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NEW DEVELOPMENTS IN OKLAHOMA BUSINESS ENTITY LAW

GARY W. DERRICK* & IRVING L. FAUGHT**

I. Introduction

Oklahoma corporate and other business entity statutes have changed markedly in the past few years. In 1986, the Oklahoma General Corporation Act (OGCA),¹ a Delaware-based act, replaced the Oklahoma Business Corporation Act.² In 1992, the Oklahoma legislature passed the Oklahoma Limited Liability Company Act (LLC Act)³ that introduced a new type of business entity to Oklahoma. Limited liability companies (LLCs) account for more than half of the new business entity filings with the Secretary of State.⁴

¹. 18 OKLA. STAT. §§ 1001-1144 (2001).
⁴. For the fiscal year ending in 2002, 7016 domestic LLCs were filed in Oklahoma compared to 6454 domestic profit corporations, 242 domestic limited partnerships, and 12 domestic limited liability partnerships (LLPs). Oklahoma Secretary of State, Filing Statistics for Fiscal Years Ended 1997 Through 2002 (on file with Gary W. Derrick) [hereinafter

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In 1996, the legislature passed the Oklahoma Limited Liability Partnership Act.\(^5\) The following year, the legislature replaced this act with the more comprehensive Revised Uniform Partnership Act (RUPA).\(^6\) RUPA also replaced the Uniform Partnership Act that the legislature enacted in 1916.\(^7\) In 1984, the legislature adopted the Revised Uniform Limited Partnership Act (RULPA).\(^8\) In 2000, the legislature revised Article 9 of the Uniform Commercial Code (UCC) to expand the Article's scope, clarify the issues about the creation, perfection, and enforcement of security interests, and provide for electronic filings.\(^9\) In 2001, the legislature adopted Senate Bill 610, an eighty-six-page bill implementing numerous changes in the OGCA and the LLC Act.\(^10\)

The breadth of change in Oklahoma is not unique. Other states have busily adopted similar legislation as states compete against one another to retain existing business and attract new business.\(^11\) All fifty states now have LLC acts and forty-eight states have LLP provisions, both of which were virtually unknown a generation ago.\(^12\) Forty-six states adopted the UCC Article 9 revisions less than two years after approval by the American Law Institute and the National Conference of Commissioners on Uniform State Laws.\(^13\)

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6. 54 OKLA. STAT. §§ 1-100 to 1207 (2001).
9. 12A OKLA. STAT. §§ 1-9-101 to 1-9-710 (2001); see Fred H. Miller, Prefatory Note to the Oklahoma Comments, reprinted in 12A OKLA. STAT. ANN. art. 9 (West 2001).
11. Larry E. Ribstein, Statutory Forms for Closely Held Firms, 73 WASH. U. L.Q. 369 (1995). "[T]he rapid evolution of the LLC demonstrates that jurisdictions compete for formations of closely held firms. Not only have the states rushed to enact these statutes and firms rushed to organize as LLCs, but over a very short period there has been a remarkable evolution of statutory terms." Id. at 430-31.
While these dramatic statutory changes seem to have encouraged business development in Oklahoma, the role of the courts in adjudicating corporate disputes and interpreting these statutes has been less pronounced. Oklahoma appellate courts decide only a few business and corporate law cases each year. The decisions that appear often are marked by a lack of clarity, perhaps reflecting the courts’ difficulty in keeping pace with the specialized legal knowledge required to adjudicate these types of cases.

To understand Oklahoma corporate law, it is important to see both the Oklahoma statutes and case law in a broad context. Oklahoma courts decide just a few corporate cases each year, but many cases are adjudicated nationally — especially in Delaware regarding corporate law matters and in the federal courts regarding securities law matters. Traditionally, the Delaware courts’ decisions influence corporate law practice nationally and should influence interpretation of Oklahoma corporate law. "The general rule in Oklahoma is that where one state has adopted statutes from another state, [as Oklahoma has done from Delaware,] at the time of such adoption decisions from the latter state are persuasive in the adopting state’s construction of such

14. The formation of LLC’s in Oklahoma increased from 3039 in 1997 to 7016 in 2002, representing a 131% increase over the period. The numbers are notable considering that LLC’s did not exist in Oklahoma before 1992. Oklahoma Secretary of State Filing Statistics, supra note 4.

15. Considering cases dealing primarily with corporate or corporate-related law issues, the Oklahoma Supreme Court and the Courts of Civil Appeal combined issued published opinions in only one case in 1999 (International Brotherhood of Teamsters v. Fleming Companies, 1999 OK 3, 975 P.2d 907); two cases in 2000 (Sutter v. Sutter Ranching Corp., 2000 OK 84, 14 P.3d 58 and Total Access, Inc. v. Caddo Electric Cooperative, 2000 OK CIV APP 60, 9 P.3d 95); three cases in 2001 (Corman v. H-30 Drilling, Inc., 2001 OK 92, 40 P.3d 1051 (dealing primarily with charter reinstatement and ability of corporation to defend), Weeks v. Manchester, 2001 OK CI APP 101, 29 P.3d 616, and K.J. McNitt Construction, Inc. v. Economopoulos, 2001 OK CIV APP 45, 23 P.3d 983 (dealing primarily with director and officer liability during charter suspension)); and two cases in 2002 (Cardiovascular Surgical Specialists, Corp. v. Mammana, 2002 OK 27, 61 P.3d 210, and Winston v. Stewart & Elder, P.C., 2002 OK 68, 55 P.3d 1063). Of these cases, Corman and McNitt deal primarily with the non-payment of franchise taxes, Mammana deals with non-competes and arbitration, and Winston deals with a debtor’s obligations to creditors who are former shareholders; only Fleming, Sutter and Weeks directly involve the OGCA or the rights and duties of directors and shareholders.

In comparison, in fiscal 2002, the Delaware Supreme Court disposed of fifty-eight cases from the Court of Chancery, which is the specialized court dealing with corporate law matters. The Court of Chancery disposed of over 900 civil (corporate or fiduciary) cases in the same period. See 2002 Statistical Report of the Delaware Judiciary, available at http://courts.state.de.us (last visited July 4, 2003).
Thus, the decisions of the Delaware courts are vital to a correct understanding of Oklahoma corporate law.

Other external influences on Oklahoma corporate law may derive from developments following the publicized financial collapses of companies such as Enron, Worldcom, and Global Crossing. These spectacular failures have focused unprecedented public attention on corporate governance. While state law generally controls corporate governance, federal securities laws and regulations and the listing standards of the stock exchanges have generated greater change in this area. Nevertheless, several state legislatures are attempting to strengthen corporate governance laws, and it is possible that these efforts might develop into a trend.

To aid in understanding Oklahoma's laws for corporations and other entities, this article will outline the Oklahoma legislative and judicial developments between October 2001 and October 2002. It will also forecast possible future developments that might stem from external influences and from internal trends.

II. Legislative Developments

A. Senate Bill 610

The Oklahoma General Corporation Act Committee of the Oklahoma Bar Association (OGCA Committee) prepared a number of amendments to the OGCA, the LLC Act, and RULPA that emerged in Senate Bill 610. Senate

16. FAUGHT, supra note 2, § 1.1, at 1-2; Price v. Southwestern Bell Tel. Co., 1991 OK 50, ¶ 11, 812 P.2d 1355, 1358. The court also stated that “subsequent interpretations placed upon such laws are not controlling or conclusive.” Id.; see, e.g., Bank of the Lakes v. First State Bank, 1985 OK 81, ¶ 9, 708 P.2d 1089, 1091; Anderson v. Fry, 1955 OK 286, ¶ 3, 288 P.2d 1111, 1112. The Oklahoma Court of Civil Appeals has stated that since the OGCA is based on Delaware law, it should be interpreted in accordance with Delaware decisions. Woolf v. Universal Fid. Life Ins. Co., 1992 OK CIV APP 129, ¶ 6, 849 P.2d 1093, 1095. However, the holding in International Brotherhood of Teamsters v. Fleming Companies, 1999 OK 3, ¶ 25, 975 P.2d 907, 913 (holding that shareholders do have the power to adopt binding bylaws that restrict the board’s ability to implement shareholder rights plans), may bring into question the will of the Oklahoma courts to analyze Delaware case law and apply Delaware statutory construction principles where there is no case “on all fours.”


18. See infra notes 174-80.

19. Act Relating to Business Entities, 2001 Okla. Sess. Laws ch. 405, 3069. The OGCA Committee is a committee of the Business Associations Section of OBA. It was formed in 1984 to pursue modernization of the Oklahoma Business Corporation Act, which the legislature adopted in 1947. It prepared the OGCA to replace the Business Corporation Act, and the
Bill 610 constituted one of the broader bills proposed by the OGCA Committee in recent years. The bill amended the OGCA to incorporate recent Delaware amendments. The bill also made changes in the LLC Act, RULPA, the Oklahoma Cooperative Marketing Association Act, and provisions dealing with taxes on property deeds.

1. The Technology Amendments

Senate Bill 610 incorporated many recent changes to the Delaware General Corporation Law (DGCL). The legislature changed several sections of the OGCA to authorize corporations to use the Internet and “electronic transmissions” in various ways. Such amendments made it possible to hold shareholder meetings and vote by the Internet, to adopt written consents by e-mail, to provide e-mail notice for director and shareholder meetings, and to store and retrieve corporate records, including shareholder lists, electronically. Each of these changes is discussed below.

To implement the “technology amendments,” the legislature amended subsections B and F of section 1027 of the OGCA to permit directors to submit resignations and written consents by e-mail.20 A change in subsection F.4 broadened the type of communication equipment that directors can use to participate in a meeting when not physically present.21

The legislature adopted much more extensive changes in sections relating to shareholders. It amended section 1056, which relates to shareholder meetings, to permit shareholders (1) to attend and participate in meetings using remote communication; (2) to hold meetings with no physical location; and (3) to vote by e-mail or the Internet.22 Section 1064, which deals with shareholder voting lists, now enables a corporation to maintain the list electronically if (1) the list is reasonably accessible and (2) the means of

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20. 18 OKLA. STAT. § 1027(B), (F)(1) (2001).
21. Id. § 1027(F)(4).
22. Id. § 1056(A)(1)-(2).
access are described in the notice of meeting.\textsuperscript{23} A new section 1075.2 further permits corporations to give a shareholder notice by facsimile transmission, e-mail, or the Internet with the shareholder’s consent.\textsuperscript{24} Finally, as with directors, shareholders may now act by written consents given by e-mail.\textsuperscript{25}

These amendments are voluntary. They do not require corporations to conduct their affairs by e-mail or implement any technology changes at all.\textsuperscript{26} Many of the changes, especially those dealing with shareholder meetings, must be authorized by the board of directors and require specialized procedures for implementation.\textsuperscript{27} Thus, despite the statutory amendments, many corporations must amend their bylaws before using the new forms of communication.\textsuperscript{28}

The technology amendments offer potential cost savings to all corporations. Sending notices by e-mail is cheaper and faster than sending paper notices. Small corporations may realize the greatest savings. A corporation with only five shareholders could implement a “cyberspace” meeting that would be impossible for a large, publicly held corporation. Large, publicly held corporations have used, however, electronic voting extensively and many have supplemented their physical shareholders meetings with webcasts.\textsuperscript{29} The possibility of electronic communications and “placeless” electronic meetings will not eliminate the need for physical meetings. Written consents in lieu of meetings have been available to directors and shareholders for decades, yet

\textsuperscript{23} Id. § 1064(A)(1).
\textsuperscript{24} Id. § 1075.2.
\textsuperscript{25} Id. § 1073(D).
\textsuperscript{26} See, e.g., id. § 1064(A) (“Nothing contained in this section shall require the corporation to include electronic mail addresses or other electronic contact information on the [shareholder voting] list.”).
\textsuperscript{27} See, for example, title 18, section 1056 of the Oklahoma Statutes that states that the board of directors will determine the place of a meeting, if it is to have a place, and whether shareholders may participate remotely. Id. § 1056(A)(1). If shareholders are to participate remotely, the corporation must implement procedures for verifying a shareholder’s identity, to permit remote shareholders to “read or hear the proceedings” simultaneously, and for recording shareholder votes. Id. § 1056(A)(2)(b).
\textsuperscript{28} Bylaw provisions often track the statutory language, especially regarding procedural matters such as notices. Corporations should amend bylaws tracking the former statutes to reflect the recent statutory changes. For example, bylaws referring to communication “in writing” must be expanded to include e-mails. Bylaw references to a meeting “place” must be amended if a meeting is to have no physical location.
\textsuperscript{29} A May 23, 2003, search of the SEC’s online database (Edgar) through the Edgar Online search engine reflects that, since January 1, 2003, 248 companies filed proxy statements disclosing electronic voting arrangements for their annual meetings and seventy companies filed proxy statements disclosing webcast arrangements for their annual meetings. Edgar Online, http://www.sec.gov (last visited May 23, 2003).
written consents have hardly replaced actual meetings. Actual meetings at which directors and shareholders are physically present continue to be the predominant forum for the conduct of business, at least in publicly held companies for which data is available. Like written consents, webcasts and teleconferences will generally serve as a supplement to, rather than a replacement of, actual meetings. Similarly, voting and transmitting shareholder communication by Internet, e-mail or facsimile do not replace paper mailings. They supplement the paper mailings. By supplementing the physical meeting or the paper mailings, corporations provide alternatives that permit greater access to, and participation in, the governance process.

2. International Brotherhood of Teamsters v. Fleming Companies

The legislature changed the OGCA most notably in response to Fleming. In that case, the Oklahoma Supreme Court held that shareholders could adopt binding bylaws that restricted the board’s ability to implement shareholder rights’ plans. Some legal experts felt that the Oklahoma court ruled differently than the Delaware courts would have ruled under the same circumstances. Fleming unsettled many people because it elevated the

30. Section 228 of the DGCL authorizes shareholder written consents. It was amended in 1967 to permit action by less than all shareholders, if authorized in the certificate of incorporation. A 1969 amendment eliminated the need for charter authorization. After 1969, the statute generally authorized shareholders holding a majority of shares to take action by written consent without special charter or bylaw authorization. See Rodman Ward, Jr. et al., 1 Folk on the Delaware General Corporation Law § 228 cmt. (4th ed., 2003). While small, closely-held corporations often use written consents in lieu of meetings, the practice is not common in publicly-held companies. For example, on Edgar Online search of the SEC’s online database (Edgar) shows that, from January 1, 2003, to May 23, 2003, 5038 companies filed proxy statements for shareholder meetings while only 229 companies filed information statements covering shareholder actions by written consent. The data suggests that publicly held companies will continue to value physical shareholder meetings even though other alternatives are available.


32. Id. ¶ 25, 975 P.2d at 913.

33. See, e.g., John C. Coates & Bradley C. Faris, Second Generation Shareholder Bylaws: Post Quickum Alternatives, 56 Bus. Law. 1323, 1328-29 & nn.25, 27, 28, 21, 31 (2001); Charles F. Richards, Jr. & Robert J. Stearn, Jr., Shareholder By-Laws Requiring Boards of Directors to Dismantle Rights Plans Are Unlikely to Survive Scrutiny Under Delaware Law, 54 Bus. Law. 607, 631-34 (1999). The Delaware Supreme Court has written, “One of the most basic tenets of Delaware corporate law is that the board of directors has the ultimate responsibility for managing the business and affairs of a corporation. Section 141(a) requires that any limitation on the board’s authority be set out in the certificate of incorporation.” Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281, 1291 (Del. 1998). Section 141 of the DGCL is identical to section 1028 of the OGCA. The Fleming opinion ignores this “basic tenet,” suggesting instead — with no statutory authority — that a limitation on the shareholders’
shareholders' authority over the authority of the corporate bylaws and the board of the directors. Some commentators generally viewed the decision as impinging on the statutory management prerogatives of the directors and risking shareholder action unconstrained by the directors' fiduciary obligations. The Fleming decision presented several problems. First, the court's attempt at statutory reconciliation was unconvincing. Further, the court omitted fundamental corporate governance concepts under Delaware law, such as the board of directors' authority to manage and the role of fiduciary duties in corporate action. Finally, with its decision, the court overlooked a genuine opportunity to determine the boundaries of director and shareholder authority.

power to adopt bylaws should be set forth in the certificate of incorporation. Fleming, ¶ 26, 975 P.2d at 913. For additional discussion on this point, see infra note 36.

34. Richards & Stern, supra note 33, at 631-34.

35. Shortly before the Fleming decision, the Delaware Supreme Court decided Quickturn, which involved a board's attempt to use a shareholder rights' plan when confronted with a hostile takeover. Quickturn, 721 A.2d at 1287. The Delaware court struck the plan, which contained a provision preventing any subsequent board from eliminating the rights for six months. Id. at 1290-92. The Delaware court wrote that a contract provision cannot limit a board's ability to act in the shareholders' best interests. Id. at 1292. The holding suggests that the Delaware court would not uphold a shareholder bylaw that materially restricted a board's ability to implement, maintain, or redeem a rights plan. See Coates & Faris, supra note 33, at 1328-35.

36. The opinion, for example, fails to reconcile its holding with the vested managerial authority of the board of directors under title 18, section 1027 of the Oklahoma Statutes or with the provisions of section 1038 that direct that the creation and issuance of stock rights and options conform to requirements set forth in the certificate of incorporation or "in a resolution adopted by the board of directors." Section 1027 contains no reference to the shareholders or to the bylaws. The opinion analogizes the rights plans to stock options, which ignores the different contexts in which each is employed. Fleming, ¶ 18, 975 P.2d at 911. It cites an Internal Revenue Code requirement that shareholders approve incentive stock options (following board approval) as support for the notion that shareholders can limit the board's authority. Id. ¶ 21, 975 P.2d at 911-12. The Court's purpose in citing the Internal Revenue Code is unclear. The OGCA and the Code are not linked in any way. Each act is presumably independent of the other. If cited for the notion that shareholders typically approve stock options, the notion is flawed. The Code requires shareholder approval of a certain type of option — incentive stock option — but these options are only one kind of stock option. There are many kinds of options, and shareholder approval is not a prerequisite for their issuance. See, e.g., 18 Okla. Stat. § 1038 (2001); Del. Code Ann., tit. 8, § 157 (2001 & Supp. 2002)). Director authorization is typically required. 18 Okla. Stat. § 1038; Del. Code Ann., tit. 8, § 157.
under Oklahoma law. Unfortunately, the opinion confounded this latter issue, and, as suggested in the opinion itself, necessitated legislative action.

The Oklahoma legislature responded to Fleming by enacting Senate Bill 610, which altered section 1013 of the OGCA by vesting the presumptive authority to adopt or amend a corporation's bylaws with directors, rather than shareholders. Section 1013 permits shareholders to amend the bylaws only if authorized by the certificate of incorporation, and then, only if the authorization does not divest or limit the directors' authority.

3. Statutory Conversions

Notably, Senate Bill 610 also included the adoption of "conversion" provisions in the OGCA, the LLC Act, and RULPA. The legislature modeled its statutory conversion provisions after the recent Delaware conversion provisions. These provisions permit: (1) a "business entity" to convert to a domestic corporation; (2) a domestic corporation to convert to a business entity; and (3) one type of business entity to convert to another type of business entity. A corporation can authorize a conversion by a vote of its


38. Fleming, ¶ 26, 975 P.2d at 913. After examining the OGCA and finding no statutory limits on shareholder bylaws and noting that Fleming Companies' charter "does not offer directors the broad authority to protect against mergers and takeover, corporations must look to Oklahoma's legislature, not this Court, which is more properly vested with the means to offer boards such authority." Id.

40. Id. § 1013(A).
41. Id. §§ 1090.4-.5.
42. Id. §§ 2054.1-.2.
44. Del. Code Ann., tit. 6, §§ 17-217 (Supp. 2002) (conversions involving limited partnerships); id. § 18-216 (conversions involving LLCs); tit. 8, §§ 265-266 (conversions involving corporations).
45. A "business entity" is defined as a domestic general or limited partnership; LLC; business or common law trust; or other unincorporated association. 18 Okla. Stat. §§1090.4(A), 2054.1(A) (2001); 54 Okla. Stat. § 310.2(A) (2001).
46. 18 Okla. Stat. §§ 1090.4-.5 (2001) (conversions involving corporations); id. §§ 2054.1-.2 (conversions involving LLCs); 54 Okla. Stat. §§ 310.2-.3 (2001) (conversions
board of directors and all of its shareholders, including holders of non-voting stock.\textsuperscript{47} A business entity can authorize a conversion by following procedures described in its governing documents, or if no procedures exist, by a vote of a majority of its owners.\textsuperscript{48} The conversion becomes effective when the converting entity files certificates of conversion and incorporation with the Secretary of State.\textsuperscript{49}

A statutory conversion operates much like a merger, although the transaction involves only a single party.\textsuperscript{50} The conversion does not alter the prior obligations or liabilities of the converting entity or the personal liability incurred by any person in the entity before the conversion.\textsuperscript{51} The pre-conversion and post-conversion entities are deemed to be one and the same.\textsuperscript{52} The existence of the post-conversion entity relates back to the formation of the pre-conversion entity,\textsuperscript{53} and neither is labeled a predecessor or successor entity.\textsuperscript{54}

The availability of a statutory conversion permits an entity to change its form without a merger or the attendant need to create a shell entity. Conversions will prove helpful for entities merely wanting to change their form. Mergers will continue to be used for combinations involving two or more groups.\textsuperscript{55}

4. Other Changes in Senate Bill 610

Senate Bill 610 also instituted an annual certificate requirement for LLCs and limited partnerships.\textsuperscript{56} The certificate is due each July 1 and requires an involving limited partnerships).

\textsuperscript{47} 18 OKLA. STAT. § 1090.5(B) (2001).

\textsuperscript{48} Id. § 1090.4(G) (referring to approval procedures in governing documents or by applicable law); id. § 2054.2 (for LLCs, stating that approval is as required by the operating agreement, or if not specified, by a majority vote of the members); 54 OKLA. STAT. § 310.3 (2001) (for limited partnerships, stating that approval is as required by the partnership agreement, or if not specified, by all general partners and a majority of the limited partners by interest).

\textsuperscript{49} 18 OKLA. STAT. §§ 1007(D), 1090.4.(B) (2001) (for corporations); id. § 2054.1(B) (for LLCs); 54 OKLA. STAT. § 310.2(B) (2001) (for limited partnerships).

\textsuperscript{50} 18 OKLA. STAT. § 1090.4(B) (2001) (for corporations); id. § 2054.1(B) (for LLCs); 54 OKLA. STAT. § 310.2(B) (2001) (for limited partnerships).

\textsuperscript{51} 18 OKLA. STAT. § 1090.4(E) (2001).

\textsuperscript{52} Id. § 1090.4(D) (for corporations); id. § 2054.1(D) (for LLCs); 54 OKLA. STAT. § 310.2(D) (2001) (for limited partnerships).

\textsuperscript{53} Id. § 1090.4(D).

\textsuperscript{54} Id.

\textsuperscript{55} FAUGHT, supra note 2, § 8.2, at 8-5.

\textsuperscript{56} 18 OKLA. STAT. § 2055.2 (2001) (for LLCs); 54 OKLA. STAT. § 311.1 (2001) (for limited partnerships).
annual fee. An LLC or limited partnership that fails to file will terminate its good standing and will be cancelled after three years. The legislature intended the change to purge dormant entities from the Secretary of State's records. The annual report requirement introduces for the first time the concept of "good standing" to LLCs and limited partnerships.

The new LLC and limited partnership good standing and suspension provisions are much less penal than the provisions covering corporations. When a corporation is suspended, its directors and officers become personally liable for debts incurred with their knowledge, approval and consent during the suspension. Even if the corporation is later restored to good standing, the personal liability remains. A corporation cannot defend itself while suspended. The enforceability of contracts made during suspension has been

57. 18 OKLA. STAT. § 2055.2(B) (2001) (for LLCs); 54 OKLA. STAT. § 311.1(B) (2001) (for limited partnerships). The Secretary of State charges a $25 fee for LLCs under title 18, section 1142(A)(1) and a $50 fee for limited partnerships under title 54, section 314(C)(2).

58. 18 OKLA. STAT. § 2055.2(D)-(E) (2001) (for LLCs); 54 OKLA. STAT. § 311(B) (2001) (for limited partnerships). An entity is in "good standing" if it has paid all fees required for its maintenance. For example, an LLC must pay the $25 annual fee upon filing its annual certificate. If the LLC relies upon the Secretary of State to act as its registered agent, it must pay a $40 annual fee. 18 OKLA. STAT. § 2055.1 (2001). A corporation must file an annual franchise tax return and pay its tax. 68 OKLA. STAT. §§ 1203, 1210 (2001). An entity failing to pay these fees will cease to be in good standing, which means generally that it cannot make filings with the Secretary of State and cannot maintain actions within the State. See, e.g., 18 OKLA. STAT. § 2055.2(F)-(G) (2001) (penalties for LLCs); 68 OKLA. STAT. § 1212 (2001) (penalties for corporations).

In addition, a corporation not in good standing cannot defend against actions, and its officers and directors can be personally liable for debts incurred while it is not in good standing. Id. § 1212(c); Corman v. H-30 Drilling, Inc., 2001 OK 92, 40 P.3d 1051 (dealing with corporation's ability to defend an action); K.J. McNitt Constr., Inc. v. Economopoulos, 2001 OK CIV APP 45, 23 P.3d 983 (dealing with director and officer liability).

An LLC that has ceased to be in good standing can restore its good standing if it files its annual certificates and pays all amounts due within three years of its delinquency. 18 OKLA. STAT. § 2055.2(E) (2001). After three years, the Secretary of State will terminate the LLC and its existence cannot be restored. Id. A corporation that has ceased to be in good standing can be restored by filing its returns and paying its delinquent taxes. 68 OKLA. STAT. § 1212(f) (2001). After three years, the corporation is no longer entitled to use its earlier name if the name had become available. 18 OKLA. STAT. § 1120(F) (2001).

59. Synopsis of Senate Bill 610 prepared by Gary W. Derrick and distributed to OGCA members (on file with author).

60. 68 OKLA. STAT. § 1212(c) (2001); Economopoulos, 2001 OK CIV APP 45, 23 P.3d 983.

61. Bethlehem Steel Corp. v. Giese, 1984 OK 28, ¶4, 681 P.2d 769, 770 ("[R]einstate[ment does not vitiate the officers' and directors' personal liability for debts knowingly incurred during the period of suspension.").

62. Corman, ¶ 8, 40 P.3d at 1053.
questioned. By contrast, the suspension of an LLC or limited partnership does not make the members, managers or partners personally liable for entity obligations. Although an LLC or partnership cannot maintain an action, it can defend itself while suspended. The statute specifically provides that contracts made during a suspension are enforceable. In the authors' opinion, the corporate approach is too penal. Imposing personal liability on directors and officers and withholding a corporation's ability to defend against claims seems to outweigh the State's need to collect franchise taxes, especially considering that franchise taxes are much less than corporate income taxes, for which similar enforcement provisions do not exist. Especially penal is the law that directors and officers remain personally liable for debts incurred during suspension even though the corporation restores its good standing. The legislature should reevaluate these laws and the underlying policies and reform the corporate provisions to match the more balanced LLC and limited partnership provisions. This and the conversion provisions of Senate Bill 610 may herald the start of more changes in the Oklahoma business entities laws to eliminate unintended differences and their consequences. Overlapping and conflicting provisions can complicate and confuse a practitioner's compliance with the formalities of the various laws. Movement towards a more unified business practice may be debated in future legislative sessions.

Other changes in the LLC Act include an expansion of the purpose section to include nonbusiness activities, and changes authorizing the resignation of a manager or member-manager, and the addition of a section that permits the delegation of responsibilities to others. This latter change is helpful when a corporate structure is used in which the managers function as directors and officers function as agents of the managers. The changes also permit the

63. Id.; Economopoulos, § 5, 23 P.3d at 984.
64. 18 OKLA. STAT. § 2055.2(I) (2001).
65. Id. § 2055.2(G).
66. Id. § 2055.2(H).
70. Id. § 2014(3).
71. Id. § 2015(B).
72. Id. § 2016(3).
LLC's operating agreement to define the scope of the manager's duties, and provide that the business judgment rule, as it applies to corporate directors and officers, also applies to LLC managers.\textsuperscript{73}

Senate Bill 610 clarified the scope of exemption in title 68 that relates to the documentary tax stamps on deeds.\textsuperscript{74} The legislature amended the wording of the exemption to ensure that transfers between and among family members or entities for the benefit of family members would not be subject to the tax.\textsuperscript{75}

Senate Bill 610 clarified the application of the OGCA to cooperative marketing associations, including foreign cooperatives doing business in Oklahoma.\textsuperscript{76} Before this change, the Cooperative Marketing Association Act had no provision authorizing foreign cooperatives to do business in Oklahoma. The provision incorporating the OGCA as to matters not addressed by the cooperative act appeared to cover only domestic cooperatives.\textsuperscript{77} The change added language stating that the OGCA will apply to domestic and foreign cooperatives.\textsuperscript{78} This meant that foreign cooperatives could use the OGCA domestication provisions to qualify to do business in Oklahoma.\textsuperscript{79}

**B. Other Legislative Noteworthy Changes**

As the legislature amended the OGCA to recognize the use of electronic communication for director and shareholder meetings, they also enacted similar changes for filings by business entities. In 2000, Oklahoma adopted the Uniform Electronic Transactions Act.\textsuperscript{80} The UETA facilitates electronic commerce by giving electronic records and signatures the legal equivalence of paper writings and traditional signatures.\textsuperscript{81} In 2001, the legislature

\begin{itemize}
  \item \textsuperscript{73} Id. \S \textsuperscript{2016(4)}.
  \item \textsuperscript{74} 68 OKLA. STAT. \S\textsuperscript{3202} (2001).
  \item \textsuperscript{75} Id.
  \item \textsuperscript{76} 2 OKLA. STAT. \S\textsuperscript{17-24} (2001).
  \item \textsuperscript{77} Title 2, section 17-24 previously read: "The provisions of the general business corporation laws of this state and all powers and rights thereunder shall apply to the associations organized hereunder, except where such provisions are inconsistent with the express provisions of this act." 2 OKLA. STAT. \S\textsuperscript{17-24} (2001) (emphasis added).
  \item \textsuperscript{78} Id.
  \item \textsuperscript{79} See 18 OKLA. STAT. \S\textsuperscript{1130-1136} (2001).
  \item \textsuperscript{80} 2000 Okla. Sess. Laws 2130 (codified as amended at 12A OKLA. STAT. \S\textsuperscript{15-101 to -121} (2001)).
  \item \textsuperscript{81} See Fred H. Miller, Commentary on the Oklahoma Version of the Uniform Electronic Transactions Act, \textit{reprinted in} 12A OKLA. STAT. ANN. art. 15 (West 2001).
\end{itemize}
amended the UETA to implement the concept of a "certification authority"—a person who certifies a digital signature.\(^{82}\) This change facilitates the electronic filing of legal documents in the courts, in real estate transactions, and with the Secretary of State.\(^{83}\) The UETA is a voluntary act. It does not require that anyone accept an electronic signature.\(^{84}\) Thus, businesses must wait for court clerks, county clerks, and the Secretary of State to implement systems to accept electronic filings.

The Secretary of State is currently implementing such a system that is expected to be functional by the end of the 2003 calendar year.\(^{85}\) The system will allow Internet access to the Secretary of State's business entity database to check name availability and good standing and to view constituent documents.\(^{86}\) The system also will permit Internet filing of corporate, LLC, limited partnership, and other entity documents for formations, amendments, mergers, and dissolutions.\(^{87}\)

### III. Recent Oklahoma Decisions

The only notable cases in the general corporate area do not directly involve the OGCA or the rights and duties of directors or shareholders. One case,

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83. Id. § 2(b), 2001 Okla. Sess. Laws at 2341 (codified at 12A OKLA. STAT. § 15-121(b)). An electronic signature under the UETA is broadly inclusive. It might be a voice mail message, a name on a facsimile or name on an e-mail. See 12A OKLA. STAT. ANN. § 15-102 cmt. 7 (West 2001). While a broadly inclusive definition facilitates e-commerce, a greater degree of security is warranted for documents having significant legal import, such as land records, court documents and Secretary of State filings. The enhanced degree of security is provided by the "certification authority," which will certify a "digital signature." A digital signature is narrowly defined as an electronic signature that is encrypted in a way that permits the sender to be distinguished from any other person. 12A OKLA. STAT. § 15-102(6) (2001). By using a certification authority, land records, court documents and Secretary of State filings can be transmitted electronically.

84. 12A OKLA. STAT. § 15-105(b) (2001).


87. See id.
Cardiovascular Surgical Specialists, Corp. v. Mammana, 88 principally affects physicians' noncompete agreements. 89 It also touches on the enforceability of arbitration decisions. 90 The other case, Winston v. Stewart & Elder, P.C., 91 involves the break-up of a professional corporation and the obligations owed by the firm and the remaining lawyer/shareholders to the withdrawing lawyer/shareholders. The Winston decision covers an appeal of a summary judgment motion and never addresses directly the merits of the case. 92

In Mammana, a professional corporation, Cardiovascular Surgical Specialists (CSS), employed a Tulsa surgeon, Mammana, for about two years. 93 Mammana's employment agreement contained a noncompete provision. 94 The surgeon later left CSS, but continued to work as a sole practitioner. 95

An arbitration panel held the noncompete provision valid and enforceable. 96 CSS took the arbitration award to the district court, which "enjoined Dr. Mammana from practicing... surgery within a twenty-mile radius of one of CSS's offices." 97 Mammana appealed, and the Oklahoma Supreme Court retained the case to consider whether the noncompete provision was valid and enforceable. 98

The court's opinion regarding the noncompete was predictable and

89. Id. ¶ 2, 61 P.3d at 211.
90. Id. ¶¶ 10-13, 61 P.3d at 212-13.
91. 2002 OK 68, 55 P.3d 1063.
92. Id. ¶ 0, 55 P.3d at 1064.
93. Mammana, ¶ 5, 61 P.3d at 212.
94. Id. ¶ 4, 61 P.3d at 212. The noncompete provision reads as follows:
   During the term of the Agreement, and for two years thereafter, [the surgeon] agrees that he will not... within a twenty mile radius of [CSS's] offices:
   A. own, operate, or in any way participate in the practice of cardiovascular or thoracic surgery,
   B. solicit, divert or accept referrals from any source of [CSS] referrals within nine months of the date of termination,
   C. solicit or divert business of any patient who had been a patient of [CSS] within one year of the termination, without [CSS's] advanced written consent.
Id. ¶ 15, 61 P.3d at 213-14.
95. Id. ¶ 5, 61 P.3d at 212.
96. Id. ¶ 6, 61 P.3d at 212.
97. Id. ¶ 7, 61 P.3d at 212.
98. Title 15, section 217 of the Oklahoma Statutes prohibits restraints of trade, which includes unreasonable noncompete provisions. See Bayly, Martin & Fay, Inc. v. Pickard, 1989 OK 122, 780 P.2d 1168. The legislature amended the statute in 2001 to address noncompetes in the employment context, but Mammana was decided under the prior statute. See 15 OKLA. STAT. § 219A (2001).
consistent with precedent. The court voided a clause that prohibited Mammana from practicing cardiovascular or thoracic surgery within the twenty-mile radius of one of CSS’s offices. It also voided a clause prohibiting Mammana from accepting patient referrals from sources that had made referrals to CSS within nine months of Mammana’s departure.

The court stated that the practice prohibition was “much broader than necessary to protect any legitimate interest of CSS.” Regarding the referral clause, the court wrote, “Ordinary competition for patients is something CSS cannot avoid through a ‘non-compete’ provision. Evidence presented to the arbitration panel demonstrated the personal nature of reputation-dependent referrals to cardiovascular surgeons. One surgeon has no legitimate business interest in another surgeon’s referral base regardless of a past employer-employee relationship.”

In striking these clauses, the court referred to earlier cases upholding “nonsolicitation” provisions, but not broader noncompetes, and to the notion that noncompetes were only reasonable and enforceable to the extent that they protected against “unfair competition.” The court allowed a clause prohibiting Mammana from soliciting CSS patients for one year unless he had treated them and they had requested his continued service. The court noted that this clause was similar to provisions previously upheld.

The more surprising aspect of the court’s decision was its voiding of the arbitration award. Obviously, to void any of the noncompete clauses, the court had to set aside the arbitration panel’s determination that the clauses were reasonable, and thus enforceable. Citing Wyatt-Doyle & Butler Engineers, Inc. v. City of Eufaula, the court held that it could review the validity of a contract even if an arbitration panel had already deemed it

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99. Prior Oklahoma cases generally had upheld nonsolicitation clauses while striking broader noncompete clauses. See Bayly, 1989 OK 122, 780 P.2d 1168 (striking a noncompete); Tatum v. Colonial Life & Accident Ins. Co., 1970 OK 27, 465 P.2d 448 (upholding nonsolicitation of former customers provision, constituting the first time an employment restraint was upheld); Loewen Group Acquisition Corp. v. Matthews, 2000 OK CIV APP 109, 12 P.3d 977 (striking noncompete). Like Mammana, these cases dealt with employees who posed little risk of unfair competition.

100. Mammana, ¶ 16, 61 P.3d at 214.

101. Id. ¶ 20, 61 P.3d at 215.

102. Id. ¶ 16, 61 P.3d at 214.

103. Id. ¶ 18, 61 P.3d at 214 (citation omitted).

104. Id. ¶ 14, 61 P.3d at 213.

105. Id. ¶ 19, 61 P.3d at 214.


valid. If the court determined that the contract was invalid, it could set aside the arbitration award because the arbitrators ""exceeded their powers"" in attempting to enforce an invalid contract.

The Uniform Arbitration Act (UAA) that Oklahoma has adopted, permits the court to vacate an award only on narrow grounds. In most jurisdictions, a court's review of an arbitration decision is not de novo, but rather, the award is presumed proper. Yet, the Oklahoma Supreme Court gave no weight to

108. Mammana, ¶ 11, 61 P.3d at 213.
110. Title 15, section 812 of the Oklahoma Statutes sets forth the grounds upon which an arbitration award might be vacated:

A. Upon application of a party, the court shall vacate an award if:
   1. The award was procured by corruption, fraud or other illegal means;
   2. There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
   3. The arbitrators exceeded their powers;
   4. The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the requirements of this act, as to prejudice substantially the rights of a party; or
   5. There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 3 of this act and the party did not participate in the arbitration hearing without raising the objection.

B. The fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

111. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 37-38 (1987) ("'[I]t is the arbitrator's view of the facts . . . that [the parties have] agreed to accept" and the "[c]ourts thus do not sit to hear claims of factual . . . error by an arbitrator as an appellate court does in reviewing decisions of lower courts."); W.R. Grace & Co. v. Local Union 759, 461 U.S. 757, 764 (1983) ("[A] federal court may not overrule an arbitrator's decision simply because the court believes its own interpretation of the contract would be the better one."); Saturday Evening Post Co. v. Rumbleseat Press, Inc., 816 F.2d 1191, 1197 (7th Cir. 1987); Parsons & Whittemore Ala. Mach. & Servs. Corp. v. Yeargin Constr. Co., 744 F.2d 1482, 1484 (11th Cir. 1984); Coast Trading Co. v. Pac. Molasses Co., 681 F.2d 1195, 1197-98 (9th Cir. 1982); Boise Cascade Corp. v. United Steelworkers of Am., Local Union No. 7001, 588 F.2d 127, 128 (5th Cir. 1978); see also Seymour v. Blue Cross/Blue Shield, 988 F.2d 1020, 1023 (10th Cir. 1993) (finding a public policy exception to the enforcement of an arbitrator's decision). The public policy exception might appear at first blush to support the Mammana decision. A closer examination reveals that any support is illusory. The public policy exception is too narrow to support a recasting of the arbitrator's factual determinations. "A court may not substitute its judgment for that of the arbitrator. Nor may a court decide facts to support its public policy views." Kennicott Utah Copper Corp. v. Becker, 195 F.3d 1201, 1207 (10th Cir. 1999) (public policy exception will not permit a court to overturn an arbitrator's refusal to allow dismissal of
the arbitration award. It seemingly applied a de novo standard and substituted its own factual determinations in deciding whether the noncompete provisions were reasonable for the determinations of the arbitration panel.\textsuperscript{112}

The decision is problematic for arbitration. If a court may apply a de novo standard of review to arbitration awards, then by recasting facts it can determine, in many cases, that the arbitrators have exceed their powers. A determination that the arbitration award was contrary to a contract or to a statute would suffice. The result amounts to a judicial second-guessing of the arbitration award.

The Oklahoma Supreme Court also decided \textit{Winston v. Stewart \& Elder, P.C.}\textsuperscript{113} Winston involved the break-up of a professional corporation (PC). Two lawyer/shareholders left in 1994, triggering a buyout of their shares under their shareholder agreements.\textsuperscript{114} The two remaining lawyer/shareholders dissolved the PC and formed a new PC at year-end.\textsuperscript{115} The new PC had substantially the same name, the same location and the same practice.\textsuperscript{116} While it appears to have assumed the other liabilities of the former PC, the new PC did not assume the old PC’s buyout obligation.\textsuperscript{117} The former lawyer/shareholders sued for the balance due in their buyout.\textsuperscript{118}

As the court wrote, “The [case history] is rather convoluted.”\textsuperscript{119} After the plaintiffs sued, the defendant law firm answered timely in October 1995.\textsuperscript{120} The trial court appointed a receiver who completed his work and was

\textsuperscript{112} The case upon which the court relied, \textit{Wyatt-Doyle}, involved an engineering firm’s claim against a municipality that had guaranteed a trust authority’s performance under some industrial revenue bonds. An arbitration panel found the municipality liable, and the firm attempted to enforce its award. \textit{Wyatt-Doyle}, \textsuperscript{13} 3, 13 P.3d at 475. Wyatt-Doyle appealed to the Oklahoma Supreme Court. The \textit{Wyatt-Doyle} court set aside the arbitration award holding that the municipality was constitutionally prohibited from performing its guarantee. \textit{Id.} \textsuperscript{14} 16, 13 P.3d at 479.

Whether one agrees with the \textit{Wyatt-Doyle} court’s holding, it was based on a contract that the court held was invalid as a matter of law. The noncompetes in \textit{Mammana} could only be invalidated by a factual determination that the noncompetes were unreasonable. If a court may freely substitute both its legal and factual determinations for those of an arbitration panel, little accord is left for an award.

\textsuperscript{113} 2002 OK 68, 55 P.3d 1063.
\textsuperscript{114} \textit{Id.} \textsuperscript{2} 0, 55 P.3d at 1065.
\textsuperscript{115} \textit{Id.} \textsuperscript{3} 4, 55 P.3d at 1066.
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{Id.} \textsuperscript{4} 4-5, 55 P.3d at 1066-67.
\textsuperscript{118} \textit{Id.} \textsuperscript{5} 5, 55 P.3d at 1066.
\textsuperscript{119} \textit{Id.} \textsuperscript{6} 2, 55 P.3d at 1067.
\textsuperscript{120} \textit{Id.} \textsuperscript{7} 7, 55 P.3d at 1067.
discharged in November 1996. The plaintiffs sought to amend their petition in July 1998. In September 1998, the trial court denied the plaintiffs leave to amend and allowed the remaining defendants to answer the original petition. In April 2000, the trial court denied plaintiffs’ motion for summary judgment and granted defendants’ motion for summary judgment. The Court of Civil Appeals reversed the trial court’s grant of summary judgment and the defendants appealed.

The plaintiffs’ status after terminating their employment was an apparent point of confusion. Did they remain shareholders after ceasing to be employees? The distinction is critical. If the plaintiffs are shareholders, their claims would arise out of a fiduciary relationship. If the plaintiffs are not shareholders, their claims arise out of a creditor-debtor relationship. As the

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121. Id. ¶ 6, 55 P.3d at 1067.
122. Id. ¶ 7, 55 P.3d at 1067.
123. Id.
124. Id.
125. Id. ¶ 8, 55 P.3d at 1067.
126. Id. ¶ 18, 55 P.3d at 1070.
127. The directors and officers of a corporation (presumably the individual defendants) owe fiduciary duties of due care and loyalty to the shareholders. The duty of care requires that the director conduct himself or herself with the same care that an ordinarily prudent director would exercise in like circumstances. The duty of loyalty requires that the director elevate the interests of the corporation above his or her own self-interest. See generally PAT K. CHEW, DIRECTORS’ AND OFFICERS’ LIABILITY 2.4 (2001) (duty of care); id. at 4-2 (duty of loyalty). In instances of self-dealing, the majority shareholders might owe fiduciary duties to the minority shareholders. See Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971). These concepts would permit plaintiffs — as shareholders — to sue the individual defendants personally.
128. If plaintiffs are creditors instead of shareholders, they must use different bases to reach the defendants. In most cases, the directors of a corporation owe no fiduciary duties to a creditor. The creditor could sue the corporation on its account. It could not sue a director. There are exceptions. A director owes a fiduciary duty to corporate creditors if the corporation is insolvent. See, e.g., Union Coal Co. v. Wooley, 1915 OK 992, 154 P.62; see also Gregory V. Varallo & Jesse A. Finkelman, Fiduciary Obligations of Directors of the Financially Troubled Company, 48 BUS. LAW. 215 (1992) (for a broader and more current discussion of the fiduciary duties directors owe to creditors). A creditor could also reach a successor corporation — such as the new PC — in certain situations, such as when the successor is a mere continuation of the old corporation. See, e.g., Okla. Title Co. v. Burrus, 1935 OK 495, 44 P.2d 852. A creditor could also reach the successor corporation, and the individual defendants to the extent of a benefit received, under fraudulent conveyance theories. See e.g., In re Honey Creek Entm’t, Inc., 246 B.R. 671 (Bankr. E.D. Okla. 2000), rev’d on other grounds, Nos. 01-7052, 01-7059, 2002 WL 1265630 (10th Cir. June 7, 2002); Rucks-Brandt Constr. Corp. v. Silver, 1944 OK 215, 151 P.2d 399; Sec. Nat’l Bank of Tulsa v. Cain, 1927 OK 98, 259 P. 572; Skirvin Operating Co. v. S.W. Elec. Co., 1918 OK 503, 174 P. 1069.
court correctly notes, the answer (no) was in the shareholder agreement. 129 Yet, plaintiffs themselves advanced positions premised on their continued shareholder status 130 and the trial court’s order discharging the receiver presumed that the plaintiffs were shareholders over a year after their termination. 131

After correctly resolving the plaintiffs’ status, the court resolved procedural issues regarding the maintenance of an action against a dissolved corporation and the plaintiffs’ right to amend its petition. 132 But, perhaps due to the convoluted nature of the case, the most interesting issue was not before the Court and thus was not addressed. The crux of the case is the validity of the dissolution of the old PC, the contemporaneous formation of the new PC, and the transfer of assets from the old PC to the new PC. The transaction is daring at best. 133 The transaction poses nettlesome conflicts of interest. The individual defendants owned and operated both the old and the new PCs. In the dissolution and transfer of assets, they controlled both buyer and seller and thus determined the price of the transferred assets. Perhaps most importantly, since the old PC was “no longer a viable economic entity,” they owed

129. The plaintiffs were party to a shareholder agreement that required them to sell their shares a price determined under the agreement if their employment terminated. Winston, ¶ 20, 55 P.3d at 1070.

130. While parties at times advance inconsistent positions given the vagaries of litigation, the plaintiffs’ failure to adopt a consistent position was noted by the court and may have contributed to the trial court’s confusion. Id ¶ 18, 55 P.3d at 1070 (“the confusion [about whether plaintiffs stand as shareholders or creditors] is apparent from the face of plaintiffs’ petition . . . .”). The inconsistency was still present three years later when plaintiffs sought to amend their petition to allege that “[the individual defendants] breached the fiduciary duties owed by majority shareholders to minority shareholders.” Id ¶ 7, 55 P.3d at 1067.

131. The trial court’s order discharging the receiver treats the plaintiffs as shareholders of the old PC. Id ¶¶ 6, 19, 55 P.3d at 1067, 1070. The discharge order was entered in November 1996. The plaintiffs had resigned in 1994. Id ¶ 3, 6, 55 P.3d at 1066-67.

132. The defendants argued that the order discharging the receiver was a final, unappealable order that dissolved the old PC and mooted any claims against it. The argument flies in the face of title 18, section 1099 of the Oklahoma Statutes that continues the existence of a dissolving corporation until all pending proceedings against it conclude. The court so held and reversed the trial court. Id ¶¶ 11-17, 55 P.3d at 1068-69. The court also reversed the trial court to permit the plaintiffs to amend their petition. Id ¶ 24, 55 P.3d at 1070-72.

133. The notion that a successor corporation could be liable for the antecedent obligations of its predecessor was well established early in Oklahoma jurisprudence. See Okla. Title Co. v. Burrus, 1935 OK 495, 44 P.2d 852; Sec. Nat’l Bank of Tulsa v. Cain, 1927 OK 98, 259 P. 572; Spring Creek Oil Corp. v. Dillman, 1923 OK 324, 215 P. 1053; Burkholder v. Okmulgee Coal Co., 1921 OK 84, 196 P. 679; Skirvin Operating Co. v. S.W. Elec. Co., 1918 OK 503, 174 P. 1069; Union Coal Co. v. Wooley, 1915 OK 992, 154 P. 62. Of these cases, all but Union Coal involved related party transfers similar to that in Winston. In every case, the successor corporation was liable to the creditor of the predecessor.
fiduciary duties not to themselves as shareholders, but to the creditors of the old PC. Sustaining the fairness of the transaction to these creditors — including the former shareholders — would have presented a steep, if not insurmountable, burden.

It is regrettable that the transaction was not squarely at issue and discussed. Few Oklahoma cases have discussed the fiduciary obligations of directors, officers and shareholders generally. Even fewer have discussed the duties that directors owe to creditors in an insolvent corporation. It would have been interesting to examine what steps, if any, the individual defendants took to ameliorate their conflict of interest or to examine their methods of assigning value to the assets, including the work-in-progress and the firm’s goodwill. Dealing with corporate conflicts of interest has been the subject of many cases and treatises for many years, but comparatively little caselaw exists in

134. See, e.g., Wooley, 1915 OK 992, 154 P. 62; see also Varallo & Finkelstein, supra note 128.
135. In Warren v. Century Bankcorporation, Inc., 1987 OK 14, 741 P.2d 846, the Oklahoma Supreme Court addressed the conflicts that a parent corporation faces in dealing with its 80%-owned subsidiary and held the parent corporation to a higher standard: the parent’s dealing must be “intrinsically fair” to the minority shareholders of the subsidiary. Assuming the individual defendants owed fiduciary duties to plaintiffs as creditors, the higher standard of the “intrinsical fairness” test would presumably apply.
137. The court affirmed the defendants’ summary judgment motion as to the new PC. Winston, ¶ 20, 55 P.3d at 1070-71. Its affirmation appears premised on the belief that the plaintiffs could not state a claim against the new PC since the plaintiffs were not shareholders of the new PC and thus lacked standing. Id. The affirmation is perplexing. The Winston facts afford the plaintiffs an ample basis for asserting — as creditors of the old PC — successor liability against the new PC. The notion that a successor corporation could be liable for the antecedent obligations of its predecessor was well established early in Oklahoma jurisprudence. See Okla. Title Co. v. Burrus, 1935 OK 495, 44 P.2d 852; Spring Creek Oil Corp. v. Dillman, 1923 OK 324, 215 P. 1053; Burkholder v. Okmulgee Coal Co., 1921 OK 84, 196 P. 679; Skirvin Operating Co. v. S.W. Elec. Co., 1918 OK 503, 174 P. 1069; Union Coal Co. v. Wooley, 1915 OK 992, 154 P. 62. Of these cases, all but Union Coal involved related party transfers similar to that in Winston.
138. One would expect the conflicts of interest and valuation issues to arise in a trial on the merits. The case was on appeal from a denial of summary judgment and other preliminary rulings. Neither the conflicts of interest nor the valuation issues were before the Winston Court and its opinion does not address these issues.
Oklahoma. The assignment of values, particularly in professional corporations, is a subject that arises with some frequency in Oklahoma. Yet, clear guidance is wanting. Perhaps, the Court will address these issues.

139. The means of dealing with conflicts of interest are many. For a discussion of the historical development, see Harold Marsh, Jr., Are Directors Trustees? Conflict of Interest and Corporate Morality, 22 BUS. LAW. 35 (1966). Common means might involve the use of independent experts to handle the valuation of assets or to opinion as to the fairness of the transaction, the retention of independent legal counsel for the old PC, or the appointment of a special committee to represent the old PC in structuring the transaction. See LOU R. KLING & EILEEN NUGENT SIMON, NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS § 22.04[2] (2001 ed.) (regarding use of fairness opinions); In re Fort Howard Corp., No. Civ. A 9991, 1988 Del. Ch. LEXIS 110 at *36 (Del.Ch. 1988) (regarding importance of independent legal counsel); Weinberger v. UOP, 457 A.2d 701 (Del. 1983) (regarding use of special committees); Scott V. Simpson, The Emerging Role of the Special Committee — Ensuring Business Judgment Rule Protection in the Context of Management Leveraged Buyouts and Other Corporate Transactions Involving Conflicts of Interest, 43 BUS. LAW. 665 (1988). The only Oklahoma case discussing the directors’ standards in conflict of interest transactions at length is Warren v. Century Bankcorporation, Inc., 1987 OK 14, 741 P.2d 846, in which the Oklahoma Supreme Court established the “intrinsic fairness” test for judging the validity of conflicts of interest transactions. Id. ¶ 7-8, 741 P.2d at 849.


The guidance from divorce proceedings offers little utility to other areas. Divorce proceedings often involve a division of property and an alimony or child support award. If the property includes a service business (such as a professional practice), the valuation of the divided property overlaps with the alimony or child support award, which is based on the monthly income. In other words, the value of a service business is largely based on the value of the labor inputs. The labor inputs also generate the alimony or child support payments. While no case has attempted to analyze this overlap, the overlap has been acknowledged in the context of whether the goodwill of a professional practice should be included in a valuation of the property to be divided. In Travis v. Travis, 1990 OK 57, 795 P.2d 96, the Court noted that goodwill should not be included, for among other reasons that inclusion of goodwill — which is linked to future revenues — would amount to a “double counting” when combined with alimony. Id. ¶ 7-8, 795 P.2d at 99. It thus accepted that goodwill should not be included in valuing a professional practice. Id. ¶ 13, 795 P.2d at 100. Travis’s application, however, should be limited to divorces in which alimony or child support awards are made. As an
if the case's convoluted path winds around to that resort again.

IV. Developments in Corporate Responsibility Law

A. General

As a general rule, corporate governance is the prerogative of state legislation and state common law.\(^{142}\) State corporation statutes specifically address the ways corporations handle their internal affairs.\(^ {143}\) Indeed, “[m]odern corporate statutes place greater reliance on fiduciary duty concepts as a means of regulating director and officer actions and less reliance on statutory restrictions.”\(^ {144}\) Interpretation and evolution of these duties depend on state court review and oversight in areas of responsibility, liability, duty of care and loyalty — including conflicts of interest, negligence, and misconduct.

However, the federal government also took major steps to influence corporate governance matters during the last year. In response to the major scandals surrounding the bankruptcies of Enron, WorldCom, and Global Crossing, the activity on Capitol Hill in 2002 was fast and furious.

Early in 2002, eleven separate congressional committees and subcommittees began investigating the situation surrounding the Enron bankruptcy. The senators and congressmen held their hearings, brought in victims and expert witnesses, and received considerable press coverage.\(^ {145}\)

The result was the broad Sarbanes-Oxley Act of 2002 (SOA) that was signed into law on July 30, 2002.\(^ {146}\) Congress intended the Act “to address the systematic and structural weaknesses affecting our capital markets which were revealed by repeated failures of audit effectiveness and corporate . . .

(intangible) asset, goodwill is and should be included in a calculation of the net asset value of any business, including a professional corporation. Accord Freeling v. Wood, 1961 OK 113, 361 P.2d 1061 (goodwill should be included in valuing interest of deceased partner); see Rev. Rul. 68-609, 1968-2 C.B. 327 (describing standards for calculating the value of goodwill).

142. FAUGHT, supra note 2, § 6.1, at 6-2.1.

143. Title 18, section 1013 of the Oklahoma Statutes provides that the bylaws (the internal operating rules of the corporation) may contain any provision relating to the conduct of the affairs of the corporation not inconsistent with law or the certificate of incorporation. 18 OKLA. STAT. § 1013(B) (2001). Pursuant to the Internal Affairs Doctrine that only one state should have the authority to regulate a corporation’s internal affairs, a foreign corporation’s internal affairs are usually governed by the law of its jurisdiction of incorporation. FAUGHT, supra note 2, § 11.103, 11:3.

144. FAUGHT, supra note 2, 6.102, at 6-3.


responsibility." Many felt that systemic problems existed in corporate disclosure in general, and specifically in accounting and corporate responsibility.

B. Provisions Applying to Publicly Held Corporations

The SOA focuses primarily on publicly held corporations. While the SOA involves many reform subjects, this Article will briefly reference only sections that deal directly with the impact of the legislation on corporate governance. Congress gave great authority to the SEC to enact rules and regulations implementing the SOA, and no study of the SOA is complete without reference to such regulations.

The SOA sets forth standards relating to a public company’s audit committee. Under the Act, an audit committee is directly responsible for the appointment, compensation, and oversight of the work of the auditors. Further, each member of the audit committee must be a member of the board of directors and be otherwise independent. Independent means that the member may not accept any consulting, advisory, or other compensatory fee from the company, or be an affiliated person of the company or any subsidiary.

149. S. REP. NO. 107-205, at 1.
152. Id.
153. Id.
Because of the congressional perception that recent corporate failures have resulted from defects in procedures for monitoring financial results and controls, the SOA contains a number of provisions aimed at increasing the direct responsibility of senior corporate managers. The SEC requires CEOs and CFOs, or persons performing similar functions, to certify that the officer signing the financial report made to the SEC has reviewed it, and that, based on the signing officers’ knowledge, the report does not contain any misstatement or omission, and fairly presents the financial condition and results of operations. The Act also requires the signing officers to certify that they are responsible for establishing and maintaining internal controls, that such controls ensure that proper information reaches the right people, and that the signing officers have evaluated the effectiveness of the controls within ninety days prior to the report.

The SOA also makes it unlawful for any officer or director to take any action to fraudulently influence, coerce, manipulate, or mislead an accounting firm conducting an audit for the corporation. The Act further prohibits officers from benefitting from profits they receive as a result of misstatements of the company’s financial reports. The SOA facilitates the imposition of judicial bars against officers and directors who have violated securities laws, and prevents employers from requiring employees to hold company stock in their retirement accounts while officers and directors are free to sell their shares. The SOA also enhances certain conflict of interest provisions by prohibiting certain personal loans from public companies to their executives.

C. Provisions Applying to All Corporations

Although the SOA primarily targets public reporting companies, some of its provisions also apply to private corporations. These provisions are as follows:

155. Sarbanes-Oxley Act § 302(a)(1)-(3) (to be codified at 15 U.S.C. § 7241(a)(1)-(3)).
156. Id. § 302(a)(4)(A)-(C) (to be codified at 15 U.S.C. § 7241(a)(4)(A)-(C)).
157. Id. § 303(a) (to be codified at 15 U.S.C. § 7242(a)).
158. Id. § 304(a)(2) (to be codified at 15 U.S.C. § 7243(a)(2)).
159. Id. §§ 305-306 (to be codified at 15 U.S.C. §§ 77t(e), 78u(d), 7244; 29 U.S.C. §§ 1021, 1132).
160. Id. § 402(a) (to be codified at 15 U.S.C. § 78m(k)).
(1) The SOA requires employers to give employees thirty-day advance written or electronic notice of any pension-fund blackout period.\textsuperscript{162}

(2) The SOA amends federal law to provide new penalties for the destruction, alteration, or falsification of records in federal investigations and bankruptcies.\textsuperscript{163} Penalties for such actions shall include up to twenty years imprisonment, fines, or both.\textsuperscript{164} Further, the Act requires any accountant that conducts an audit of any issuer to retain all audit or review paperwork for a period of five years.\textsuperscript{165} Penalties for violations include imprisonment up to ten years, fines, or both.\textsuperscript{166}

(3) The SOA provides that any person who attempts to commit crimes under the title can be treated as if they had committed the crime.\textsuperscript{167}

(4) The SOA increases the maximum penalty for mail and wire fraud from five to twenty years imprisonment.\textsuperscript{168}

(5) The SOA changes the penalty structure for violations of the Employee Retirement Income Security Act (ERISA). The maximum penalty for individual violations increased from a five-thousand dollar to a one-hundred-thousand dollar fine, and from one year to ten years imprisonment.\textsuperscript{169} The maximum penalty for business entities increased from a one-hundred-thousand dollar to a five-hundred-thousand dollar fine.\textsuperscript{170}

(6) The SOA recommends, but does not require, that CEOs sign corporate tax returns.\textsuperscript{171}

(7) The SOA requires that anyone who tampers with or obstructs an official proceeding be fined, imprisoned up to twenty years, or both.\textsuperscript{172}

(8) The SOA provides a penalty of a fine, imprisonment up to ten years, or both for retaliating against any corporate whistleblower.\textsuperscript{173}

\textsuperscript{162} Sarbanes-Oxley Act § 306(b) (to be codified at 29 U.S.C. § 1021(i)).
\textsuperscript{163} Id. § 802(a) (to be codified at 18 U.S.C. §§ 1519-1520).
\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{167} Id. § 902(a) (to be codified at 18 U.S.C. § 1349).
\textsuperscript{168} Id. § 903(a)-(b) (to be codified at 18 U.S.C. §§ 1341, 1343).
\textsuperscript{169} Id. § 904 (to be codified at 29 U.S.C. § 1131).
\textsuperscript{170} Id.
\textsuperscript{171} Id. § 1001.
\textsuperscript{172} Id. § 1102 (to be codified at 18 U.S.C. § 1512).
\textsuperscript{173} Id. § 1107(a) (to be codified at 18 U.S.C. § 1513(e)). A whistleblower in this case is any person who provides any truthful information relating to the commission or possible commission of any federal offense to a law enforcement officer.
D. State Legislative Reform Proposals

Because the SOA mainly affects securities reporting companies listed on major stock exchanges, some states are seeking changes in corporate responsibility that will apply to smaller, closely held, and not-for-profit corporations.

The New York Attorney General has proposed state corporate reform in the following areas: (1) protecting honest whistleblowers from retaliation; (2) protecting against fraud in not-for-profit corporations, including requiring officers to sign annual reports, mandating audit committees, and preventing self-dealing; and (3) preventing cover-ups of corporate crimes, addressing misconduct by corporate officers, and improving oversight of the accounting industry.¹⁷⁴

Colorado passed legislation prohibiting a public corporation from making loans to directors.¹⁷⁵

Kansas passed legislation to: (1) prohibit influencing or misleading persons in the preparation of financial statements or appraisals; (2) prohibit the destruction or falsifying of records; and (3) protect whistleblowers from retaliation for providing truthful information.¹⁷⁶

The Maryland state legislature considered adopting similar legislation, entitled the Corporate Accountability Act of 2003, but the legislation failed to pass.¹⁷⁷ The Act would have: (1) prohibited a registered public accounting firm that performs specified audits for a securities issuer from providing specified non-audit services; (2) prohibited a registered public accounting firm from providing audit services for a securities issuer if specified partners of the firm have performed audits for the issuer during a specified time period or if the firm employed specified officers of the issuer within the previous year; and (3) provided whistleblower protections for employees who report specified violations.¹⁷⁸

Texas is considering requiring a certified annual report for all private corporations doing business in Texas that resembles the certified annual filing required in the SOA.¹⁷⁹


¹⁷⁷ Id.

¹⁷⁸ Id.

We can expect further state action, as well as changes in the Model Business Corporation Act in regard to improving the ability of state law to deal with conflicts of interest on the part of corporate directors and officers.\(^{180}\)

**E. Preliminary Proposals of the American Bar Association Task Force on Corporate Responsibility**

In March 2002, the American Bar Association (ABA) formed a task force to examine systemic issues relating to corporate responsibility arising out of the Enron failures.\(^{181}\) The preliminary report of the task force contains specific recommendations regarding mandatory internal corporate governance for public corporations and the conduct of in-house and outside lawyers representing them.\(^{182}\) A list of those recommendations includes:

1. A substantial majority of the members of the board of directors should be independent of management, both in fact and in appearance.\(^ {183}\)

2. The board of directors should appoint a Corporate Governance Committee entirely composed of independent directors, and which may consist of all of the independent directors.\(^ {184}\)

3. The Audit and Compensation Committees of the board of directors should be composed entirely of independent directors.\(^ {185}\)

4. The Corporate Governance Committee should recommend that the board of directors adopt a corporate code of ethics and conduct that includes the establishment of a mechanism — such as a hot line, an ombudsman, or compliance certification — through which information can be freely transmitted to senior officers and, if necessary, to the Audit or Corporate Governance Committee.\(^ {186}\)

5. The Corporate Governance Committee, the Audit Committee, or another committee composed exclusively of independent directors and appointed for the purpose by or on the recommendation of the Corporate Governance Committee, should review and approve any material transaction between the corporation and any director or executive officer, including a loan or guarantee by the corporation.\(^ {187}\)

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181. *Id.*
182. *Id.*
183. *Id.* at 198.
184. *Id.*
185. *Id.*
186. *Id.* at 199.
187. *Id.*

https://digitalcommons.law.ou.edu/olr/vol56/iss2/14
(6) The Corporate Governance and Audit Committees should establish procedures for regular meetings with the corporate officers responsible for implementing the corporation's internal controls, codes of ethics, and compliance policies. Such officers include general counsel, the chief internal auditor, and the chief compliance officer.\textsuperscript{188}

The Task Force made further recommendations regarding the best practices of corporate governance:

(1) Encourage active and informed input by independent directors.\textsuperscript{189}

(2) Establish term limits or policies governing the rotation of the chair and membership of the board of directors and its Corporate Governance, Audit, and Compensation Committees, and the number of board and committee memberships.\textsuperscript{190}

(3) Institute and maintain training and education programs for all directors, particularly independent directors, in regard to (a) their legal and ethical responsibilities as directors; (b) the financial condition, principal operating risks, and performance factors materially important to the business of the corporation; and (c) the operation, significance, and effect of compensation incentive programs and related party transactions.\textsuperscript{191}

(4) Institute procedures for directors to periodically evaluate (a) the effectiveness and adequacy of meetings of the board of directors and its committees; (b) the adequacy and timeliness of the information provided by management to the board of directors; (c) the diversity of experience of individual directors; and (d) the contributions of each director.\textsuperscript{192}

While this report is preliminary, it provides a beginning road map for states to revisit the roles of lawyers and corporate officials in addressing and resolving conflicts of interest. In order to restore public confidence in the American business systems, a careful balance must be found between freedom and government regulation and self-regulation. The report suggests some self-regulatory steps that corporations may take to start the process of developing systems that can restore and preserve public confidence.

\textbf{V. Conclusion}

Oklahoma’s legislative developments are commendable. The OGCA — adopted in 1986 and patterned after the DGCL\textsuperscript{193} — has kept the pace of

\begin{itemize}
  \item \textsuperscript{188} Id. at 200.
  \item \textsuperscript{189} Id.
  \item \textsuperscript{190} Id. at 201.
  \item \textsuperscript{191} Id.
  \item \textsuperscript{192} Id.
  \item \textsuperscript{193} FAUGHT, supra note 2, § 1.2, at 1-2.
\end{itemize}
modernity with frequent amendments. The Senate Bill 610 amendments continue this trend. The electronic communication amendments are especially welcome, permitting the kinds of communications between corporations and their directors and shareholders that many companies are using elsewhere in their businesses. The LLC Act too has kept pace. Oklahoma was an early adopter of LLCs in 1992. The LLC Act was among the first “second generation” acts. Through regular amendments, it has remained among the better LLC acts in the nation. The Senate Bill 610 amendments to the LLC Act continue its betterment. These changes, and the adoption of uniform acts such as RUPA and UETA, provide a modern statutory framework for Oklahomans and Oklahoma businesses.

The modern statutory framework for business entities also provides a basis for more predictable judicial outcomes. Although Oklahoma courts handle relatively few cases dealing with business entity law, the paucity of Oklahoma cases need not create a vacuum. Oklahoma’s business entity statutes — the OGCA for corporations, the LLC Act for LLCs, RUPA for partnerships and RULPA for limited partnerships — do not stand in isolation. The modeling of the OGCA upon the DGCL means that Oklahoma practitioners can turn to a trove of Delaware cases and corporate legal treatises to guide them. The LLC Act was based on an early American Bar Association prototype that later became the Uniform LLC Act. In later amendments, the LLC Act borrowed concepts from the Delaware LLC Act. With these sources, Oklahoma courts and practitioners can turn for guidance to Delaware and the several jurisdictions with the Uniform LLC Act. Similarly, RUPA and RULPA — both widely adopted uniform acts — afford much guidance from other jurisdictions and from legal commentary.

196. Id. at 646 n.1.
200. See supra note 15.