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We Want to Hear From You!

By Anne L. Kleindienst

Greetings from the Section Chair.

I am excited about the Section's direction for this year. This past July, while many of us were enjoying a mountain or sea-side escape from the desert heat, a group from the Section's Executive Council attended a one-half day planning retreat at my home. Although the consensus from our retreat was to continue a number of our existing programs or initiatives, we also agreed on the need to get feedback from you, our members, as to how we might tailor our programs to better serve you.

You can once again this year expect to have the opportunity to attend the Section's regular monthly CLE programs. Our programming this year is under the direction of the Section's Co-Vice Chairs, Susan Klemmer and Brandon Kavanagh. Although breakfast at The University Club has in many ways been a Business Law Section "tradition", we will be open to changes in location, time or format to better serve our members. We hope to see you at our next monthly meeting. Whether or not you attend, please share with Susan (susan.klemmer@kutakrock.com), Brandon (bkavanagh@gustlaw.com), me (akleindi@fclaw.com) or any other Council member your ideas for change in our programming. We want to hear from you!

One change we initiated this year was to have a "Holiday Before the Holiday" program in late November. Although we were not able to welcome back our reigning Business Jeopardy champion from our December 2005 holiday program, we enjoyed the evening views of downtown Phoenix from the Arizona Club while learning about how we can each give back to the community.

Our State Bar Convention programming for June 27-30, 2007 will be directed by our Convention Co-Chairs, Charlie Berry and Laura Lo Bianco. They have arranged for speakers on recent developments affecting nonprofit corporations and on financing issues for what has all the makings of a stimulating and practical full day of programming. The Section will continue to look for opportunities to bring in prominent local and national speakers for all of its programming. We want to hear your ideas and suggestions for speakers and topics.

The *Business Lawyer* will continue to be published thanks to the efforts of our Editor-in-Chief, Paul Buser. You too can be published as your contribution is always welcome! Paul can be reached at arizonalaw@paulbuserlaw.biz with your ideas.

Our efforts to monitor, inform and propose change on issues of interest to you before the Arizona Legislature and the Arizona Corporation Commission is again being led by Scott DeWald. If you want to participate in this effort, even if only to suggest a legislative or regulatory issue to receive attention by Scott's committee, let Scott know (SDewald@lrlaw.com). We want to hear from you!

Finally, we will be looking at ways to give back to the community as well as to reach out to members of the Section located outside of Maricopa County. And just in case we don't hear from you, we are formulating plans to more directly elicit your input through a survey or other method designed to ascertain how the Section can best serve you.

So don't be shy. Whatever your input, it will be welcome. We look forward to hearing from you!



ANNE L. KLEINDIENST

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2007 STATE BAR OF ARIZONA CONVENTION
JUNE 27-30 • WESTIN KIERLAND

PREVIEW ON PAGE 2

Business Legislation Committee Report

By Scott DeWald

This report summarizes (a) HB 2111, a bill that originated with the Arizona Corporation Commission that has passed both houses of the legislature and is expected to become law this summer, and (b) additional proposed amendments to titles 10 and 29 that were proposed too late for inclusion in HB 2111 but are expected to be introduced next year.

NEW LEGISLATION THIS TERM

HB 2111. This is a link to HB 2111:

http://azleg.gov/DocumentsForBill.asp?Bill_Number=HB2111

HB 2111 contains technical amendments (clarifying that certain procedures the ACC now follows—such as fax and electronic filings and LLC good standing certificates—are statutorily authorized), clarifies that the official deadline for publication of articles begins on the date documents are approved by the ACC (thereby preventing the deadline from being missed just because the ACC has taken more than 90 days to approve), and contains these substantive provisions:

Requires Articles of Merger or Consolidation to contain any amendments to the Articles of Organization of the surviving LLC, if the surviving business is an LLC, and, if the Articles of Merger include amendments to the Articles of Organization, they must be filed with the ACC as *Articles of Amendment and Merger*.

Rewrites and clarifies the process and procedures after dissolution of the LLC, including the stipulation that a dissolved LLC cannot carry on any business except as necessary to wind up and liquidate its affairs as outlined in current law.

HB 2050. This is a link to HB 2050:

http://azleg.gov/DocumentsForBill.asp?Bill_Number=HB2050

HB 2050 extends the period within which an Arizona nonprofit corporation may be reinstated from three years to six years after revocation.

ADDITIONAL PROVISIONS PROPOSED TO BE INTRODUCED NEXT SESSION

1. Eliminate “trustee” language in the LLC termination provision that could suggest liability.

29-784. Effect of filing articles of termination

On the filing of the articles of termination the existence of the limited liability company ceases, except for the purpose of suits, other proceedings and appropriate action as provided in this chapter. The managers in office at the time of termination or, if none, the members ~~are thereafter trustees for the members and creditors of the terminated limited liability company and as such~~ may distribute any of the limited liability company’s property discovered after termination, may convey real estate and may take other action as necessary on behalf of and in the name of the terminated limited liability company for winding up and liquidating the business and affairs of the limited liability company.

Reason:

To conform to well-established rule relating to corporations, set forth in the following corporate provision, that winding up activities continue, and to eliminate the language, unheard of in other entity law, stating that managers have ongoing trustee liability:

10-1405. Effect of dissolution

A. A dissolved corporation continues its corporate existence but shall not carry on any business except that business appropriate to wind up and liquidate its business and affairs, including:

1. Collecting its assets.
2. Disposing of its properties that will not be distributed in kind to its shareholders.
3. Discharging or making provisions for discharging its liabilities.
4. Distributing its remaining property among its shareholders according to their interests.
5. Doing every other act necessary to wind up and liquidate its business and affairs.

2. Eliminate language suggesting that an LLC cannot terminate if assets are not available to pay all debts by deleting Subsections 29-783.2 and .4.

29-783. Articles of termination

If all of the known property and assets of a limited liability company have been applied and distributed pursuant to this chapter, written articles of termination shall be signed on behalf of the limited liability company by a manager if management of the limited liability company is vested in one or more managers or by a member if management of the limited liability company is reserved to the members. The articles of termination shall be filed with the commission and shall state:

1. The name of the limited liability company.
2. ~~That all debts, obligations and liabilities have been paid and discharged or that adequate provisions have been made for them.~~
3. That all of the known properties and assets of the limited liability company have been applied and distributed pursuant to this chapter.
4. ~~That there are no suits pending against the company in any court or that adequate provisions have been made for the satisfaction of any judgment, order or decree that may be entered against it in any pending suit.~~

Under subsections .2 and .4, the manager or member of a dissolving LLC must state, under the amended provision, that all debts, obligations and liabilities have been paid and discharged or that adequate provisions have been made for them, and that there are no suits pending against the company in any court or that adequate provisions have been made for the satisfaction of any judgment, order or decree that may be entered against it in any pending suit.

These new statements go beyond the requirement in 29-783.3 of a statement that “all of the known properties and assets of the limited liability company have been applied and distributed pursuant to this chapter.” Although the statement that “adequate provisions have been made” for obligations and liabilities or for the satisfaction of any judgment, order or decree that may be entered against the company in any pending suit, does not necessarily mean that known properties and assets of the company are sufficient to pay for such obligations, liabilities, or satisfaction, such an inference is possible.

Compare title 10: there is no requirement to state that all debts have been paid except under 10-1401, which applies only to a corporation dissolving before it has any shareholders or has commenced business:

Continued on the next page

...the articles of dissolution...shall set forth all of the following:

4. That no debt of the corporation remains unpaid.

Other than that, there is nowhere in title 10 a requirement that the articles of dissolution of a corporation contain a statement that all its debts are paid or provided for. Nor should there be.

3. Revise Section 29-782. B, describing what an LLC should do upon dissolution. It now states, "After its dissolution, the limited liability company shall proceed to collect its assets, convey and dispose of its properties that are not to be distributed in kind to its members, pay, satisfy or discharge, or make adequate provision to pay or discharge, its liabilities and obligations and do all other acts required to liquidate its business and affairs."

It should be more clear that liabilities to creditors must be paid before distributions are made to members. Better language is in title 10, which states in 10-1405:

Effect of dissolution

A. A dissolved corporation continues its corporate existence but shall not carry on any business except that business appropriate to wind up and liquidate its business and affairs, including:

1. Collecting its assets.
2. Disposing of its properties that will not be distributed in kind to its shareholders.
3. Discharging or making provisions for discharging its liabilities.
4. Distributing its remaining property among its shareholders according to their interests.

The key here is the word, "remaining," which clearly contemplates paying a corporation's creditors first.

Therefore, for limited liability companies, 29-782 should be revised to use similar language, as follows:

29-782. Effect of dissolution

A. After the dissolution of a limited liability company, its separate existence continues until articles of termination have been filed with the commission or until a decree terminating the limited liability company has been entered by a court of competent jurisdiction.

B. After its dissolution, until its separate existence terminates, a dissolved limited liability company shall not carry on any business except that business appropriate to wind up and liquidate its business and affairs, including:

1. Collecting its assets.
2. Disposing of its properties that will not be distributed in kind to its members.
3. Discharging or making provisions for discharging its liabilities.
4. Distributing its remaining property among its members according to their interests.
5. Doing all other acts required to liquidate its business and affairs

4. Authorize features sometimes requested by lenders in LLCs that act as special purpose entities.

§ 29-601(12) "Member" means a person who is admitted as a member in a limited liability company pursuant to this chapter until an event of

withdrawal occurs with respect to the person and, if reference is made to members, that reference means a member in the case of a limited liability company that has a single member. **A Member may be a "noneconomic member" as a member of a limited-liability company who:**

- 1. Does not own a Member's Interest in the company;**
- 2. Does not have an obligation to contribute capital to the company;**
- 3. Does not have a right to participate in or receive distributions of profits of the company or an obligation to contribute to the losses of the company; and**
- 4. May have voting rights and other rights and privileges given to noneconomic members of the company by the articles of organization or operating agreement.**

5. 44-1236.

44-1236. Certificate of name required

A. Any person other than a partnership transacting business in this state under a fictitious name or a designation not showing the name of the owner of the business or the name of the corporation doing such business shall record with the county recorder of the county in which the place of business is located a certificate stating in full either:

1. The name of the owner of the business and his or her place of residence, signed by the owner and acknowledged.
2. If a corporation, the name and address of the corporation, signed by the statutory agent and acknowledged.


B. A new certificate shall be recorded upon any change in ownership of the business using a fictitious name unless such business is a corporation.

C. A new certificate shall be recorded if a corporation transfers the right to use such fictitious name to another corporation.

D. A person or corporation doing business contrary to this section shall not maintain an action upon or on account of a contract or transaction made in the fictitious name in any court of this state until such person has first recorded the certificate required by this section.

This statute could be read to require a company doing business under a dba (with a properly filed tradename, which is the way corporations—foreign or domestic—prefer to register a dba) which, for instance, offers transactions on a website, to record at the county. This seems anachronistic.

County recordings are not universally searchable, and the trade name filing should be sufficient. The consequence of noncompliance with this statute is inability to file suit in the state. The suggestion is to add something like, "Any entity that has filed a trade name certificate with the Secretary of State or obtained authorization from the Arizona Corporation Commission to conduct business as a foreign corporation using a particular name, shall not be required to make a recording under the foregoing provisions."

If you have any comments on the proposals, or have other suggestions for revisions to title 10, 29 or 44, contact the author at SDewald@LrLaw.com. 

Author Biographies/Photos

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Anne L. Kleindienst is a director of the law firm of Fennemore Craig. In addition to representing businesses in general corporate matters, she practices in the areas of corporate and municipal finance and franchising. Ms. Kleindienst is currently Chair of the Business Law Section of the Arizona State Bar, and is also a member of the Maricopa County Bar Association, American Bar Association, Federal Bar Association/Arizona Chapter (past president), Arizona Women Lawyers Association/Maricopa Chapter (past president), the Arizona Association of Health Care Lawyers, and the National Association of Bond Lawyers.

Ms. Kleindienst's community activities include serving as General Counsel and on the Board of the Greater Phoenix Chamber of Commerce. She has also served on the Boards of the Goldwater Institute, Church Divinity School of the Pacific (Berkeley, CA), the Phoenix Committee on Foreign Relations, Arizona Republican Caucus (past chair), Arizona Licensors/Franchisor Association (past president) and local chapter of the Leukemia Society of America. She is a graduate of Valley Leadership Class XIII and previously served on the Valley Leadership Board. She also served as Commissioner on the Maricopa County Commission on Trial Court Appointments.

EDITOR-IN-CHIEF & EXECUTIVE COUNCIL MEMBER



Paul J. Buser is a sole practitioner in North Scottsdale. His litigation and ADR practice focuses on the resolution of business, trust, estate, and property disputes. He has been named by The National Law Journal as one of the country's leading divorce attorneys and is rated "A" in Martindale Hubbell's Preeminent Lawyers Directory. Paul is a graduate of The Arizona College of Trial Advocacy and has received certifications in both mediation and arbitration (ABA/Harvard Law College, Cambridge, MA; Straus Institute for Dispute Resolution, Pepperdine University School of Law, Malibu, CA; and The Northwest Institute of Dispute Resolution, University

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William D. Black served as the Chair of the Business Law Section for the 2001-2002 year. In 1979 he established his own firm known as the Law Offices of William D. Black. His undergraduate work was at Northwestern University in Evanston, Illinois. He then graduated from the University of Wisconsin Law School in Madison, Wisconsin. Bill practices principally in the areas of business and commercial litigation, personal injury, medical malpractice, and business transactional law. He can be reached at william@bblaw.com

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Laura A. Lo Bianco is a director of the law firm of Fennemore Craig, P.C. in Phoenix, Arizona. She focuses her practice on corporate law and transactional matters. Ms. Lo Bianco's corporate experience includes formation of non-profit organizations and limited liability companies. She advises various entities, such as private foundations, support organizations, public charities, and other entities that are tax-exempt under the Internal Revenue Code. Ms. Lo Bianco graduated from Arizona State University, *magna cum laude*, with a B.S. degree in finance. She obtained her J.D. degree, *cum laude*, from Santa

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Charles R. Berry is a shareholder and director of Titus, Brueckner & Berry, P.C. in Scottsdale Arizona. He represents corporations, limited liability companies, partnerships, other business entities and individuals in a wide spectrum of transactions, focusing primarily on capital formation, business management, and real estate. Mr. Berry has extensive experience in securities regulation, public offerings, business mergers, acquisitions and sales, private placements and compliance with the periodic reporting requirements of the Securities Exchange Act of 1934. He prepared the first

"plain English" initial public offering of securities registered with the Securities and Exchange Commission. Mr. Berry has participated in many continuing legal education seminars and panels for organizations such as the State Bar of Arizona and the National Association of Securities Dealers, including "Raising Capital in Arizona," "Securities Arbitrations," "Going Public in Arizona," "Private Offerings of Securities Under State Regulation D," and "Business Jeopardy." Mr. Berry received his Bachelor of Arts and Juris Doctor degrees from Northwestern University, where he graduated cum laude and was on the Editorial Board of the Northwestern University Law Review.

BUSINESS LEGISLATION COMMITTEE REPORT



Scott DeWald is a partner in Lewis and Roca's Corporate Group, where he practices in the areas of corporate, securities, mergers and acquisitions, lending and other commercial transactions, with particular emphasis on the legal needs of high-tech, e-commerce and emerging companies and limited liability companies. Mr. DeWald received his B.A. from Yale University in 1976 and in 1981 he received both his M.B.A. from the University of Chicago Graduate School of Business and his J.D. from the University of Chicago Law School.

BUSINESS LAW MONTHLY MEETINGS



Brandon Kavanagh concentrates his practice on commercial real estate, including purchasing, sales, leasing, condominium creation and conversions, landlord/tenant issues (commercial and residential), property management, and representation of homeowners' associations and condo associations. His practice also encompasses business law, including contracts, entity creation, management and dissolution. Mr. Kavanagh represents municipal governments and school districts in real property acquisition and usage, open meeting law and public funds issues.

We welcome your input!

Please send your articles, comments and solutions to:

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