

# **JOINT VENTURE GOVERNANCE AND BUSINESS OPPORTUNITY ISSUES**

**By**

**BYRON F. EGAN**  
Jackson Walker L.L.P.  
901 Main Street, Suite 6000  
Dallas, TX 75202-3797  
began@jw.com



**THE UNIVERSITY OF TEXAS SCHOOL OF LAW**

**11<sup>TH</sup> ANNUAL MERGERS AND ACQUISITIONS INSTITUTE**

**DALLAS, TX • OCTOBER 15, 2015**

Copyright© 2015 by Byron F. Egan. All rights reserved.

**Byron F. Egan**  
Biographical Information

Jackson Walker L.L.P.  
901 Main Street, Suite 6000  
Dallas, Texas 75202

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.

## TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION .....	1
II. CHOICE OF ENTITY .....	2
A. Alternatives .....	2
B. LLC Entity of Choice for Joint Ventures.....	5
III. PRELIMINARY AGREEMENTS .....	24
A. Confidentiality Agreement.....	24
B. Exclusivity Agreement.....	25
C. Letter of Intent .....	25
D. Conduct of Parties Can Result in Binding Agreement Before Definitive Agreements Signed .....	26
IV. SCOPE AND PURPOSE.....	30
V. FUNDING.....	33
VI. ALLOCATIONS AND DISTRIBUTIONS.....	36
VII. GOVERNANCE AND MANAGEMENT .....	38
VIII. DEFAULTS .....	41
IX. RESTRICTIONS ON TRANSFER OF JOINT VENTURE INTERESTS .....	45
X. DISPUTE RESOLUTION .....	46
XI. TERMINATION .....	46
XII. ANTITRUST .....	48
A. HSR Filing Requirements .....	48
B. HSR Filing Fee Thresholds.....	49
C. General Antitrust Considerations.....	49
XIII. INTELLECTUAL PROPERTY .....	49
XIV. TRANSFERRING ASSETS TO A JOINT VENTURE.....	51
XV. LEGAL REPRESENTATION OF JOINT VENTURE.....	51

## Appendix A – Egan on Entities

# JOINT VENTURE AND BUSINESS OPPORTUNITY GOVERNANCE ISSUES

BY

BYRON F. EGAN\*

## I. INTRODUCTION

The joint venture is a vehicle for the development of a business opportunity by two or more entities acting together,<sup>1</sup> and will exist if the parties have: (1) a community of interest in the venture, (2) an agreement to share profits; (3) an agreement to share losses, and (4) a mutual right of control or management of the venture.<sup>2</sup> A joint venture may be structured as a corporation, partnership, limited liability company (“**LLC**”), trust, contractual arrangement, or any combination of such entities and arrangements.<sup>3</sup> Structure decisions for a particular joint venture will be driven by the venturers’ tax situation, accounting goals, business objectives and financial needs, as well as the venturers’ planned capital and other contributions to the venture, and antitrust and other regulatory considerations.<sup>4</sup> Irrespective of the structure chosen, however, certain elements are typically considered in connection with structuring every joint venture.

Because a joint venture is commonly thought of as a limited duration general partnership formed for a specific business activity, the owners of a joint venture are sometimes referred to herein as “**partners**” or “**venturers**,” and the joint venture as the “**entity**,” “**partnership**” or “**venture**,” in each case irrespective of the particular form of entity or other structure selected for

---

\* Copyright © 2015 by Byron F. Egan. All rights reserved.

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 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. See “*Egan on Entities*” attached as **Appendix A**.

The author wishes to acknowledge the contributions of the following in preparing this paper: Gemma L. Descoteaux of Polsinelli PC in Dallas, Texas; Tom D. Harris of Haynes and Boone, LLP in Dallas, Texas; Marc Rose of Vinson & Elkins LLP in Dallas, Texas; Michael L. Laussade, David D. Player, Sara Puls and Katy Ragsdale of Jackson Walker, L.L.P. in Dallas, Texas.

<sup>1</sup> See Byron F. Egan, *Joint Venture Formation*, 44 Tex. J. Bus. Law 129 (2012); James R. Bridges and Leslie E. Sherman, *Structuring Joint Ventures*, 4 Insights 17 (Oct. 1990); David Ernst and Stephen I. Glover, *Combining Legal and Business Practices to Create Successful Strategic Alliances*, 11 Insights 6 (Oct. 1997); Stephen I. Glover, *Joint Ventures and Opportunity Doctrine Problems*, 9 Insights 9 (Nov. 1995); Warren S. de Wied, *Structuring Strategic Equity Investments*, 1 No. 8 M&A Law. 7 (Jan. 1998).

<sup>2</sup> *Pitts & Collard, L.L.P. v. Schechter*, No. 01-08-00969-CV, 2011 WL 6938515, at \*11 (Tex. App.—Hous. [1st Dist.] Dec. 29, 2011). For additional discussion of whether the agreement is, in fact, a joint venture, see *id.* at \*11-12.

<sup>3</sup> See JOINT VENTURE TASK FORCE OF NEGOTIATED ACQUISITIONS COMMITTEE, MODEL JOINT VENTURE AGREEMENT WITH COMMENTARY (Am. Bar Ass’n., 2006) (the “**ABA Model Joint Venture Agreement**”).

<sup>4</sup> See Byron F. Egan, *Choice of Entity Decision Tree*, TexasBarCLE and Business Law Section of State Bar of Texas program on Choice and Acquisition of Entities in Texas, May 22, 2015, available at <http://www.jw.com/publications/article/2054> (“**Business Entities Paper**”) at pages 49, 430-436.

the joint venture. Today the LLC is typically the entity of choice for the formation of a joint venture because, as discussed below, it offers structuring flexibility and limited owner liability for joint venture activities under both the Texas Business Organizations Code (“*TBOC*”), which now governs all LLCs formed under Texas law,<sup>5</sup> and the Delaware Limited Liability Company Act (the “*DLLCA*”).<sup>6</sup>

## II. CHOICE OF ENTITY

### A. *Alternatives*

A joint venture may take the form of:

(1) Contractual Relationship Not Constituting an Entity Recognized by Statute. The joint venturers may operate under a relationship such as a contractual revenue-sharing joint venture, a lease, a creditor/debtor relationship or some other relationship not constituting an entity. A risk to this structure is that a court will impose general partnership duties or liabilities on the venturers if their relationship is found to constitute “an association of two or more persons to operate a business as co-owners for a profit” (the traditional definition of a partnership) regardless of how the venturers characterize and document their relationship.<sup>7</sup> In determining whether the relationship is a partnership, the following factors are considered:

---

<sup>5</sup> LLCs formed under Texas law are now governed by Title 3 and pertinent provisions of Title 1 of the TBOC. TBOC §§ 401.001, 402.003. The TBOC provisions applicable to LLCs may be officially and collectively referred to as “Texas Limited Liability Company Law.” TBOC § 1.008(e).

<sup>6</sup> Del. Code Ann. tit. 6 § 18-101 *et. seq.*

<sup>7</sup> In *Dernick Resources, Inc. v. Wilstein, et al*, 312 S.W.3d 864, 877 (Tex. App.—Houston [1st Dist.] 2009, no pet.), which involved an oil and gas drilling and production arrangement pursuant to a contract that was called a “joint venture agreement,” the court in an opinion by Justice Evelyn Keyes held that the joint venture agreement created a fiduciary relationship that imposed a fiduciary duty of full and fair disclosure on the managing venturer as it held title to the venture’s properties in its name and had a power of attorney to dispose of the properties, and explained:

Joint venturers for the development of a particular oil and gas lease have fiduciary duties to each other arising from the relationship of joint ownership of the mineral rights of the lease. [citation omitted] Likewise, if there is a joint venture between the operating owner of an interest in oil and gas well drilling operations and the non-operating interest owners, the operating owner owes a fiduciary duty to the non-operating interest owners. [citation omitted] In addition, “[a]n appointment of an attorney-in-fact creates an agency relationship,” and an agency creates a fiduciary relationship as a matter of law. [citation omitted] The scope of the fiduciary duties raised by a joint venture relationship, however, does not extend beyond the development of the particular lease and activities related to that development.

The dispute revolved around the manager’s sale of parts of its interest after giving oral notice to the other venturer, but not the written notice accompanied by full disclosure specified in the agreement. The opinion is lengthy and very fact specific, but the following lessons can be drawn from it: (i) calling a relationship a joint venture can result in a court categorizing the relationship as fiduciary, which in turn implicates fiduciary duties of candor and loyalty and could implicate the common law corporate opportunity doctrine (which is part of the fiduciary duty of loyalty), (ii) it is important to document the relationship intended (an LLC could be used as the joint venture entity and the LLC company agreement could define, or in Delaware eliminate, fiduciary duties), and (iii) written agreements should be understood and followed literally.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

## Title search: Joint Venture Governance and Business Opportunity Issues

Also available as part of the eCourse

[Answer Bar: New Boardmember Basics](#)

First appeared as part of the conference materials for the  
11<sup>th</sup> Annual Mergers and Acquisitions Institute session  
"Joint Venture Governance and Business Opportunity Issues"