



DELBERT HOSEMANN
Secretary of State

2016 Business Law Study Group Minutes

August 2, 2016

The Business Law study group was called to order on Tuesday, August 2, 2016, at 11:30 a.m. at the Secretary of State's Office, 125 S. Congress Street, Jackson, Mississippi. A list of attendees is included as Exhibit A.

Welcome and Introduction

Delbert Hosemann, Secretary of State, welcomed everyone to the Business Law Study Group and began with a quick summary of all the Secretary of State office's ongoing initiatives and programs. He then introduced Curtis Anders, Senior Attorney for Policy and Research.

Proposed Changes

Anders provided a brief overview of the agenda for the meeting. First, the group would be considering the potential adoption of legislation related to Series LLCs and For-Profit Public Benefit corporations, then evaluating proposed changes to the Model Business Corporation Act, and finally the floor would be open for input and suggestions from attendees.

A. Series LLC

Series LLCs are the subsidiary "series" of a larger, parent or "master" LLC. The main advantages of a Series LLC are the liability shield created between individual series or between the series and parent, and the filing simplicity. Currently eleven (11) states have adopted Series LLCs. Anders highlighted several potential legal issues, especially in areas of bankruptcy law, particularly substantive consolidation, piercing the corporate veil, and alter-egos/corporate fictions that may trigger consolidation of assets of all series and master in bankruptcy or legal proceedings. Secretary Hosemann noted that the Office of the Secretary of State has considered this legislative proposal before and questioned the real benefit of enacting such a provision now. Anders discussed the Fifth Circuit precedent which holds state corporate law binds courts in legal proceedings and in those states that do not recognize Series LLCs, courts interpreting that state's law cannot recognize such an entity structure. If Mississippi were to adopt Series LLCs

legislation it would likely adopt language similar to Illinois, as it addresses and attempts to limit many of the aforementioned legal issues.

Secretary Hosemann asked why a person would not opt to file each business as its own LLC. Anders explained that filing is much simpler for a Series LLC, rather than individual filings for each separately held LLC; additionally, no separate registration fee need be paid for each LLC under a Series LLC. Tom Riley, Assistant Secretary of State for Business Services, added that in Illinois it costs approximately \$500 per LLC registration, and it may be cost-effective in some instances to establish series rather than separate LLCs. However the cost per registration in Mississippi is \$50. One of the group participants was worried this business structure would increase liability for consolidation of assets for such a low filing fee savings. Another group member asked if there is only one operating agreement for the parent or master LLC, or whether each Series also has its own. Anders answered that the master LLC would always have a governing document stipulating it is a series. Riley added that it would seem that each series would need some kind of operating agreement. He also voiced concern over transparency of disclosure, as only one annual report needs to be filed by the master and each series need not file/disclose separately. Another participant asked what would happen to the holding of real property by a series that wasn't required to make disclosures, to which Secretary Hosemann agreed, stating this change might make it more difficult to search for title on real property.

One group member asked if there might be some benefit to foreign, out-of-state, corporations being able to create series inside Mississippi, thereby saving on the \$250 filing fee. Secretary Hosemann responded that the \$250 fee for foreign corporation filings generates about \$2.6 million annually, which in turn helps fund the State's elections. Tom Riley added that numbers of foreign corporations filing in the state are dropping due to the relatively high fee. The question was asked if there would be a response from the Department of Revenue regarding nondisclosure of individual series, or if they would require a separate EIN number. Secretary Hosemann asked the group for a consensus on whether any Series LLC legislation is needed, and the answer generally was "no."

B. Benefit Corporations

Preston Goff, Assistant Secretary of State for Policy and Research, then presented the possibility of adopting a For-Profit Benefit Corporations entity structure. Goff told the group the idea had first been introduced in a Nonprofit Webinar hosted by the Office of the Secretary of State. Goff gave a brief summary of benefit corporations, telling the group they are sometimes referred to colloquially as "Corporations with a Conscience." This entity type allows for corporations to engage in activities designated for a "public benefit" without fear of legal action against the corporations' Board of Directors for not acting in a way that maximizes profit. Goff then introduced Tennessee Code § 48-28-103(9), which gives the definition of "specific public

benefit,” for discussion among the group participants. Goff then stated that participants in the Nonprofit Webinar had expressed concern the general public would confuse for-profit benefit corporations with nonprofit corporations.

Tom Riley asked if the Tennessee law’s list of “public benefits” limited entities to only engaging in one of those few options; and, whether the public benefit is listed in the articles of incorporation or the bylaws, because if the public benefit provision is located in the bylaws, those aren’t filed with the Secretary of State’s office and there would be little oversight over compliance. Secretary Hosemann then stated he thinks benefit corporations would help promote start-ups, because students at Mississippi universities and colleges would adjust their public benefit status to positively influence the ability to accrue capital. A group member asked how creating a benefit corporation entity type would affect corporations who already engage in charitable giving now, specifically whether this would create more liability for those companies. Goff and Riley both responded that a benefit corporation need not necessarily engage in charitable giving, they might instead choose to use only recycled paper or buy solar panels to run their business completely on solar energy for example. A group member opined that companies could engage in this practice without being a benefit corporation, because if a company is advertising from the beginning that they engage in a public benefit in addition to making a profit, then the shareholders bought into the company knowing they were agreeing to a potentially lower dividend amount. One group member inquired what the actual benefit of being a benefit corporation was and then asked if it is possible for benefit corporations to supplement their income with grant money. Goff responded that he was unaware of their ability to get grants, but they clearly operate as for-profit businesses and not 501(c)(3) organizations. Goff stated that the benefit is almost entirely a marketing tool that these corporations could use to garner more investments.

One group member then asked if a benefit corporations will create liability in the reverse, for example, if a company is not engaging in the public benefit as it stated it would. Another member added onto that question, asking if it adds even more liability for that company since they’ve written that public benefit down into their governing articles. Goff answered that this is likely the case, although the Secretary of State likely would not be the party to enforce it. More likely than not, the shareholders of that benefit corporation would sue to enforce the public benefit provision. Goff also noted some states have not enacted separate benefit corporation statutes but rather only added provisions into their existing law adding protection for public benefits. Some states even require their benefit corporations be certified by “B-Labs” as a for-profit benefit corporation. It was noted that under the B-Labs criteria it is possible to get certified as a “certified benefit corporation” under any entity type, including LLCs. One group member asked how the certification process works. Goff explained that every few years the certification company comes in to look at the public benefit provision, how the company is complying, and collects a fee from the company for recertification. The member then followed up by asking if

the Secretary of State, the IRS, and other agencies have oversight over a benefit corporation, or are the shareholders the only ones who can hold that benefit corporation accountable. Goff answered that this is likely the case. Also, it would be possible to distinguish a benefit corporation because they could use a “P.B.C.” designation or “public benefit corporation.” Cheryn Netz, Assistant Secretary of State for Securities, asked if benefit corporations would be a separate section of the code or if they would be incorporated into the existing Mississippi Business Corporation Act. Goff answered there would likely be a new chapter created, and that is how most other states are handling it as well.

C. Model Business Corporation Act (proposed changes)

Goff then introduced the newest proposed changes by the American Bar Association (“ABA”) to the Model Business Corporation Act (“MBCA”). He noted these changes are only out in draft form and are still in the comment period, but the final draft would be released sometime in early 2017. Most of the changes are stylistic: renumbering code sections or changing a few words. The most significant change, according to Goff, is the revision to voting trust agreements, which in Mississippi and the original MBCA are limited to 10 years before expiration. The 10 year limitation has been removed from the MBCA proposed changes. Secretary Hosemann asked if the 10 year period could be extended. A member responded no, the limit for a voting trust agreement is 10 years under current law. Another member asked about the logic behind capping such an agreement at 10 years, sentiments the Secretary also echoed. The consensus in the room was to eliminate the 10 year cap.

Goff then discussed the next change, which renames a “certificate of authority” for a foreign corporation as “foreign registration statement.” A member requested we not change the name and the Secretary of State agreed.

Goff then moved onto the governing law provision revision and the types of activity constituting “doing business” in the state as to require registration as a foreign entity. Most of the changes to this provision were stylistic; the section had been consolidated with another section and renumbered. The Secretary asked whether under the new language Uber would be considered “doing business” within the state, even though they only employ independent contractors. Tom Riley answered no, under this language Uber is not required to register as a foreign entity in the State of Mississippi. Then the Secretary asked if trial lawyers on either plaintiff or defense sides would take issue with any of the suggested changes. Tom Riley stated the statutory language appears to be identical to the provisions currently in the Mississippi Code. The Secretary then asked if any of the revisions complicate service of process if one is not “conducting business” in the state for purposes of the statute. Tom Riley answered that the Mississippi Registered Agents Act has solved a lot of those issues, because plaintiffs can serve the Office of the Secretary of State as the registered agent. The Secretary asked a group member to circulate a copy of the

discussed changes to litigators at his firm and to get their thoughts. One member asked if Mississippi has observed every change made to the MBCA, which Netz then answered affirmatively. She said that after every proposed change, they have brought those changes to a study group for further review and discussion. Goff restated that these changes were still in the comment period and would be revisited next year once the final changes are released by the ABA.

Conclusion

At the conclusion of scheduled discussion, Secretary Hosemann asked the group participants to contact the Policy and Research Division staff if they had any technical suggestions related to business law reform.

With no further business, the Study Group was concluded at 12:50 p.m.

Exhibit A

Minutes of the Business Law Study Group

August 2, 2016

Attendees

1. C. Tyler Ball
2. Robert E. Box, Jr.
3. William O. Brown, Jr.
4. C. Phillip Buffington, Jr.
5. Stephen W. Burrow *
6. Chad Davidson*
7. C. Joyce Hall
8. Nina M. Jacobs
9. Peder Johnson
10. Walter R. Jones, III*
11. Linda Keng
12. Floyd Melton, III
13. Paul Newton*
14. Kenneth A. Primos III*
15. Ken Rector
16. Gordon "Sandy" Sanford
17. Thomas B. Sheperd
18. William B. Staggers
19. Joseph E. Varner, III

Secretary of State's Staff

1. Delbert Hosemann
2. Nathan Upchurch
3. Anna Moak
4. Preston Goff
5. Curtis Anders
6. Leann Thompson
7. Matt Anthony
8. Meredith Pohl
9. Tom Riley
10. Cheryn Netz

* Telephone