Minnesota Public Benefit Corporation: Vehicle for Public Good or Abuse?

By Vincent Louwagie

Starting Jan. 1, 2015, Minnesota will have a new business entity that is already available in over 20 other states: the public benefit corporation. A public benefit corporation is intended to be a socially-conscious organization that commits to making business decisions not just for the financial benefit of its owners, but also to pursue or create a public benefit. The act, while well-intended, lacks meaningful enforcement provisions and may invite abuse.

The legislature (with extensive drafting assistance from the bar) desired to provide a mechanism for socially-minded entrepreneurs to run their businesses for a public benefit, but to protect them from shareholder criticism for not putting profits first. The statute, in effect, gives such entrepreneurs a way to brand their businesses as socially-minded. The price of that branding opportunity is that the board must consider (and presumably, must be able to prove it considered) the public benefit. The other price of the brand is the annual report, which must be filed with the secretary of state's office describing the public benefit corporation's pursuit of the public benefit.

Make no mistake. A public benefit corporation is a for-profit enterprise. In making decisions, the board must consider profit so the organization can stay in business. But the act expressly prohibits the board of a public benefit corporation from giving "regular, presumptive, or permanent priority" to the pecuniary interests of shareholders.

Any corporation or limited liability company can be socially-minded. Indeed, many of Minnesota's existing business entities regularly contribute to the public good in a wide variety of ways. A shareholder agreement or member control agreement can even formalize the consideration of a public benefit in business decisions and protect the board from criticism by owners.

Why would a business decide to become a public benefit corporation? While social activism is undoubtedly part of the answer, the value of the brand may be the overriding reason. There are several constituencies that, it is hoped, will be influenced by the brand.

Potential customers leap to mind. All other things being equal, many customers will prefer to patronize socially-minded businesses. If a public benefit corporation can put the initials PBC or GBC behind its name, it hopes to attract that business. Existing Minnesota businesses regularly advertise their social causes in an attempt to increase revenue.

Potential employees are another constituency the brand may influence. Talented workers may choose to work for a socially-minded employer over a competitor.

Financial investors and other business partners may prefer to invest in a public benefit corporation. That choice may be driven by that financial investor's own social motives. But the choice may also be driven by pure greed. If the financial investor believes customers and potential employees will be sufficiently motivated to favor a public benefit corporation, the better talent and increased revenue may be enough from a pure financial standpoint, to make up for the prohibition on the board giving "regular, presumptive, or permanent priority" to the pecuniary interests of shareholders.

The value of the brand will undoubtedly invite abuse. It remains to be seen how valuable the brand will be; experience in other states is too limited to know. What also remains to be seen is the extent to which unscrupulous business people may take wrongful advantage of the brand without having a true public benefit in mind.

What is apparent is that the act provides inadequate enforcement mechanisms. There is no oversight by the Minnesota Attorney General, like there is for nonprofit corporations. Private litigation is discouraged. Monetary damages are expressly prohibited. And only shareholders can assert any claim for a failure to pursue or create the public benefit. But what if all of the shareholders are in on the plan to take wrongful advantage?

Failing to file the annual report will lead to revocation of the brand. And knowingly filing a false report with the secretary of state can result in criminal charges (but not civil liability).

The drafters' hope is that existing laws and economic forces will work to minimize abuse of the branding opportunity. To the extent there are shareholders motivated to complain, the statute expressly incorporates the protections of the Minnesota Business Corporations Act. Duped customers may have claims under existing consumer protection statutes. Competitors who lose business to a disingenuous public benefit corporation may have claims under the federal Lanham Act and/or state Deceptive Trade Practices Acts. Employees will have to vote with their feet. And public watch-dogs, maybe even the press, may be motivated to expose the disingenuous public benefit corporation.

Will these enforcement mechanisms be enough to prevent abuse? Probably not. The act is new, and is a work in progress. As is frequently the case with lawmakers, a well-publicized instance of abuse will motivate reform.

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