



Best Practices – Corporate Governance for Private Companies

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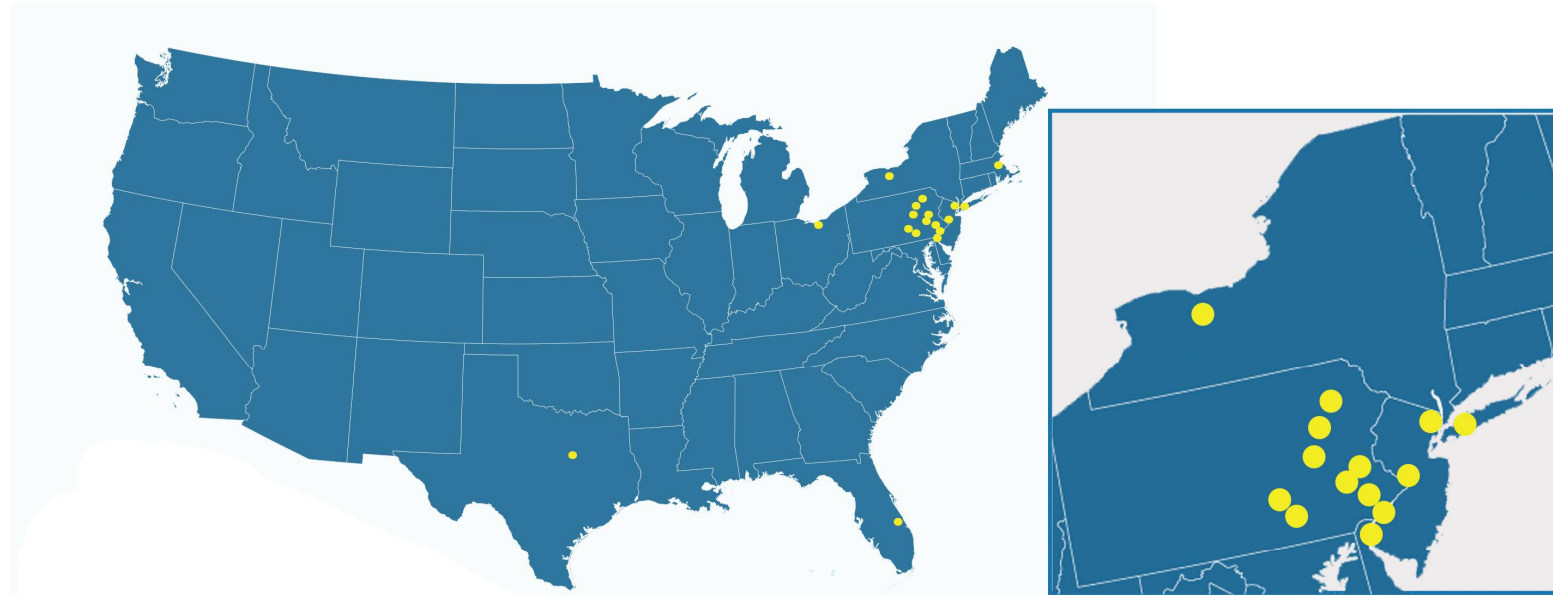
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Our Companies

- Stevens & Lee is part of an affiliated group of multidisciplinary professional services firms collectively known as The Stevens & Lee Companies
- Together, we provide a full range of legal, investment banking, business and government consulting services to assist clients in solving their most complicated problems
 - **Griffin Financial Group** is an investment bank providing merger and acquisition advisory, financing and strategic consulting services for both healthy and financially challenged businesses.
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 - **Reliance Search and Settlement** is a full-service title agency providing title search, title insurance and advisory services for commercial and residential real estate transactions.
 - **Pinnacle Risk Services** provides professional risk management and insurance consulting and brokerage services to assist businesses in the protection of their assets.

Geography



- Allentown, PA
- Boston, MA
- Bala Cynwyd, PA
- Bergen County, NJ
- Cleveland, OH
- Dallas/ Fort Worth, TX
- Fort Lauderdale, FL
- Harrisburg, PA
- Lancaster, PA
- New York City
- Philadelphia, PA
- Princeton, NJ
- Reading, PA
- Rochester, NY
- Scranton, PA
- Valley Forge, PA
- Wilkes-Barre, PA
- Wilmington, DE

Best Practices – Corporate Governance

Scope of Presentation

- Minimum Statutory Requirements vs. Best Practices
 - State Law Driven – varies state to state
 - Focus on PA; some DE; others
- Private Entities vs. Public Corporations/MLPs
- Legal Requirements – not tax (C Corp. vs. S Corp.)
- Appropriate Type of Entity – not covered
- Focus is on on-going operations vs. formation

Scope of Presentation (cont'd)

- Focus is on Corporations – most complex
- Limited Liability Companies (LLC) to lesser extent
- Excluded are other entities and specialty entities (LP, LLGP, LLLP, RPC/RPLLC)

PA Business Corporation – Corporate Minute Book Contents

- At Formation:
 - Articles of Incorporation (Certificate of Incorporation – DE)
 - Evidence of filing
 - Evidence of advertising (not required in DE or other entities)
 - Organizational meeting minutes/consent – election of directors
 - Initial director minutes – appointment of officers, adoption of bylaws, etc.
 - Bylaws
 - Share ledger and specimen share certificate (DE – stock)
 - EIN letter
 - Initial banking resolutions/documents (optional)

PA Business Corporation – Corporate Minute Book Contents (cont'd)

- On-going:
 - Minutes/written consents of director meetings
 - Minutes/written consents of shareholder meetings
 - Fundamental change documents (merger)
 - Subscription Agreements (optional)
 - Shareholder Agreements (Buy/Sell) (optional)
 - Foreign qualifications
 - Amendments to Articles/Bylaws

PA Business Corporation

- On-going Statutory Requirements (minimum):
 - Annual Meeting of Shareholders for Election of Directors (Title 15 §1755)
 - Can be in the form of a written consent
 - Annual Meeting of Directors for Election of Officers (Title 15 §1732)
 - All PA corporations are required to have a president, secretary & treasurer
 - DE only requires an officer with the duties typical of a secretary and an officer who can sign stock certificates & other instruments (Ch.8 §103, §142 and §158)
 - Can be in the form of a written consent

PA Business Corporation (cont'd)

- On-going Statutory Requirements:
 - Annual Report – varies by state (different than tax return)
 - Annual filing in some states (e.g., Florida – annually; DE – annual franchise tax report)
 - Periodic filings in PA (every 10 years – annually starting in 2024)
 - Special Entities in PA – Annually (LLGP, LLLP, RPLLC)
 - No annual report – (e.g., SC)
 - Amendments to Articles/Bylaws
 - Changes to registered agent/registered address (in state)
 - Qualify to do business in other states (fines, penalties, access to courts, etc.)

Registration in Foreign Jurisdictions

- Is your entity formed in the right state?
- If doing business (sales office, employee, real property, etc.) in another state, then generally required to qualify to do business in that state.
- What is “doing business”?
 - Varies from state to state but most states define this in the negative.
 - Many follow Model Act, Revised Model Act, variations
 - Examples:
 - Delaware/NY/NJ – use their own requirements
 - PA – Model Act with variations
 - SC – Revised Model Act; FL/NV – with variations
 - CA – Model Act

Registration in Foreign Jurisdictions

Not Doing Business in PA:

(1) Maintaining, defending, mediating, or settling an action or proceeding.

(2) Carrying on any activity concerning its internal affairs, including holding meetings of its interest holders or governors.

(3) Maintaining accounts in financial institutions.

(4) Maintaining offices or agencies for the transfer, exchange and registration of securities of the association or maintaining trustees or depositories with respect to the securities.

(5) Selling through independent contractors.

(6) Soliciting or obtaining orders by any means if the orders require acceptance outside of this Commonwealth before the orders become contracts.

Registration in Foreign Jurisdictions (cont'd)

Not Doing Business in PA (cont'd):

- (7) Creating, acquiring or incurring obligations, indebtedness, mortgages or security interests in property.
- (8) Securing or collecting debts or enforcing mortgages or security interests in property securing the debts and holding, protecting or maintaining property so acquired.
- (9) Conducting an isolated transaction that is not in the course of similar transactions.
- (10) Doing business in interstate or foreign commerce.
- (11) Acquiring, owning, holding, leasing as a lessee, conveying and transferring, **without more** and whether as fiduciary or otherwise:
 - (i) real estate and mortgages and other liens thereon; or
 - (ii) personal property and security interests therein.
- (12) Conducting operations or performing work or services in good faith in response to a disaster or emergency event.

Director Powers

- Matters requiring director action:
 - Corporate Policy
 - Appointment of officers
 - Executive Compensation
 - Pension, Retirement & Other Plans
 - Dividends
 - New Share Issuances
 - Amendment to Articles of Incorporation/Bylaws
 - Fundamental Transactions (Mergers, Asset Sale/Purchase, Dissolution)
- May be subject to shareholder approval or limited by bylaws
- All director action should be documented in minutes or consents

Director Duties

- Stand in a fiduciary relation to the corporation
- Standard of Care
 - Act in good faith
 - In manner director reasonably believes to be in the best interest of the corporation
 - Exercise care (including skill/diligence) that a person of ordinary prudence would use under similar circumstances
 - May rely on officers, professionals, board committees
- Duty of Loyalty – best interest of the corporation; not self interest
 - Cannot compete with corporation
 - Cannot usurp corporate opportunity for personal gain

Director Liability

- Generally, NOT liable if they act within the statutory standard of conduct or in compliance with their fiduciary duties
- Business Judgment Rule – applies to business decisions
 - No self dealing
 - Informed with respect to the subject matter and to the extent the director believes appropriate under the circumstances
 - Rationally believes the decision is in the best interests of the corporation

Officer Powers/Liability

- Agents through whom the Board acts.
- Duties are generally provided by the Bylaws.
- Must discharge duties in good faith.
- Owe duties of fidelity, honesty, good faith and fair dealing to the corporation.
- May be personally liable for failure to perform duties in compliance with these standards.

Bylaws/approval authority/signature authority should clearly lay out the duties and authority of each officer.

These originate at the Board and are delegated.

Indemnification of Directors/Officers

- Sources of indemnity rights include:
 - State Statute
 - Articles of Incorporation
 - Bylaws
 - Personal Agreements with the corporation
- Generally limited to situations where the director/officer acts in good faith and reasonably believes their conduct was in the best interest of the corporation
- May provide for advancement of expenses (permissive)
- Generally not available if:
 - Found liable in the underlying suit; or
 - Received an improper benefit as a result of their conduct

Some Public Company Governance Practices (applicable to private companies)

- Establishing an annual calendar
 - Annual Shareholders' meeting
 - Elect directors and other shareholder business
 - Four (4) quarterly board meetings
 - Elect officers at first meeting after S/H meeting
 - Review quarterly financial results
 - Consider dividends
 - Approve executive comp. and bonus plan
- Use special meetings when appropriate
- Use board committees where appropriate
 - Used for either on-going or specialized tasks best accomplished by a subset of the Board
 - Example of an on-going committee – Compensation
 - Example of a special committee – Acquisition
 - On-going committees should have their own charter.
 - Committees report and generally recommend to Board; Board takes action.

Governance Practices

Why Do We Care

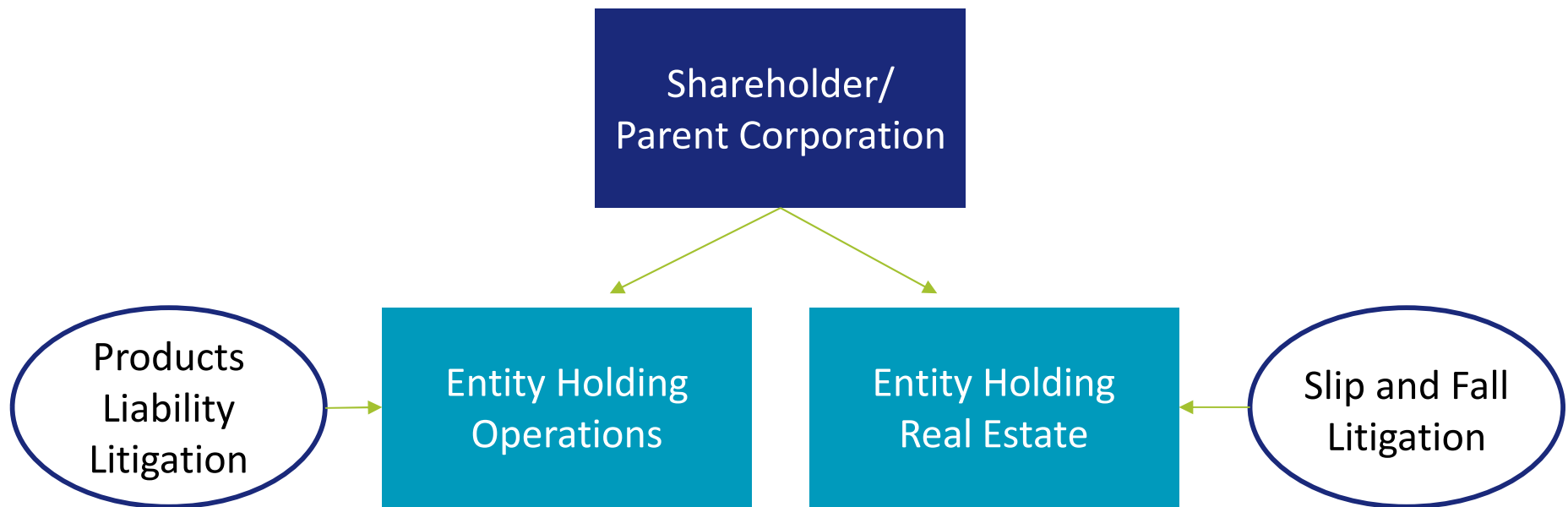
To protect the corporate structure

- Tax
- Business strategy reasons (JV)
- Liability/Asset protection
 - Inside liability
 - Outside liability

Liability/Asset Protection

Inside Liability

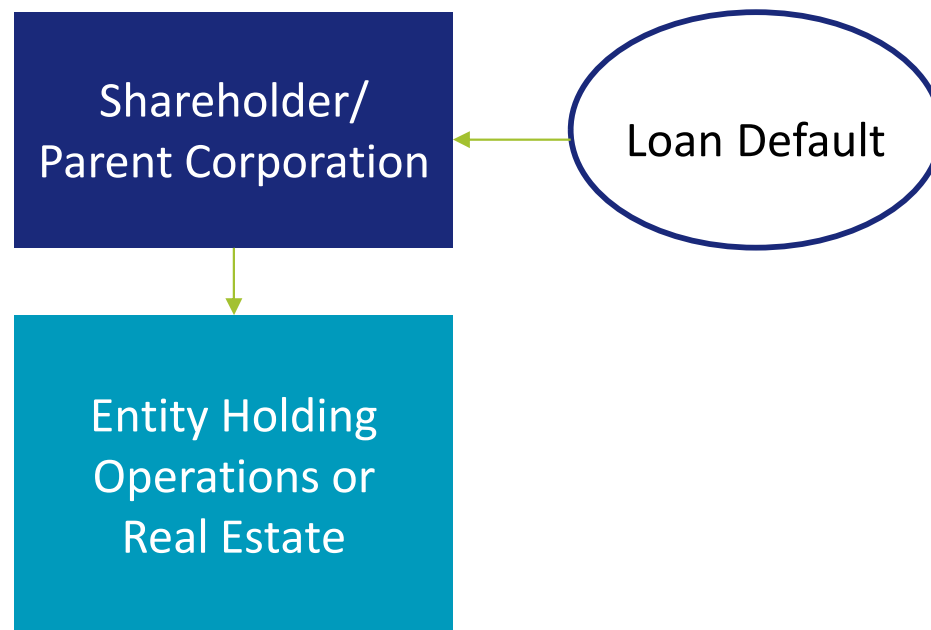
- Protect owner and sister entities from tainted entity – relatively easy
- Based on protecting the “Corporate Veil”.



Asset Protection

Outside Liability

- Protect the entity from the owner – more difficult
- Charging orders; liens; foreclosures – outside scope



Limited Liability Companies (LLC)

- PA LLCs
- LLCs in General

PA LLC

Company Minute Book Contents

At Formation:

- Certificate of Organization (Certificate of Formation – DE)
 - Member vs manager-managed
- Evidence of filing
- Organizational meeting minutes/consent – appointment of manager(s), if manager-managed
- Manager minutes, if manager-managed
- Operating Agreement including list of membership interests/membership certificates (optional)
- EIN Letter
- Initial banking documents

PA LLC

Operations:

- Amendments to Certificate of Organization
- Amendments to Operating Agreement
- Annual member minutes/consent – appointment of managers
- Annual/quarterly manager minutes/consent – appointment of officers, if applicable
- Fundamental change documents (merger)
- Subscription Agreements (optional)
- Buy/sell provisions – generally in Operating Agreement
- Foreign qualifications, if applicable

PA LLC

Governance:

- Member vs. manager managed.
- Managers akin to Board of Directors.
- Officers are permitted and recommended.
- Indemnification of members/managers is mandatory (with certain limitations) per statute.
- Insurance/advancement of expenses is permissive – per statute.
- Duties of members/managers akin to director duties
 - Exception – members in a manager-managed LLC, then only duty of good faith and fair dealing applies.

LLCs in General

Governance:

- Applicable statute is very flexible and does provide for flexible governance.
- Good Operating Agreement –provides specific processes & procedures to be followed.
- Best practice is to mimic what a well-run corporation does:
 - Annual member meeting – elect managers
 - Quarterly manager meetings (members, if member-managed)
 - Managers elect officers annually
 - Keep minutes of all decisions (distributions; election of managers or officers; changes to governance documents; fundamental changes; etc.)

LLCs in General

Asset protection

- Inside liability – isolate the shareholder/parent from business liability – essentially the same as corporation
- Outside liability – state specific, generally three types:
 - Type 1 – LLC dissolution states (i.e., NY)
 - Creditors can force the dissolution of a debtor-member's LLC and receive a pro-rata share of the LLC's assets.
 - Type 2 – Foreclosure states (i.e., PA, SC, FL)
 - Creditors can foreclose upon the member's interest in the LLC, but cannot force dissolution.
 - Type 3 – Charging order states (i.e., DE, NV, WY)
 - Creditor's sole remedy is to obtain a charging order for future distributions from the LLC.

Governance Practices

Some Do's and Don'ts

- Do frequently refer to Bylaws/Operating Agreement/Partnership Agreements.
- Do follow the formalities in your governing documents.
- Don't put anything in writing unless you intend to comply.
- Do document all board/manager/shareholder/member decisions – there is an art to minutes/consents.
- Do use telephonic meeting or consents, as appropriate.

Governance Practices

Some Do's and Don'ts

- Don't commingle the funds of one entity with those of another.
- Don't pay the expenses of one company with the funds of another entity.
- Do consider establishing approval/signing authority document.
- Consider following certain public company practices.
- Do timely file any annual (periodic) state reports.

Best Practices for Pension/401k Plans

- Board of Directors/manager(s) delegate responsibility to investment committee.
- Generally, consists of employees who have some knowledge of investments.
 - Examples include CFO/HR Director/Treasurer/Others.
 - Develop a committee charter and investment policy
 - Appoint administrative committee (one or more employees) who handles routine issues that arise.
 - Responsibilities generally in plan document.
 - Important to have consistency in administration of plan to avoid litigation.

Special Services – S&L

GC Solutions™ Class Action Claims Management Services

S&L GC Solutions

What We Do:

We provide a dedicated, experienced lawyer (with in-house experience) to work part-time either on your site or remotely to manage and handle your legal issues so you can achieve better business results and potentially save \$\$\$.



GC Solutions

- Dedicated means you get the same person, week in and week out.
- Experienced means prior in-house experience in your industry.
- Value Provided
 - Minimize risk
 - Get quick answers to ad hoc legal questions
 - Free-up management time

– All at an attractive rate –
- Cost Savings - if your legal spend is between \$200,000 – \$300,000 or more, the client should save money by implementing GC Solutions

Types of Services Typically Provided:

- General Legal Advice
- Contract Management
- Risk Assessment and Mitigation
- Corporate Governance
- Litigation/Claims Management
- Employment Counseling
- Regulatory Compliance
- Compliance Programs and Training
- Business Planning
- Functional/Project Support

How Is This Any Different Than Traditional Legal Services?

- “Your” dedicated lawyer will be at your site and readily available to your management team, typically on a preset day each week
- “Your” dedicated lawyer will be able to give real-time attention to urgent matters and support matters not getting adequate attention due to lack of expertise or band-width
- “Your” dedicated lawyer will have significant in-house experience, typically from working with other companies in your industry

Class Action Claims Management Services

– Background

- We all know what class action claims are. What is not as well known is that many members of the class who are eligible to receive funds do not apply for the money.
- Historically, less than 40% of eligible claimants participate.
- What we are talking about here has nothing to do with the legal proceedings.
- This is AFTER the litigation is over, the settlement is approved and funds are in the hands of a trust administrator.
- Many eligible parties do not apply despite the fact that there is an easy way to apply and get this money – using an intermediary.

Class Action Claims Management Services

— Use of an Intermediary

- Intermediaries handle all of the administrative details and file the necessary paperwork on a contingency basis
 - Claimants do not need to compile information; the intermediary obtains all relevant information from the administrator
 - The only step the client takes is to review the data to ensure nothing is missing
- S&L has partnered with a highly experienced firm, Claims Monitoring & Recovery, who specializes in monitoring class actions, filing claims on behalf of clients and managing the process
 - The service is provided on a fully contingent fee basis so no fees are paid unless there is a recovery

Class Action Claims Management Services

– Potential Current Opportunity

Master Card/Via Litigation

- Entities who collected funds using Merchant Credit and Debit Card Transactions with MasterCard and/or Visa
- Settlement Fund is up to \$6.5 billion
- Potential recovery ranges from 0.075% to 0.225% of the value of the interchange fees paid to accept Visa and Mastercard, depending on participation rate
- Translates to \$75,000 to \$225,000 per \$100 Million of transactions from 1/1/2004 through 1/24/2019

Client's Responsibility

- Execute an Engagement Letter containing a Power of Attorney
- The Power of Attorney authorizes CM&R to obtain all of the necessary information to make and file a claim on behalf of the Commonwealth
- CM&R does virtually all of the work
- Once CM&R obtains the requisite information and prepares the claims form(s), the Commonwealth will have the opportunity to confirm/verify the data being used by CM&R
- Once the claim is made and finalized, the settlement fund trustee will remit payment



Questions?

Today's Presenter



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- Leads Stevens & Lee's outside general counsel service, [S&L GC Solutions™](#), working with a select number of clients providing on-site legal counsel services on a part-time basis
- Extensive experience as in-house counsel at both public and private companies spanning manufacturing, distribution and technology companies
 - Dealt with matters ranging from routine day-to-day items to strategic matters such as managing acquisitions, overseeing critical litigation and developing and implementing policies and procedures to mitigate legal risk
- Prior to becoming a lawyer, worked as an engineer and business professional in operations and manufacturing management, including positions as a plant manager, manager of materials management and operations/planning manager