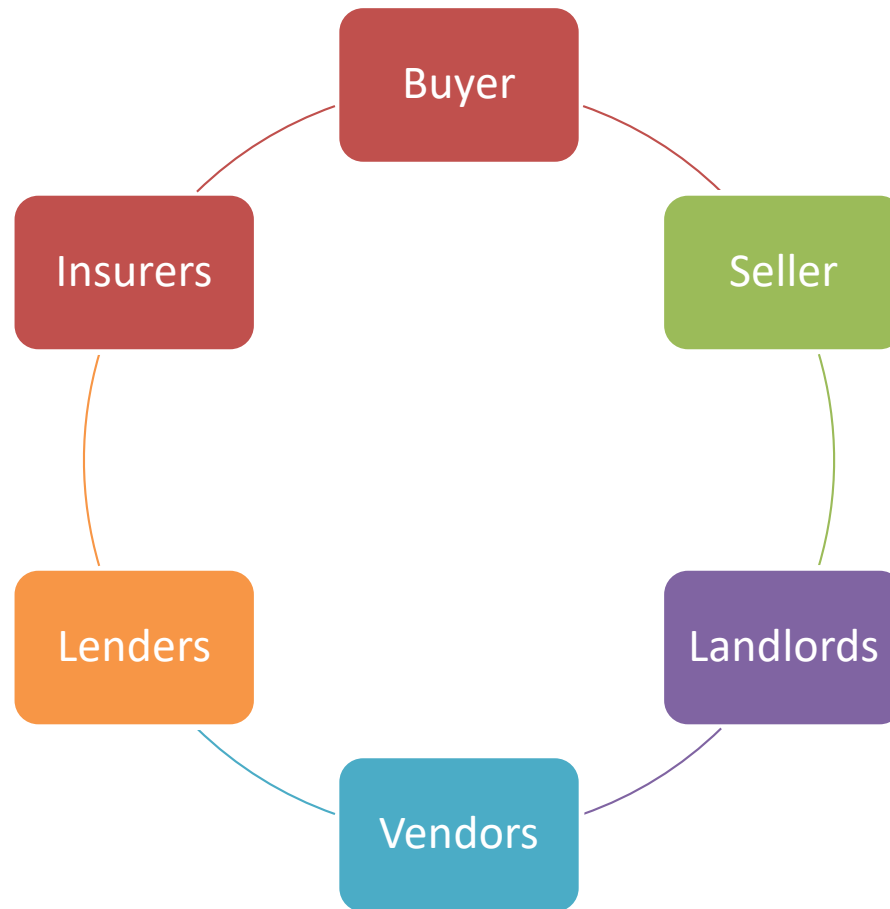


# AR/Debt Management In Crisis Mode



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# Pay the Pied Piper....



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**Customer says:**

**“Force majeure...”**

**or**

**“We can’t pay...”**

**Now what?**



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# Perfect/Protect Your Rights

## **Contractual**

- Serve required notices
- Serve demand letters

## **Statutory**

- Serve lien notices
- Record liens/security interests

## **Plan for Logistical Issues**

- CMRRR
- Fed Ex
- Regular Mail
- Office closures
- Essential business restrictions



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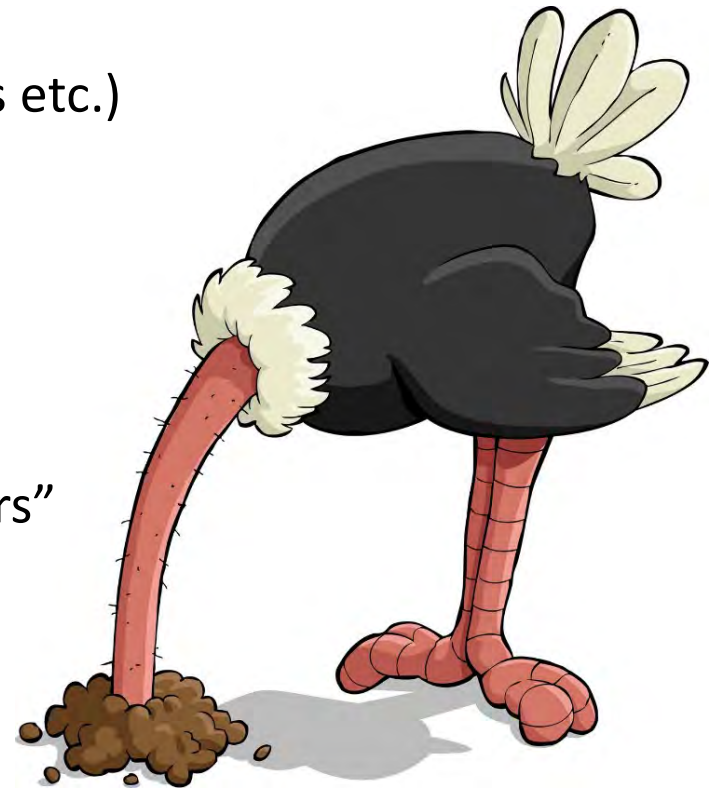
# Be Proactive

## Don't be an Ostrich.

- Don't wait. Communicate.
- Reach out to customers
- Find out if you are you a priority. Where are you on the "list?"
- Problem won't be going away
- Assess cash flow needs
- Reach out to your "Pipers" (lenders, insurers etc.)

## Consult with counsel sooner, rather than later.

- Devise responses to FM notices
- Devise plans for workouts
- Advice on applicable statutes of limitations
- Advice on what is allowable with your "Pipers"



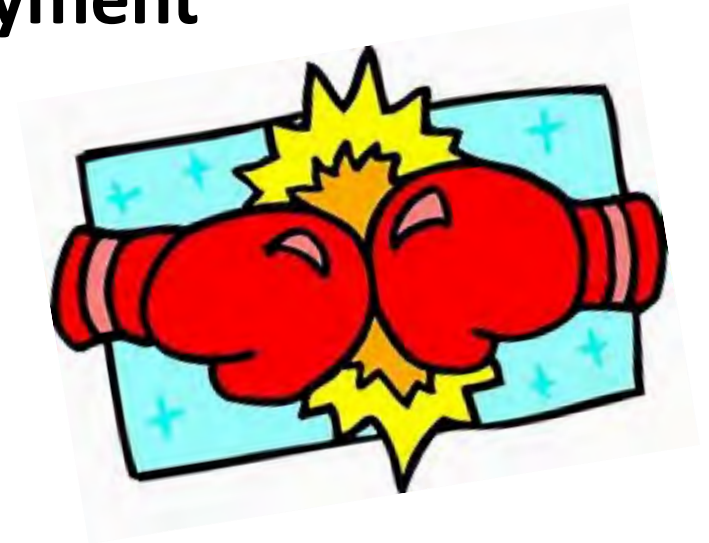
# Options & Alternatives

## ✓ Fight

- Send Demand
- Dispute force majeure
- Insist on full & immediate payment
- File suit
- Enforce judgments

## ✓ Compromise (for now)

- Workouts





# Fight

- Many courts remain open, subject to modifications.
- Lawsuits can still be filed.
  - Pleadings can still likely be filed
  - E-filing
  - Clerks may be short handed or limited operations or closed for processing
- Expect delays.
  - Especially with trial settings
  - Courts will expect cooperation on pre-trial deadlines

# Fight

- Video pre-trial proceedings becoming more common and permitted
  - Hearings (telephonic, some video)
  - Depositions
  - Mediations
  - “Zoom” popular platform.

# Fight

- Check applicable judicial disaster orders.
  - May permit video attendance at depositions
  - May toll statute of limitations
  - May halt certain proceedings (eg evictions, foreclosures)
- <https://www.oscn.net>.
- <https://www.arcourts.gov/arkansas-supreme-court-statement-novel-coronavirus-outbreak-and-courts>



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1. Governor J. Kevin Stitt issued Executive Order 2020-07 on March 15, 2020, declaring an emergency in all 77 Oklahoma Counties caused by the impending threat of COVID-19 to the people of the state. This joint order is issued to clarify the procedures to be followed in all Oklahoma district courts and to encourage social distancing and to avoid risks to judges, court clerks, court employees and the public.
2. All district courts in Oklahoma shall immediately cancel all jury terms for the next 30 days and release jurors from service. No additional jurors shall be summoned without approval of the Chief Justice. All civil, criminal and juvenile jury trials shall be continued to the next available jury dockets.
3. Subject only to constitutional limitations, all deadlines and procedures whether prescribed by statute, rule or order in any civil, juvenile or criminal case, shall be suspended for 30 days from the date of this order. This suspension also applies to appellate rules and procedures for the Supreme Court, the Court of Criminal Appeals, and the Court of Civil Appeals.
4. In any civil case, the statute of limitations shall be extended for 30 days from the date of this order.
5. Subject only to constitutional limitations, assigned judges should reschedule all non-jury trial settings, hearings, and pretrial settings. Emergency matters, arraignments, bond hearings, and required proceedings of any kind shall be handled on a case by case basis by the assigned judge. Judges shall use remote participation to the extent possible by use of telephone conferencing, video conferencing pursuant to Rule 34 of the Rules for District Courts, or other means. The use of email, fax and drop boxes for acceptance of written materials is encouraged, except that the use of email may not be used for appellate filings at this time. If any party or counsel objects to a continuance of any matter, assigned judges are encouraged to hold hearings in the same manner as emergency matters.
6. The following persons are prohibited from entering any courtroom, court clerk's office, judges' offices, jury room or other facility used by the district courts:
  - a. Persons who have been diagnosed with or have direct contact with anyone diagnosed with COVID-19.
  - b. Persons with symptoms such as fever, severe cough, or shortness of breath.
  - c. Persons who have traveled to any country outside of the U.S. in the past 14 days, and those with whom they live or have had close contact.
  - d. Persons who are quarantined or isolated by any doctor or who voluntarily quarantine.
  - e. If you are in one of these categories (a-d) and are scheduled for a court appearance or are seeking emergency relief, contact your attorney, and if you have no attorney, call the court clerk's office in the county where you are required to appear.
7. All courts may limit the number of persons who may enter any courtroom, judges' or clerk's office, jury room or any other facility used by the district courts.

# OK Supreme Court Order (March 16).

1. The First Emergency Joint Order entered on March 16, 2020 remains in effect except as it is modified herein. To the extent the Joint Emergency Orders conflict with local practices, the First and Second Emergency Joint Orders control.
2. On March 24, 2020, Governor J. Kevin Stitt issued the Fourth Amended Executive Order 2020-07 and ordered that additional steps be taken to protect all Oklahomans from the growing threat of COVID-19. This Second Emergency Joint Order joins the Governor in addressing the ever changing situation in the district courts in all 77 counties as well as the appellate courts in Oklahoma and Tulsa Counties. We admonish all Oklahoma judges, court clerks, court employees and staff and the public to follow the guidelines to protect public health set forth in the Governor's Executive Orders, those issued by the Oklahoma Department of Health and the CDC.
3. All district courts in Oklahoma shall immediately cancel all jury terms through May 15, 2020. No additional jurors shall be summoned without approval of the Chief Justice. All civil, criminal and juvenile jury trials shall be continued to the next available jury dockets. If necessary, additional jury terms may be ordered in July and/or August or later in the year.
4. Subject only to constitutional limitations, all deadlines and procedures whether prescribed by statute, rule or order in any civil, juvenile or criminal case, shall be suspended through May 15, 2020. This suspension also applies to appellate rules and procedures for the Supreme Court, the Court of Criminal Appeals, and the Court of Civil Appeals.
5. In any civil case, the statute of limitations shall be extended through May 15, 2020.
6. All courthouses in all 77 counties shall be closed to the public with exceptions for emergencies as permitted by local order. To the extent that emergency dockets are being held, no more than 10 persons including the judge and court personnel shall be in a courtroom at one time. Judges and other courthouse personnel shall use all available means to ensure the health of all participants in any court proceeding. If judges continue to hold hearings, all of the mandated COVID-19 precautions issued by the CDC and all State and local governments shall be followed. Judges shall continue to use remote participation to the extent possible by use of telephone conferencing, video conferencing pursuant to Rule 34 of the Rules for District Courts, or other means.
7. Court clerks and judges shall use email, fax and drop boxes for acceptance of written materials, except for emergencies. All appellate filings shall be made by mail.

## OK Supreme Court Order (March 25).

# Compromise

## ■ Payout/Workout agreements

- Reduced principal
- Reduced interest rates
- Forbearance/abatement
- Document, document, document!



Did I say document???



# Workout Options

- Payouts
- Personal guarantees
- Promissory notes
- Agreed Judgments
  - Get it writing!
  - Preserve, don't waive rights



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# The CARES Act (Highlights)



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# The CARES Act



## New SBA Loans (PPP)

- Potentially forgivable up to 100% of principal borrowed
- Do not require collateral or guarantees
- Businesses, Non-profits and veteran's orgs and tribal concerns with less than 500 employees (generally)
- Available to sole proprietors, independent contractors, self-employed (subject to add'l requirements)
- Capped at lesser of 10M or 2.5 X average monthly payroll costs one year before the date of the loan.
- Payroll includes: salary/wages/tips, sick/family leave/PTO, severance, group health (including ins. Premiums, retirement benefits, state/local taxes on employee comp. But for employees paid more than 100K only the amount up to 100K counts.
- Forgivable amount: 8 wks.; payroll, mortgage interest, rent, utilities. Reduced proportionally based on layoffs or reduction of wages (between Feb 15- Jun 30).



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# The CARES Act



## Payroll Tax Credit

- Allows employers to defer payment of the employer's share of the 6.2% Social Security tax on wages paid March 27 – Dec. 31, 2020
- Deferred payments due in 2 installments – 50% due Dec. 31, 2021 and 50% due Dec. 31, 2022

## IRS Covid-19 Tax Credit FAQ Page:

<https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>

## PPP Info Sheet:

<https://home.treasury.gov/system/files/136/PPP%20Borrower%20Information%20Fact%20Sheet.pdf>



# The CARES Act



## Individual Relief/Assistance. You may ...

- Be eligible for additional unemployment benefits or tax rebates
- Have access to distributions from defined contribution plans (eg 401K) without penalty
- Be eligible for 401K plan participant loan relief
- Be entitled to student loan deferment or mortgage forbearance
- Be entitled to additional unemployment benefits (beyond/in addition to state benefits – extra \$600 per week; additional 13 weeks; gig workers)
- Be entitled to recovery rebates: \$1,200 for individuals with AGI up to \$75K; \$2,400 for joint filers with AGI up to \$150K; plus \$500 per child.
- Be entitled to suspension of federal student loans (principal and interest)

<https://www.benefits.gov/help/faq/Coronavirus-resources>

<https://www.careeronestop.org/LocalHelp/UnemploymentBenefits/find-unemployment-benefits.aspx>



# Bell Nunnally COVID-19 Resource Center

<https://www.bellnunnally.com/covid19-legal-services-resource-directory>



# Questions?



Karen L. Hart

Bell Nunnally & Martin LLP

[karenh@bellnunnally.com](mailto:karenh@bellnunnally.com)

214-740-1444 / 214-435-6373 (c)



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### ***About Karen ...***

**Karen L. Hart is a business attorney with over 18 years of experience litigating commercial disputes.**

**Karen counsels clients on creditor's rights issues, real estate and landlord-tenant matters as well as various other contract and business disputes. She is a tireless advocate for her clients, providing guidance on business legal matters, such as lease, purchase and sale, brokerage and property management disputes, specific performance claims, commercial evictions, lis pendens, lien and bond claims, lien priority disputes, promissory note claims, commercial foreclosures, bankruptcy claims, professional ethics and liability matters, bills of review, confidentiality, non-competition and non-solicitation agreements and related disputes and injunctive proceedings, and business tort claims, including tortious interference with contracts and business relationships, civil theft, fraud, and misappropriation of trade secret claims.**

**Karen L. Hart  
Bell Nunnally & Martin LLP  
[karenh@bellnunnally.com](mailto:karenh@bellnunnally.com)  
214-740-1444  
214-435-6373 (cell)**

**Prior to joining Bell Nunnally, Karen served as a law clerk to the Honorable Hayden Head, Jr., United States District Court, Southern District of Texas, Corpus Christi Division. Karen is an honors graduate of the University of Texas at Austin School of Law.**

**Karen's recent accolades include: Dallas Top 50 Women Lawyers Award, Texas Diversity Council (2017); Best Lawyers in America (2017-2019); Winning Women Award, Texas Lawyer (2014); Women in Business Award, Dallas Business Journal (2012); Leadership Council on Legal Diversity Fellow (2017). Karen also serves as Bell Nunnally's General Counsel.**

