

Oregon Business Lawyer

NEWSLETTER

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CORPORATION LAW

Understanding Oregon's New Benefit Company Law

By Jay D. Brody, K&L Gates LLP

On January 1, 2014, Oregon's "benefit company" law took effect.¹ The new form of legal entity provides an alternative or supplement to the "B Corp" designation currently offered by nonprofit organization B Lab, under which a number of Oregon companies have already been certified. Oregon businesses electing to become benefit companies will commit to provide environmental or social benefits

to society, and to consider the effects of their actions on various stakeholders.

While becoming a benefit company will be relatively straightforward, the new law may pose challenges to businesses as they adapt to new fiduciary responsibilities and work to understand their compliance obligations. Oregon business attorneys will need to advise clients not only how they should form and govern a benefit

company, but also how to manage potential liabilities while taking advantage of the decision-making flexibility offered by the new law.

Becoming a Benefit Company

Any Oregon corporation or limited liability company can become a benefit company by including in its articles of incorporation or articles

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CORPORATION LAW

Actions That Arise Out of Oppression and Deadlock

By Robert J. McGaughey, Attorney at Law

ORS 60.661 (Grounds for judicial dissolution) has long permitted a shareholder to seek judicial dissolution when there is conduct which is "illegal, oppressive or fraudulent," or in the event of a voting deadlock. A similar provision exists in the newer ORS 60.952, applicable only to close corporations. A close corporation is a corporation that does not have shares listed on a national securities exchange

or regularly traded in a market maintained by one or more members of a national or affiliated securities association. Unlike ORS 60.661, ORS 60.952 specifically gives the corporation or noncomplaining shareholders the right to force a sale of the complaining shareholder's shares at a price and on terms agreed upon by the parties, or, if the parties are unable to agree, set by the court. This irrevocable buy-out

election must be made within 90 days after the proceeding is brought.

Although the only remedy specified in ORS 60.661 is dissolution, courts acting in proceedings under this statute usually fashioned other remedies, relying on their traditional equitable powers.¹ In contrast, ORS 60.952 includes a long list of possible remedies,

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of organization a statement that it is subject to the benefit company act. Existing businesses that wish to become benefit companies can make the election by amending their articles, subject to a minimum status vote of their shareholders or members.

Providing a Public Benefit

At the heart of the benefit company legislation is the requirement to provide a public benefit, which includes a “general public benefit” – a “material positive impact on society and the environment, taken as a whole, from the business and operations of the company”—together with any additional specific public benefits described in a company’s articles.

The “governors” of a benefit company—its directors, managers, or members—must also account for how an act or decision not to act will affect the following when determining the best interests of a benefit company:

- The company’s shareholders and members;
- The employees and work force of the company, and of its subsidiaries and suppliers;
- The company’s subsidiaries and suppliers;
- The interests of the customers;
- The community;
- The local and global environment;
- The short-term and long-term interests of the company; and
- The company’s ability to fulfill its public benefit purposes.

The above represents a substantial departure from the traditional fiduciary duties of a non-benefit company’s directors or managers. Not only do benefit companies have an affirmative obligation to consider different priorities and constituencies, but the law effectively provides “cover” to companies wanting to forego profit maximization in favor of a more balanced set of priorities that could include, for example, providing access to education or improving the physical well-being of the company’s employees.

Governance

A benefit company must have a board of governors for the purposes of making decisions under the law. The board of governors is comprised of a corporation’s directors or an LLC’s managers (or, for a member-managed LLC, its members). The company may, but does not need to, elect a “benefit governor” to provide information about ongoing benefit company responsibilities to the governors and fulfill other duties.

Enforcement and Liability

While the act requires a benefit company to consider public benefit issues, it also provides legal protection for the company and its directors, officers, managers, and members, and substantially limits the scope of their liability for making decisions to achieve public benefits.

Instead of financial penalties, the muscle of the benefit company act is a proceeding—which can be brought by the company, a governor, a shareholder, a member, or another person identified in a benefit company’s articles or bylaws—to compel the benefit company to provide a public benefit or otherwise act in accordance with the relevant provisions of its articles.

Because such actions are limited to mostly internal constituencies and monetary compensation is not available, the potential for frivolous or financially motivated litigation should be limited. The enforcement provisions of the law seem designed primarily to ensure that someone at the benefit company can force the company to duly heed its responsibilities.

Reporting Obligations

Each year, a benefit company must prepare a benefit report. The report must provide a narrative describing the extent to which the company provided public benefits during the previous year, together with a description of the actions and methods used to provide the public benefits and any circumstances that hindered the providing of public benefits. The benefit report also must assess the extent to

which the benefit company met or exceeded a specific third-party standard selected by the benefit company, and the rationale for choosing that third-party standard.

Working Out the Details

Questions remain regarding how the statute will evolve and be interpreted by the courts, and how Oregon businesses will adapt. For example:

1. What will be the standard of review in determining whether a “material positive impact” has been achieved by a benefit company? When can a small positive impact be deemed by a company to outweigh what many would consider a substantial negative one? Will the business judgment rule and other case law-derived principles of corporate law apply?
2. What is a sufficient level of substantive review for benefit company governors? For example, can a company that has committed to a specific public benefit of avoiding environmental contamination be compelled to commission expensive environmental reports to evaluate its success? Will complex determinations made by non-expert governors be sufficient to satisfy the statutory requirements?
3. Will investors in Oregon companies seek protective provisions or voting agreements to make it more difficult for businesses to become benefit companies? Such investors may want assurances that the companies in which they are investing will remain focused on maximizing profits. As a result, Oregon attorneys could begin to routinely seek such protections for their clients, even in circumstances where a benefit company election has not yet been contemplated by management.

Until the benefit company law has been tested in practice and these questions and others have been resolved, Oregon business lawyers will need to be particularly vigilant in navigating this new area on behalf of their clients. ■

1. Or Laws 2013, ch 269 (H.B. 2296)

expressly permitting the courts to fashion remedies that may include an accounting, damages, dissolution or other remedy.

Illegal, oppressive or fraudulent conduct

According to the Court of Appeals opinion in *Hayes v. Olmsted & Associates, Inc.*

The legislature has not defined “oppression” for present purposes...Rather, courts must determine on a case-by-case basis whether the conduct complained of rises to the level of oppression.²

A fiduciary duty breach may constitute oppressive conduct.³ Where there are both fiduciary and oppressive claims and where the remedy imposed is a stock sale, the fiduciary claim “is essentially subsumed under the oppression claim” and there is not separate remedy for the fiduciary claim.⁴ But not all conduct which negatively affects shareholders will give rise to a remedy under ORS 60.661 or 60.952. As the Court of Appeals described it:

The existence of one or more of these characteristic signs of oppression does not necessarily mean that the majority has acted oppressively within the meaning of ORS 60.661(2)(b). Courts give significant deference to the majority’s judgment in the business decisions that it makes, at least if the decisions appear to be genuine business decisions. As we have noted, attempts to define what oppressive conduct is, instead of what it is not, have proved elusive, and cases of this sort depend heavily on their specific facts. The court must evaluate the majority’s actions, keeping in mind that, even if some actions may be individually justifiable, the actions in total may show a pattern of oppression that requires the court to provide a remedy to the minority.⁵

Usually, in order to trigger a remedy under ORS 60.661 or 60.952, a shareholder must engage in some pattern of wrongful conduct or a single instance of wrongful conduct which is particularly egregious. Conduct which constitutes “oppressive conduct” is necessarily fact dependent and summary judgment on this issue is usually inappropriate.⁶

The other conduct which triggers ORS 60.661(2) or 60.952(1)—fraudulent and illegal conduct—has not been separately discussed by the Oregon courts.



Deadlock

ORS 60.661 and 60.952 also permit courts to dissolve a corporation (or fashion another remedy) in the event of shareholder or director deadlock. “Deadlock is the inaction which results when two equally powerful factions stake out opposing positions and refuse to budge.”⁷ If one shareholder owns a majority of the shares, the corporation is not necessarily deadlocked simply because its board is deadlocked, because ORS 60.661(2)(a) and 60.952(1)(a) also require that “the shareholders are unable to break the deadlock.”

Even though shareholders are deadlocked, dissolution is not proper if the board is not deadlocked or if shareholder deadlock has not lasted through at least two consecutive annual meeting dates.⁸

Power to dissolve is discretionary

In *Baker v. Commercial Body Builders, Inc.*, 264 Or 614, 507 P2d 387 (1973), the court noted the power granted by the judicial dissolution statute was

discretionary and pointed out that this statutory power did not limit the court’s more general equitable power to protect minority shareholders by fashioning remedies other than dissolution.⁹

Courts are disinclined to intervene to dissolve a corporation – even in cases involving deadlock or oppressive conduct. A court may find inequitable conduct, but order relief short of dissolution.¹⁰

Mismanagement alone usually does not constitute oppression

Courts will usually not intervene in the case of alleged director incompetence and mismanagement.¹¹ The Oregon Supreme Court said:

In the absence of a fraudulent or coercive design or purpose on the part of the management neither the judgment of the court nor that of a minority stockholder can properly be substituted for the judgment of the majority of the directors and stockholders of a corporation.¹²

Ordinarily, either bad faith or fraud must be present in order for a court to intervene in internal corporate affairs.

New statutory provisions for close corporations

As discussed above, the prescribed remedy for oppressive conduct under ORS 60.661 is the dissolution of the corporation.

ORS 60.952 became law in 2002 and applies procedures specifically for close corporations. Concurrent with the effective date of ORS 60.952, ORS 60.661(2) was revised to apply only to corporations that have shares listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national or affiliated securities association. The major points of ORS 60.952 are:

- The threshold statutory issue of “illegal, oppressive or fraudulent” conduct remains unchanged and has been left for further judicial development.

- In the event a court finds threshold oppressive conduct, statutory remedies are expanded beyond the drastic remedy of dissolution. The statute lists twelve other permissive statutory remedies—all previously applied by the courts exercising their equitable powers. The remedies listed in ORS 60.952(3) are not exclusive.
- Except for the remedies of an accounting, damages, or dissolution, shareholders may agree to limit or eliminate any of the statutory remedies through an agreement under ORS 60.265.
- In fashioning a remedy, courts may consider the “reasonable expectations of the corporation’s shareholders as they existed at the time the corporation was formed and developed during the course of the shareholders’ relationship with the corporation and with each other.”¹³ The statute continues: “[t]he court shall endeavor to minimize the harm to the business of the corporation.”
- If a court orders the purchase of a shareholder’s stock, the court shall determine the “fair value” of the shares – a value which shall take “into account any impact on the value of the shares resulting from the actions giving rise to a proceeding” under ORS 60.952(1).¹⁴ The court is also required to “[c]onsider any financial or legal constraints on the ability of the corporation or the purchasing shareholder to purchase the shares.”

Forced buy-out provisions

Up to this point, ORS 60.952 contains no significant departure from existing law. Its only radically new provision – ORS 60.952(6) – provides that within 90 days after a shareholder initiates an oppression-type proceeding, either the corporation or non-complaining shareholders may force a

sale of the complaining shareholder’s shares. In the event of such an irrevocable election, if the parties are unable to reach an agreement within 30 days as to the fair value of the shares and the terms of the purchase, upon application by any party the court will stay the underlying proceeding while it determines the fair value and terms.

NOTE: This forced buy-out provision is drawn from Model Business Corporation Act § 14.34 (2001). Other state oppression statutes contain similar provisions, although the actual mechanism for the forced buy-out varies widely.

Cases indicate that “fair value” is the value of a share *with* a marketability discount, but *without* a minority discount.¹⁵ But in cases involving oppression and breaches of fiduciary duty, Oregon courts often refuse to apply either discount.¹⁶ It is unclear whether courts will apply discounts in a forced buy-out under ORS 60.952(6). Cases from other states go both ways on the marketability discount issue.¹⁷

Jury trials; attorney fees

An action under ORS 60.661 – and presumably under ORS 60.952 – is an equitable action.¹⁸ There is likely no right to a trial by jury. Neither ORS 60.661 nor 60.952 provide for the award of attorney fees. ■

Footnotes

1. *Baker v. Commercial Body Builders, Inc.*, 264 Or 614, 507 P2d 387 (1973) (“[T]he courts [in an oppression action] are not limited to the remedy of dissolution, but may, as an alternative, consider other appropriate equitable relief.”).
2. *Hayes v. Olmsted & Associates, Inc.*, 173 Or App 259, 265, 21 P3d 178 (2001) (citing *Baker*).

3. *Naito v. Naito*, 178 Or App 1, 20-1, 35 P3d 1068 (2001); *Cooke v. Fresh Express Foods Corp.*, 169 Or App 101, 108, 7 P3d 717 (2000).
4. *Tift v. Stevens*, 162 Or App 62, 78, 987 P2d 1 (1999).
5. *Cooke v. Fresh Express Foods Corp.*, 169 Or App 101, 110, 7 P3d 717 (2000) (internal citations omitted); see also *Davis v. Brockamp & Jaeger, Inc.*, 216 Or App 518, 174 P3d 607 (2007).
6. *Weiner Investment Co. v. Weiner*, 105 Or App 339, 804 P2d 1211 (1991).
7. *Wilcox v. Stiles*, 127 Or App 671, 678, 873 P2d 1102, 1105 (1994).
8. ORS 60.661(2)(c); 60.952(1)(c); *Jackson v. Nicolai-Neppach Co.*, 219 Or 560, 348 P2d 9 (1959).
9. See also *Jackson v. Nicolai-Neppach Co.*, 219 Or 560, 574-5, 348 P2d 9 (1959).
10. *Browning v. C & C Plywood Corp.*, 248 Or 574, 434 P2d 339 (1968).
11. *Beeler v. Standard Investment Co.*, 107 Wash 442, 181 P 896 (1919).
12. *Horner v. Pleasant Creek Mining Corp.*, 165 Or 683, 699, 107 P2d 989, 109 P2d 1044 (1941).
13. ORS 60.952(4).
14. ORS 60.952(5).
15. *Columbia Management Co. v. Wyss*, 94 Or App 195, 204, 765 P2d 207 (1988).
16. *Cooke v. Fresh Express Foods Corp.*, 169 Or App 101, 115, 7 P3d 717 (2000).
17. *Charland v. Country View Golf Club, Inc.*, 588 A2d 609 (RI 1991); *Blake v. Blake Agency, Inc.*, 107 AD2d 139, 486 NYS2d 341 (1985).
18. *Naito v. Naito*, 178 Or App 1, 4, 35 P3d 1068 (2001); but see *GI Joe’s, Inc. v. Nitzam*, 183 Or App 116, 123, 50 P3d 1282 (2002).

Business Law Section News

James B. Castles Leadership Award

At our annual meeting, Brent Bullock received the 2013 James B. Castles Leadership Award, the highest recognition bestowed by the Business Law Section of the Oregon State Bar on one of the Section's members.

The award was established in 1998 to recognize an Oregon lawyer for excellence in the practice of business law, professionalism among fellow business lawyers and outstanding community leadership.

Brent clearly meets these professional and community standards, having spent his legal career building a successful business practice in Oregon--with particular contributions in recent years to helping start-up and emerging companies grow--and being an active and often leading partici-

pant in numerous charitable and non-profit organizations.

The namesake of the award, James B. Castles, began his career in private practice advising the founders of Tektronix, Inc., subsequently becoming the founding General Counsel and a long-time director of Tektronix, and also actively providing philanthropic support of Northwest organizations, including through his service as a founding trustee of the M. J. Murdock Charitable Trust.

Previous recipients of the award include Oregon business attorneys Otto B. Frohnmayer, Henry H. Hewitt, Brian Booth, Andrew J. Morrow, Jr., Donald L. Krahmer, Jr., Neva Campbell, Robert Art, MardiLyn Saathoff and Ruth Beyer. ■



John Castles (l) presents Brent Bullock with the award established in honor of his father, James B. Castles.

From the 2013 Chair

This year has been an active year for the past Business Law Section and momentum is building all the time. Thank you to the leadership and tireless efforts of our Executive Committee members for all they have done to bring the Oregon business law community together in 2013.

Early in the year we conducted a survey to get feedback from the section membership on the services provided by the section. We had active participation from the membership. The Executive Committee reviewed the survey results at our annual offsite and took action.

As a result of our planning efforts and member feedback, we sponsored a number of events and activities in 2013:

- We re-structured our section newsletter, under the leadership of our past chair, Kyle Wuepper.
- We updated the Business Law Section website to make it easier to access certain content.
- We reviewed, commented on and sponsored certain legislation that

affects Oregon business law practitioners.

- We held well-attended networking events. These included a social gathering with lawyers and accountants in May and a discussion with Oregon State Treasurer Ted Wheeler, followed by a BBQ in July.
- We held our second annual daylong CLE in Portland: *Key Updates for Business Lawyers*.
- We recognized Brent Bullock of Perkins Coie for his leadership and contribution to the business community.

There is more for the section to do and we encourage you to get involved. Whether it is in the form of feedback on what we can do better to support the Oregon business law community or hours you are willing to log to help us make things happen, we welcome your participation. Let's get 2014 off to a great start! ■

*2013 Business Law Section Chair
Ambyr O'Donnell
VP & General Counsel | Tripwire, Inc.*

2014 Executive Committee

Chair: Benjamin G. Lenhart
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Holley Young Franklin
Lorie Harris Hancock
Edward Charles Impert
James M. Kearney
David Kopilak

CALENDAR

Click on an event for a link to more information.

Friday, January 31, 2014

OSB CLE Audio Online Seminar
Attorney Ethics and Digital Communications

Tuesday, February 4, 2014

Multnomah Bar Assn. CLE Seminar
What's it Worth? Developing, Evaluating and Critiquing Business Valuations for Litigation

Tues. & Wed., February 4 & 5, 2014

OSB CLE Audio Online Seminar
2014 Ethics Update

Friday, February 7, 2014

ABA Webinar & Teleconference
What Every Business Lawyer Needs to Know about the Foreign Corrupt Practices Act

Friday, February 7, 2014

OSB CLE Audio Online Seminar
Retaliation in Employment Law Update

Tuesday, February 11, 2014

OSB CLE Audio Online Seminar
Successor Liability in Business Transactions: The Risks of Buying Assets

Wednesday, February 12, 2014

OSB CLE Audio Online Seminar
Small Commercial Leases: Negotiating and Drafting Issues

Friday, February 14, 2014

OSB CLE Seminar
Intellectual Property Review: Updates and Changes from 2013

Tuesday, February 18, 2014

Multnomah Bar Assn. CLE Seminar
Dealing with Pro Se Parties

Wednesday, February 19, 2014

OSB CLE Audio Online Seminar
Rescission in Business Transactions: How to Fix Something That's Gone Wrong

Thursday, February 20, 2014

OSB CLE Audio Online Seminar
Private Company Directors: Fiduciary Duties and Liability

Friday, February 21, 2014

OSB CLE Audio Online Seminar
Ethics in the Receipt and Release of Confidential Information

Wednesday, February 26, 2014

OSB CLE Audio Online Seminar
Structuring Profits Interests in LLCs, Partnerships

Thursday, February 27, 2014

OSB CLE Audio Online Seminar
Choice-of-Entity Considerations for Nonprofits

Tuesday, March 4, 2014

Multnomah Bar Assn. CLE Seminar
Science of the Mind: How Jurors, Judges and Other Key Decisionmakers Really Think

Wednesday, March 19, 2014

Multnomah Bar Assn. CLE Seminar
The Status of Internal Law Firm Privilege in Oregon

Thursday, March 20, 2014

Multnomah Bar Assn. CLE Seminar
Intellectual Property Protection: Creative Approaches to Keeping What Your Clients Create

April 10–12, 2014

ABA Business Law Section Spring Meeting (Los Angeles)

September 11–13, 2014

ABA Business Law Section Annual Meeting (Chicago)

November 21–22, 2014

ABA Business Law Section Fall Meeting (Washington, DC)

Editorial Team

Kyle D. Wuepper is a partner in Ball Janik LLP's Bend, Oregon office. He advises businesses on day-to-day legal issues, and provides counseling on mergers and acquisitions, raising capital, corporate finance, choice of entity, and business formations. He was the 2012 Business Law Section Executive Committee Chair.

Kenneth Haglund is an associate at Lane Powell in the firm's business and financial institutions groups. His practice focuses on mergers and acquisitions, securities and corporate finance, community banking, corporate governance, executive agreements and general business matters. He served as Secretary of the Business Law Section Executive Committee 2012–2013 and is the 2014 Treasurer.

Dave Kopilak is the founder of Crux Law Group in Portland. Previously, he was a shareholder at Schwabe, Williamson & Wyatt where his practice focused on business and corporate law. He is the president and co-founder of ClayTablet, a company that provides legal document templates to Oregon and Washington attorneys.

Assistant Editors

Jay D. Brody
Jake Heth
James Kearney
John Witherspoon
Leigh Gill
Matthew Thompson
Ralph Gzik

Articles in this newsletter are informational only, and should not be construed as providing legal advice. For legal advice, please consult the author of the article or your own attorney.

About the Oregon State Bar Business Law Section



Business Law Section

The mission of the Oregon State Bar Business Law Section is to

provide excellent service to the diverse group of business law practitioners throughout the State of Oregon by providing regular, timely and useful information about the practice of business law, promoting good business lawyering and professionalism, fostering communication and networking among our members, advocating improvement of business law, and supporting Oregon's business infrastructure and business community.