From the Packers to Patagonia
Nonprofit and Not-just-for-profit Corporations

BY ASSOCIATE PROFESSOR USHA RODRIGUES

You know the professors at the University of Georgia School of Law are a distinguished bunch. We count former U.S. Supreme Court clerks, former editors-in-chief of premier law reviews and former law firm partners among our own. But did you know that three members of the faculty are also co-owners of a legendary NFL team?

Yes, Associate Dean for Faculty Development Dan T. Coenen, Martin Chair James C. “Jim” Smith and I each own a share of the Green Bay Packers.

But don’t think that we will be quitting our day jobs anytime soon — the Packers are our country’s only publicly held, nonprofit professional sports team.

I recently wrote about the Packers — and about larger questions regarding the choice of business-entity form in an article titled “Entity and Identity.”

In fact, a key idea in that piece came from the Green Bay Packers’ unusual business form.

The Packers are unique in that they are a non-tax-exempt nonprofit organization. That is to say, although the Green Bay Packers corporation is a nonprofit, it is not a tax-exempt organization.

As a result, you do not receive any deduction for donating to the organization, and it pays taxes just like a for-profit corporation does.

Although share certificates are issued (one is hanging on my office wall, if you have any doubt), this “stock” is largely ceremonial because no profits (i.e., dividends) may be distributed, and shareholders do not even receive preference in obtaining the notoriously hard-to-get tickets to Lambeau Field games.

Shareholders may not sell their shares; they can only give them away. Thus, shareholders have no possibility of making a profit on their “investment” and receive no tax deduction for the money they channel to the Packers.

Indeed, one could fairly say that being a shareholder of the Green Bay Packers provides one, and only one, benefit: that of being a shareholder of the Green Bay Packers.

I argued in “Entity and Identity” that people are willing to spend money on a share that holds no management authority and no possibility of a return on investment because they want to create and participate in a special kind of identity — a social identity.

Social identity theory, which originated in psychology, postulates that one’s concept of self is made up both of idiosyncratic traits (personal identity) and membership in various group categories (social identity).

Social identity can be defined as “self-conception as a group member.” It suggests that an individual divides the world into categories, and that one’s sense of self derives largely from the categories in which one belongs.

Social identity theory holds that personal identifications are important to personal identity: “I am a friend of Suzie” or “I need my morning coffee” have a lot to say about who an individual is. But social identifications, such as “I am a Dawgs football fan” or “I am a Georgia lawyer,” are prominent, too.

The key teaching of this work is clear: The knowledge that one is a member of certain groups represents a constitutive part of one’s identity.

The nonprofit entity form, I argue, creates a special kind of social identity — one that hinges on the fact that its participants share a unique and nonpecuniary bond.

Each characteristic of Packers ownership supports the proposition that it is really identity that the Packers are selling when they market shares — the social identity of belonging to an organization rooted in a small city in Wisconsin.

At least before the 2012 stock sale, most shareholders were Green Bay residents, demonstrating a strong sense of place.

Remember, this stock may not be sold but may be given as gifts, emphasizing the noncommercial nature of corporate “ownership.”
Besides having the right to elect a board (which has no say in the actual management of the team itself), shareholders have only one governance power—the ability to veto any move by the Packers outside of Green Bay.

To say the least, this power suggests the connectedness of shareholdership to the rich history of the Green Bay Packers, which in turn is intimately associated with small-town America and telling disassociated from the big-city glitz of modern professional sports.

To protect against one person (or a small group of persons) taking control of the team, the articles of incorporation prohibit any shareholder from owning more than 200,000 shares.

Although shareholders do not receive coveted tickets to Packers games, there is an annual Shareholders Day, which is attended by thousands—in striking contrast to the sparsely attended shareholders meetings of a typical public corporation.

What is more, the events of Shareholders Day focus on key elements of the team’s identity—tailgating parties, visits to the Packers Hall of Fame, and the purchase of special shareholder paraphernalia.

The Packers’ fifth stock offering, ending on February 29, 2012, sold more than 268,000 shares.

The offering raised more than $67 million, which will be used for the expansion of Lambeau Field.

Professors Coenen, Smith, and I all received shares as gifts this past holiday season as part of this latest offering.

In “Entity and Identity,” I argued that choice of business form matters for reasons that go beyond economic advantage.

In fact, there has been a recent explosion in new corporate forms that respond to the public’s hunger for organizational forms that, while allowing for the making of profit, also stress goals beyond profit maximization.

Low-profit Limited Liability Companies

The most established of these forms is the low-profit limited liability company (L3C), which was created by the Vermont legislature only in 2008.

The motivation behind the L3C form stems from the tax treatment of foundations.

Foundations are in something of a bind: They are required to spend 5 percent of their assets in order to maintain their tax-exempt status, yet they also want to preserve and grow their capital.

The Internal Revenue Code penalizes private foundations that make investments that jeopardize the accomplishment of their exempt purposes but allows private foundations to make program-related investments (PRIs).

To qualify: (1) the primary purpose of the investment must be to accomplish a foundation’s exempt purpose; (2) no significant purpose of the investment can be the production of income or the appreciation of property; and (3) no purpose of the investment can be to elect a member of the board, and only limited lobbying is permitted.

PRIs permit foundations to garner some financial return, and investment in PRIs counts toward the 5 percent annual distribution requirement.

The problem with PRIs is that uncertainty often surrounds whether a given investment will qualify for the exception.

Enter the L3C. The social entrepreneurs who designed the L3C aimed to create an entity in which foundations can safely invest.

The catch is that by statute the L3C cannot be formed for the purpose of producing income or property appreciation (although the mere fact that the organization produces significant income does not necessarily mean that it violates this requirement).

Promoters of the L3C envision a hybrid organization that permits several different tiers or tranches of investment, with “senior” tranches that focus on money making and “junior” tranches that focus on other values.

Assume, for example, the investment is in rehabilitating a historic building in downtown Athens that has fallen into neglect but which could provide attractive office space and banquet facilities if properly repaired.

The investment is one that is socially beneficial because of its historic preservation value. It could generate some investment returns, but not enough to make the investment viable on its own.

The idea is that private foundations, interested in availing themselves of PRIs with minimum hassle, could invest in junior tranches that would receive only a modest financial return.

L3C promoters posit that the entity could also create multiple tiers of membership.

An intermediate ownership tier would target socially responsible investors who are looking to help the community and willing to accept a lower than market rate of return.

Finally, the L3C could create a tier of investment that offers market-rate returns to private investors.

For now it remains unclear whether the IRS will accept these new entities’ claims to qualify for the PRI exemption.
In 2008, L3C advocates failed in their attempt to have legislation passed that would amend the Internal Revenue Code’s PRI definition to match L3C structure.

Another effort was made in 2011, and this bill is still pending in the House Ways and Means Committee.5

No matter the fate of the PRI bill, I argue the L3C as a form is unlikely to succeed because it reduces the social identity value of participating in a nonprofit.

The L3C challenges the traditional conception of entity as a collection of individuals with a common purpose – be it to maximize profit (the for-profit corporation, LLC or partnership) or to maximize benefits for society or members (the nonprofit).

The L3C form contemplates for-profit and nonprofit investors living side by side.

Not only does that seem like a recipe for owner vs. owner conflict – it also dilutes the “warm glow” for nonprofit participants to know that some of their fellow investors are just looking to make a buck. (“Warm glow” is a term economists use to describe the positive feeling people get when they help others.)

Other New Business Models

Even in the few months since “Entity and Identity” was published, two new organizational forms have arisen that indicate how much value people place on marrying for-profit and nonprofit features.

Maryland passed the first benefit corporation statute in 2010.6

The “benefit corporation” and California’s “flexible purpose corporation” (which debuted this year), unlike the L3C, do not contemplate mixing nonprofit and for-profit investors. They do however offer new possibilities to those who are interested in doing good while also doing business.

Although benefit corporations are for-profit entities, they have as a purpose creating a “general public benefit” that is defined as having “a material, positive impact on society and the environment, as measured by a third-party standard, through activities that promote a combination of specific public benefits.”

These benefits include, among other activities, providing beneficial products or services, promoting economic opportunity beyond regular job creation, preserving the environment, improving human health, and promoting the arts, sciences or advancement of knowledge.

Each year these corporations must send shareholders an annual benefit report describing how they have followed through on their commitment to improve societal or environmental welfare.

The corporation is also required to post the benefit report on its website, so the public can access it.

The report should detail how the corporation pursued a general public benefit (and any other specific benefit identified in the company’s charter), any negative circumstances that impacted achieving the targeted benefits and how successful the corporation was in achieving its goals.

Success in providing these benefits is measured against a third-party standard that the board is responsible for selecting and utilizing.

Since the third-party standard essentially defines whether or not the corporation achieved its goals, the report must include the rationale for selecting or changing the standard.7

Organizations that provide various standards against which a benefit corporation may be evaluated include Benefit Labs, Global Reporting Initiative, Green Seal and Green America.

Ordinary corporations become benefit corporations by amending their charters; and according to The Wall Street Journal, “hundreds of existing businesses” plan to reincorporate as benefit corporations in the coming months – Patagonia already has, and Ben & Jerry’s plans to incorporate as a benefit corporation in Vermont during the next few months.8

Corporate law scholars are divided on the wisdom of the benefit corporation. Corporate lawyers know directors already receive considerable leeway from courts in deciding what constitutes spending “in the best interests of the corporation” – and that freedom is certainly broad enough to encompass charitable giving, political donations and support for environmental protection.

So why do we need a benefit corporation?

William Clark, a partner at Drinker, Biddle & Reath, observes that the form’s structure “tells directors that it’s their duty to consider other interests, rather than say they ‘may’ consider them.”

In contrast Charles Elson, a corporate law professor at the University of Delaware’s John L. Weinberg Center for Corporate Governance has observed “for an investor, this is a terrible idea.”

I’m not sure if we need benefit corporations either, but I see the appeal.

Choosing the benefit corporation form reflects a kind of credible commitment: It signals to shareholders more powerfully than any slogan can that maximizing wealth is not the ultimate goal of this particular corporation.

Most recently, on January 1, 2012, California not only began authorizing benefit corporations but also introduced yet another new business form, the flexible purpose corporation.

These organizations must either (1) engage in one or more charitable or public purpose activities that a nonprofit
public benefit corporation is normally authorized to carry out or (2) promote the positive effects of the entity’s activities on the corporation’s employees, suppliers, customers, creditors, the local community, society as a whole and the natural environment.

Unlike the benefit corporation, FPCs are not required to pursue a “general public benefit” that will be judged according to a third-party standard.

Indeed, FPCs may focus on more specific purposes. As a result, if shareholders are dedicated to one particular cause, the FPC might well present a more attractive form.

While benefit corporations must take into account the interest of employees, customers, community and the environment, flexible purpose corporations are only authorized, not required, to do so.

The FPC’s annual report must contain an evaluation of whether the corporation achieved its special purpose that year. Corporations with fewer than 100 shareholders may waive this requirement, making it less of a burden on the corporation but also increasing the risks that managers will not follow through on their commitments to the desired corporate purpose.

Conclusion

A new form of business organization is a rarity. The last major form was the limited liability company, or LLC, and that debuted in 1977.

Today, we are experiencing a surge of interest in new business forms that meld traditional nonprofit goals with the ability to make a profit.

In the L3C, for-profit and nonprofit investors invest side by side. This blending of interests may not work if it dims the “warm glow” nonprofit-minded investors desire.

In contrast to the participants in any given L3C, shareholders of a benefit corporation and a flexible purpose corporation are on the same page. They want to make a profit but also to contribute to some greater good.

Only time will tell what success these exciting new business forms will have in the coming years.

Their very existence, however, illustrates the range of values that modern-day shareholders bring to “investment” decisions. Some seek only profit; others look for something more.

Some will say that being a shareholder of the Green Bay Packers involves little more than succumbing to a marketing ploy designed to fund stadium improvements.

But I prefer to think that it ties me to a deep and valuable tradition — indeed, a tradition that includes earlier sales of similarly “worthless” stock that were critical to ensuring the very survival of this storied team.

When September comes, I will be heard cheering on the Packers as usual. But now that I’m a shareholder, I suspect that my shouts will have an added measure of both volume and meaning. Pack Go!

Endnotes

1 Usha Rodrigues, Entity and Identity 60 Emory L.J. 1257 (2011).
3 Something of the history of the Packers is captured in the following paragraphs, written by Associate Dean Dan T. Coenen:

What is the sacred thing that is the Green Bay Packers? It is the team of Lambeau and Lombardi, and the Green Bay tradition, and buy stock that will never bear their names. It is the home place of Herb, the master of the place, and the horse, too — like Eamon, Clarence, Perdue or Woodward.

The Packers are the team of the underdog — the 17th-round pick, Bart Starr, and the NFL’s first drafts, and more. The Packers are the team of Lambeau and Lombardi. The team of the dreamers, too — like Johnny “Blood” McNally, Clarke Hinkle, Forrest Gregg, Willie Davis, Ray Nitscke, James Taylor, Herb Adderley, Reggie White and Brett Favre.

The Packers are a team of constancy and tradition. The team that has won 90 years has been a pillar of its league. It has played in one city longer than any other NFL franchise. It has won more championships than any other NFL club.

The Packers are the team of the ordinary person — owned by more than 600,000 fans, whose shares do not have a dollar’s worth of financial value and never will. It is the team that is in 1920 was brought into the NFL by a local meat-canning company, a team that was saved by its community in 1925, when 4000 supporters gathered in an Elite Lodge to pitch in $3000 to keep it afloat. And saved again in 1945, and then again in 1966, with still more purchases of worthless stock by local citizens, including a woman who showed up at the team office with $25 in quarters collected in a mailbox.

The Packers are the team of small town America. The team that represents on the international stage a city of 100,000 people. The team that opens in what is by far the smallest metropolitan area, with by far the smallest television market, of any NFL, NHL, NBA and MLB club.

The Packers are the Green and Gold. The pride of the Black and Blue Division. The great rival of the Chicago Bears. The antithesis of the Dallas Cowboys. The Packers are the team of Green Bay.

The Packers are the team of Titletown. USA. The team that claimed victory in the Ice Bowl. The team that won the first Super Bowl. The team that, during the glory Years of the 1960s, became so mighty that in a single decade it claimed five NFL championships, including three in consecutive seasons. A team that so dominated an era that it produced even the most despairing players not yet indoctrinated into the NFL Hall of Fame — five-time All-Pro Jerry Kramer, who remains excluded only because so many of his teammates (10 in all) gained entry before him.

The Packers are the team that, even while producing only three winning seasons during all of the 1970s and 1980s, packed its stadium for every game it played. The Packers are the team that for six decades has seen its season-ticket waiting list grow so fast that it now numbers 81,112 and includes would-be buyers who have been on it for more than 30 years.

The Packers are the team that, according to current projections, will be unable to sell tickets so the fans who apply for them today until, at the earliest, 2074.

The Packers are the team of the “green mullets,” with its still-dreaded stadium in an era of professional sports comfort and glitz. It’s the team of sub-zero tailgaters, who come to the shrine of their team — and often to answer games as well — from every walk of life. The team of fans decked out in hunting boots, snowsuits and ski masks — fans who dream the night before of a forced field and the piercing chill of a bitter cold December Sunday afternoon.

The Packers are of, by and for the people of Wisconsin. They stayed when the Braves left. They always will stay. They are in the very air that the people of their city and their state inhale. They are what those of us who cherish our legacy most hope for ourselves to be — open to dreams, filled with purpose, spirited, resilient, unprejudiced and, on our best days, a source to others of meaning, memories and joy.

6 Md. Code Ann., Corps & Assns, §5-6C-01 to -08 (2011). As of this writing, seven states had passed benefit corporation legislation, with legislation pending in three other states and the District of Columbia.
7 http://benefitsCorp.net/storage/The_Need_and_Rational_for_Benefit_Corporations__11-16_version.pdf — at page 19; see also CAL. CORP CODE § 14601(g), available at 2011 Cal. Legis. Serv. Ch. 728 (A.B. 361).
9 Id.