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NOLS Newsletter

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Note from the Chair

by Anne O'Malley, Nonprofit Strategies & Affairs, Portland

As the newest NOLS chair I would like to share the following updates about our section.

We welcomed five new members this year: Alex Bassos, Alex Ogurek, Kimberly Pray, Rosalie Westenskow, and Jeff Thiede.

At the request of OSB we will be producing a full-day nonprofit basics CLE in the fall. We are discussing the possibility of working with an organization such as the WA Bar or AICPA to plan a separate advanced nonprofit CLE with nationally known speakers. If you have any ideas for this please share them with us.

We put out a newsletter several times a year, and our upcoming spring newsletter will be focused on social benefit corporations and legal updates.

Legislatively the Chapter 65 Workgroup has resubmitted the draft of ORS Chapter 65 with suggested revisions and is working to fully understand the effects of House Bill 2191, which took effect January 1, 2018, requiring the Secretary of State to collect additional information from business entities when filing certain documents, e.g., Articles of Incorporation (discussed here *http://sos.oregon.gov/business/Pages/house-bill-2191.aspx*).

Additionally, over the next couple of years NOLS will endeavor to write and edit a nonprofit corporation Bar Book in coordination with the Bar.

Other things are going on in the background and we are always interested, in fact eager, to hear what you might think about the section, what you might like to see, or where you think we are missing the boat.

Definitely contact any one of us to share or inquire.

PRIs: A Key Tool For Mission-Investing

by Theresa Deibele, Housing Opportunities Portfolio Director at Meyer Memorial Trust

Most nonprofit organizations see foundations as only a source of grants. But foundations have another important, and lesser known, tool for helping organizations with a charitable purpose: Program-Related Investments ("PRIs").

Defined in the U.S. tax code, PRIs are investments – including below-market-rate loans, guarantees, linked deposits, and equity investments – made primarily for an exempt or charitable purpose and not for investment return. They were initiated by the Ford Foundation and MacArthur Foundation in the 1960s as an alternative way to invest in social change while earning a modest return. Like grants, PRIs count as qualifying distributions toward the 5% payout a private foundation is required to make to maintain its tax-exempt status.

What role do PRIs play for nonprofits and foundations? After spending some time to identify the characteristics that distinguish PRIs from other impact investment tools, I'll explore the reasons why PRIs continue to be a useful tool supporting social change.

The Investment Continuum

Potential for return is a key characteristic often used to distinguish the range of investments a foundation or social investor may make. At the low end of the return continuum are those investments that have no expected return – i.e., grants. In the middle are a range of PRI options earning below-market returns, and at the high end are more traditional investments earning market rates, such as public and private equity. All come under the heading of mission-related investments because they are made by mission-based organizations, such as foundations.

"Impact investments," another common term, tends to be used to describe a range of investments in companies, organizations, and funds while seeking social or environmental impacts alongside financial return. Impact investors are generally seen as broader than foundations and may include wealthy individuals and institutional investors.

As the field of impact investing has evolved in recent years, the push for greater financial return has often overshadowed social and environmental returns. "[T]oo many impact investors have predefined expectations of financial return that are both too high and too short term," wrote the authors of Marginalized Returns, a recent article in the Stanford Social Innovation Review. Mara Bolis & Christ West, Stanford Social Innovation Review, Marginalized Returns (Fall 2017). The authors called for a "shift from the false binary of grants with no financial-return expectations, on the one hand, and investments seeking net-15-percent-or-greater return, on the other." The solution? A call for philanthropists and donors to deploy more long-term funding in the form of program-related investments – in essence, refocusing on social impact with lower financial returns.

Meyer's PRI Practice

Over the years, Meyer Memorial Trust has completed more than 50 PRIs, and almost all were below-market loans, sometimes coupled with a grant. We've completed both direct PRIs to specific nonprofits and projects, and PRIs to intermediaries, such as Community Development Financial Institutions, that will relend to customers. Some examples of PRI loans from Meyer's Awards Database are:

- Portland Housing Center – $400,000 (2015) – To increase outreach to underserved homebuyers and to invest in a revolving loan fund for downpayment assistance.

- Harney Community Energy LLC – $1,444,000 (2015) – To support a public-private partnerships to advance biomass energy, build a renewable energy market, control invasive juniper, and contribute to economic development in rural Oregon.
- Craft3 – $400,000 (2011) – To establish a loan fund for land trusts to acquire land and secure conservation easements.

In our PRI work, Meyer has used the same program staff to process PRIs and grants, and Meyer counts PRIs under its payout budget. By contrast, the market-rate investments are more typically made using foundation corpus funds and lead by investment staff.

Select foundations, including The Heron Foundation, have chosen to remove the division between the investing and the grantmaking sides of the business. In 2011, Heron went "all in" to deploy all of its capital – financial, human knowledge, and social – on its mission. One team with wide-ranging skills of financial analysis, investing, research, and community-building work in concert to make all investments.

Meyer's functions are not this integrated. We continue to explore intersections of program and investment, and we recently added a full-time Director of Mission Related Investing to our investment team. Through our investment team, we are exploring mission-related investments that are expected to earn a market-rate return. Some of these directly connect with and complement Meyer's programmatic priorities, and program staff are engaging in those nexus points.

As of the end of August, 2017, Meyer has $17.4 million invested in PRIs, as well as active loan guarantees. Although we have paused in making new PRI investments through our recently restructured grant programs, we continue to have a hands-on approach with our 17 outstanding PRIs. Specifically, we have been increasing the duration, flexibility, and impact of some of our investments in intermediaries, allowing us to continue to keep dollars circulating in support of mission-aligned organizations and work without impacting our payout. In addition, we are contributing dollars to a pooled philanthropic investment fund alongside other funders, providing opportunities for leverage and efficiencies for both recipients and funders.

Why Take on a "Mean Grant"?

Because PRI loans are expected to be repaid, some in the nonprofit field have labeled them "mean grants." That name belies some challenging truths behind PRIs. First, they require a different relationship between the foundation and the PRI recipient. Financial analysis and underwriting can feel awkward when the organization is used to having a grant relationship with a foundation. The organization's board of directors may struggle to understand the different relationship that is being established in a PRI versus a grant and feel intimidated by the PRI documents. There is also pressure to perform, typically reflected in financial covenants.

Structurally, PRIs don't fit every capital need an organization may have. Some projects need a line of credit structure, allowing funds to be drawn down as needed. Many foundations, including Meyer, don't have the bandwidth to manage a letter of credit structure and instead have all the PRI paid out at once. Additionally, foundations tend to invest in shorter projects (1-5 or 7 years) and are not well structured to tie up assets for a 20- or 30-year mortgage in the way a traditional bank lender might. Foundations can also be notoriously slow in processing PRI and grant applications. In a quickly changing market where capital is needed quickly, PRIs are not a great fit.

Despite these challenges, PRIs can still be useful tools for many organizations working for social change. Most foundations make PRIs in higher amounts than they do for grants, so they can play a meaningful part in project financing. As below-market investments, PRIs often have an attractive interest rate (1.5%- 3%). When coupled with more traditional commercial loans, PRIs can create a lower blended interest rate and significantly lower the costs of capital. Often, they also serve as critical bridge funding in early stages of a project, before an entity may meet the underwriting standards for commercial financing. PRIs can help an organization build a credit history or entice traditional lenders with a guarantee.

From the perspective of the foundation, PRIs also serve many purposes:

- PRIs can complement grantmaking. If a project has a revenue stream that can be used for debt service, a PRI can make sense and be another tool for supporting social impact work.
- By earning a below-market return, PRIs stretch the foundation's corpus to allow for more resources toward mission and social change. By our calculations, PRIs have allowed Meyer to grow the corpus by $25 million in the last few decades.
- PRIs can buffer the foundation's market-rate investments. During the Great Recession of 2008-14, PRIs were, for some quarters, the second best performing asset class for Meyer.
- PRIs allow an easier way to invest in a broader range of entities, including for-profit corporations that advance a foundation's social goals. Meyer made its first PRI to a for-profit entity that developed a biomass system using waste wood to heat public buildings in Harney County.
- When done in larger amounts, PRIs serve as an efficient way to meet a foundation's payout.

Despite some challenges posed by PRIs, they serve an important role by being a flexible, capacity-building tool for mission-related investments for social change. Many private and public foundations are wading into the PRI space, either by experimenting with a few solid PRI candidates or by launching more robust programs. It's safe to say that PRIs will continue to be a critical tool for philanthropy and social impact well into the future.

Private Businesses Benefiting the Public: Oregon's Benefit Company

By David Forman and Adam Adkin

Socially conscious entrepreneurs often struggle when they realize that organizing as a for-profit business may limit their ability to pursue a mission-driven business. Because the typical corporate model imposes an obligation on directors and officers to make decisions primarily to improve the financial bottom line, owners often struggle in determining how to embed sustainability concepts in the organizational foundation of their operations. And, often, organizing as a nonprofit entity with federal tax-exempt status is not an available option because the entrepreneur's idea does not satisfy the requirements for 501(c)(3) tax exemption. This article generally describes the nature of a benefit company under Oregon law and assumes that the nature of the venture under consideration does not lend itself to nonprofit status.

Since January 1, 2014, Oregon entrepreneurs have been able to register their corporation or LLC as a "benefit company" under Oregon law. Unlike a standard for-profit business, whose fundamental purpose is to achieve a profit for its owners, a benefit company has the additional requirement that directors and officers must consider the public benefit promoted by their decisions. Accordingly, a benefit company not only has the ability to make choices that might achieve a public benefit at the expense of its profits, but is obligated to consider the general impact that the conduct of its business and operations has on society and the environment. In addition to pursuing a general public benefit, an Oregon benefit company can also adopt a specific public benefit, such as providing living wage jobs in certain communities.

Sections 60.750 to 60.770 of the Oregon Revised Statutes (ORS) establish the requirements of a benefit company. To become an Oregon benefit company, a company simply states in its charter documents, filed with the Oregon Secretary of State, that it wants to be subject to the benefit company statutes. An example of the text to include in the charter documents is: "The Company is a benefit company subject to ORS 60.750-60.770." In order to include this language in its charter document, an existing company must obtain the approval of its board (or managers) and its owners.

The statute does not require a third-party audit but does require the company to adopt a third-party standard to measure its public benefit performance. The company must summarize its performance on an annual basis in a "benefit report." The report describes the company's progress toward achieving a public benefit and any specific benefit adopted by the company. The report must describe the actions and methods used to provide a public benefit, any circumstances that hindered or prevented the company from achieving the public benefit, and an analysis of the benefit company's performance with respect to the third-party standard. The benefit company must distribute the annual benefit report to its owners and post it on its website or otherwise make it publicly available.

Certain types of people affiliated with the benefit company, such as its owners or officers, and the benefit company itself, may commence direct or derivative actions to compel the benefit company to provide a public benefit or to compel its directors and officers or other affiliated people to act in accordance with the duties and standards of care established by the benefit company's organizational documents. However, the statutory scheme specifically provides that a benefit company and its officers and directors are not liable for money damages if the company fails to provide a public benefit. *See* ORS 60.764(3); ORS 60.766(3).

Oregon's Secretary of State recommends a number of third-party standards that a company can use to define, report, and assess its social and environmental performance. B Lab, a nonprofit corporation, has established a set of standards, referred to as "B Corporation" certification, commonly used by benefit companies. Similar to "Fair Trade" or "Oregon Tilth," "B Corporation" certification is not based on a governmental standard and is not subject to regulation by any public agency. As B Lab's website notes (see www.bcorporation.net): B Lab "serves a global movement of people using business as a force for good™. Its vision is that one day all companies compete not only to be the best in the world, but the Best for the World® and as a result society will enjoy a more shared and durable prosperity." B Lab, http://www.bcorporation.net/what-are-b-corps/about-b-lab (last visited May 1, 2018). B Lab hopes to achieve this goal by, as its website notes:

1) Building a global community of Certified B Corporations™ who meet the highest standards of verified, overall social and environmental performance, public transparency, and legal accountability;
2) Promoting Mission Alignment using innovative corporate structures like the benefit corporation to align the interests of business with those of society and to help high impact businesses be built to last;
3) Helping tens of thousands of businesses, investors, and institutions Measure What Matters, by using the B Impact Assessment and B Analytics to manage their impact—and the impact of the businesses with whom they work—with as much rigor as their profits; [and]
4) Inspiring millions to join the movement through story-telling on bthechange.com.

Id. B Lab requires its certified companies organized in Oregon to maintain benefit-company status. According to the Oregon Secretary of State, Oregon has more than 1,300 companies that have registered as a benefit company, and B Labs notes that approximately 100 Oregon companies have been certified as a B Corporation.

Although an Oregon benefit company is a viable alternative for socially conscious entrepreneurs, there are no economic incentives built into the statute, nor does a benefit company have the ability to take advantage of any tax incentives by virtue of its status. In fact, companies that require growth capital should consider the impact that adopting benefit-company status might have on their ability to attract investment in their particular industry. However, being a benefit company can have a positive impact on internal governance and employee recruitment and retention, and provide significant branding and marketing opportunities. Ultimately, though, owners should choose benefit-company status because they believe that the mission and value system contemplated by the statute align with their incorporation of triple bottom line principles into the fabric of their business and its operations. Adoption of benefit-company status legally requires and explicitly permits directors and officers to consider community and environment, in addition to making a profit, when making business decisions.

Feeder Organizations Are Still Not Charitable – Zagfly, et al.

by Susan A. Bower, Assistant Attorney General, Oregon Department of Justice

With the growing interest in social entrepreneurism, the Department has seen an uptick in efforts to qualify a business venture as charitable on the basis that the business donates its profits to charities. Owners of such businesses often cite Newman's Own[1] as the model they wish to exemplify. They are often surprised to learn that Newman's Own is a for-profit company and that the law is well-established that businesses that donate their profits to charity, referred to as feeder organizations, do not qualify for 501(c)(3) status.

Section 502(a) explicitly addresses this issue and provides:

> An organization operated for the primary purpose of carrying on a trade or business for profit shall not be exempt from taxation under section 501 on the ground that all of its profits are payable to one or more organizations exempt from taxation under section 501.

Two recent cases touch upon this business model.

In *Zagfly, Inc. v. Commissioner*, 603 F App'x 638 (9th Cir 2015), the court affirmed the US Tax Court's ruling that an online floral business that planned to donate its profits to charities did not qualify for tax-exempt status. Zagfly was formed as a California nonprofit for the purpose of creating an "Internet platform[] that will enable the general public to direct the proceeds of their activities to charitable causes." *Zagfly, Inc. v. Commissioner*, TC Memo 2013-29 at 2 (Jan. 28, 2013). More specifically, the company's owner planned to sell flowers online at market rates and donate all profits from the transactions to charity. The purchaser would be able to select a charity from a list of pre-approved entities on the website. *Id.* at 3. The owner acknowledged that although the company would engage in activities "that others engage in for commercial gain," her company's primary purpose would be to generate donations for charities. *Id.* at 9-10.

The US Tax Court was not persuaded and ruled that selling flowers online at market rate was not substantially related to an exempt purpose. Because the company's primary activity was not charitable, it did not qualify for tax-exempt status. *Id.* at 10-11. Also, since the court found the entity was not organized for an exempt purpose, the court did not need to determine if Zagfly was a feeder organization under section 502(a). *Id.* at 9.

In a subsequent private letter ruling, the IRS cited Zagfly when it denied tax-exempt status to a Christian coffee shop. Priv Ltr Rul 201645017 (Nov. 4, 2016). The coffee shop was formed as a nonprofit with the purpose of donating 100% of its profits to charity, providing a safe and informal gathering place, serving coffee and food, and revitalizing downtown. In its 1023 Application for Exemption, the organization asserted its operations would be different from other commercial coffee shops in the following ways: it would use low-key evangelical techniques for referencing and advancing Christianity when interacting with patrons; it would buy coffee directly from coffee farmers; it would locate its operations downtown where there were no other such businesses and help revitalize the area; a minister and church members would serve on the board; it would offer the space for formal and informal Bible study and church

1 Ironically, the Newman's Own company and foundation are now in jeopardy for other tax reasons. Paul Newman devised his ownership of Newman's Own, the for-profit company, to the Newman's Own Foundation. However the IRC prohibits a private foundation from owning more than 20% of the voting stock of a for-profit company. The penalty is a 200% fine for the value of any excess holdings. The company had gross sales of $600 million in 2016. A provision in the recent congressional tax bill gave the foundation an exemption from the rule, but the exemption was removed by the Senate parliamentarian. As a result, Newman's Own Foundation faces a massive tax bill and will likely sell its interest in Newman's Own and may dismantle the foundation. *See* Rob Meiksins, *Newman's Own Foundation and the Tax Overhaul: Two Cases of "Who Knew?"* Nonprofit Quarterly, Dec. 12, 2017. [cite not verified]

meetings as well as for other community events such as parties and live music; it would not charge a fee for groups to use the space, but would accept donations; it would display the work of ministries, missionaries, and nonprofits; and it would give away coffee and meals to the homeless.

The IRS found that the Christian coffee shop's activities were similar to those of an ordinary commercial enterprise and denied it tax-exempt status. Though neither ruling referred to the businesses as feeder organizations, it seems clear that both businesses relied on the idea that all profits would be donated as a means for obtaining tax exemption. Though it may be apparent to tax or nonprofit practitioners that such business models are not organized or operated for exempt purposes, it does not seem apparent to laymen. Referring people to section 502(a) and these recent rulings may provide a clearer explanation of why simply donating profits to charity does not make an organization charitable for purposes of tax exemption.

Legislative Updates: State of Washington

By R. Brent Berselli, Holland & Knight LLP

The Washington Legislature completed a 195-day legislative session in 2017, composed of a single regular 105-day session and three additional 30-day special sessions. Following are summaries of legislation signed into law by Governor Jay Inslee that may impact nonprofit or exempt organizations operating in the State of Washington:

1. **SB 5581 – Chapter 221, Laws of 2017**: Senate Bill ("SB") 5581, enacted with an effective date of July 23, 2017, authorizes public benefit hospital entities to participate in self-insurance risk pools with nonprofit hospitals. A public benefit hospital entity may include a public hospital district or a nonprofit corporation that operates a hospital in Washington or another state. Qualifying nonprofit corporations that are eligible to participate in a joint self-insurance program are limited to those that operate a hospital licensed for 360 or fewer beds by the Department of Health. Entities must submit a plan and obtain approval from the State Risk Manager before creating a self-insurance program. The plan must include the risks to be covered, funding, claim practices, proposed purchases of insurance or reinsurance, the legal form of the program, planned actuarial analysis, and an analysis of the feasibility of the self-insurance program. The State Risk Manager must adopt rules governing the management and operation of the joint self-insurance program. The rules must include standards that preclude public hospital districts or other public entities from subsidizing entities that are not public entities.
2. **HB 1274 – Chapter 133, Laws of 2017**: House Bill ("HB") 1274, enacted with an effective date of July 23, 2017, removes the requirement that a bona fide charitable or nonprofit organization have at least 15 active members with equal voting rights in order to qualify as an organization for purposes of the State of Washington's Gambling Act (the "Act"). Prior to the adoption of HB 1274, the Act authorized bona fide charitable or nonprofit organizations to conduct certain gambling activities, such as bingo games, raffles, amusement games, and fundraising events, to raise funds for the organization's stated purposes. Specifically, the organization was also required to have not less than 15 bona fide active members with equal voting rights in the election of officers, or board members, if any, who determine the policies of the organization. That 15 active member requirement is removed by HB 1274.
3. **HB 1718 – Chapter 250, Laws of 2017**: HB 1718, enacted with an effective date of July 23, 2017, authorizes the Washington State Liquor and Cannabis Board to issue a special permit to nonprofit organizations, allowing the organization to sell wine through a private auction. Further, HB 1718 authorizes the nonprofit organization permit holder to conduct wine tastings at the auction, provided that the wine offered for tasting is the same as that being auctioned. The nonprofit organization may procure wine from multiple wineries as long as each winery is identified on the organization's permit application filed with the Liquor and Cannabis Board.

4. **2SSB 5107 – Chapter 178, Laws of 2017**: Second Substitute Senate Bill ("2SSB") 5107, enacted with an effective date of July 23, 2017, adds nonprofit organizations to the types of organizations that are permissible contributors of funds to the Early Start Account in order to expand access and eligibility in the Early Childhood Education and Assistance Program ("ECEAP"). The bill provides that children enrolled in the ECEAP with funds contributed by community sources do not have to meet state ECEAP eligibility requirements and are not considered eligible for, or part of, the state-funded entitlement.
5. **SHB 1526 – Chapter 301, Laws of 2017**: Substitute House Bill ("SHB") 1526, enacted with an effective date of July 23, 2017, grants a property tax exemption to multipurpose nonprofit senior centers without a limit on the number of days the exempt property may be loaned or rented, if the rents and donations received for the use of the center are reasonable and do not exceed the maintenance and operation expenses attributable to the portion of the property loaned or rented. Under prior law, similar nonprofit organizations seeking a continued property tax exemption were required to show, among other factors, that the exempt property is not used for a nonexempt purpose for more than 50 days within a calendar year. SHB 1526 removes this restriction for nonprofit senior centers. Further, SHB 1526 clarifies that the senior center can operate a thrift store, farmers market, or similar activity year round without jeopardizing the exemption. SHB 1526 creates a new tax preference, and all tax preference legislation enacted, expanded, or extended after August 1, 2013 must direct the Washington State Joint Legislative Audit and Review Committee to evaluate the performance of the tax preference in achieving its stated public policy objective. To this end, the Joint Legislative Audit and Review Committee is required to review the number of senior centers that receive tax relief due to SHB 1526 and that would not have previously qualified for a property tax exemption. The exemption under SHB 1526 is subject to the automatic 10-year expiration date for new and expanded tax preferences.

In addition to the legislative initiatives, the Washington State courts released the following opinions that may be of interest to nonprofit organizations operating in Washington:

1. *Fortgang v. Woodland Park Zoo*, 187 Wn.2d 509, 387 P.3d 690 (2017): Petitioner Alyne Fortgang brought a challenge against the Woodland Park Zoo Society ("WPZS" or "Zoo"), a nonprofit organization organized under the laws of the State of Washington, alleging that WPZS violated the Washington Public Records Act by failing to release requested documents related to the elephants located at the Zoo.

   It was undisputed that the Zoo was a private, nonprofit organization, and the Supreme Court of Washington was asked to determine whether WPZS should be treated as a functional equivalent of a government agency and, therefore, be required to release the requested documents. The Court addressed the following factors that are relevant to deciding when a private entity is treated as the functional equivalent of a government agency:

   - Whether the entity performs a government function;
   - The extent to which the government funds the entity's activities;
   - The extent of the government's involvement in the entity's activities; and
   - Whether the entity was created by the government.

   In addressing each of the foregoing factors, the Supreme Court held:

   - While the parties acknowledged that the government contracted with WPZS to manage the Zoo, the Court found that this, alone, was insufficient to reach the conclusion that WPZS was performing a "core" government function.
   - The parties agreed that approximately 30% of the Zoo's funding came from public sources. The trial court was also persuaded that the Zoo's use of city-owned property to run the Zoo operation was substantial and weighed in favor of requiring WPZS to release the records requested. The Supreme Court noted that "Washington cases also suggest that the percentage of funds attributable to public

sources is the foremost consideration." *Fortgang*, 187 Wn.2d at 529 (*quoting Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wn. App. 695, 720 (2015) (government funding factor supported Public Records Act ("PRA") coverage where city paid private consulting firm "for at least a majority of the work at issue")). The Supreme Court further stated that "no Washington case concludes that an entity's funding supports PRA coverage in the absence of majority public funding. With respect to WPZS's direct monetary funding, this weighs against a finding of functional equivalency on this factor." *Fortgang*, 187 Wn.2d at 529. The Supreme Court ultimately concluded that, though the nature of the government funding weighs in favor of functional equivalence, the percentage of the government funding weighs against it. Therefore, "keeping in mind that the purpose of each of these factors is to help us decide whether treating a private entity as a government agency furthers the PRA's mandate of transparency in government affairs, we find the funding evidence here inconclusive." *Id.*

- The Supreme Court concluded that the government has no involvement in the day-to-day operations of the Zoo and, therefore, found that the third factor weighed against a finding of functional equivalency for purposes of the PRA analysis.
- WPZS was undisputedly created by private individuals. *Fortgang* sought a ruling that any government involvement in the creation of the entity, or any special legislation permitting the entity, must be considered to weigh in favor of the equivalency test. The Supreme Court was unconvinced, stating that the equivalency test is "designed to prevent the government from operating in secrecy via a private surrogate. It is not designed to sweep within PRA coverage every private organization that contracts with government. This remains true even if the contracts in question are governed or authorized by statute." *Fortgang*, 187 Wn.2d at 532.

2. *Swank v. Valley Christian School, 188 Wn.2d 663, 398 P.3d 1108 (2017)*: The parents of a high school student athlete who died following a concussion sustained during a football game filed a wrongful death suit against the nonprofit religious school, football coach, and a nonresident treating physician for negligence, medical negligence, and other causes of action. The trial court granted summary judgment in favor of the coach, and the parents appealed that ruling. The Supreme Court held:
    - RCW 4.24.670 makes nonprofit organization volunteers immune from liability for simple negligence. Volunteers are not, however, immune from acts that are grossly negligent or reckless.
    - The coach satisfies the definition of a volunteer and he is, therefore, entitled to immunity if his conduct was simply negligent rather than grossly negligent or reckless.
    - The Court found ample testimony suggesting that the coach failed to monitor the decedent for symptoms of a concussion during the game. One assistant coach even testified that players who suffered a head injury and were returned to play were not monitored any differently from other players. *Swank*, 188 Wn.2d at 685-86.
    - Substantial evidence contradicted the coach's assertion that the student's play was normal until the final injury. The student's relatives described him as unusually "sluggish, confused, and slow to respond." *Id.* These same individuals also recalled the student "missing plays, which was apparently out of character. They further described [the coach] and the assistant coach yelling at [the student] from the sidelines in apparent frustration over his poor performance." *Id.*
    - Additional evidence described the coach grabbing the student's "face mask and shaking it up and down while yelling" at the student. *Id.*
    - Viewed in the light most favorable to the student's parents, "this collective evidence could suggest that [the coach] 'substantially' failed to meet the standards of a reasonable and prudent person under the circumstances. Taken as a whole, the evidence creates genuine issues of material fact regarding [the

coach's] degree of fault," and a "reasonable jury may conclude that [the coach] was grossly negligent or reckless when he failed to monitor [the student] and remove him from play." *Id.* at 687 (citation omitted).

- Based on all of the evidence, the Supreme Court held that summary judgment on the coach's immunity claim was improper.

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