FIDUCIARY DUTIES OF GOVERNING PERSONS OF BUSINESS ENTITIES

By

BYRON F. EGAN
Jackson Walker L.L.P.
2323 Ross Avenue, Suite 600
Dallas, Texas 75201
began@jw.com



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Byron F. Egan
Biographical Information

Jackson Walker L.L.P.
2323 Ross Avenue, Suite 600
Dallas, Texas 75201

Phone: (214) 953-5727
Email: began@jw.com
www.jw.com

Practice: Byron F. Egan is a partner of *Jackson Walker L.L.P.* in Dallas. He is engaged in a corporate, partnership, securities, mergers and acquisitions ("M&A") and financing practice. Mr. Egan has extensive experience in business entity formation and governance matters, M&A and financing transactions in a wide variety of industries including energy, financial and technology. In addition to handling transactions, he advises boards of directors and their audit, compensation and special committees with respect to fiduciary duty and other corporate governance issues, the Sarbanes-Oxley Act, special investigation and other issues.

Involvement: Mr. Egan is Senior Vice Chair and Chair of Executive Council of the M&A Committee of the American Bar Association and served as Co-Chair of its Asset Acquisition Agreement Task Force, which wrote the *Model Asset Purchase Agreement with Commentary*. He is immediate Past Chair of the Texas Business Law Foundation; is a former Chair of the Business Law Section of the State Bar of Texas and former Chair of that section's Corporation Law Committee; and on behalf of these groups, has been instrumental in the drafting and enactment of many Texas business entity and other statutes. He is also a member of the American Law Institute.

Publications: Mr. Egan writes and speaks about the areas in which his law practice is focused, and is a frequent author and lecturer regarding M&A, governance of corporations, partnerships and limited liability companies, securities laws, and financing techniques. Mr. Egan has written or co-authored the following law journal articles: Corporate Governance: *Fiduciary Duties of Corporate Directors and Officers in Texas*, 43 Texas Journal of Business Law 45 (Spring 2009); *Responsibilities of Officers and Directors under Texas and Delaware Law*, XXVI Corporate Counsel Review 1 (May 2007); Entity Choice and Formation: *Joint Venture Formation*, 44 Texas Journal of Business Law 129 (2012); *Choice of Entity Decision Tree After Margin Tax and Texas Business Organizations Code*, 42 Texas Journal of Business Law 171 (Spring 2007); *Choice of Entity Alternatives*, 39 Texas Journal of Business Law 379 (Winter 2004); *Choice of State of Incorporation – Texas Versus Delaware: Is it Now Time to Rethink Traditional Notions*, 54 SMU Law Review 249 (Winter 2001); M&A: *Confidentiality Agreements are Contracts with Long Teeth*, 46 Texas Journal of Business Law 1 (Fall 2014); *Private Company Acquisitions: A Mock Negotiation*, 116 Penn St. L. Rev. 743 (2012); *Asset Acquisitions: Assuming and Avoiding Liabilities*, 116 Penn St. L. Rev. 913 (2012); *Asset Acquisitions: A Colloquy*, X U. Miami Business Law Review 145 (Winter/Spring 2002); Securities Law: *Major Themes of the Sarbanes-Oxley Act*, 42 Texas Journal of Business Law 339 (Winter 2008); *Communicating with Auditors After the Sarbanes-Oxley Act*, 41 Texas Journal of Business Law 131 (Fall 2005); *The Sarbanes-Oxley Act and Its Expanding Reach*, 40 Texas Journal of Business Law 305 (Winter 2005); *Congress Takes Action: The Sarbanes-Oxley Act*, XXII Corporate Counsel Review 1 (May 2003); and Legislation: *The Role of the Business Law Section and the Texas Business Law Foundation in the Development of Texas Business Law*, 41 Texas Journal of Business Law 41 (Spring 2005).

Education: Mr. Egan received his B.A. and J.D. degrees from the University of Texas. After law school, he served as a law clerk for Judge Irving L. Goldberg on the United States Court of Appeals for the Fifth Circuit.

Honors: For over ten years, Mr. Egan has been listed in The Best Lawyers in America under Corporate, M&A or Securities Law. He is the 2015 recipient of the Texas Bar Foundation's Dan Rugeley Price Memorial Award, which is presented annually to a lawyer who has an unreserved commitment to clients and to the legal profession. He won the Burton Award for Legal Achievement four times. Mr. Egan has been recognized as one of the top corporate and M&A lawyers in Texas by a number of publications, including Corporate Counsel Magazine, Texas Lawyer, Texas Monthly, The M&A Journal (which profiled him in 2005) and Who's Who Legal. In 2009, his paper entitled "Director Duties: Process and Proof" was awarded the Franklin Jones Outstanding CLE Article Award and an earlier version of that article was honored by the State Bar Corporate Counsel Section's Award for the Most Requested Article in the Last Five Years.

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FIDUCIARY DUTIES OF GOVERNING PERSONS OF BUSINESS ENTITIES

BY

BYRON F. EGAN *

CHAPTER 1. INTRODUCTION.

1.1. General. The following five business entity forms are regularly used for business operations in Texas:

- Corporation
- General Partnership
- Limited Partnership
- Limited Liability Partnership ("LLP")
- Limited Liability Company ("LLC")

1.1.1. Choice of Entity. The form of business entity most advantageous in a particular situation depends on the business objectives for which the entity is being organized. In most situations, the choice of entity focus will be on how the entity and its owners will be taxed and the extent to which the entity will shield the owners and managers of the business from liabilities arising out of its activities. An increasingly important factor in choosing the form of entity, and its state of domicile, is the extent to which the fiduciary duties and personal liability of the entity's board of directors ("Board") or other governing persons may be limited in the entity's governing documents.

1.1.2. Entity Governance. The conduct of corporate directors and officers is subject to particular scrutiny in the context of business combinations (whether friendly or hostile), executive compensation and other affiliated party transactions, allegations of illegal or improper

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Byron F. Egan is a partner of Jackson Walker L.L.P. in Dallas, Texas. Mr. Egan is Senior Vice Chair and Chair of the Executive Council of the ABA Business Law Section's Mergers & Acquisitions Committee and former Chair of its Asset Acquisition Agreement Task Force, and a member of the American Law Institute. Mr. Egan is immediate past Chairman of the Texas Business Law Foundation and is also former Chairman of the Business Law Section of the State Bar of Texas and of that Section's Corporation Law Committee.

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corporate conduct, and corporate insolvency. The individuals who serve in leadership roles for corporations are fiduciaries in relation to the corporation and its owners.

Increasingly the courts are applying principles articulated in cases involving mergers and acquisitions ("M&A") to cases involving business opportunities and executive compensation, perhaps because those areas often involve conflicts of interest and self-dealing or because in Delaware, where many of the cases are tried, the same judges are writing significant opinions in both areas. Director and officer fiduciary duties are generally owed to the corporation and its shareholders collectively, but when the corporation is insolvent, the constituencies claiming to be beneficiaries of those duties expand to include the entity's creditors.

Similar fiduciary principles are applicable to governing persons of a general or limited partnership and a limited liability company ("LLC"). These entities are often referred to as "alternative entities" in recognition that the rights and duties of their owners and governing persons can be modified by contract to greater extent than is permitted in the case of corporations.

1.1.3. State Statutes. The Texas Legislature enacted the Texas Business Organizations Code (the "TBOC")[1] to codify the Texas statutes relating to business entities referenced above, together with the Texas statutes governing the formation and operation of other for-profit and non-profit private sector entities. The TBOC is applicable to entities formed or converting to another entity form under Texas law after January 1, 2006. Entities in existence on January 1, 2006 could continue to be governed by the Texas source statutes until January 1, 2010, after which time they must conform to the TBOC,[2] although they could elect to be governed by the TBOC prior to that time.[3]

Like Texas, Delaware has a body of statutory and case law relating to corporations as well as alternative entities, including partnerships (general and limited) and LLCs. Those statutes include the Delaware General Corporation Law (as amended, the "DGCL"),[4] the Delaware Revised Uniform Partnership Act ("DRPA"),[5] the Delaware Revised Limited Partnership Act ("DRLPA"),[6] and the Delaware Limited Liability Company Act (the "DLLCA").[7]

1.1.4. Federal Law. The focus of the Congress of the United States ("U.S.") on how corporations should be governed following corporate debacles early in the last decade led to the

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1 TEX. BUS. ORGS. CODE. ANN. (Vernon 2015), *available at* www.statutes.legis.state.tx.us/docs/bo/htm/bo.1.htm.

2 TBOC § 402.005.

3 TBOC § 402.003.

4 DEL. CODE ANN. tit. 8, §§ 101 *et seq.* (Supp. 2015).

5 DEL. CODE ANN. tit. 6, §§ 15-101 *et seq.* (Supp. 2015).

6 DEL. CODE ANN. tit. 6, §§ 17-101 *et seq.* (Supp. 2015).

7 DEL. CODE ANN. tit. 6, §§ 18-101 *et seq.* (Supp. 2015).

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