

## Fall 2015

### Inside this issue:

- Trap for Nonprofit Corporations: Using Single Member LLCs 2
- Form of Nonprofit Corporation Governing Documents 3
- Delaware Judge Fines Dole Food Executives \$148 Million for Merger Fraud 3-4
- Common Qualifications to a Remedies Opinion in U.S. 5
- Donation Opportunities Available to Members 6
- Upcoming CLE's 7
- Committee Spotlight: Date Privacy & Security Committee 7

### Business Law Section Council Members (2015-2016):

**Jacqueline Akins**  
*USAA FSB*

**E. Steve Bolden II**  
*Mahomes Bolden PC*

**Cheryl Crandall Tangen**  
*Cheryl Crandall Tangen, P.C.*

**John Fahy**  
*Whitaker, Chalk, Swindle and Sawyer, LLP*

**Irene Kosturakis**  
*BMC Software, Inc.*

**Carol B. Mattick**  
*Carol Bavousett Mattick, PC*

**Shanna Nugent,**  
*Law Offices of Shanna Nugent, P.C.*

**F. John Podvin, Jr. (Chair)**  
*Biegging, Shapiro & Barber, LLC*

**Stephen C. Tarry**  
*Vinson & Elkins LLP*

**Evan Young**  
*Baker Botts LLP*



## Fall Newsletter 2015

### Message From The Chair



Dear Section Members:

As Chair of the Business Law Section, I want to make sure all of our members are aware of a significant benefit of State Bar of Texas membership that I recently learned about and thought I would pass along to you.

The Texas Bar Private Insurance Exchange (the "Insurance Exchange") is a multi-carrier private exchange designed for State Bar of Texas members, as well as their spouses, staff, and dependents. The Insurance Exchange is available to both individuals and employer groups, and offers a wide range of health insurance choices and more. The various types of insurance coverage offered include health, dental, term life, long term care, whole life, disability, and even identity theft protection.

The following link highlights six of top reasons to take advantage of this member benefit: <http://texasbar.memberbenefits.com/2015/10/13/6-reasons-to-use-the-texas-bar-private-insurance-exchange/>. For more information or to enroll, visit: <http://texasbar.memberbenefits.com/>.

Open enrollment for the Insurance Exchange began on November 1, 2015.

Very truly yours,

F. John Podvin, Jr.  
Chair of the Business Law Section, 2015-2016

### Texas Journal of Business Law (Digital Edition): Available to Members

As a member of the Business Law Section, you are entitled to the newest edition of the Texas Journal of Business Law, which will now be made available electronically on the Business Law Section's website by logging in with your Texas Bar Number at <http://texasbusinesslaw.org/resources/business-law-journal/>.

The upcoming Journal issue features a 2015 Legislative Update on Entity Law by noted author Daryl B. Robertson of Hunton & Williams LLP.

## **Trap for Nonprofit Corporations: Using Single Member LLCs**



By Darren Moore, Copyright Reserved 2015  
Bourland, Wall & Wenzel, P.C.  
Nonprofit Corporations Committee Vice Chair

and



Frank Sommerville, Copyright Reserved 2015  
Weycer, Kaplan, Pulaski & Zuber, PC  
Nonprofit Corporations Committee Chair

The current rage among nonprofit organizations is to use a single member limited liability company for asset protection or risk isolation. Because single member LLCs are ignored for federal income tax purposes, charities reason that the use of the single member LLC has no adverse tax consequence. They are correct when addressing federal income tax, but they are overlooking state taxes. While many states conform to the federal check-the-box regulations thereby allowing an entity that is disregarded for federal income tax purposes to likewise be disregarded for state tax purposes, Texas does not. Texas assesses taxes on each LLC separate from its members.

Single member LLCs are subject to the Texas margin tax, sales tax, use tax, property tax, and cannot utilize liability protection provisions of Chapter 84 of the Civil Practice and Remedies Code. As a result, if a charity placed its facilities in a single member LLC, the facilities will now be subject to state and local property taxes. If the sale of the facilities creates a large enough gain, the LLC could pay margin taxes. Improvements will require the payment of sales taxes. All these taxes add up to big dollars for the charity -- dollars that were not paid when the charity owned its facilities.

The single member LLC fails to qualify as exempt from the Texas margin tax under Section 171.063 because Section 171.063 speaks specifically in terms of “nonprofit corporations” and speaks specifically in terms of the applicant entity being exempt under certain applicable sections of the Internal Revenue Code (IRC). The same issue arises with regard to the sales and use taxes tax.

While the property tax provisions of Texas law do not tie exemption to federal exemption, the various exemption provisions speak to organizations being in the form of a nonprofit corporation or an association. The Texas Tax Code exempts property based on the activities of the owner. If the activities are not conducted by the owner, or the owner is not a nonprofit corporation or association, the property tax exemption is lost.

With respect to charitable immunity, Chapter 84, which provides limited immunity to charitable organizations and their volunteers, defines “charitable organization” primarily in relation to an organization’s being listed as an exempt organization under various sections of Chapter 501 of the IRC. As a result of being disregarded from an exempt parent as opposed to the single member LLC itself being listed as an exempt organization, a single member LLC must meet the more fact-intensive requirements of Sec. 84.003(1)(B) to qualify for organizational immunity as well as to provide immunity for its volunteers and employees. As a result, placing higher risk activities in a single member LLC (one of the primary justifications for creating a single member LLC) creates the risk that the charitable immunity provisions of Texas law will no longer apply to cover those activities.

All these items could add up to potential malpractice for the unsuspecting lawyer who recommends a Texas single member LLC without disclosing the potential adverse consequences under state law.

## Form of Nonprofit Corporation Governing Documents Available to Members



By Elizabeth Miller, Copyright Reserved 2015  
Baylor Law School  
Business Entities Forms Chair

and



Frank Sommerville, Copyright Reserved 2015  
Weycer, Kaplan, Pulaski & Zuber, PC  
Nonprofit Corporations Committee Chair

Many business lawyers whose practices do not regularly involve nonprofit corporations are from time to time asked to review, draft, or revise governing documents or policies of nonprofit corporations, usually on a pro bono basis as a result of the lawyer's service as a volunteer in the organization. There are numerous aspects of a nonprofit corporation's governing documents that will differ from a for-profit corporation's governing documents based on differences in the provisions of the Texas Business Organizations Code applicable to for-profit and nonprofit corporations. Further, there are specific issues and concerns related to a nonprofit corporation's tax-exempt nature and particular structure. While no form should ever be relied upon without careful analysis of the needs and circumstances surrounding a particular nonprofit corporation, attorneys often find it very helpful to see and consider examples of governing documents containing typical provisions. To that end, the Nonprofit Corporation Law Committee has posted the following forms on its committee page on the Business Law Section website as a benefit to members of the Business Law Section:

1. Conflict of Interest Policy
2. Supplemental Provisions to Certificate of Formation (provisions to be added to Secretary of State Form 202 for various types of tax-exempt nonprofit corporations)
3. Bylaws for a Nonprofit Corporation with a Board of Directors and No Members
4. Bylaws for a Nonprofit Corporation with Members and a Board of Directors

As a member of the Business Law Section, these forms are available to you on the Business Law Section website once you have logged in with your Texas Bar Number at <http://texasbusinesslaw.org/forms.html>.

## Delaware Judge Fines Dole Food Executives \$148 Million for Merger Fraud



By Byron Egan, Copyright Reserved 2015  
Jackson Walker, LLP  
Texas Business Law Foundation Liaison

In a recent Delaware shareholder litigation decision, Vice Chancellor Travis Laster ordered David H. Murdock, Dole Food Company, Inc.'s President and controlling stockholder, to pay an additional \$148 million to Dole shareholders because he found the 2013 going private merger in which Mr. Murdock acquired the 60% of Dole which he did not already own was not entirely fair.

## **Delaware Judge Fines Dole Food Executives \$148 Million for Merger Fraud (Continued from Page 3)**

Murdock, a 92-year-old billionaire who took control of Dole in 1985, had already taken the food company private once in 2003. He sold a 41% stake to the public again in 2009 at \$12.50 a share when he was in financial difficulty, but disliking the sharing of control required with a public company and minority shareholders, decided to take Dole private again. A going private merger transaction structured to achieve business judgment rule review under the *In re MFW S'holders Litig.*, 67 A. 3rd 496 (De. Ch. 2013), *aff'd sub nom.*, *Kahn v. M&F Worldwide Corp.*, 88 A. 3rd 635 (Del. 2014), was subjected to (and failed) entire fairness review because the Chancery Court found the transaction complied with MFW as to form but not substance because of misleading projections and other information furnished to the special committee.

In his initial offer to Dole's Board, Murdock proposed to pay \$12 per share for the minority shares. Structuring his proposal to meet the requirements for business judgment rule (rather than entire fairness) review under the teachings of the MFW case, Murdock's offer was conditioned on (i) approval from a special committee of the Board consisting of disinterested and independent directors, who were empowered to and did engage a competent financial adviser and counsel, and (ii) the affirmative vote of a majority of the unaffiliated shares (50.2% of the minority shares voted in favor of the merger). Murdock said that he was a "buyer and not a seller", which made it difficult for the special committee to generate competing third party bids for Dole during the "go-shop" period provided in the merger agreement although it contacted over sixty parties.

The Vice Chancellor found that while the form of MFW was followed and the special committee and its advisers performed their roles with diligence and integrity (having negotiated the merger price from the initially offered \$12 per share to \$13.50 per share) the substance of MFW was not satisfied because Murdock and his right-hand man, Dole general counsel Michael Carter, undermined the Special Committee by concealing favorable information about Dole from the Special Committee. The Vice Chancellor particularly focused defendants' giving lowball projections to the special committee that understated savings Dole could realize after selling approximately half of its business to a joint venture a year before the merger and from purchasing farms to supply products. Further, Carter cancelled a stock repurchase program to push the market price of Dole down to make the going private proposal more attractive and misstated the reasons therefor. The Court was concerned that the general counsel for Dole was conflicted because at the same time as he was representing the company he was also acting as Murdock's right-hand man in controlling the information flow to the Special Committee to benefit Murdock rather than the company. He was also concerned that at the time it was advising the company on some matters it was also advising Murdock on the going-private transactions. The Vice Chancellor wrote "what the Committee could not overcome, what the stockholder vote could not cleanse, and what even an arguably fair price does not immunize, is fraud." Even though the Court found the merger price was within the range of fairness as Lazard had opined, the Court wrote that the stockholders "are entitled to a fairer price designed to eliminate the ability of defendants to profit from their breaches of the duty of loyalty" and awarded them an additional \$2.74 per share ( a total of \$148 million).

For additional information, the Delaware Vice Chancellor Travis Laster's 108 page decision in *In re Dole Food. Co. Inc. Stockholder Litigation*, CA No. 8703-VCL (August 27, 2015) is available at:

<http://courts.delaware.gov/opinions/download.aspx?ID=228790>

## **Newsletter Submissions**

If you would like to submit an article for inclusion in the Business Law Section's Newsletter, please email it to our Newsletter Committee Chair, Louann Fang at [louann.fang@bakermckenzie.com](mailto:louann.fang@bakermckenzie.com)

The Newsletter Committee reserves the right to edit contributions for clarity and content.



## Common Qualifications to a Remedies Opinion in U.S. Commercial Loan Transactions



By Gail Merel, Copyright Reserved 2015  
Andrews Kurth LLP  
Working Group on Legal Opinions Liaison

and



Steve Tarry, Copyright Reserved 2015  
Vinson & Elkins LLP  
Legal Opinions Chair

Gail Merel and Steve Tarry, past and current Chairs of the Business Law Section's Legal Opinions Committee, recently co-authored an article entitled "Common Qualifications to a Remedies Opinion in U.S. Commercial Loan Transactions" with nine other co-authors practicing in the States of California, Delaware, Florida, Illinois, New York and North Carolina. The article identifies a number of qualifications commonly taken and accepted in enforceability opinions rendered in the U.S. commercial loan market. The text and footnotes also provide citations and other authority, including authority under Texas law, on the subjects covered by each qualification. The article is a handy reference guide for both opinion givers and opinion recipients, whether the opinions address Texas law or the laws of the other jurisdictions in the U.S. Gail and Steve, as well as the other co-authors, are all active participants in the work of the national Working Group on Legal Opinions Foundation.

This article appeared in the Winter 2014 issue of *The Business Lawyer*, published by the Business Law Section of the ABA. For those who are members of the ABA, the article is available on *The Business Lawyer's* website at [http://www.americanbar.org/publications/the\\_business\\_lawyer/volume\\_70/number\\_1.html](http://www.americanbar.org/publications/the_business_lawyer/volume_70/number_1.html).



### Keeping Your Email Address Updated

With the electronic distribution of the newsletter, it will be important for every Section member to keep an updated email address with the State Bar of Texas since that agency will distribute the email on behalf of the Section. You may update your email address at the [MyBarPage](#) of the State Bar's website. Please note that the Section will not sell or distribute your email address to anyone, including the State Bar's CLE Division.

## Donation Opportunities Available to Members

### AND JUSTICE FOR ALL LICENSE PLATE

Support the promise of "Justice for All" and advertise your belief in its value by purchasing a specialty license plate. Proceeds from the sale of the "And Justice for All" license plate (\$22 of the \$30 purchase price) are administered by the Texas Access to Justice Foundation and support legal aid.

To donate, please fill out the application, available at: [http://www.tyla.org/tasks/sites/default/assets/File/Texas\\_Get\\_1.pdf](http://www.tyla.org/tasks/sites/default/assets/File/Texas_Get_1.pdf)

Additional information about the Justice for All License Plate is available at: [http://www.teajf.org/donate/license\\_plate.aspx](http://www.teajf.org/donate/license_plate.aspx)



### THE SHEERAN-CROWLEY MEMORIAL TRUST

The Sheeran-Crowley Memorial Trust offers a source of possible financial support to Texas lawyers in crisis. These funds are for the benefit of Texas attorneys and their families to assist attorneys impaired by substance dependence or other mental disorders in paying for treatment or otherwise achieving recovery from their disorder. Often, lawyers who come to the Texas Lawyers' Assistance Program (TLAP) have depleted both personal and financial resources, a circumstance which presents considerable challenges to beginning treatment.

To be eligible to receive funds, an attorney must: be a Texas resident, a law school graduate and have applied for a Texas law license or already have a license the status of which is active, suspended, or revoked. Funds are made available only when other resources are not available. Recipients are asked to make a moral commitment to repay the grant, so other attorneys who suffer can be helped.

Contact TLAP at 1-800-343-8527 for an application and information on how to apply. To make a donation to the Sheeran-Crowley Memorial Trust, please fill out the donation form available at: [https://www.texasbar.com/AM/Template.cfm?Section=Sheeran\\_Crowley\\_Memorial\\_Trust&Template=/CM/ContentDisplay.cfm&ContentID=31347](https://www.texasbar.com/AM/Template.cfm?Section=Sheeran_Crowley_Memorial_Trust&Template=/CM/ContentDisplay.cfm&ContentID=31347)

Additional information about the Memorial Trust is available at: <https://www.texasbar.com/Content/NavigationMenu/ForLawyers/TexasLawyersAssistanceProgram/SheeranCrowleyMemorialTrust/default.htm>

**UPCOMING CLE PROGRAMS****\*Advanced Business Law****Crowne Plaza River Oaks**

November 19-20, 2015

13 Hours CLE (Including 2.75 Ethics)

Click [HERE](#) to register*NOTE: Separate registration required for the 101 Course.***CLE Credit:**

*Don't miss the  
Business Law  
Section  
sponsored CLE's  
listed here and  
on the Website!*

**\*State Bar of Texas Annual Meeting 2016**

Fort Worth, Texas - June 16 - 17, 2016

Presented jointly by the Business Law Section  
and the Corporate Counsel Section**\*Ethical Implications of Cloud Computing**

11/19/2015, 4-5 PM central time

Join us for a webinar on Nov 19, 2015 at 4:00 PM CST for 1 hour ethics CLE and up to 1 hour in 6 specialties. Joseph Jacobson's presentation is applicable to several practice areas and specialties. After registering, you'll receive a confirmation email containing information about joining the webinar. **Register now!** <https://attendee.gotowebinar.com/register/1303835343224757761>

**Committee Spotlight:****Data Privacy and Security Committee****Chair:**

Al Harrison

**Vice Chair:**

Joseph Jacobson

**Current Priorities:**

Our mission is to stay abreast of newly proposed bills pertaining to business law issues and to share knowledge about privacy and security issues as construed by state and federal case law (via our monthly webinars and the forthcoming Section website). We also work to develop standards and recommendations for ethical representation of business clients implicating encryption, data breaches and recovery logistics, and to provide guideline for computer and online access policies complying with such federal laws as HIPAA and CFAA (Computer Fraud And Abuse Act) and state laws such as Texas Business and Commerce Code.

**Upcoming Events:**

Regarding the first webinar, here's the great news about the fabulous CLE -- complimentary to Section members!

COURSE TITLE: **Ethical Implications of Cloud Computing**

COURSE NO.: To be provided during the webinar

COURSE DATE: 11/19/2015, 4-5 PM central time

Approved 1 Hr Ethics &amp; Specialization credit:

Presented by our Committee Vice-Chair, Joseph Jacobson of Jacobson Law Firm of Dallas.

1.00 Administrative Law

1.00 Bankruptcy

1.00 Civil Appellate Law

1.00 Civil Trial Law

1.00 Consumer Law

1.00 Real Estate

**Get Involved:**

If you would like to help with the projects or join the Data Privacy and Security Committee, please contact Al Harrison, at [Patent.Trademark.Lawyer@hlop.com](mailto:Patent.Trademark.Lawyer@hlop.com).