

Spring 2016

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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)
Shapiro Bleging Barber Otteson LLP

Stephen C. Tarry
Vinson & Elkins LLP

Evan Young
Baker Botts LLP



Spring Newsletter 2016

Message From The Chair



Dear Section Members:

As my tenure as the Chair of the Business Law Section comes to an end in June, I want to report on two exciting developments which will have a continuing impact on our section after my departure.

First, the redesign of our Section's website, www.texasbusinesslaw.org, is nearing completion. We continue to update our website with digital images of past issues of the Journal of Texas Business Law and with continuing legal education (CLE) materials from the programs we sponsor. And second, several of our committees are working on legislative proposals for the next Session of the Texas Legislature. These proposals would provide a much need update to statutes which impact Texas businesses, and will ultimately enhance the attractiveness of Texas for businesses.

It has been my pleasure to serve as your Chair for the past year.

Best regards,

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/>.

Delaware Courts Continue To Rein In Disclosure Settlements



By Brent A. Benoit, Copyright Reserved 2016
Bourland, Wall & Wenzel, P.C.
Litigation Committee Chair

No matter the terms or the benefits to the parties involved, companies engaging in significant corporate transactions know one thing: they will very likely be sued. Opportunistic securities plaintiff's lawyers, understanding the leverage created by a transaction that both sides want (and may even need) to complete, frequently capitalize by initiating shareholder derivative or class action litigation. The litigation can take many forms, but very often the allegations include the assertion that some aspect of the contemplated transaction was not adequately disclosed. Because public filings cannot recite every detail of the negotiations or board deliberations, there is always undisclosed information (although often this is because the information is immaterial). Faced with litigation that could stall or even ultimately derail the transaction, the companies involved may elect to negotiate a quick settlement rather than test the allegations in a court room. Plaintiff attorneys are receptive provided that the settlement results in a satisfactory fee award. Shareholders generally are only involved in name only and their claims are often compromised in this less than robust process.

In the Delaware Chancery Court, where a considerable number of these lawsuits are litigated, shareholder derivative and class action lawsuit settlements require court approval. Ct. Ch. R. 23(e) (class action lawsuits) & 23.1(c) (derivative litigation). Very often, the consideration offered to the shareholders in the proposed settlement is supplementary disclosures that will "cure" the alleged disclosure deficiencies. These enhanced disclosures are alleged to provide benefit to the shareholders because the shareholder vote is now better informed. In exchange, the company obtains a release. The agreement also typically provides for an attorney's fee award to the plaintiff's attorneys for the alleged benefit provided to the shareholders.

Recently, the Delaware Chancery Courts have viewed these settlements with increasing scrutiny and this trend continued in the recent case of *In re Trulia, Inc. Stockholder Litigation*. 2016 WL 325008 (Del. Ch. Jan. 22, 2016). The lawsuit sought to enjoin the proposed merger of Trulia and Zillow. *Id.* at *1. It alleged that Trulia's board failed to obtain sufficient consideration in the merger for Trulia's shareholders, failed to properly value the company, agreed to deal terms that prevented superior offers, and disseminated false and misleading disclosures to investors. *Id.* at *3. The parties quickly agreed to settle the lawsuit. *Id.* The terms of the settlement provided for certain additional material to be disclosed to investors, a release to be issued to the defendants, and the payment of a fee to the plaintiff's attorneys. *Id.* The shareholders received no monetary consideration under the settlement. As required under Delaware law, the parties presented the settlement to the Chancery Court for approval. *Id.* at *3-4.

Before reaching the merits, the Court discussed the need for enhanced scrutiny of such disclosure settlements. The Court began by noting the extreme incentive to settle that is felt by companies facing such lawsuits – pointing out that economically rational defendants would agree to settle for "a peppercorn and a fee." *Id.* at 5 (quoting *Solomon v. Pathe Comm. Corp.*, 1995 WL 250374, at *4 (Del. Ch. Apr. 21, 1995), *aff'd* 672 A.2d 35 (Del. 1996)). The Court, however, noted that such litigation often yields no real benefit to the shareholders. *Id.* This is especially true in disclosure settlements where the only "benefit" to the shareholders is more information. *Id.* at *6. The Court pointed out that such disclosure settlements present real difficulties when settlements are submitted for approval because the proceedings are often non-adversarial and follow "little or no motion practice" and typically "the discovery record is sparse." *Id.* at *7. In such circumstances, courts are left to essentially fend for themselves in attempting to determine whether the settlement should be approved.

The Court noted that disclosure settlements are under increasing attack by academics and that the Chancery Courts have begun to apply enhanced scrutiny to the settlements. *Id.* at *8 n.29 & n.35. The Court noted that one way the disclosure claims could be effectively tested through the advocacy process was to adjudicate them in the context of a preliminary injunction motion. *Id.* at *9. But, of course, this defeats the certainty that a settlement provides. The Court also pointed out that the enhanced disclosures could be made, the claims mooted and dropped, and a separate motion for fees to be filed. Because the claims are resolved already, the defendants would then have an incentive to vigorously contest the fee application. *Id.* Of course, this

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deprives the plaintiff's attorney of certainty and deprives the defendants of a full release. Nonetheless, the Court noted an increase in the use of this mechanism to settle cases. *Id.* at *10.

The Court concluded by holding that in the absence of some alternative process, it "will continue to be increasingly vigilant in applying its independent judgment to its case-by-case assessment of the reasonableness of the 'give' and 'get' of such settlements in light of the concerns discussed above." *Id.* Specifically, the Court held that it would disfavor proposed settlements unless any proposed disclosures "address a plainly material misrepresentation or omission" and the Court clarified that this means that "it should not be a close call" as to whether the proposed disclosure is material. *Id.* The Court also stated that it would look for "narrowly circumscribed" releases for defendants so that plaintiff's claims are not unfairly or too broadly compromised. *Id.* The Court even noted the possibility that it may be beneficial to appoint an amicus curiae to assist in evaluating the proposed settlement. *Id.* Ultimately, the Court refused to approve the settlement at hand because it concluded that none of the supplemental disclosures were sufficiently material to justify the settlement. *Id.* at *13-18.

The lesson for practitioners is that the days of perfunctory review of a disclosure settlement in the Delaware Chancery Court are over. Careful consideration must be given to the structure of any proposed disclosure settlement. Specifically, the proposed disclosures must be carefully thought through and proposed releases should be evaluated to make sure that they are broad enough to accomplish what the defendants require in a settlement, but are not too broad that they will result in rejection.

Report of Nominating Committee

As provided in Article IV, Section 1 of the Bylaws of the Business Law Section of the State Bar of Texas, the current Chair of the Section, F. John Podvin, Jr., appointed David R. Keyes, Richard Tulli and Scott G. Night to serve as the Nominating Committee for members of the Council of the Section to be elected at its annual meeting in 2016. Mr. Podvin asked Mr. Tulli to serve as Chair of the Nominating Committee.

The members of the Committee met via telephone conference call and communicated via electronic messages. The Nominating Committee is pleased to make and report the following nominations for two-year terms on the Section's Council, to serve commencing immediately following the close of the Section's 2016 annual meeting:

Jacqueline Akins
E. Steve Bolden II
John Fahy
Irene Kosturakis
Christina Marshall

The other five members of the Council elected for two-year terms in 2015 will continue to serve, and Mr. Podvin will also serve as a member of the Council as its immediate past Chair as provided in Article III, Section 2 of the Bylaws of the Section.

The Committee also recommends that the Council, at its annual meeting following the annual meeting of the Section, elect the following individuals as officers of the Section, to serve commencing at the close of the Council's annual meeting:

Irene Kosturakis, Chair
Shanna Nugent, Chair-Elect
Evan Young, Vice-Chair
Matthew T. Moran, Secretary-Treasurer

Membership Update: The Law School Initiative

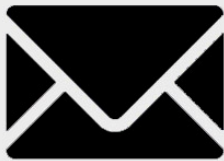
Several years ago, the membership committee of the Business Law Section examined ways to thoughtfully increase the membership of the Section and provide meaningful benefits and services to our members. As a result of several brainstorming sessions of the membership committee, the Law School Initiative was born. For the past couple of years, members of the Business Law Section have visited most of the Texas law schools each year and discussed the life of a business lawyer in a panel presentation. We just wrapped up our visits for the 2015/2016 school year and had great successes.

The goal of the Law School Initiative is to reach all of the law students in Texas who are interested in business law and provide meaningful member services to help the students be successful. We believe that if we can attract students to the Business Law Section by providing helpful information and networking and mentorship opportunities, then the students will be more likely to continue as a contributing member of the Business Law Section during their practice and further enhance the membership of the Business Law Section.

During and following the presentations at the law schools, at least 75% of the attendees join the Business Law Section, which has resulted in over two hundred new members. The Business Law Section provides free membership for all law students and lawyers during the first two years of their practice. In addition to the increased membership of the Business Law Section, over the past two years we have seen the creation of business law societies at law schools where such societies did not previously exist.

As we move forward with the Law School Initiative, we will continue the panel presentations by accomplished business lawyers to provide students with helpful information and tips but we also plan to expand to more formal mentoring programs and partnerships with law students. With more than 4,000 members, the Business Law Section is in a unique position to invest in the career development of our young lawyers and ensure that Texas remains as a preeminent place for business lawyers to practice, develop and thrive.

If you would like to participate in the Law School Initiative, please reach out to Christina Marshall at christina.marshall@chalakmitragroup.com and Mandy.Price@weil.com. Additionally, if you or anyone you know would like to join the Business Law Section, a link to the membership application is as follows: <http://www.texasbusinesslaw.org/join/how-to-join-the-business-law-section/membership-application/view>.



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.

UPCOMING CLE PROGRAM***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

Click [HERE](#) to register to attend the Annual Meeting

Click [HERE](#) for a listing of the Business Law Section and

Corporate Counsel Section CLE on June 16, 2016 at the Annual Meeting.

**CLE Credit:**

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



Committee Spotlight:
**Venture Capital and Emerging
Businesses Committee**



**Newsletter
Submissions**

Chair: Rick Jordan

Rick is the immediate Past Secretary/Treasurer of the Business Law Section. He represents numerous start-ups, investors, and executives throughout Texas, and particularly in Austin. Rick splits his time between the Dallas and Austin offices of Gardere Wynne Sewell LLP, where he is a corporate partner. Rick is a frequent speaker on venture capital matters.

In December 2015, the council re-established the committee (which had been inactive for a decade) and appointed Rick as chair. Rick is interested in connecting with Section members who practice in the venture space to ensure the committee is providing substantive and market-oriented information.

Current Priorities:

The primary purpose of the committee is to support attorneys who assist start-ups and investors with organizational matters, financings, and day-to-day matters. Among other activities, the committee anticipates hosting CLEs from time to time, which will be available through the Section's new website. Initial topics will be:

- How to Issue Equity (or Equity Equivalents) to Employees without Giving Away the Company and Creating Tax Problems
- So You're the Outside General Counsel for an Emerging Business – Some Tips on Day-To-Day Labor, Tax, and Securities Law Matters
- Preparing an Emerging Business for an Exit

Get Involved:

Rick intends to grow the committee to 8 to 10 members. If you would like to help with any projects or join the committee, please contact Rick Jordan, at rjordan@gardere.com or 214.999.4839.

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

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