



LEGISLATIVE UPDATE

Business Law

BY DARYL B. ROBERTSON



Introduction

This article summarizes several bills passed by the 82nd Texas Legislature in its 2011 Regular Session that affect business law. These bills amend the Texas Business Organizations Code (TBOC) or the Texas Business and Commerce Code (TBOC). This discussion should not be considered exclusive of other bills that may affect certain areas of business law. These summaries should not be relied upon for legal advice to clients and interested attorneys should review the actual bill before providing such advice. All bills are effective on Sept. 1, 2011, unless otherwise indicated.

General TBOC Amendments Bill (S.B. 748)

Senate Bill 748 makes numerous technical and substantive amendments to the TBOC. The following discussion summarizes, in this author's view, the substantive amendments and more important clarifications effected by the bill.

Conflict of Interest Transactions and Relationships

The TBOC contains various sections that establish similar safe-harbor approval procedures for transactions between a for-profit corporation, nonprofit corporation, real estate investment or limited liability company (LLC) and one of its managerial officials (i.e., a governing person or officer).¹ S.B. 748 revises the provisions of these sections to make their intent more clear. Each section is amended to clarify that the transaction is not void or voidable, and is valid and enforceable, notwithstanding the conflicting relationship or interest of the managerial official, or his or her affiliates or associates, if the requirements of the section are satisfied. New language in each section specifies that neither the domestic entity nor any of its owners have any cause of action against the conflicted managerial official for breach of duty in respect to the transaction because of such relationship or interest or because the managerial official executes a consent or participates in the meeting of governing persons approving the transaction.



References in Governing Documents To Prior Statutes and Old Terminology

S.B. 748 adds new Section 402.0051 and amends several other sections to clarify that, in a governing document or filing instrument (including a certificate of formation or application for registration), references to prior law (including the business entity statutes replaced by the TBOC), the use of synonymous terminology contained in prior law, the failure to state the type of entity, the failure, in an application for registration as a foreign entity or any amendment thereto, to appoint the Secretary of State of Texas as agent for service of process when required or the inclusion of provisions authorized by prior law at the time of filing or adoption are not nonconforming to the TBOC and, therefore, are not required by other provisions of the TBOC to be updated or amended. The changes also specify how references to prior law should be interpreted in governing documents.

Limited Liability Partnerships

TBOC Section 152.804 required a limited liability partnership (LLP), as a condition to its registration, to provide evidence of \$100,000 of liability insurance or a \$100,000 cash deposit, letter of credit or bond (referred to herein as the “insurance requirement”). S.B. 748 repeals Section 152.804 and other provisions that cross-reference to such section or contain provisions relating to such insurance requirement. Also deleted are provisions specifying that a partner could be liable for negligence or malfeasance of another partner if the partner was supervising the responsible partner or directly involved in the specific activity or had knowledge of such negligence or malfeasance by the responsible partner and failed to take reasonable action to prevent it.

New language is added that clarifies an obligation is incurred while a partnership is an LLP if the obligation relates to an action or omission occurring, or the obligation arises under a contract or commitment entered into, while the partnership is an LLP.

Charging Orders for General Partnerships

S.B. 748 adds charging-order provisions applicable to partnership interests in general partnerships that are similar to those contained in the TBOC for limited partnerships and LLCs.

Reasonable Restrictions on Access to LLC And Limited Partnership Records

An amendment specifies that a company agreement of an LLC may not unreasonably restrict the right of access of a member or manager to records and information. For limited partnerships, a similar change specifies that a limited partnership agreement may not unreasonably restrict a partner’s right to access to books and records. As a result, by implication, the limited partnership agreement or company agreement may rea-

sonably restrict a partner’s, member’s, or manager’s right of access to the entity’s books and records.

Membership Interests as Community Property And After Death or Divorce

S.B. 748 clarifies that an LLC membership interest may be community property under applicable law and that a member’s right to participate in the management of the business of the LLC is not community property. New Section 101.1115 clarifies that a non-member who, under other applicable law, succeeds to or retains an interest in a membership interest upon the death or divorce of a member acquires only the rights of an assignee.

Dissenter Appraisal Rights Procedural Amendments

S.B. 748 amends the notice and demand requirements and various time limits contemplated by the dissenter appraisal rights provisions. As revised, if a proposed entity action (such as a merger) is submitted to a vote of the owners at a meeting, a notice from an owner to the domestic entity stating the owner’s intent to exercise dissenters’ rights and containing other specified information must be delivered to the entity’s principal executive office before the meeting. A second required notice demanding payment of the fair value of the owner’s ownership interests must be given within 20 days after the effectiveness of the proposed entity action. The time periods for this demand and other subsequent specified time periods are amended to reflect that the demand is made after, and not before, the entity action has become effective, not upon the owners’ vote or consent regarding that action. Other amendments specify that the dissenting owner may consider the responsible organization’s offer of fair value for 90 days and the responsible organization must pay the agreed amount of fair value within 120 days, after the date on which the entity action was effective.

Shareholder Standing for Derivative Actions (S.B. 1568)

To bring a “derivative action” (i.e., an action brought in the right of a corporation by a shareholder), TBOC Section 21.552(a) requires that a person must have been a shareholder at the relevant times and must fairly represent the interest of the corporation in the action. In apparent conflict with this requirement, Section 21.552(b) stated that Chapter 10 or Subchapter J of Chapter 21 may not be construed to limit or terminate a shareholder’s standing after a merger to the extent that the shareholder had standing immediately before the merger. S.B. 1568 deletes Section 21.552(b), thereby eliminating any resulting ambiguity.

LLC Liability Shield (S.B. 323)

Although TBOC Section 101.114 provides that a member or manager is not liable for the debts, obligations, or liabilities of an LLC, several court cases in Texas have determined, without a great deal of analysis, that corporate veil-piercing standards should apply in the context of LLCs to overcome the



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statutory liability shield. Consistent with these court cases, S.B. 323 adds new Section 101.002, which incorporates by reference the corporate veil-piercing standards set forth in Sections 21.223 through 21.226 so that they apply to an LLC, subject to the limitations contained in Section 101.114.

Choice of Law for Qualified Transactions (H.B. 2991)

Chapter 271 of the TBCC provides that, with certain exceptions, the parties to a “qualified transaction” (i.e., transactions involving value of more than \$1 million) may agree in writing that the law of a particular jurisdiction governs an issue relating to the transaction if the transaction bears a reasonable relation to the chosen jurisdiction. Alternative criteria are specified to determine if a qualified transaction bears a reasonable relation to a particular jurisdiction. House Bill 2991 amends one criterion to specify that negotiation relating to the transaction may take place “from,” in addition to “in,” the jurisdiction. A new alternative criteria is added for a transaction in which (i) all or part of the subject matter is an extension of credit involving at least \$25 million, (ii) at least three providers of credit are parties to the transaction, (iii) a party to the transaction has more than one place of business and has an office in the chosen jurisdiction, and (iv) the chosen jurisdiction is in the United States.

A second new criterion is added permitting the choice of a jurisdiction if all or part of the subject matter of the transaction is related to the governing documents or internal affairs of an entity formed under the laws of the chosen jurisdiction. Finally, the amendments specify that a reasonable relation established at the inception of the qualified transaction is preserved despite subsequent changes in the transaction, its subject matter or parties, or despite amendments to any transaction agreement.

Amendments to UCC Chapter 9 Secured Transactions (S.B. 782)

S.B. 782 enacts changes to Chapter 9 Secured Transactions of the TBCC. Most of the changes represent uniform changes to the UCC approved by the National Conference of Commissioners of Uniform State Laws and the American Law Institute. The changes will have a delayed effective date of July 1, 2013. New Subchapter H to Chapter 9 added by the bill contains lengthy transition provisions. This summary addresses only some of the changes.

S.B. 782 makes changes to the definitions of “authenticate,” “certificate of title,” and “registered organization.” A new definition of “public organic record” is added to mean a record that is available for inspection by the public and that is the initial record filed with or issued by a state or the United States to form an organization and any record filed with or issued by the state or the United States that amends or restates the initial record.

As amended, control of electronic chattel paper can be established through a system employed for evidencing the transfer of interests in the chattel paper.

The provisions in TBCC Section 9.503 for stating the name of the debtor on a UCC financing statement are also clarified.

For a registered organization, the name on the financing statement must be the registered organization’s name on the public organic record most recently filed with, issued, or enacted by the registered organization’s jurisdiction of organization that purports to state, amend, or restate its name. Revised rules for estates and trusts are also provided. For individual debtors, the financing statement must state the name indicated on the individual’s latest unexpired Texas driver’s license or personal identification card. If the individual has no unexpired Texas driver’s license or personal identification card, the financing statement must provide the individual name or the surname and first personal name of the debtor.

Service of Process on LLCs By Political Subdivisions (S.B. 582)

S.B. 582 amends TBOC Section 5.257 and the Texas Civil Practices and Remedies Code to add LLCs to special provisions specifying how service of process relating to ad valorem tax collection suits by a political subdivision can be effected against a corporation whose certificate of formation or registration has been terminated or forfeited.

Service of Process on Employees of Registered Agents That Are Organizations (H.B. 2047)

Issues have arisen in the past as to whether service of process against a registered agent that is a corporation must be effected on an officer of that corporation. H.B. 2047 specifies that any employee of an organization that is serving as a registered agent may receive service of process at the registered office. An organization serving as a registered agent must have an employee available at the registered office during normal business hours to receive such service.

Joint Ownership of Domestic Entities by Physicians And Physician Assistants (H.B. 2098)

H.B. 2098 amends the TBOC to authorize properly licensed physicians and physician assistants to form a non-profit corporation, general partnership, professional association, or professional LLC to perform professional services that fall within the scope of practice of those practitioners.

NOTES

1. See TBOC §§21.418, 22.230, 101.255, and 200.317.

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