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In this issue, Brian Rolfe breaks down the fiduciary duties inherent to the management of closely held businesses. When fiduciary duties are overlooked, those in control of the business could face costly litigation. Mark Filipp also helps employers assess potential risk to their companies by delineating the types of conduct considered sexual harassment. Joe Buttiglieri and Ed Nahhat share their recent success winning a jury verdict in a trust contest and discuss the value of careful planning in the execution of estate planning documents.

In the same spirit that we work to reduce risk for businesses and minimize the potential for challenges to estate plans, our firm joined LEGUS, an international network of high quality law firms, in order to get assistance for clients with matters that go beyond our practice borders.

Best Wishes,

Management and Operation of Closely Held Businesses Implicate a Number of Fiduciary Duties; So What?

BRIAN H. ROLFE



Fiduciary duties in Michigan apply to directors, officers, managers or “those in control” of closely held businesses and include duties of:

1. Care, 2. Loyalty, 3. Good faith and 4. Disclosure. In Michigan, these duties are based in common law (case law) but have now been codified (become statutory law as enacted by the legislature) in Michigan’s Business Corporation Act and Michigan’s Limited Liability Company Act. A fiduciary relationship is one where a person is under a duty to act for the benefit of another on matters where: 1. One puts faith and trust in another, 2. One assumes control and/or responsibility over

another, 3. One acts for or advises another on matters related to the relationship and 4. One traditionally recognized as involving fiduciary duties such as the attorney client relationship. Likewise, fiduciary relationships can be created informally or even unintentionally.

The Fiduciary Duties

1. Duty of Care

The duty of care requires that the fiduciary act as and make decisions as a reasonably prudent person would under similar circumstances. Put another way, if the decision is made in such a manner as would be made by a person making a decision for his own interests and the decision was ostensibly reasonable then the standard has been met and no breach

of duty of care would have occurred.

2. Duty of Loyalty

The duty of loyalty compels that the fiduciary be loyal to the interests of those to whom the duty is owed – putting their interests ahead of his own. In the closely held business, this duty of loyalty is usually implicated when some form of self-dealing occurs whereby the fiduciary takes a personal benefit not shared with the company itself or the other shareholders.

3. Duty of Good Faith

The duty of good faith is usually couched in the negative; i.e. if bad faith is shown in the context of an action taken or decision made then, typically, a breach of the duty of good faith can be established.

4. Duty of Disclosure

The duty of disclosure requires that the fiduciary disclose to the corporation and the shareholders all information that is known to be relevant to the goings on of the corporation and that would be important for the other shareholders to be aware of.

So What?

The relatively obvious answer to this question is that if the fiduciary duties are ignored a breach of a duty may occur. Such a breach may cause, at best, corporate mistrust and discontent and, at worst, difficult and expensive litigation. Claims may be brought on behalf of the corporation (a derivative claim) for harm caused to the corporation and by extension

the shareholders or the claim may be brought directly by “oppressed” shareholders (or LLC members). Typically, the claims would allege that certain conduct of those in control of the corporation was illegal, fraudulent or willfully unfair and oppressive to the shareholder, the member [or the corporation]. Again, these duties and legal remedies apply to both corporations and limited liability companies alike.

Conclusion

Those in positions, and with duties, that compel fiduciary duties owed to others must be mindful of their responsibilities and be loyal and honest and act with care and in good faith to those whose trust and faith they have been charged

with. Although there is substantial protection under the “business judgment rule” for those making important business decisions on behalf of the company, those actions cannot be taken with impunity. Failure to recognize this fact can and does result in shareholder or member actions directly against those fiduciaries both on their own behalf and on behalf of the entity which also suffered the harm. The best way to avoid these style, and potentially company ending, litigation matters is to fully understand and honor the obligations the law imposes. Failure to do so makes the “so what” a long and expensive story no business owner wants to have to tell.

248.740.5684
brian.rolfe@kkue.com

Client Success Story

Buttiglieri and Nahhat Win Jury Verdict in Trust Contest

Kemp Klein attorneys Joseph P. Buttiglieri and Edward Nahhat recently won a jury’s verdict affirming a contested Trust Amendment. Shortly before his death, the Decedent amended his Trust – substantially reducing the share of one of his children, who previously was to receive one-third of the Trust assets. The decedent had a difficult relationship with his son, so he decided to favor his two daughters in the amendment, and allocate to them the great bulk of his estate. While he was a seriously ill widower, there was no allegation that the Decedent was mentally incapacitated, only that he had been allegedly “unduly influenced” by the two daughters to change his Trust near the end of his life.

Testimony from various witnesses and documents were presented over a three-day jury trial before seven jurors. After the close of the case and final arguments, the jury determined that the Decedent’s Trust was valid, declining to find undue influence, and sustaining the surviving daughters’ unequal benefit.

The Trust and the amendments were not drafted by Kemp Klein. Unfortunately, when the last Amendment was signed, the scrivener attorney did not ask one of the daughters (who was named as Trustee and beneficiary) to leave the room while the document was reviewed and the Decedent signed it. Also, the lawyer apparently was unable to bring a second witness to the signing appointment in the decedent’s home, so the attorney was the only disinterested live witness to the execution. These signing anomalies were factors in sending the case to jury. One key fact elicited at trial appears to have been the decedent’s decision to visit with a priest the day before he amended his trust for the last time.

Kemp Klein attorneys are always very careful in planning the execution of instruments in such a way to reduce potential challenges to those documents. This not only includes making sure that beneficiaries of the Trust and/or Will are not present at the execution – but that appropriate witnesses are available and, if necessary, that a medical examination of the client is conducted to assure not only their competence, but that the testator is not being unduly influence by anyone. While we try to make sure that our clients do not face litigation, it sometimes happens. Kemp Klein stands ready with an experienced litigation team to successfully represent clients in Trust, Will and all other contested Probate litigation.

Kemp Klein Joins LEGUS Network

In the spring of 2017, Kemp Klein was honored to join LEGUS, an international network of high quality law firms located around the world. LEGUS was founded in 1995 as a Michigan not-for-profit organization to assist law firms in better serving their clients as their needs for worldwide expertise expanded. For 20 years, LEGUS members have developed trusted, valuable and respected relationships with each other.

When client's needs go beyond their borders, a LEGUS member can contact

almost 2500 trusted lawyers to help meet those needs. LEGUS reflects a vibrant worldwide range of work and client referrals between member firms. It fosters close relationships between its members through referrals, the legal and educational programming held at LEGUS meetings, and an exchange of information focusing on member law firm issues.

In the short time Kemp Klein has been a member of LEGUS, we have been able to assist clients, through other LEGUS member firms, with matters in other

states and countries. Finding a law firm to make a referral to, especially where one actually knows the other firms, has been made much easier via LEGUS. In one instance we were able to retain competent counsel in Singapore in short order to address a crucial, time sensitive, client need.



Employment Law Q & A

MARK R. FILIPP

The following Q & A has been selected from Employment Law Answer Book, co-authored by Mark R. Filipp.

Q 4:80 What types of conduct are considered sexual harassment under Title VII?

Title VII states:

It shall be an unlawful employment practice for an Employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin. [Title VII § 703(a)(1), 42 U.S.C. § 2000e-2(a)]

In *Meritor Savings Bank v. Vinson* [477 U.S. 57 (1986)], the Supreme Court affirmed the EEOC's guidelines, which establish sexual harassment as a form of sex discrimination. The EEOC Guidelines on Discrimination Because of Sex, published in 1980, defines **actionable sexual harassment** under Title VII as follows:

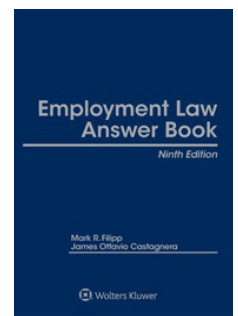
Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

- (1) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
- (2) Submission to or rejection of such conduct is used as the basis for employment decisions affecting such individual; or
- (3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment. [29 C.F.R. § 1604.11]

The behavior described in the first two sections is generally referred to as quid pro quo sexual harassment. Conduct referred to in the third is generally known as hostile work environment sexual harassment. These two types of sexual harassment differ both in theory and in potential liability. Employers need to understand the two theories and their differences to properly assess their liability and exposure to sexual harassment claims.

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248.619.2580
mark.filipp@kkue.com





201 W. Big Beaver Rd. Ste. 600, Troy, MI 48084

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Firm News

Attorneys Jason P. Seaver and Kate L. Ringler Join Kemp Klein Law Firm

Kemp Klein Law Firm welcomed Jason P. Seaver and Kate L. Ringler as associates this summer. Mr. Seaver counsels companies and individuals in residential and commercial real estate matters, including the purchasing, selling, financing, or leasing of existing buildings, as well as in land acquisition, financing and construction of new residences or commercial/industrial buildings. Ms. Ringler holds an L.L.M. in Taxation from Northwestern University and practices in the areas of tax, probate and estate planning, with a focus on guardianships, conservatorships and special needs trusts.

Recent Recognition

Kemp Klein attorneys among Best Lawyers in America

Kemp Klein Law Firm celebrates William B. Acker, C. Leslie Banas, Joseph P. Buttiglieri, Ralph A. Castelli Jr., Mark R. Filipp, Brian R. Jenney, Alan A. May, Norman D. Orr, Thomas C. Rauch, Amy A. Stawski, Thomas V. Trainer and Michael D. Umphrey for being selected by their peers for inclusion in The Best Lawyers in America©2019 (Copyright 2018 by Woodward/White, Inc., of Aiken, SC). In addition, William B. Acker, Ralph A. Castelli, Jr. and Alan A. May were recognized by Best Lawyers as the 2019 "Lawyer of the Year" for their respective practice areas in the Troy area.

Kemp Klein attorneys among Michigan's Super Lawyers

Kemp Klein congratulates William B. Acker, C. Leslie Banas, Joseph P. Buttiglieri, Ralph A. Castelli, Jr., Mark R. Filipp, Alan A. May, Raymond L. Morrow, Brian H. Rolfe, Stuart Sinai, Amy A. Stawski, and Thomas V. Trainer as 2018 Super Lawyers (among the top 5% of attorneys in Michigan).