SHAREHOLDER AND MEMBER DISPUTES © 2018

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TABLE OF CONTENTS

EXHIBITS:

INTRODUCTION

Shareholder and member disputes can arise for a wide variety of reasons, from financial misconduct or economic downturns to longstanding family resentment (many closely-held businesses are family enterprises). These disputes involve corporations (both C-corporations and S- corporations) and LLCs. While each dispute has its own unique personalities and facts, some of the common themes we repeatedly see in these disputes are as follows:

A. Disagreements about management of company money
    a. Excessive spending of company funds
    b. Excessive stockpiling of company funds
    c. Causing the company to take on excessive debt

B. Disagreements over entitlement to financial benefits
    a. Officer/Director/Employee Compensation
        1. This may be challenged as excessive by a corporate shareholder or LLC member not employed by company.
        2. This may be challenged as inadequate by stakeholder employee.
        3. Stakeholder employees may believe compensation is unfairly allocated.
        4. Outsized compensation and/or bonuses can reduce cash available for dividends or distributions. In C-corporations, there is an incentive to pay out all net income in salary or bonuses; this avoids the double tax (tax on net income at the corporate level and tax on dividends to the shareholders.) For pass-through entities like S-corps or LLCs, the owners are taxed on profits, whether or not the profits are distributed to the owners, so the controlling owners could withhold profit distributions (on which the owners will be taxed) as part of a freeze-out strategy.
    b. Dividends or Distributions
        1. Controlling stakeholder employees may resent sharing profits with stakeholders who do not work for the company.
        2. Stakeholders may disagree over appropriate reserves or need for capital improvements.
        3. Controlling stakeholders may limit dividends to put pressure on non-controlling stakeholders to sell their interests at an artificially low price.
        4. Non-controlling stakeholders may prioritize short-term benefits over long-term company needs.

C. Disagreements over levels of control
    a. This is common in family businesses – not all second or later generation family members are willing or able to work for the company.
    b. Disputes may arise where a stakeholder's employment is terminated, benefits reduced, or a stakeholder is refused employment – stakeholders may have different work ethics and different financial needs.
    c. Voting vs. non-voting shares – control can be concentrated with the voting shareholder while financial benefit is spread more widely

D. Disagreements based on family/relationship difficulties
    a. "Family feuds" may be exacerbated by introduction of spouses, children, and other family members into the business.
    b. Breakdown in trust, sense of betrayal based on business disagreements, and desire for vengeance for perceived past mistreatment
    c. Death of family/company patriarch or matriarch
    d. Personal issues affecting stakeholder (e.g. divorce, addiction, financial issues, depression, etc.)

E. Disagreements over opportunities for ancillary income
    a. Usurpation of corporate/company opportunities by those in control
    b. Self-dealing by those in control – e.g., purchasing company assets, using wholly-owned entities to provide contract services to the company, etc.

F. Disagreements over significant company actions or decisions
    a. In corporate context, shareholders may exercise dissenters' rights if non-controlling shareholder properly objects to action.
    b. No statutory dissenters' rights for LLC members – this can increase the risk of membership disputes arising out of significant company actions/decisions

G. Disagreements over rights to redeem or exit the company
    a. Disputes over meaning of contractual language (Buy-Sell agreements, Shareholder or Operating Agreements)
    b. Withdrawal or expulsion provisions – statutory or contractual
    c. Valuation disputes

H. Disagreements based on violations of contracts
    a. May include Articles of Incorporation/Organization, Bylaws, Operating Agreements, Shareholder or Buy-Sell Agreements, etc.

I. Disagreements over access to information
    a. Shareholder/Member rights to review documents – statutory
    b. Shareholder/Member rights to information – shareholder or operating agreements
    c. Freeze-outs designed to cut off access to information

I. SOURCES OF RIGHTS: STATUTES, COMMON LAW, AGREEMENTS

Shareholder and member rights arise from three primary sources:

(1) Statutory Rights;
(2) Common Law; and
(3) Agreements Among Shareholders/Members and/or the Company

A. STATUTORY RIGHTS

1. The Michigan Business Corporation Act ("MBCA"), MCL 450.1101 *et seq*., and the Michigan Limited Liability Company Act ("MLLCA"), MCL 450.4101 *et seq.*
   - M.C.L. § 450.1103(c) of the MBCA states, in pertinent part, that the act shall be "liberally construed to give special recognition to the legitimate needs of close corporations."

2. In 1989, the Michigan legislature enacted MCL § 450.1489, which allows shareholders to bring actions "to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder."

3. Eight years later, the legislature added a similar provision – MCL § 450.4515 – to the Michigan Limited Liability Company Act.

4. However, it wasn't until the 2002 decision in *Estes v Idea Engineering & Fabricating, Inc* that Michigan courts clearly recognized the impact of these legislative acts – specifically, that § 1489 "creates a separate and independent statutory cause of action" for shareholders of closely-held corporations. *Estes v Idea Engineering & Fabricating, Inc*, 250 Mich App 270, 285-286 (2002).

5. In 2014, the Michigan Supreme Court considered shareholder rights in *Madugula v Taub*, 496 Mich 685 (2014). The *Madugula* Court explained that under the Michigan Business Corporation Act ("MBCA" or "BCA"), a shareholder has "certain statutory rights that allow the shareholder to protect and gain from his or her interest as a shareholder..." (Emphasis added.) These include, but are "not limited to," the rights to "vote, inspect the books, and receive distributions" and elect directors. *Id.* (Emphasis added). (Citing "MCL 450.1441, 450.1487(2), and 450.1345; see also MCL 450.1231, 450.1343, 450.1405, 450.1505(2), and 450.1511.")

6. Statutory rights include, but are not limited to:

   Business Corporation Act (shareholders)

   - Right to vote – MCL 450.1441
   - Right to inspect the books – MCL 450.1487
   - Right to receive distributions – MCL 450.1345
   - Participating in meetings – MCL 450.1404
   - Right to elect directors – MCL 450.1505

Limited Liability Company Act (members) LLC Act

- The LLC Act describes various member rights provided by statute, but most are expressly subject to language in a company's Operating Agreement
- Receiving equal share of distribution – MCL 450.4303
- Participating in management of member-managed companies – MCL 450.4401
- Voting rights – MCL 450.4502
- Seeking an accounting and reviewing books and records – MCL 450.4503

7. Both § 1489 and § 4515 provide the court with substantial latitude to "make an order or grant relief as it considers appropriate" if the shareholder or member establishes grounds for relief. This is in keeping with the equitable nature of the claim, as was reinforced by the Michigan Supreme Court in *Madugula v Taub*, 496 Mich 685 (2014).

B. COMMON LAW

1. In its 2014 opinion in *Madugula*, the Michigan Supreme Court acknowledged that it had:

> …never exhaustively listed the interests or rights that shareholders have as shareholders of a corporation. However, we have recognized that '[t]he relation between a corporation and its stockholders is contractual in its nature' and that '[t]he charter of a corporation is its constitution. It prescribes the duties of stockholders and directors within the limits of the charter in the exercise of the power conferred upon them.' Beyond a corporation's articles of incorporation, we may also consider a corporation's bylaws and the governing statutes to determine a shareholder's interests. (*Id.* at 718.)

2. Corporations – Common Law Shareholder Rights

a. Right to receive pro rata share of dividend – *Polish American Pub Co of Detroit v Wojcik*, 280 Mich 466, 474 (1937)
b. Right to adopt bylaws and amend corporate charters - *Franchino v Franchino*, 263 Mich App 172 (2004)

3. LLCs – limited common law rights because they are user-defined entities meant to be governed by Operating Agreements

C. AGREEMENTS

1. Although shareholders have certain statutory rights, the MBCA allows shareholders to modify those rights through shareholder agreements:

> The BCA also allows shareholders to enter into voting agreements and shareholder agreements. Through a voting agreement, shareholders may agree to modify how the shares held by them are voted. Through a shareholder agreement, shareholders are able to modify several of the statutory rights and interests. A shareholder agreement, if it complies with the requirements of MCL 450.1488, 'is effective among the shareholders and the corporation....' **Thus, although the BCA provides specific rights and interests to a shareholder as a shareholder, shareholders are entitled to modify these rights and interests through shareholder agreements**." (*Madugula.* at 718-719) (Citing MCL 450.1461; emphasis added.)

For example, "shareholder agreements can modify the method of distributions, establish directors or officers, 'govern[ ] the exercise or division of voting power by or between the shareholders and directors or by or among any of the shareholders or directors, including use of weighted voting rights or director proxies,' change dissolution requirements, and more. MCL 450.1488(1)." *Madugula*, n. 97.

2. Typically, Operating Agreements and Shareholders' Agreements are given significant deference by courts. Thus, "[b]ecause these modified rights and interests are statutorily effective among shareholders and the corporation, evidence of a breach of those rights or interests may be evidence of shareholder oppression." *Id.* at 719-720. (Emphasis added).

a. One purpose of the Business Corporation Act is "to provide a general corporate form for the conduct or promotion of a lawful business or purpose with variations and modifications from the form as interested parties in any corporation may agree upon, subject only to overriding interests of this state and of third parties." MCL 450.1103(b).

b. Not every section of the Limited Liability Company Act is expressly subordinate to contrary language in an Operating Agreement adopted by a company's Members.

3. Types of agreements:

- Corporations:
  - Articles of Incorporation – MCL 450.1202
  - Bylaws – MCL 450.1231
  - Shareholders' (or Buy-Sell) Agreements – 450.1487

- Limited Liability Companies:
  - Articles of Organization – MCL 450.4203
  - Operating Agreements

4. Freedom of contract principles: Michigan law recognizes and gives broad deference to individuals' right to freedom of contract. *See Rory v Contl Ins Co*, 473 Mich 457; 703 NW2d 23 (2005)**;** *Wilkie v Auto-Owners Ins Co*, 469 Mich 41; 664 NW2d 776 (2003); *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005).

5. Parties can enter agreements to alter statutory default provisions

   - "The BCA also allows shareholders to enter into voting agreements and shareholder agreements. Through a voting agreement, shareholders may agree to modify how the shares held by them are voted. Through a shareholder agreement, shareholders are able to modify several of the statutory rights and interests. A shareholder agreement, if it complies with the requirements of MCL 450.1488, 'is effective among the shareholders and the corporation....' Thus, although the BCA provides specific rights and interests to a shareholder as a shareholder, shareholders are entitled to modify these rights and interests through shareholder agreements." *Madugula v Taub*, 853 NW2d 75, 93 (Mich 2014)

   - MCL 450.1461: Permits voting trust agreement between shareholders.

   - MCL 450.1488: Permits agreements among shareholders and the corporation even though inconsistent with the MBCA.

   - The Michigan LLC Act does not provide a specific provision permitting agreements among members even if inconsistent with the Act; however, sections throughout the Act state that the particular provision applies unless otherwise stated in an operating agreement. *See e.g.,* MCL 450.4216 ("Except as otherwise provided in an operating agreement, a limited liability company may do any of the following…").

   - The Michigan Limited Liability Act and Michigan Business Corporation Act provide default provisions for situations not covered by an agreement between the parties.

   - However, where an agreement exists between the parties, that agreement will typically govern unless it is contrary to the statute. *See e.g. Levine v O'Dorisio,* 494 Mich 874 (2013) ("MCL 450.4404(5) is not applicable to this case. Instead, the division of the profits of the company are governed by the operating agreement, which provides that the PLLC 'shall be dissolved' upon the occurrence of a withdrawal event."); *Clark v Butoku Karate School, LLC*, 2016 WL 4419321 (Mich App, Aug 18, 2016) ("The Operating Agreement permits a member to withdraw and is not silent on the issue of a withdrawal distribution. Because the Operating Agreement is not silent on the matter of a withdrawal distribution, the terms of the Operating

Agreement control on that issue and plaintiff is not entitled to look to the terms of MCL 450.1305 to govern the issue of withdrawal distribution.).

6. Operating agreements and shareholder agreements may grant majority shareholders or those in control broad general powers. This broad grant of power does not mean those in control can act oppressively. *Berger v Katz*, 2011 WL 3209217, at *4 (Mich App July 28, 2011)

7. Operating or shareholder agreements may contain arbitration provisions which will require analysis regarding the scope of coverage. "To ascertain the arbitrability of an issue, [a] court must consider wither there is an arbitration provision in the parties' contract, whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration by the terms of the contract." *Huntington Woods v Ajax Paving Indus, Inc [After Remand]*, 196 Mich App 71, 74-75 (1992).

8. Shareholder agreements or operating agreements for pass-through entities often require distribution of cash in amounts at least sufficient to pay owner's anticipated tax liabilities.

II. CLAIMS AND ISSUES FREQUENTLY LITIGATED

A. SHAREHOLDER/MEMBER OPPRESSION

- MCL 450.1489 = shareholders / corporations
- MCL 450.4515 = members / LLCs

i. Overview of Statutes:

- MCL 450.1489: permits minority shareholder to file suit "to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder."

- Purpose: "to give a statutory cause of action to shareholders who are abused by controlling persons." (*Estes v Idea Engineering & Fabricating, Inc*, 250 Mich App 270, 284 (2002)).

- Section 1489 is designed to provide "unique" relief for shareholders of closely held companies who are owed the strictest of fiduciary duties by those in control of the corporation, akin to those owed in a partnership. *Estes v Idea Engineering & Fabrications, Inc*, 250 Mich App 270, 280-281 (2002).

- The shareholder can recover for direct harm OR harm resulting to the shareholder as a consequence of harm to the company. (e.g., *Lozowski v Benedict*, 2006 Mich App Lexis 324 (Feb 7, 2006) (defendants enriched themselves at expense of corporation and the shareholder by funneling corporate funds to other corporations controlled by defendants)

ii. Features of Statutes

- Section 1489 defines:
  - Who has standing to bring a claim: a shareholder
  - The liable parties: directors or those "in control"
  - The three separate, independent categories of conduct that trigger liability and the imposition of remedies:
    - Illegal
    - Fraudulent
    - Willfully unfair and oppressive

- Breaches of fiduciary duties may entitle a shareholder to the remedies in Section 1489 (e.g. *Jelonek v Emergency Medical Specialists, PC*, Nos. 220244, 220245, 220246 (Mich App Aug 28, 2001)

- Section 4515 is the LLC analogue to Section 1489.

iii. What is "willfully unfair and oppressive" conduct?

- Defined as "a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder." (MCL 450.1489(3))

- Also includes "termination of employment or limitations on employment benefits" to the extent such actions disproportionately interfere with the shareholder's interests.

  - *Franchino* Amendments: In 2004, the Michigan Court of Appeals held that termination of a shareholder's employment and his removal from the board of directors were not "oppressive" as they did not implicate the plaintiff's rights "as a shareholder." *Franchino v Franchino*, 263 MichApp 172, 184 (2004). Thereafter, in 2006, the Michigan legislature amended §§ 1489 and 4515 to clarify that going forward, termination of employment could constitute oppressive conduct if such termination "interfere[d] with distributions or other [shareholder/member] interests disproportionately as to the affected [shareholder/member]."

- Since the 2006 amendments, the Michigan Court of Appeals has issued several opinions supporting the principle that termination of a shareholder's salary can be oppressive conduct. For example, in *Berger v Katz*, 2011 WL 3209217 (Mich App July 28, 2011), the court found oppression where the controlling shareholders eliminated the plaintiff's salary after he relocated to California.

- The trial court in *Madugula v Taub* also held (on remand) that the controlling shareholder's termination of the plaintiff's employment and associated compensation and benefits constituted illegal, fraudulent, or willfully unfair and oppressive conduct.

- Actionable conduct need not be illegal or fraudulent.

- Pursuant to MCL 450.1489(2), the statute excludes "conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure." MCL 450.1489(2).

  - Courts approach operating agreements and bylaws with substantial deference and typically seek to enforce them. *See S-S, LLC v Merten Bldng Ltd Partnership*, 2010 WL 4679524 (Mich App November 18, 2010) (no oppression where court determined that defendants' actions were generally consistent with operating agreement); *Kent Tillman, LLC v Tillman Const Co,* 2006 WL 143289, at *4 (Mich App Jan 19, 2006) (No oppression where neither defendant did anything in violation of the LLC operating agreement); *Wisner v SB Indiana LLC,* 2017 WL 540107 (Mich App Feb 9, 2017) (no shareholder oppression if the actions were permitted under the operating agreement or bylaws).

  - However – broad grant of power to majority shareholders in bylaws does not mean that power can be applied oppressively. *Berger v Katz*, 2011 WL 3209217, at *4 (Mich App July 28, 2011) ("Although the bylaws gave defendants the general authority to make business decisions such as setting salaries, issuing capital calls, or approving rental payments, that does not mean that defendants were permitted to act in a manner that was willfully unfair and oppressive to plaintiff, as a minority shareholder. The exception in MCL 450.1489(3) cannot be read as permitting willfully unfair and oppressive conduct under the guise of defendants' general authority to run and manage IPAX.")

iv. Examples of Actionable Oppression

***Note**:* There is limited published case law on the issue of minority shareholder and member oppression in the State of Michigan. As such, courts have sometimes relied on unpublished case law and persuasive case law from other jurisdictions.

- Preventing minority shareholder from exercising typical shareholder rights, such as voting, electing directors, examining corporate books, and receiving dividends (e.g., *Franchino v Franchino*, 263 Mich App 172 (2004)); *Madagula v Taub*, Case No 2008-537-CK (on remand); MCL §§ 450.1487 and 450.4503).

- Diverting corporate funds to outside companies owned by controlling shareholders or diverting funds to the majority shareholder. *Lozowski v Benedict*, 2006 WL 287406 at *3 (MichApp Feb 7, 2006); *Arunski v Pet Pool Products, Inc*, 2012 WL 893091, at *1 (Ariz App 1st Div Mar 15, 2012); *Bedi v Dhaliwal*, 2014 WL 280498 (Cal App 1st Dist Jan 27, 2014), *reh'g denied* (Feb 21, 2014), *review denied* (Apr 16, 2014); *Niloy & Rohan, LLC v Sechler*, 782 SE2d 293 (Ga App 2016)).

- Misappropriating corporate opportunities and reducing value of minority's shareholding interest (e.g., *McDonnell v Colburn*, 2010 Mich App Lexis 2029 (Oct 21, 2010)).

- Self-dealing and breaching fiduciary duties (e.g., *Weiner v Weiner*, 2008 WL 746960 (WD Mich Mar 18, 2008); *BSA Mull, LLC v Garfield Investment Co*, 2014 WL 4854306 (MichApp Sept 30, 2014)).

- "Mismanagement of the corporation resulting in harm both to the corporation and to the interests of the shareholders" (e.g., *Bromley v Bromley*, 2006 US Dist Lexis 37022 (ED Mich June 7, 2006); *McCann v McCann*, 275 P3d 824 (Idaho 2012)).

- Depriving minority shareholder of benefits of ownership, while those in control receive substantial benefits (*Kayne v Mense*, 2016 WL 1178671 (Cal App 2d Dist Mar 25, 2016), *review denied* (June 22, 2016)).

- Under certain circumstances, a controlling shareholder's attempt to sell back his stock to the company at favorable terms not offered to the minority shareholder may constitute oppression. *Schimke v Liquid Dustlayer, Inc*, 2009 WL 3049723, at *1 (Mich App Sept 24, 2009)

- Refusing to pay dividends to minority shareholder, despite substantial cash reserves in the corporation. (*Blankenship v. Superior Controls, Inc.*, 2015 WL 5768525 (E.D. Mich. Sept. 30, 2015); *Robertshaw v. Pudles*, 2013 WL 1148395 (E.D. Pa. Mar. 20, 2013); *Miller v Magline, Inc.*, 76 Mich App 283 (1977)). In *Schimke v Liquid Dustlayer, Inc*, the Court of Appeals noted that the defendants "remained steadfast in refusing to pay dividends, despite … substantial cash reserves, essentially preventing plaintiff from receiving any benefit whatsoever from his nearly one-third ownership of [the company]." *Cf. Wolding v Clark*, 563 Fed Appx 444, 454 (CA 6, 2014) (dismissing minority shareholder cause of action for corporation's failure to pay dividends where minority shareholder could not show that the corporation's decision not to pay dividends was made fraudulently or in bad faith).

- Refusing to pay distributions to shareholders to cover tax liabilities. *Guillory v Broussard*, 2015-888 (La App 3 Cir 5/18/16) (Failure to make a distribution to Plaintiff was breach of duty because "Defendant's action in refusing to make a distribution sufficient to pay Plaintiff's tax liability was not done in good faith nor was it guided by any notion of the best interest of the corporation"); see also *One to One Interactive, LLC v Landrith*, 920 NE2d 303, 307-308 (Mass App Ct 2010) (controlling members acted improperly by allocating excess income to defendant and then refusing to issue tax distribution unless he sold his shares for artificially low price).

- Preventing minority shareholder from participating in corporate decisions. (e.g., *Berger*, *supra*; *Madagula v Taub*, Case No 2008-537-CK (on remand); *McCann v McCann*, 275 P3d 824 (Idaho 2012)).

- Hiding profits from minority shareholder (e.g., *Berger*, *supra*).

- Withholding information from the minority shareholder. (*e.g., Madagula v Taub*, Case No 2008-537-CK (on remand); *Franchino*, 263 MichApp at 184; see also *Bromley*, *supra*, 2006 WL 2861875 at *7; *Etowah Envtl Group, LLC v Walsh*, 774 SE2d 220 (Ga App 2015), *reconsideration denied* (July 29, 2015), *cert. denied* (Jan 11, 2016); *Grill v Aversa*, 2014 WL 4672461 (MD Pa Sept 18, 2014); *William Penn Partn. v Saliba*, 13 A3d 749 (Del 2011)

- Substantially increasing the salaries of those in control of the corporation (e.g., *Berger*, *supra*; *Booth v Waltz*, 2012 WL 6846552 (Conn Super Dec 14, 2012)).

- Terminating employment or refusing to provide corporate employment. *See Madagula v Taub*, Case No 2008-537-CK; Douglas Moll, *Shareholder*

Oppression and "Fair Value": Of Discounts, Dates, and Dastardly Deeds in the Close Corporation, 54 Duke L Rev 293, 339 (2004) ("In a close corporation, a shareholder typically commits his capital with the expectation that the investment entitles him to employment and to a management role, as well as to a proportionate share of the company's value."); *De-Chu Christopher Tang v Vaxin, Inc*, 2015 WL 1487063 (ND Ala Mar 31, 2015); *Folie v Aging Joyfully, Inc*, 2015 WL 1959854 (Minn App May 4, 2015); *Selmark Associates, Inc v Ehrlich*, 5 NE3d 923 (Mass 2014).

- Issuing a capital call when corporation is doing fairly well, diluting minority shareholder's interest and forcing minority shareholder to put his own money into the corporation (e.g., *Berger*, *supra*; *Ballard v Roberson*, 733 SE2d 107 (SC 2012).

- Breaching a shareholder agreement. *Madugula v Taub*, 496 Mich 685, 720 (2014) ("Thus, we agree with the Court of Appeals to the extent that it determined that a breach of the rights and interests contained in the stockholders' agreement could be evidence of shareholder oppression."); *Kayne v Mense*, 2016 WL 1178671 (Cal App 2d Dist Mar 25, 2016), *review denied* (June 22, 2016)

- "Squeezing" or "freezing" the minority shareholder out of the corporation rather than giving him fair share of his investment *Berger*, *supra*; *Ballard v Roberson*, 733 SE2d 107 (SC 2012); *Booth v Waltz*, 2012 WL 6846552 (Conn Super Dec 14, 2012); *Villalobos v Villalobos*, 2015 WL 8676440 (NM App Nov 24, 2015), *cert. denied,* 370 P3d 1213 (NM 2016)).

v. Remedies for Oppression

- The shareholder and member action statutes offer some specific suggested remedies for oppressive conduct, such as dissolution and liquidation; cancellation or alteration of provisions in bylaws, shareholder agreements or operating agreements; the purchase at fair value of the interest of the aggrieved shareholder or member by the company or those responsible for the wrongful acts; and/or an award of damages.

- These enumerated remedies are intended as examples, and not as a limitation on the court's discretion – before listing remedies, both §§ 1489 and 4515 state that "…the circuit court *may* issue an order or grant relief as it considers appropriate, including, *but not limited to*, an order providing for any of the following…" (Emphasis supplied). For example, an accounting or an audit of the company's books and records may be appropriate.

- Where a court finds oppression, it would be extraordinary for no remedy to be appropriate, and at least one trial court has been reversed for awarding no remedy despite finding oppressive conduct. *Ginnard v Advanced Design and Prototype Technologies, Inc*, 2012 WL 4465191 at *3 (MichApp Sept 27, 2012) (trial court erred when it refused to award buyout due to "speculative" nature of expert report after jury found in plaintiff's favor on oppression claim).

- "Most modern courts . . . see the oppression statutes as intended to expand shareholder remedies." O'Neal & Thompson, 2 Close Corp and LLCs: Law and Practice § 9:32 (Rev 3d ed). See also Moll, *Reasonable Expectations v Implied-in-Fact Contracts: Is the Shareholder Oppression Doctrine Needed?*, 42 BC L Rev 989, 1018 (2001) ("The breadth of remedies for shareholder oppression provides the courts with great flexibility to choose a remedial scheme that most appropriately responds to the aggrieved shareholder's harm.").

- **Forced Buy-Back of Shares**

    1. Court has broad discretion to decide appropriate remedies to resolve shareholder disputes

    2. *Berger v Katz*, 2011 Mich App Lexis 1408 (July 28, 2011)

        a. Court is not limited by language of MCL 450.1489(1)
        a. Defendants were ordered to value plaintiff's shares and communicate the valuation to plaintiff
        b. Plaintiff then had option to sell his own shares or to buy defendants' shares at that price

- **Arguably no minority/marketability discounts to "fair value"**

    1. The buy-out language of Section 1489 does not include "discounts" for lack of control or salability of the shares.

    2. Court correctly ascertained "fair value" of minority's shares "without a discount for lack of marketability or minority status" (e.g., *Schimke v Liquid Dustlayer, Inc*, 2009 WL 3049723, at *1 (Mich App Sept 24, 2009)

    3. Courts in most jurisdictions tend to follow a "fair value" standard – i.e. without discounts – when determining appropriate buyout prices for shareholders in dissenters' rights and oppression cases. *See e.g., Cavalier Oil Corp v Harnett*, 564 A.2d 1137 (Del. 1989) (rejecting marketability and minority discounts in appraisal);

Friedman v. Beway Realty Corp, 87 NY2d 161 (1995) (rejecting minority discount in appraisal and oppression).

4. "In most cases, however, it would appear as a matter of policy that no discount should be applied where oppressive conduct is found under section 489." *Michigan Corporation Law and Practice*, Schulman, Moscow, Lesser, § 4.22.

B. BREACH OF FIDUCIARY DUTY

i. This claim arises out of the defendant's failure to act with good faith, care, and loyalty, including engaging in self-dealing without disclosure.

ii. Statutory rights – owed to the company, not individual shareholders/members

- MBCA: Director or officer must discharge duties (a) "In good faith," (b) "With the care an ordinarily prudent person in a like position would exercise under similar circumstances," and (c) "In a manner he or she reasonably believes to be in the best interests of the corporation." (MCL 450.1541a(1))

- MLLCA: "A manager shall discharge the duties of manager in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner the manager reasonably believes to be in the best interests of the limited liability company." (MCL 450.4404 (1)).

iii. Common law rights – owed directly to individual shareholders; lack of clarity with respect to fiduciary duties owed to LLC members

1. "[D]irectors and officers of corporations are fiduciaries who owe a strict duty of good faith to the corporation which they serve." (e.g., *Salvador v Connor*, 87 Mich App 664, 675 (1978))

2. Majority/controlling shareholders owe fiduciary duties to minority/non-controlling shareholders to manage corporation to maximize benefit to all shareholders – *Veeser v Robinson Hotel Co*, 275 Mich 133, 138 (1936)

3. "[B]ecause the shareholders participate in the management of the corporation, the relationship among those in control of a closely held corporation requires a higher standard of fiduciary responsibility, a standard more akin to partnership law." (e.g., *Estes v Idea Engineering & Fabrications, Inc*, 250 Mich App 270, 281 (2002).

4. Michigan law is unclear regarding whether or not non-controlling LLC members may assert direct claims for breach of fiduciary duty against majority/controlling LLC members or managers. See, e.g., *BSA Mull, LLC v Garfield Investment Co*, Nos. 310989, 311911, 315359, 315544, 2014 WL 4854306 at *7 (Sept. 30, 2014) (upholding dismissal of member's breach of fiduciary duty claim against manager); *cf Techner v Greenberg*, 553 Fed Appx 495, 507 (6th Cir. 2014) (member's direct breach of fiduciary duty claim against manager affirmed and tolled due to defendant's breach of her fiduciary duty of disclosure).

iv. Agency Duties

1. Officers and managers are agents of the corporation/company they serve
2. Directors, shareholder/employees, and member/employees may also be subject to these duties depending on context
3. Agency duties apply to these individuals, but such duties are owed to the principal – i.e., the corporation/company – and not to individual shareholders/members

v. What is the difference between Shareholder/Member Oppression and Breach of Fiduciary Duty?

- Some courts initially believed that MCL 450.1489 simply allowed shareholders to sue derivatively for breach of fiduciary duty – *Baks v Moroun* 227 Mich App 472 (1998).

- The Court of Appeals clarified in *Estes v Idea Engineering & Fabrications, Inc*, 250 Mich App 270 (2002), that MCL 450.1489 created a new, direct statutory cause of action for shareholders subject to unfair and oppressive actions.

vi. Oppression v. Fiduciary Duty

- Oppression does not have to include a fiduciary breach, although it often does

- Proof of fiduciary breach can be evidence of oppression, as fiduciary breaches often disadvantage or damage non-controlling members or shareholders

- Breach of common-law fiduciary duty to minority shareholders is likely to be oppressive – See *Thompson v Walker*, 253 Mich 126, 135 (1931).

C. BREACH OF OVERARCHING PARTNERSHIP

i. A "partnership is an association of 2 or more persons . . . to carry on as co-owners a business for profit[.]" (MCL 449.6(1))

ii. In *Byker v Mannes*, 465 Mich 637, 644-653 (2002), aff'd 469 Mich 881 (2003), the Michigan Supreme Court interpreted the partnership statute as providing that "if the parties associate themselves to 'carry on' as co-owners a business for profit, they will be deemed to have formed a partnership relationship regardless of their subjective intent to form such a legal relationship." 465 Mich. at 646.

iii. The Court held that a partnership can exist even if the parties are not aware of their status as partners. *Id.* "In ascertaining the existence of a partnership, the proper focus is on whether the parties intended to, and in fact did, 'carry on as co-owners a business for profit' and not whether the parties subjectively intended to form a partnership.'" *Id.* at 653.

iv. For violations of the parties' "unintended" partnership that underlies their business affairs, the partnership may stand independent of formal shareholder relationships within a corporate entity. (e.g., *Byker v Mannes*, 465 Mich 637 (2002)). In other words, a business relationship may consist of multiple LLCs and/or corporations, with an overarching partnership encompassing all such entities.

v. The issue is the parties' objectively manifested conduct toward one another with respect to their business, and whether such conduct meets the statutory definition of a partnership. (e.g., *Byker*, *supra*). *Cf. Custom Pack Solutions v Great Lakes Healthcare Purchasing*, unpublished per curiam opinion of the Court of Appeals issued February 22, 2018 (Docket No 334815).

D. BREACH OF CONTRACT

i. Breach of Employment Agreement with regard to shareholder:

- "[I]n close corporations, shareholders often work for the corporation, and corporate dividends are often paid in the form of a salary." (e.g., *Franchino*, *supra* at 184)

- "[T]he presumption of at will employment may be overcome by proof of an express contract for a definite term or by a provision forbidding discharge without just cause." (e.g., *Bracco v Michigan Technological University*, 231 Mich App 578, 598 (1998))

- The contract need not be in writing to be enforceable. (e.g., *Rice v ISI Mfg, Inc*, 207 Mich App 634, 636-637 (1994) ("After reviewing the record in this case, we are convinced that the evidence presented, including the

supervisor's oral assurances that plaintiff could return to his engineering position if the sales position did not work out, was sufficient for the jury to find that plaintiff could not be discharged without just cause.").

ii. Breach of Stock Purchase Agreement with regard to shareholder:

- "[T]rial court erred by dismissing plaintiff's claim that defendants breached the . . . stock purchase agreement. Plaintiff [upon resigning voluntarily] had performed all of the clearly stated prerequisites to trigger his contractual right to have the company purchase his stock, with a personal guarantee of payment by defendant [shareholder]." (e.g., *Wojcik v McNish*, 2006 WL 2061499 (Mich Ct App July 25, 2006)).

iii. Breach of Shareholder Agreement or Operating Agreement:

- Remember, pursuant to *Madugula*, breach of a shareholder agreement or operating agreement may also be evidence of oppression.

E. BREACH OF NON-COMPETE AGREEMENT

i. Non-competes between employers and employees are governed by MCL 445.774a, which limits enforcement to situations where such clauses both:
- Protect an employer's "reasonable competitive business interest," and
- Are reasonable in duration, geographical area, and the type of employment or line of business.

ii. Additionally, a restrictive covenant between employer and employee "must be reasonable as between the parties, and it must not be especially injurious to the public." *St Clair Med, PC v Borgiel*, 270 Mich App 260, 266; 715 NW2d 914, 919 (2006)

iii. "[B]usiness interest justifying a restrictive covenant must be greater than merely preventing competition." (e.g., *St Clair Med, PC v Borgiel*, 270 Mich App 260, 266 (2006))

iv. The same reasonableness requirements of MCL 445.774a apply to other non-compete clauses, not between employers and employees. (e.g., *Bristol Window & Door, Inc v Hoogenstyn*, 250 Mich App 478 (2002))

v. In a recent decision reversing the Court of Appeals, the Michigan Supreme Court held that non-competes between businesses are subject to the rule of reason and that any consideration will generally suffice to support such non-competes/non-disclosure agreements. *Innovation Ventures v Liquid Mfg*, 885 NW2d 861 (Mich 2016), *reh'g denied sub nom. Innovation Ventures, LLC v Liquid Mfg, LLC*, 884 NW2d 573 (Mich 2016). The Court held that the proper inquiry when reviewing

a non-compete provision was whether the non-compete provisions constituted unreasonable restraints on trade pursuant to antitrust principles and the "rule of reason." Such inquiry, the Court explained, requires the trial court to determine whether the restraint "merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." For a more in-depth discussion of the case, please see http://connect.michbar.org/businesslaw/enewsletter/sept16.

F. USURPATION OF CORPORATE OPPORTUNITIES

i. Rigorous disclosure requirements: "Except with the full knowledge and consent of his principal, an agent authorized to buy for his principal cannot buy of himself; an agent authorized to sell cannot sell to himself; an agent authorized to buy or sell for his principal cannot buy or sell for himself; nor can an agent take advantage of the knowledge acquired of his principal's business to make profit for himself at his principal's expense." *Stephenson v Golden*, 279 Mich 710, 736 (1937)

ii. *Prod Finishing Corp v Shields*, 158 Mich App 479, 485; 405 NW2d 171, 174 (1987):

> It is widely recognized that the appropriation of a corporate opportunity by an officer or director will constitute an actionable breach of fiduciary duties:
>
> A corporate officer or director is under a fiduciary obligation not to divert a corporate business opportunity for his own personal gain.
>
> **The rule is that** if there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake which is, from its nature, in the line of the corporation's business and is of practical advantage to it, and which is one in which the corporation has an interest or a reasonable expectancy, and if, by embracing the opportunity, the self interest of the officer or director will be brought into conflict with that of this corporation, the law will not permit him to seize the opportunity for himself. If he does, the corporation may claim the benefit of the transaction.

iii. Defendant may be required to disgorge profits earned from opportunity pursued while under a duty to corporate plaintiff. (e.g., *Central Cartage Co v Fewless*, 232 Mich App 517, 535 (1999))

iv. Absent full disclosure, defendant can be liable even if usurped opportunity may never have been available to the corporation to begin with. (e.g., *Production Finishing Corp v Shields*, 158 Mich App 479 (1987)).

v. *See Emmet v Del Franco*, 2017 WL 697049, at *10 (ED Mich Feb 22, 2017) ("Here, Plaintiff has alleged that the Defendants have misused their collective power over the corporation's affairs to enrich themselves at the expense of the corporation and Plaintiff by funneling corporate funds to the Defendants to support their lavish lifestyles. As such, contrary to Defendants' argument, Plaintiff has stated sufficient allegations to put them on notice that Plaintiff is asserting a direct claim on his own behalf, which he has a statutory right to do under Michigan law.").

vi. **Note:** Governing documents might waive or modify the corporate opportunity doctrine, especially where a party is infusing significant capital.

G. INTERESTED TRANSACTIONS

- A shareholder/member may challenge an officer or director's self-interested, unratified transactions.

- A transaction involving an interested officer or director shall not be set aside or give rise to an award of damages if the person interested in the transaction establishes that the transaction was fair, the transaction was approved by independent directors upon disclosure of all material facts, or the transaction was approved by the shareholders upon disclosure of all material facts. (MCL 450.1545a)

- "Michigan requires that the interested person demonstrate that the transaction was validated in one of the ways permitted by statute." (e.g., *Camden v Kaufman*, 240 Mich App 389, 398 (2000)); *Bromley v Bromley*, 2006 WL 2861875, at *6 (ED Mich Oct 4, 2006) (majority shareholder caused company to "expend exorbitant amounts of money in transactions to which he had an interest.").

- "[I]n situations where directors themselves engage in direct dealings with the corporation, it becomes their burden to prove that the transaction was fair and reasonable." (e.g., *Christner v Anderson, Nietzke & Co*, 156 Mich App 330, 340 (1986) (rev'd in part on other grounds))

H. FRAUD BY OMISSION

i. A fiduciary is obligated to disclose to his principal all material information relating to the company's affairs. (e.g. *Production Finishing Corp v Shields*, 158 Mich App 479, 489 (Mich App 1987))

ii. A director has an "obligation to make full disclosure to the corporation/ shareholders of information the director knows or should know is relevant to the affairs of the corporation, and which the director knows or should know

the corporation/shareholders would desire to have. This duty may be breached by intentionally concealing information, as where a director engages in self-dealing and conceals the relevant information from the corporation[.]" (e.g., *Pinnacle Express, Inc v Trout*, 2002 WL 1547540, at*3 (Mich Cir Ct 2002))

I. CONVERSION

i. This claim arises out of defendant's wrongful exercise of dominion and control over specific funds, such as improperly diverting funds of plaintiff

ii. Statutory

1. A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees (MCL 600.2919a):

   a. Another person's stealing or embezzling property or converting property to the such person's own use.

   b. Another person's buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted.

2. Treble damages may be awarded against defendants who removed money belonging to plaintiff from a joint bank account and claimed they were entitled to the money as reimbursement for expenses that the plaintiff had agreed to reimburse. (e.g., *Burg v Burg*, 2009 WL 2951282 (Mich Ct App Sept 15, 2009))

iii. Common law

1. Common law conversion "consists of any 'distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein.' "*Agricultural Dep't. v Appletree Mktg,* 485 Mich 1, 13–14, 779 NW2d 237 (2010), quoting *Foremost Ins Co v Allstate Ins Co,* 439 Mich 378, 391, 486 NW2d 600 (1992).

2. One can sue for the conversion of funds that were delivered to the defendant for a specified purpose, but that the defendant diverted to his or her own use. (e.g., *Tooling Mfg & Techs. Ass'n v Tyler*, 2010 WL 5383529 (Mich Ct App, December 28, 2010)

3. Improperly using property that one is duty-bound to not use for his own

purposes constitutes conversion. (e.g., *BF Farnell Co v Monahan*, 377 Mich 552 (1966))

J. UNJUST ENRICHMENT / QUANTUM MERUIT

i. This claim arises out of the defendant's retention of a benefit at a shareholder's expense, without compensation to the shareholder, including, e.g., years of uncompensated professional services rendered by the shareholder.

ii. Contract is implied by law to prevent unjust enrichment and to prevent retention of a benefit conferred by another without compensation. (e.g., *Barber v SMH (US) Inc*, 202 Mich App 366 (1993))

iii. However, Courts might dismiss claims for unjust enrichment and quantum meruit if an express contract exists concerning the same subject matter. *See e.g., Carey v Foley & Lardner, LLP*, 2016 WL 4203435 (MI Ct App, Aug 9, 2016) ("Plaintiff's claim for unjust enrichment should have been dismissed based on the existence of an express contract concerning the same subject matter…The parties' partnership agreement and the relevant compensation provisions constitute an express contract within the meaning of this rule."); *Wisner v SB Indiana LLC*, 2017 WL 540107 (Mich Ct App, February 9, 2017) ("Nor could there have been unjust enrichment or quantum meruit if the parties' were governed by the operating agreements.").

K. VIOLATION OF MICHIGAN UNIFORM TRADE SECRETS ACT

i. Definition of "trade secret": Trade secret means "information, including a formula, pattern, compilation, program, device, method, technique, or process, that is both of the following: (*i*) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use. (*ii*) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." MCL 445.1902(d).

ii. Attorney fees. "If a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or willful and malicious misappropriation exists, the court may award reasonable attorney's fees to the prevailing party." MCL 445.1905.

L. BREACH OF RESTRICTIVE COVENANTS BY PLAINTIFF

i. Breach of Non-Compete
ii. Breach of Non-Disclosure (business proprietary information)

iii. Breach of Non-Solicitation (customers and employees)

III. ACCESS TO INFORMATION

When relationships among shareholders or members begin to deteriorate, access to information often becomes an issue – and, in situations where controlling shareholders/members are able to dominate, non-controlling shareholders/members may never have adequate access to begin with.

A. Statutory rights

Both the BCA and the LLC Act provide that shareholders/members have the right to access and review certain financial information.

i. MCL 450.1487 – gives shareholders right to inspect the corporation's stock ledger, list of shareholders, and other books and records upon written request and identification of a "proper purpose."

ii. MCL 450.4503 and MCL 450.4213 – give members right, upon "reasonable written request," to inspect the company's list of members and managers, articles of organization and amendments, past three years' tax returns and financial statements, operating agreements, records evidencing members' shares of distributions and voting rights, and such other books and records "as is just and reasonable."

iii. MCL 450.4503(5) also provides that, upon reasonable request, "a member may obtain true and full information regarding the current state of a limited liability company's financial condition," and gives members the right to demand a "formal accounting of a limited liability company's affairs, as provided in an operating agreement or whenever circumstances render it just and reasonable."

B. Documents available on written request

Shareholders and members may obtain, on written request, the following documents:

i. Shareholders may obtain a balance sheet, income statement, and cash flow statement (if prepared) as of year-end for the preceding fiscal year. MCL 450.1487(1).

ii. Members may obtain the most recent annual financial statement, tax returns, and other returns or filings submitted to a taxing authority for the most recent fiscal year. MCL 450.4503(1).

C. Justifying Shareholder/Member requests to review books and records

i. "Proper Purpose" requirement – in Michigan, a "proper purpose" is one that is in good faith, seeks information bearing upon protection of the shareholder's interest and that of other shareholders, and is not contrary to the corporation's interests. *North Oakland County Bd of Realtors v Realcomp, Inc*, 226 Mich App 54, 59 (1997). Some examples include:

   a. Raising doubts whether corporate affairs had been properly conducted by directors or management – *Woodworth v Old Second Nat'l Bank*, 154 Mich 459, 466 (1908).
   b. Seeking election to board of directors – *George v Int'l Breweries, Inc*, 1 Mich App 129, 133 (1965).

ii. "Reasonable Request" requirement – Michigan courts have not directly addressed the issue of when a request to review LLC documents is, or is not, "reasonable" as required under the statute.

   a. Michigan courts have rejected requests for a formal accounting where, for example, the record contradicted the plaintiff's assertion that information and records were withheld from him – *Goldberg v First Holding Management Co*, No. 325960, 2016 WL 3429851 at *15 (Mich App June 21, 2016); *cf BSA Mull, LLC v Garfield Inv Co*, No. 310989, 2014 WL 4854306 at *6 (Mich App Sept 30, 2014) (Court referenced MCL 450.4503(5) in ruling that accounting may be appropriate even in the absence of oppressive conduct).

D. Reasonably accommodating information requests

The company must reasonably accommodate a shareholder/member's information request, but the inspection right is not unlimited. MCL 450.1487 and 450.4503 provide that:

a. The company can require inspection take place during business hours
b. The shareholder/member may send an agent to inspect the records
   1. The agent must have a power of attorney or other written authorization
   2. LLCs may limit production of records that the company is required to maintain under MCL 450.4213 to the location where the records are kept
c. The shareholder/member may make copies of records
   3. The shareholder/member must bear the cost of copying
d. The court may order the company to produce records on such terms (and with such limitations) as the court deems appropriate

E. Director access to records

Corporate directors must be given access to records in order to allow them to properly fulfill their responsibilities. MCL 450.1487(4).

F. Award of costs

If a court orders that the company provide access to records, "it shall also order the corporation to pay the shareholder's or director's costs, including reasonable attorney fees," unless the corporation proves that it acted in good faith because it had a reasonable basis to doubt the requesting party's right to inspect the records demanded. MCL 450.1487(5).

IV. RECENT CASE LAW

In ***Blankenship v Superior Controls, Inc*****,** 2015 WL 5768525 (ED Mich Sept 30, 2015), the Eastern District of Michigan found that the failure to declare dividends was oppressive, and was not protected by the business judgment rule, because (1) the company was financially able to distribute profits without detriment to the business, and (2) failure to declare dividends affected the plaintiff disproportionately. *Id.* at *9. Notably, the *Blankenship* court performed the same analysis for the plaintiff's breach of fiduciary duty claim as it did for the § 1489 claim, citing to *Bromley* and *Estes*. *Id.* at *8. It also found that the defendants had breached the parties' shareholder agreement. *Id.* at *1. *Cf. Wolding v Clark*, 563 Fed Appx 444, 454 (CA 6, 2014) (dismissing minority shareholder cause of action for corporation's failure to pay dividends where minority shareholder could not show that the corporation's decision not to pay dividends was made fraudulently or in bad faith).

In ***Madugula v Taub***, 496 Mich 685 (2014), the Michigan Supreme Court held that "the plain language of § 489 does not afford a claimant a right to a jury trial and, instead, expresses a legislative intent to have shareholder-oppression claims heard by a court of equity." *Id.* In other words, a claim brought pursuant to MCL 450.1489 or MCL 450.4515 ***must be heard by the court in a bench trial.*** All remedies under those sections, including damages, will be tried to a judge, not a jury. Nevertheless, oppression lawsuits often include other claims, such as breach of contract, conversion, breach of fiduciary duty, and fraud. There may a right to a jury trial on some or all of those claims.

The Court further held in *Madugula* that "violations of a shareholder agreement may constitute evidence of shareholder oppression" pursuant to MCL 450.1489:

> The BCA also allows shareholders to enter into voting agreements and shareholder agreements. Through a voting agreement, shareholders may agree to modify how the shares held by them are voted. Through a shareholder agreement, shareholders are able to modify several of the statutory rights and interests. A shareholder agreement, if it complies with the requirements of MCL 450.1488, 'is effective

> among the shareholders and the corporation....' Thus, although the BCA provides specific rights and interests to a shareholder as a shareholder, shareholders are entitled to modify these rights and interests through shareholder agreements.

In 2017, the Michigan Supreme Court held in ***Frank v Linkner***, 500 Mich 133 (2017) that a members' action for member oppression accrued when the LLC amended its operating agreement to subordinate the members' shares, rather than when the LLC sold substantially all of its assets and the members received nothing for their shares from that sale. The Court explained that the Court of Appeals erred when it focused "on the availability of monetary damages, rather than on when plaintiffs incurred harm." *Id.* at 586. "Once a plaintiff proves that a manager engaged in an action or series of actions that substantially interfered with his or her interests as a member, the harm has been incurred, and therefore the claim has accrued…[T]his is true regardless of the time when monetary damages result." *Id.* In *Linkner,* the Court held that time for bringing suit in MCL 450.4515 is a statute of limitation, rather than a statute of repose, and can be tolled by such principles as fraudulent concealment. (Although not directly discussed in *Linkner*, the Court's discussion of accrual and statute of limitations almost certainly also applies to MCL 450.1489 and breach of fiduciary duty claims.)

In ***Holland v Kraatz,*** unpublished per curiam opinion of the Court of Appeals issued March 13, 2018 (Docket No 336808), the Court of Appeals applied *Linkner* to the plaintiff's claim for fraud and breach of fiduciary duty against a financial/investment advisor. Applying *Linkner*, the Court held that the harm actually occurred in 2004: "Actionable harm as a result of defendant's purported improper acts and omissions occurred when Laurena purchased units in LEAF I, and the claims accrued at that time." *Id.* at 4. The Court cited *Linkner*'s ruling that, "this is true regardless of the time when monetary damages result…Thus, even if plaintiff did not incur a calculable financial injury until 2012, her causes of action still accrued upon Laurena's purchase of an unsuitable investment procured by intentional or fraudulent misrepresentations and material omissions." *Id.* "Accordingly, plaintiff's claims are barred."

In ***Kenney v Boss***, unpublished per curiam opinion of the Court of Appeals issued July 18, 2017 (Docket No 331905), the Court held that the trial court did not err when it allowed extrinsic evidence to interpret the company's obligations under its operating agreement, even though the agreement contained an integration clause, because two terms material to the plaintiffs' claims were not defined in the agreement and were susceptible to more than one interpretation.

In ***Altobelli v Harmann***, 499 Mich 284 (2016), the Michigan Supreme Court considered whether an arbitration provision in an operating agreement signed by the plaintiff and his former law firm applied to principals/members of the law firm who had not signed the agreement. The Court first considered general principles of agency; specifically, that the acts of officers and agents of a corporation are the acts of the corporation. In *Altobelli*, the operating agreement's explicit language provided the defendants (managing directors, the CEO, and the head of the firm's litigation group) with complete power and responsibility for managing the affairs of the firm. Because it is "axiomatic that the Firm cannot act on its own…and because these particular defendants are clearly endowed with agency authority to administer the Firm's affairs," the Court

held that the individually named defendants were included within the meaning of "the Firm" in the arbitration clause. *See* http://connect.michbar.org/businesslaw/enewsletter/sept132016

In ***Morris v Bales***, 2017 WL 5759787 (Mich Ct App Nov 28, 2017), the Court of Appeals considered claims for minority member oppression and breach of contract. Specifically, the plaintiff challenged the company's failure to pay distributions to Class A unitholders as oppressive and as a breach of the company's operating agreement and alleged that the defendants redirected company revenue to themselves by payment of salary and backpay. *Id.* at *1. The Court held that the issues of salary and backpay fell under the operating agreement's definition of "cash flow" and that there was evidence the plaintiff had agreed to the salary. Further, the plaintiff had not complained about other employees receiving backpay. Lastly, the company's accountant recommended against making non-tax distributions to Class A unitholders because of insufficient cash flow. As such, the Court agreed with the trial court's conclusion that there was no genuine issue of material fact regarding whether legitimate business expenses precluded distributions to plaintiff and warranted summary disposition of the member oppression claim.

V. PAYMENT OF ATTORNEY FEES BY CONTROL GROUP

In shareholder disputes, the control group tends to use company funds to retain counsel – sometimes ostensibly for "the company," other times acknowledged as personal counsel. Michigan law allows this under certain circumstances, but not in every circumstance.

A. **Contractual Right to Indemnification** – it is common for Articles of Incorporation/Organization, Bylaws, Operating Agreements, and Shareholder Agreements to include provisions that allow for indemnification of directors, officers, managers, and sometimes employees and shareholders/members, from and against liability and legal expenses.

   i. The language in these clauses can vary considerably, and they do not always allow the company to advance legal fees for defense costs.

   ii. Indemnified parties that do receive advances of costs may be obliged to repay those costs depending on the outcome of the litigation.

B. **Unauthorized use of company funds for personal expenses** – if no indemnification rights apply, or if the party using company funds fails to strictly comply with contractual requirements, that party may be liable for unauthorized use of company funds. See, e.g., *Salvadore v Connor*, 87 Mich App 664, 676 (1978) (defendant liable for improper diversion of corporate funds, including, *inter alia*, payment of corporate funds for unauthorized legal fees).

VI. SOME DEFENSES AND COUNTERCLAIMS TO SHAREHOLDER SUITS

A. BUSINESS JUDGMENT RULE

1. "In the absence of bad faith or fraud, a court should not substitute its judgment for that of corporate directors concerning dividend policies. A court should be most reluctant to interfere with the business judgment and discretion of directors in the conduct of corporate affairs. However, when a board's refusal to declare a dividend constitutes a breach of its fiduciary duty to the shareholders, this amounts to a breach of trust and is ground for court intervention." *In re Butterfield*, 418 Mich 241, 255, 342 NW2d 453, 458-459 (1983). See also Schulman, Michigan Corporation Law & Practice, pp. 5-26 and 5-27.

2. Is the alleged breach an exercise of the defendants' business judgment?

3. Business Judgment Rule affords fiduciary a presumption that he or she (i) acted in good faith, (ii) on an informed basis, and (iii) in the honest belief that their actions were in the best interests of the company.

4. Mere errors in judgment in and of themselves do not create liability, even if negligent.

5. Business Judgment Rule can be rebutted by showing fraud, bad faith, or gross negligence.

6. Business Judgment Rule does not apply to self-dealing or self-interested transactions.
7. Applies to directors
    a. Courts may or may not apply Business Judgment Rule to officers
        i. Specific discussion of officer application in Delaware case law is sparse – but Delaware does hold that directors and officers have same fiduciary duties
        ii. New York courts hold that the rule applies to both directors and officers – *In re Kenneth Cole Productions, Inc.*, 52 N.E.3d 214, 218 (Ct. App. NY 2016)
        iii. California courts have held that BJR does NOT apply to officers – *Gaillard v Natomas Co*, 208 CalApp3d 1250, 1265 (1989)
        iv. Some legal scholars do not believe that the rule applies to officers
    b. Courts may or may not apply the Business Judgment Rule to LLC managers – argument should be raised, but first researched in appropriate jurisdiction

    c. Courts probably would not apply rule to controlling parties acting outside of a director/officer/manager role

B. ACTIONS PERMITTED BY AGREEMENT

i. The acts complained of were permitted by agreement or by a written policy (typically, by shareholder agreement, articles, bylaws, operating agreement, or a consistently applied, written company policy or procedure).

- MCL 450.1489(3) (corporation);
- MCL 450.4515(2) (LLC).
- *See Goldberg v First Holding Management Co,* 2016 WL 3429851 (MI Ct App 2016); *Wisner v SB Indiana LLC,* 2017 WL 540107 (Mich Ct App Feb 9, 2017); *S-S, LLC v Merten Bldng Ltd Partnership*, 2010 WL 4679524 (Mich Ct App November 18, 2010) (no oppression where court determined that defendants' actions were generally consistent with operating agreement);); *Kent Tillman, LLC v Tillman Const Co,* 2006 WL 143289, at *4 (Mich App Jan 19, 2006) (No oppression where neither defendant did anything in violation of the LLC operating agreement).

ii. Operating agreements and shareholder agreements may grant majority shareholders or those in control broad general powers. This broad grant of power does not mean those in control can act oppressively. *Berger v Katz*, 2011 WL 3209217, at *4 (Mich App July 28, 2011)

C. NO OPPRESSION

i. The actions were not "willfully unfair and oppressive." Emphasis added. MCL 450.1489(3) (corporation); MCL 450.4515(2) (LLC).

ii. The actions do not interfere with the interests of a shareholder as a shareholder or with the interests of a member as a member.

iii. Plaintiff is not a shareholder. See MCL 450.1491a (definition of "shareholder" in a derivative proceeding).

D. DOCUMENTS

i. The request for inspection of documents was not submitted for a proper purpose (corporation only), was unreasonable, or otherwise failed to comply with the statutory requirements. MCL 450.1487 (corporation); MCL 450.4503 (LLC). See also MCL 450.4213.

E. STATUTE OF LIMITATIONS

a. Oppression:
   i. MCL 450.1489(1)(f): "An award of damages to the corporation or a shareholder. An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued, or within 2 years after the shareholder discovers or reasonably should have discovered the cause of action under this section, whichever occurs first."
   ii. MCL 450.4515(1)(e): "An award of damages to the limited liability company or to the member. An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued or within 2 years after the member discovers or reasonably should have discovered the cause of action under this section, whichever occurs first."

b. Breach of fiduciary duty: Statute of limitations is three years from accrual of the cause of action or two years from discovery, whichever occurs first. MCL 450.1541a(4) (breach of fiduciary duty by officer or director); MCL 450.4404(6) (breach of fiduciary duty re LLC), 450.4515(1)(e) (oppression re LLC).

c. Various agreements (including employment agreements) may contain their own provisions limiting the time for filing suit.

F. LIMITATION OF LIABILITY

a. MCL 450.1209(c) (corporation);
b. MCL 450.4407 (LLC).
c. See also 450.4216 (indemnification re LLC).
d. **Note:** While it is not uncommon for bylaws, shareholder agreements, operating agreements, and other governing documents to include indemnification provisions, these provisions must be strictly followed, or the court may find a breach of fiduciary duty.

G. NO CONTROL

a. The defendant is not "in control" of the corporation or the LLC. MCL 450.1489(1) (corporation); MCL 450.4515(1) (LLC).

H. UNCLEAN HANDS

a. When analyzing claims for equitable relief, courts may consider the plaintiff's own misconduct in determining what remedy, if any, the plaintiff should receive. This "clean hands" doctrine may preclude the plaintiff from obtaining any recovery, or may result in the application of a discount or setoff.

b. "A party seeking the aid of equity must come in with clean hands. The clean hands doctrine closes the door of equity to a party tainted with inequitableness or bad faith with respect to the matter in which the party seeks relief. The clean hands doctrine is rooted in the historical concept that courts of equity are vehicles for enforcing the requirements of conscience and good faith." *DC Mex Holdings, L.L.C. v Affordable Land, LLC.*, 2015 WL 2090646 (Mich App May 5, 2015). "A party with unclean hands may not assert claims for equitable relief[.]" *Ammori v Nafso*, 2014 WL 308845 (Mich App Jan 28, 2014), *appeal denied,* 852 NW2d 636 (Mich 2014). In other words, "any willful act in regard to the matter in litigation, which would be condemned and pronounced wrongful by honest and fair-minded men, will be sufficient to make the hands of the applicant unclean." *Id.*

c. The clean hands doctrine was a clear subtext to the member oppression analysis in *Junge v Bartles*, 2009 WL 3365842 (Mich App Oct 20, 2009). The Michigan Court of Appeals affirmed the trial court's ruling in which the court found that the defendants oppressed plaintiff under 450.4515 by creating a new business which competed with the company, without plaintiff's knowledge or consent. *Id.* at *1. As a remedy, however, the court awarded plaintiff one-third of the "net book value" of the company rather than a buyout at fair value due to plaintiff's precipitating misconduct. *Id.* at *3. The plaintiff's misconduct included allegedly stealing money from the company, and using the company credit card for improper purposes. *Id.* at *1-2.

I. DERIVATIVE SUITS

a. The shareholder or member failed to comply with statutory standing and demand requirements. MCL 450.1492a, 450.1493a (corporation); MCL 450.4510 (LLC).

J. FRAUD

a. Traditional fraud defenses apply (no reasonable reliance; failure to plead with specificity; proof by clear and convincing evidence; etc.) MCR 2.112(B)(1); M Civ JI 128.01.

VII. COURT APPOINTED EXPERTS AND TECHNICAL ADVISORS

A. Pursuant to Michigan Rule of Evidence 706, a court may appoint an ***expert witness***. Specifically, the court:

> may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

MRE 706(a).

B. Trial courts also have broad discretion to retain ***technical advisors***. *See, e.g., Reilly v United States*, 863 F2d 149, 156 (1st Cir 1988); *Reed v Cleveland Bd of Ed*, 607 F2d 737 (6th Cir 1979).

1. A court's "appointment of a technical advisor, outside of the purview of Rule 706 of the Federal Rules of Evidence, falls within the [court's] inherent authority[.]" *TechSearch, LLC v Intel Corp*, 286 F3d 1360, 1377-78 (Fed Cir 2002).

2. Here, "the Michigan rule [MRE 706] is virtually identical to the federal rule [FRE 706] and, therefore . . . it is appropriate to look to federal cases interpreting the federal rule for guidance." See, e.g., *Matter of Subpoena Duces Tecum to the Wayne Cnty Prosecutor*, 191 Mich App 90, 94 (1991).

C. Whether the court's technical advisor is subject to Michigan Rule of Evidence 706 depends on whether the advisor is a *court expert* or a *court expert witness.* See, e.g., *Reid v Albemarle Corp*, 207 F Supp 2d 499, 507 (MD La 2001) (citing cases) ("In short, the expert appointed by the court was a *court expert* but not a *court expert witness*.").

1. A court-appointed expert ***witness*** (in which the expert witness provides **new** evidence) is subject to MRE 706.

2. The "witness" distinction is important, because it separates an expert who analyzes *existing* evidence for the court (technical advisor – not subject to MRE 706) with an expert who presents *new* evidence to the court (expert witness – subject to MRE 706).

D. Where a court retains an expert to analyze the existing record evidence and provide a report to the court, ***not to present new evidence*** – the expert is a technical advisor and MRE 706 does not apply.

i. Where the judge "asked [the expert] to review materials submitted by the parties in connection with various issues raised by those motions to increase the court's understanding of the technical matters presented," the expert was a technical advisor and thus Rule 706 did not apply. *Hemstreet v Burroughs Corp*, 666 F Supp 1096, 1123-24 (ND Ill 1987) (rev'd on other grounds) (emphasis added).

ii. "Since an advisor, by definition, is called upon to make no findings and to supply no evidence, provisions for depositions, cross-questioning, and the like are inapposite." *Reilly v United States*, 863 F2d 149, 156 (1st Cir 1988).

iii. The expert "is, more accurately, a 'technical advisor' to the Court, because he is not presenting evidence" – even if the Court "posed" questions to him and he issued a "report to the Court." *Gerloff v Hostetter Schneider Realty*, 2014 WL 1099814, at *3 (SDNY Mar 20, 2014) (emphasis added).

iv. Where the expert is appointed to evaluate other experts' opinions, "such a role has been characterized as that of a 'technical adviser' to the court." *Reid v Albemarle Corp*, 207 F Supp 2d 499, 507 (MD La 2001) (citing cases) (emphasis added). Where expert is technical advisor, "depositions are unnecessary" and "[u]nder these circumstances, the court will not grant the motion to depose the court's expert."

v. Where the expert was retained by the court to "prepare an expert report" that includes "evaluations of the expert reports and supporting evidence submitted by the parties," and "may review any pleadings, motions or documents submitted to the Court," he was "a technical advisor." *Pecover v Elec Arts, Inc*, 2012 WL 1029531, at *3-4 (ND Cal Mar 26, 2012) (emphasis added). "As such, the provisions in Rule 706 for depositions and questioning of expert witnesses will be inapplicable to [him]."

vi. "A district court judge has inherent authority to appoint a technical advisor where the trial court is faced with problems of unusual difficulty, sophistication, and complexity provided that the judge deems it desirable and necessary. Unlike a court-appointed expert, a technical adviser provides assistance privately outside of the hearing of the parties, and [is] not subject to cross-examination….The essence of a technical advisor's engagement requires that the judge and the advisor be able to communicate informally, in a frank and open fashion…It is well settled that Federal Rules of Civil Procedure 706…does not govern a technical advisor's appointment. *Comcast Cable Communications, LLC v Spring Communications Company, LP*, 2014 WL 1329063 (ED Pa 2014) (internal citations omitted)(emphasis added).

E. Even where a court has initially identified a person as an expert pursuant to Rule 706, if the functional reality is that the person is a technical advisor, it is that reality that controls. *See Reed v Cleveland Bd of Ed*, 607 F2d 737 (6th Cir 1979) (Sixth Circuit held that even though the district court had cited to Rule 706 when it appointed two experts, in reality the two individuals were not expert *witnesses*, and were actually advisors or consultants); *Gerloff v Hostetter Schneider Realty*, 2014 WL 1099814, at *3 (SDNY Mar 20, 2014). *See also In re Joint E & S Districts Asbestos Litig*, 151 FRD 540, 544 (EDNY 1993) ("The requirement for formal depositions of Rule 706 experts has not been literally enforced. Where the expert appointed under Rule 706 does not testify at trial the expert's role has been characterized as that of "technical advisor" to the court and depositions have not been required."); *Renaud v Martin Marietta Corp, Inc*, 972 F2d 304, 308 (10th Cir 1992) ("Plaintiffs contend that the District Court erroneously denied them the right to take Dr. Pavlik's deposition. In this case, however, the experts were, as observed above, more technical advisors to the Court than expert witnesses as contemplated by Fed R Evid 706, and accordingly depositions and cross-examination were inappropriate.") (emphasis added); *Hemstreet v Burroughs Corp,* 666 F Supp 1096, 1124 (ND Ill 1987), *rev'd on other grounds*, 861 F2d 728 (Fed Cir 1988).

VIII. DISCOVERY ISSUES IN A SHAREHOLDER DISPUTE

A. Electronic Discovery

a. Electronic discovery is an important issue, but it can be abused. Electronically stored information must be preserved. Email communications are often critical – if parties are on notice as to impending litigation and delete emails or text messages, sanctions are appropriate.

b. Court may also compel inspection and copying of a hard drive or cellular phone. *See Quotient, Inc v Toon*, 2005 WL 4006493 (Md Cir Ct Dec 23, 2005) ("This Court is persuaded from the evidence before it that there is a substantial probability that evidence in the form of deleted or undeleted e-mails, IMs, and/or other files that are relevant to this case could be made less accessible to the parties merely by [the defendant's] normal course of computer use, regardless of his intentions and motive."); *Firestone v Hawker Beechcraft Int'l Serv. Co.*, 2012 WL 899270 (D Kan Mar 16, 2012)(court ordered forensic analysis of a number of the plaintiff-former employee's flash drives based on evidence that he had removed confidential and proprietary information from the employer's computer system prior his termination)

c. The Eastern District of Michigan provides a "Model Order Relating to the Discovery of Electronically Stored Information (ESI"). The Order can be found: https://www.mied.uscourts.gov/PDFFIles/ModelESIDiscoveryOrderAndRule26fChecklist.pdf

B. **Proposed Discovery Rules:** On March 10, 2018, the State Bar of Michigan Civil Discovery Court Rule Review Special Committee released its Representative Assembly Proposal. The Proposal provides a series of proposed amendments to the Michigan Civil Discovery Rules, which seek to improve the civil discovery process. The recommended changes include:

- Requiring parties, counsel, and the court to take the dictates of MCR 1.105 seriously. MCR 1.105 provides that the rules be construed, administered, and employed by the court and the parties to secure the just, speedy, and economical determination of every action.
- Adopting a proportionality standard in MCR 2.302(B) to determine the appropriate scope of discovery.
- Adopting modest initial disclosure requirements and limits on interrogatories.
- Encouraging early and regular judicial case management and providing judges additional tools to proactively address problem areas.

a. Specific *proposed* changes include:

i. **Rule 1.105** – Construction: Amended to read: "These rules are to be construed, **administered, and employed by the parties and the court to** secure the just, speedy, and economical…."

ii. **Rule 2.301** – Timing of Discovery**:**

1. **2.301(A)** added: "(A) Availability of Discovery. (1) In a case where initial disclosures are required, a party may seek discovery only after the party serves its initial disclosures…"
2. **2.301(C)** added: "(C) Course of Discovery. The court may control the scope, order and amount of discovery as provided in these rules."

i. **Rule 2.302** Duty to Disclose; General Rules Governing Discovery

1. Section 2.302(A) is added to the Rule in order to mandate certain initial disclosures.
2. **2.302(A)(1)** *In General.* "Except as exempted by these rules, stipulation, or court order, a party must, without awaiting a discovery request, provide to the other parties….
3. **2.302(A)(1)(a) – (h)** set forth specific required initial disclosures.
4. **2.302(A)(4)(a) – (j)** sets forth specific cases which are exempt from initial disclosures
5. **2.302(A)(5)** – Time for Initial Disclosures
    a. 2.302(A)(5)(b)(i): "A party that files a complaint, counter-claim, cross-claim, or third-party complaint must serve its

initial disclosures **within 14 days after** any opposing party files an answer to that pleading."

b. 2.302(A)(5)(b)(ii): "A party answering a complaint, counterclaim, cross-claim, or third-party complaint must serve its initial disclosures **within the later of 14 days** after the opposing party's disclosures are due or 28 days after the party files its answer."

6. **PROPORTIONALITY - Rule 2.302(B)(1)** is amended to provide a more precise and narrower definition for the scope of discovery:

> Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case, taking into account all pertinent factors, including whether the burden or expense of the proposed discovery outweighs its likely benefit, the complexity of the case, the importance of the issues at stake in the action, the amount in controversy, and the parties' resources and access to relevant information. Information within the scope of discovery need not be admissible in evidence to be discoverable.

7. **Rule 2.302(B)(4)** is amended to clarify that MCR 2.302(B)(3)(a) protects drafts of any interrogatory answers required under 2.302(B)(4)(a)(i), and protects certain communications between the party's attorney and any expert witness.

8. **Rule 2.302(B)(6)** is amended to clarify that "the court may specify conditions for the discovery [of ESI]." Additionally, "the court may limit the frequency or extent of discovery of ESI, whether or not the ESI is from a source that is reasonably accessible, taking in to consideration whether it is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive…"

ii. **Rule 2.306** is amended to provide that "Each separately represented party may take no more than a total of **ten depositions**…" 2.306(A)(3). Further, "a deposition may not exceed **one day of seven hours**." 2.306(A)(4). These changes apply to all witnesses, both fact witnesses and expert witnesses. These limits can be changed by stipulation or order.

iii. **Rule 2.309** is amended to provide that "Each separately represented party may serve **no more than twenty interrogatories** upon each separately represented party. An interrogatory containing discrete subparts counts as a

single interrogatory." *The presumptive limit of twenty interrogatories is less than the limit provided in the Federal Rules of Civil Procedure, Rule 33.*

iv. **Rule 2.312** is amended to clarify that, the "request must clearly identify in the caption and before each request that is a Request for Admission.

v. **Rule 2.313(A)(5)** is amended to provide that the court may award expenses if the disclosure or requested discovery is provided after a motion to compel is filed. The court must provide an opportunity for a hearing before expenses are awarded.

vi. **Rule 2.313(C)(1)** is a new section setting forth sanctions for failing to provide disclosures required by MCR 2.302. A party who does not provide required information or identify a witness is not allowed to use the information or witness at trial, unless the failure to provide was "substantially justified" or "harmless". In addition, or instead of this sanction, the court may order payment of expenses, inform the jury of the failure, or award other appropriate sanctions.

vii. **Rule 2.313(E)** rewrites the current rule regarding failure to preserve electronically stored information. The proposed new version provides for sanctions if ESI is lost because a party failed to "take reasonable steps to preserve it". The rule also provides for more severe sanctions if the court finds "intent to deprive another party of the information used in the litigation".

viii. **Rule 2.401(B)** is expanded to include a number of additional issues that the court may address at an Early Scheduling Conference.

ix. **Rule 2.401(C)** is entitled Discovery Planning and is new. This rule provides that upon "court order or written request by another party", the parties must confer among themselves and prepare a proposed discovery plan. The rule goes on to set forth what is required in the plan.

x. **Rule 2.401 (H)(2)** is a new rule which provides for the scheduling of a final pretrial conference "to formulate a trial plan".

xi. **Rule 2.401(J)** is a new rule which provides for an Electronically Stored Information (ESI) Conference, Plan, and Order. The conference can take place by agreement or by court order where a case is "reasonably likely to include the discovery of ESI". The rule lists many issues to be considered at the ESI conference.

xii. **Rule 2.411(H)** is new and provides for the mediation of discovery disputes by stipulation or by court order.

IX. ADR: MEDIATION, CASE EVALUATION

When it comes to alternative dispute resolution, one size does not fit all. In other words, one method of ADR may be more or less effective than another depending on the case. For example, some parties find that a hybrid of "mediation-arbitration" ("med/arb") works best for them. Another option is a "mediator's number." Parties can and should get creative and find an ADR method that works for them.

A. MEDIATION

1. In some cases, an early mediation—perhaps even before the mandatory disclosures or the early court conference—is helpful.
    a. The longer the litigation, the more the parties are divided, and the more money is spent.
    b. Constructive business solutions become more difficult over time.

2. Issues to consider:
    a. Who should attend? Invite spouses? Invite corporate CPA?
    b. How much discovery is needed for a meaningful mediation?
    c. Judges are not permitted to recommend mediators unless requested by the parties. MCR 2.411(B)(4) and MCR 3.216(E)(4): "The court shall not appoint, recommend, direct, or otherwise influence a party's or attorney's selection of a mediator excepts as provided pursuant to this rule. The court may recommend or advise parties on the selection of a mediator only upon request of all parties by stipulation in writing or orally on the record."
    d. Use mediator for discovery issues?

3. For an early mediation to succeed, the parties should consider stipulating to a standstill agreement or other order governing how important matters involving the business will be handled.

    a. Issues to address: The parties should agree how the business will be managed during the mediation period and what the rights and responsibilities of the parties will be during that time.

    b. Suggested provisions for standstill order (subject to subsequent court order). Some may or may not apply, depending on the nature of the dispute and on the pre-existing agreements between the parties.

        1. No changes to:

a. Compensation for parties
b. How monies are disbursed or invested
c. Methods of accounting and bookkeeping
d. Methods of payment to vendors and payment on other accounts payable
e. Those approved to sign checks at given amounts
f. Professional advisors
g. Location of main and branch offices
h. Pricing to customers or clients; methods of bidding projects
i. Line of business
j. Clients and customers
k. Suppliers
l. Vendors

2. No transactions outside the ordinary course of business, including:
   a. Borrowing
   b. Transfers of money or other property between affiliated companies
   c. Purchasing, selling, or mortgaging assets
   d. Hiring or firing (or promotion or demotion) of employees
   e. Removal of officers, directors, or managers
   f. Future distributions or bonuses
   g. Issuance, redemption, or cross-purchase of shares or membership interests
   h. Amendments to bylaws, shareholder agreement, or to operating agreement
3. Reinstatement of a party to position as officer, director, manager, or employee
4. Management decisions outside the ordinary course of business to be conducted in the presence of all parties
5. Agreed access by shareholders or members to company books and records
6. Agreement on how shareholder or member loans will be repaid
7. Restoring distributions that were not proportionate to equity interests or that were not otherwise permitted by agreement
8. Retention of all documents (whether hard-copy or electronic) by the company and by the principals themselves.
9. Agreed notice period before any party takes any action in the lawsuit, including serving discovery, filing motions, etc.
10. Confidentiality. Unless required by existing agreements, the parties will not disclose even existence of the dispute to customers, clients, vendors, lenders, etc.
11. Accounting for disputed transactions.
12. Modification. Any of the above may be modified only by unanimous (or agreed supermajority), written consent.

B. CASE EVALUATION

1. Consider special panels for shareholder cases: business litigation experts instead of general practitioners

2. Mediation should occur ***before*** case evaluation, if it occurs at all.

C. 2018 SCAO STUDY REGARDING ADR: Mediation v. Case Evaluation

In 2018, the State Court Administrative Office (SCAO) contracted with Courtland Consulting to conduct a follow-up study to replicate portions of an ADR study conducted for SCAO in 2011. "The purposes of the follow-up study were to 1) examine the efficacy of case evaluation and mediation in resolving civil cases and 2) assess current attitudes and opinions of attorneys, circuit court judges, and court administrators regarding case evaluation and mediation." *2018 ADR Study,* p 4.

Major Findings: (all information taken from 2018 ADR Study, linked below)

1. Cases that used either case evaluation or mediation had high rates of disposition through settlement/consent judgment—upwards of 80% when used individually or in combination.

2. Using mediation had little or no effect on length of time to dispose of a case when compared to cases that did not use ADR.

3. The use of case evaluation, when compared to mediation, increased the amount of time to disposition by an average of 3 to 4 months.

4. Mediation provided a more direct means of achieving a disposition as two-thirds of the cases that were mediated it settled at the mediation.

5. In only 15% of the cases in which case evaluation was held did the parties accept the award amount and settle quickly, and many of the remaining cases were later disposed through mediation.

6. About two-thirds of both judges and attorneys said that mediation is used more often for civil cases than it was five years ago, (increased use of mediation as was recommended by the 2011 report.) However, most judges said they continue to order case evaluation as often as before.

7. Both judges and attorneys rated mediation as a more effective method of resolving cases than case evaluation, just as they did in 2011. Both groups rated mediators' expertise more highly than they did that of the case evaluation panelists.

8. As in the earlier study, judges continue to hold a more positive view of case evaluation than attorneys do.

9. But there were some signs of weakening support for case evaluation, especially among judges.

Link to study:
http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/2018%20Mediation%20and%20Case%20Evaluation%20Study.pdf

X. UPDATES TO THE BUSINESS COURT STATUTE

Michigan's business court statute, Public Act 333 of 2012, was amended in 2017 in two important ways. First, Mich. Comp. L. § 600.8031 was amended to clarify the types of suits which constitute a "business or commercial dispute" for purposes of business court jurisdiction. Business court jurisdiction now expressly **excludes:** supplementary hearings regarding proceedings to enforce judgments of any kind (MCL § 600.8031(3)(i)); construction and condominium lien foreclosure matters (MCL § 600.8031(3)(k)); actions involving enforcement of condominium and homeowners' governing documents (MCL § 600.8031(3)(k)); all motor vehicle insurance coverage disputes (this excludes declaratory judgment actions between insurers in PIP cases) ; and certain sections of Michigan's Revised Probate Code.

The second amendment to the business court statute was to Mich. Comp. L. § 600.8035, and also clarified the jurisdictional requirements for the business court. Section 8035 now provides business court jurisdiction for "business and commercial disputes in which equitable or declaratory relief is sought," or for actions that otherwise meet the jurisdictional requirements of the circuit court. MCL § 600.8035(1). Prior to the amendment, business court jurisdiction was limited to amounts in controversy exceeding $25,000. With the amendment, suits seeking only declaratory or injunctive relief now fall within the jurisdiction of the business courts.

XI. OTHER RESOURCES FOR BUSINESS COURT JUDGES

A. The Michigan Business Law Journal now contains a regular column on business courts (Touring the Business Courts with Douglas L. Toering). If any Business Court Judge has anything he or she would like to share with the readers, this would be a good place to do it. https://higherlogicdownload.s3.amazonaws.com/MICHBAR/ebd9d274-5344-4c99-8e26-d13f998c7236/UploadedImages/pdfs/journal/Fall17.pdf

B. SCAO's resources on business courts (including decisions by other Business Court Judges): http://courts.mi.gov/administration/admin/op/business-courts/pages/business-courts.aspx

C. The ABA's Business Law Section publishes an annual survey of Developments in Business and Corporate Litigation. This includes a section on business courts. Michigan has had a section on its business courts for the past five or so years: https://shop.americanbar.org/eBus/Store/ProductDetails.aspx?productId=312888980&sortby=Date+(DESC)&perpage=36

D. The SBM's Business Law Section sponsors a Business Law Institute every October: http://www.icle.org/modules/store/seminars/schedule.aspx?PRODUCT_CODE=2018CI1110

E. The SBM's Business Law Section has a Business Courts Committee. Any Business Court Judge may pass along suggestions to the Committee. http://connect.michbar.org/businesslaw/council/committees/businesscourt

EXHIBIT 1

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Mantese Honigman, PC

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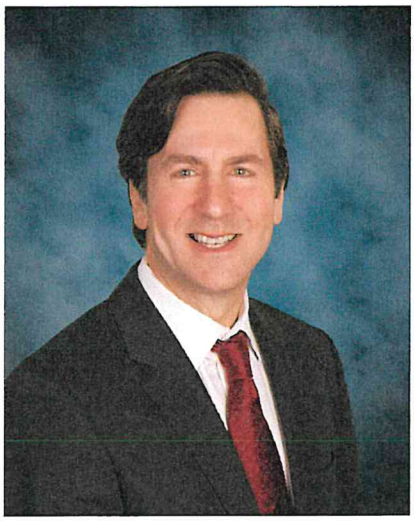

CEO and Principal, Mantese Honigman, PC, 1994-present. Gerard Mantese has concentrated his career on business law issues, including shareholder and member disputes, oppression, fiduciary duties, real estate, and business contracts. He argued the only two shareholder or member oppression cases ever accepted for review by the Michigan Supreme Court – *Madugula v. Taub,* 496 Mich. 685 (2014) and *Frank v. Linkner,* 500 Mich. 133 (2017). In addition to handling a wide variety of business litigation in Michigan and in other states, Mr. Mantese has published and authored extensively on business law issues.

Associate, then Partner, Honigman Miller Schwartz and Cohn, 1982-1994

- Elected as one of the youngest senior partners in firm history.
- Handled a wide array of complex business and health care litigation.

Adjunct Professor, Pretrial Practice, 1993-1997, Wayne State University Law School and Trial Practice, 1991-1993, University of Detroit Mercy, School of Law

- Taught strategies of motion practice, discovery, negotiations, trial preparation and trial.

AWARDS AND RECOGNITIONS

Recipient, Roberts P. Hudson Award, 2017

- The State Bar of Michigan's highest award, conferred to commend lawyers "for their unselfish rendering of outstanding and unique service to and on behalf of the State Bar of Michigan, the legal profession, and public."

Champion of Justice Award, State Bar of Michigan, 2010

- Recognized for pro bono legal work for a women's shelter and for children with autism, and for obtaining successful rulings in seminal cases that provided insurance coverage for Applied Behavior Analysis (ABA) therapy, which offered autistic children and their families the opportunity to live fuller lives and the ability to participate in mainstream society. See, e.g., *Potter v. Blue Cross,* USDC EDMI, Case No. 10-14981 (2010).

AV Martindale-Hubbell Peer Review Rating, 1996-2018

- Earned the highest rating for legal ability and ethical standards over the last two decades.

21st Century Innovator

- Recognized by Lawyer's Weekly (2009).

Leader in the Law

- Recognized by Lawyer's Weekly (2009).

Outstanding Young Lawyer of the Year

- Selected by The Young Lawyers Section of the State Bar of Michigan (1993).

40 Under 40, *Crain's Detroit Business*

- Named for community service, including for hundreds of hours volunteering as an amateur builder and internal news reporter for Habitat for Humanity (1992).

Best Lawyers in America and Super Lawyers

- Named in multiple years. Recognized Top 50 Business Lawyers in State of Michigan.

Distinguished Alumnus

- Selected by the University of Missouri Political Science Department (1993).

DBusiness, Named to Top Lawyers in Michigan, multiple years.

OTHER LEGAL ACCOMPLISHMENTS

- Each year, recovered several million and multi-million dollar verdicts and settlements in the State of Michigan as reported in the January issue of Michigan Lawyers Weekly, 2012, 2013, 2014, 2015, 2016, and 2017, often more such business law recoveries than any other attorney or firm in the State of Michigan.

EDUCATION

St. Louis University School of Law

J.D. *summa cum laude* 1982

- Graduated first in class.
- Awarded three-year academic merit scholarship.

University of Missouri

B.A. in Political Science, *summa cum laude* 1979

- GPA 4.0/4.0.
- Awarded, Senator Symington Scholarship
- Appointed to University Senate, where Mr. Mantese prepared and supported a Resolution requiring the University to divest itself of all investments in South Africa to protest that country's racial discrimination and apartheid practices, 1979.

PUBLICATIONS

Contractual Terms in Shareholder/Operating Agreements, Stout Risius Ross Journal, April 2018.

Recent Trends in New York Partnership Law, NY Business Law Journal, Winter 2017.

Litigation Between Shareholders in Closely-Held Corporations; Protecting Minority Shareholders From Abuse at the Hands of Majority Owners, Wayne Law Journal of Business, August 2017.

Michigan Business Courts and Oppression – A Review of How Michigan Business Courts Have Treated Oppression Issues Since Madugula v. Taub, Michigan Bar Journal, January 2017.

Navigating The World of Fiduciary Duty Within The Corporate Context, Missouri Bar Journal, September-October 2016.

Can't We All Just Get Along? Fiduciary Duties in the Corporate and LLC Context, Michigan Business Law Journal, Spring 2016.

Lights, Camera, Action! -- The Power of Video Depositions in Business Litigation, Michigan Bar Journal, February 2016.

Michigan Supreme Court Speaks: Madugula v. Taub and Shareholder Oppression, Mantese, Toering, Quick, Michigan Bar Journal, November 2014.

Shareholder Oppression, Fiduciary Duty, and Partnership Litigation in Closely Held Companies, Stout Risius Ross Journal, November 2014.

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Shareholder and Corporate Oppression Actions, Michigan Bar Journal, February 2012.

Reinsurance Contracts and the Role of Fiduciary Duty, Michigan Bar Journal, May 2007.

Minority Shareholder Oppression, Michigan Bar Journal, August 2005.

Letters of Intent, Michigan Bar Journal, November 2000.

Still Keeping the Faith: The Duty of Good Faith Revisited, Michigan Bar Journal, November 1997.

The UCC and Keeping the (Good) Faith, Michigan Bar Journal, 1991.

EXHIBIT 2

BUSINESS CORPORATION ACT (EXCERPT)
Act 284 of 1972

450.1489 Action by shareholder.

Sec. 489. (1) A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder. If the shareholder establishes grounds for relief, the circuit court may make an order or grant relief as it considers appropriate, including, without limitation, an order providing for any of the following:

(a) The dissolution and liquidation of the assets and business of the corporation.

(b) The cancellation or alteration of a provision contained in the articles of incorporation, an amendment of the articles of incorporation, or the bylaws of the corporation.

(c) The cancellation, alteration, or injunction against a resolution or other act of the corporation.

(d) The direction or prohibition of an act of the corporation or of shareholders, directors, officers, or other persons party to the action.

(e) The purchase at fair value of the shares of a shareholder, either by the corporation or by the officers, directors, or other shareholders responsible for the wrongful acts.

(f) An award of damages to the corporation or a shareholder. An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued, or within 2 years after the shareholder discovers or reasonably should have discovered the cause of action under this section, whichever occurs first.

(2) No action under this section shall be brought by a shareholder whose shares are listed on a national securities exchange or regularly traded in a market maintained by 1 or more members of a national or affiliated securities association.

(3) As used in this section, "willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder. The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure.

History: Add. 1989, Act 121, Eff. Oct. 1, 1989;—Am. 1997, Act 118, Imd. Eff. Oct. 24, 1997;—Am. 2001, Act 57, Imd. Eff. July 23, 2001;—Am. 2006, Act 68, Imd. Eff. Mar. 20, 2006.

EXHIBIT 3

MICHIGAN LIMITED LIABILITY COMPANY ACT (EXCERPT)
Act 23 of 1993

450.4515 Action in circuit court; grounds; order or grant of relief; "willfully unfair and oppressive conduct" defined.

Sec. 515. (1) A member of a limited liability company may bring an action in the circuit court of the county in which the limited liability company's principal place of business or registered office is located to establish that acts of the managers or members in control of the limited liability company are illegal or fraudulent or constitute willfully unfair and oppressive conduct toward the limited liability company or the member. If the member establishes grounds for relief, the circuit court may issue an order or grant relief as it considers appropriate, including, but not limited to, an order providing for any of the following:

(a) The dissolution and liquidation of the assets and business of the limited liability company.

(b) The cancellation or alteration of a provision in the articles of organization or in an operating agreement.

(c) The direction, alteration, or prohibition of an act of the limited liability company or its members or managers.

(d) The purchase at fair value of the member's interest in the limited liability company, either by the company or by any members responsible for the wrongful acts.

(e) An award of damages to the limited liability company or to the member. An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued or within 2 years after the member discovers or reasonably should have discovered the cause of action under this section, whichever occurs first.

(2) As used in this section, "willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the member as a member. Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other member interests disproportionately as to the affected member. The term does not include conduct or actions that are permitted by the articles of organization, an operating agreement, another agreement to which the member is a party, or a consistently applied written company policy or procedure.

History: Add. 1997, Act 52, Imd. Eff. July 1, 1997;—Am. 2002, Act 686, Imd. Eff. Dec. 30, 2002;—Am. 2010, Act 290, Imd. Eff. Dec. 16, 2010.

EXHIBIT 4

STOUT

Contractual Terms in Shareholder/Operating Agreem

A Survey of Recent Judicial Interpre Enforcement

Through in-depth analyses of recent cases, we find that courts analyzing shareholder/operating agreements strive to determine and effectuate the parties' intent – but agreements aren't always safe harbors from liability for oppression.

April 18, 2018

When business owners sign a shareholder or operating agreement, they are usually in the optimistic early stages of forming a new venture; thus, they may not always pay careful attention to every term in the agreement. But when a dispute arises, the language of the agreement becomes critical. For example, an operating agreement may alter the applicability of state statutory provisions, which are often subordinate

to operating agreements.[1] In the corporate context, some courts have held that breach of a shareholder agreement can serve as evidence of oppressive conduct by controlling shareholders or directors.[2]

We examine U.S. courts' recent treatment of contractual provisions commonly found in shareholder/operating agreements. These cases highlight the deference courts generally afford to parties to define the scope of their duties to one another.

Who Is Bound by the Agreements?

Shareholder and operating agreements are interpreted broadly and may apply even to nonsignatories and nonshareholders or members. This is common in the context of involuntary transfers, as sometimes happens in divorces. For example, in *Baumbouree v. Baumbouree*, 202 So. 3d 1077 (La. Ct. App. 2016), a shareholder agreement bound the nonsignatory wife to the valuation provisions that the ex-husband had signed during the marriage. Because the stock was in his name, he had the exclusive right to control it, and the ex-wife was bound to his agreement.[3] Likewise, in *Slutsky v. Slutsky*, 451 N.J. Super. 332 (N.J. Super. Ct. App. Div. 2017), a shareholder agreement signed only by the ex-husband was determinative in valuing the ex-husband's interest in a partnership.

In *Summer Haven Lake Assn. v. Vlach*, 25 Neb. App. 384 (Neb. Ct. App. 2017), the court held that the defendant intended to bind himself personally when he signed a shareholder agreement with blanks reserved for "shareholder" rather than on the signature line for the authorized officer of his corporate principal (who was the actual shareholder). Conversely, a Delaware Chancery Court held that an actual shareholder was not bound to a shareholder agreement when he acquired stock without knowledge of its transfer restrictions. *Henry v. Phixios Holdings, Inc.*, 2017 WL 2928034 (Del. Ch. July 10, 2017).

The shareholder agreement bound the plaintiff even though the court declared that she never became a shareholder in *Catamount Radiology, P.C. v. Bailey*, 2015 WL 3795028 (D. Vt. June 18, 2015). There, the plaintiff failed to fulfill her obligation to

purchase shares under the shareholder agreement, but nonetheless remained an employee of the corporation. The terms of the shareholder agreement applied to her employment regardless of her status as a shareholder. Thus, the plaintiff could pursue her claim for equal compensation under the shareholder agreement.

Forum-Selection and Arbitration Clauses

Forum-selection and arbitration clauses, which limit the available forum in which disputes may be resolved, are both common and commonly upheld. In some cases, these provisions have been held to apply to nonsignatories.

Arbitration and forum-selection clauses typically designate a forum for various types of claims "arising out of" or "relating to" the agreement. In Pinto Tech. Ventures LP v. Sheldon, 526 S.W.3d 428 (Tex. 2017), the court held that a forum-selection clause that covered claims "arising out of" the agreement applied to tort and contract claims. The court reasoned that the agreement and its terms were operative facts in the dispute, and that the agreement was the but-for cause of the shareholders' claims. Similarly, in Kadiyala v. Pupke, 2017 WL 2350454 (N.D. Ill. May 30, 2017), the forum-selection clause applied to the plaintiff's fraud claims even though the clause did not bind all the defendants because the claims involved the agreements and the disputes arose out of
them.[4]

In *Mortenson Kim, Inc. v. Safar Kim, Inc.*, 2017 WL 5905555 (E.D. Wis. Nov. 30, 2017), the court granted a motion to compel arbitration even though the validity of the agreement containing the arbitration clause was at issue. The arbitration clause required arbitration of all claims "relating to" the agreement. Although only half of the claims directly involved the agreement, the remaining claims relied on the same facts as the arbitrable claims. But in *Kramlich v. Hale*, 901 N.W.2d 72 (N.D. 2017), even broad language requiring arbitration of disputes, claims, or controversies "arising out of or relating to" an operating agreement did not require arbitration of claims that involved both the LLC and a separate partnership. The clause was not

broad enough to extend to other agreements.[5]

In *Altobelli v. Hartmann*, 499 Mich. 284 (2016), a former principal of a law firm sued individual principals of the law firm. The Michigan Supreme Court held that the plaintiff's tort claims fell within the scope of an operating agreement provision that mandated arbitration for any dispute between the firm and the former principal, even though the firm was not a named party. Similarly, in *Bonanno v. VTB Holdings, Inc.*, 2016 WL 614412 (Del. Ch. Feb. 8, 2016), a defendant nonsignatory could rely on a forum-selection clause because the defendant's relationship was "sufficiently close" to the signatories of the agreement such that it was foreseeable that the defendant could sue under the agreement's provisions. In Loya v. Loya, 507 S.W.3d 871 (Tex. App. 2016), the plaintiff was bound by a forum-selection clause requiring dispute resolution in the Netherlands, where her ex-husband (who had transferred shares to his ex-wife) had signed an agreement explicitly binding parties regardless of death or divorce.

A nonsignatory plaintiff was bound by an arbitration clause in *Craddock v. LeClairRyan, P.C.*, 2016 WL 1464562 (E.D. Va. April 12, 2016), because her conduct constituted acceptance. Although the shareholder agreement suggested a specific method of acceptance, the court did not find that suggestion limiting. The plaintiff's actions suggested her intent to accept the shareholder agreement.[6]

In *Trujillo v. Gomez*, 2015 WL 1757870 (S.D. Ca. April 17, 2015), the court found an arbitration provision in a shareholder agreement enforceable against both plaintiffs, even though at the defendant's recommendation one plaintiff had not signed it. Gomez suggested that the plaintiffs (Trujillo, Sr., and Trujillo, Jr.) form a corporation to protect their business interests and offered to create one on the condition that he become a 50% shareholder. He offered the other 50% to the plaintiffs but advised that Trujillo, Jr., hold the shares and that Trujillo, Sr., hold none. The arbitration clause was enforceable against Trujillo, Sr. because he was bound as a third-party beneficiary – and the complaint acknowledged that Trujillo, Sr., accepted the agreement's benefits, and that all parties understood that his shares were held by

Trujillo, Jr.

In *Meister v. Stout*, 353 P.3d 916 (Colo. App. 2015), the court held that an operating agreement's arbitration clause covered one nonsignatory's claims against another nonsignatory under a theory of equitable estoppel. Plaintiffs DeLollis and Stout formed Venti, LLC, and signed its operating agreement. The plaintiffs and the defendant later signed a purchase agreement under which the defendant obtained an interest in Venti. Because the purchase agreement incorporated the operating agreement by reference, the court applied the arbitration clause to the defendant's claims against Venti because his claims presumed the existence of, relied on, or otherwise referred to the operating agreement.

Interpretation

Operating/shareholder agreements vary widely in quality and scope, and they sometimes omit key terms. Courts often avoid reliance on extrinsic evidence or findings of ambiguity. Instead, they seek to discern the parties' intent through reference to the agreement's existing language, when possible.

In *Mintz v. Pazer*, 152 A.D.3d 761 (N.Y. App. Div. 2017), the court used a shareholder agreement to determine a valuation date for shares, though the agreement did not provide one. The agreement suggested that the parties intended valuation to reflect the fair market value of the shares at the time of sale. Because the parties had already exchanged appraisals, the court held that the valuation date should be contemporaneous with that exchange. Likewise, in In re: Discontinuance and Disposition of P.K. Smith Motors, Inc., 188 So. 3d 324 (La. Ct. App. 2016), the court enforced a shareholder agreement where the buy-sell provision stated, "The purchase price for each share of stock purchased pursuant to this Agreement shall be $___." Despite the lack of a price term, the court held that the overall agreement was clear and unambiguous, and the provision containing the blank price was a transfer restriction intended to keep shares within the family.

The court in *Bales v. Babcock Power, Inc.*, 476 Mass. 565 (Mass. 2017) held that the defendant employer's termination of plaintiff (for an affair with a coworker) was actionable. The defendant argued that the affair constituted a "willful and material breach" of the agreement. The defendant gave the plaintiff no opportunity to correct the breach, even though the agreement required this. According to the defendant, the plaintiff's behavior was "uncorrectable" and thus the correction would have been futile. The court found this interpretation "implausible" instead, the court held that the correction provision included an opportunity to correct adverse effects caused by an irreversible breach.

Authority and Breach

Operating/shareholder agreement provisions that provide shareholders, members, and managers or officers with general authority to take certain actions are not always safe harbors from liability when used to oppress other owners in specific contexts. For example, in *Celauro v. 4C Foods Corp.*, 2016 N.Y. Misc. LEXIS 3711, 2016 N.Y. Slip. Op. 31917(U) (Sup. Ct. Kings Co. Oct. 12, 2016), the defendants amended a shareholder agreement to enable them to repurchase the plaintiff's shares at a lower value. The amendment prevented transfer of plaintiff's shares, had no apparent business purpose, had no benefit to the shareholders, and was timed to coincide with the shareholder's imminent death. The court held that such an amendment, though innocuous and legal on its face, could breach the implied covenant of good faith and fair dealing and breach fiduciary duties.

In *State v. Bruun*, 405 P. 3d 905 (Utah 2017), broad powers granted to the defendants by the operating agreement did not unambiguously authorize the defendants to use LLC capital for the expenditures that led to their theft charges. The authority was qualified by specific restraints, rendering it reasonable to find that the defendants' acts were unauthorized. However, in *Andersen v. Succession of Bergeron*, 217 So. 3d 1248 (La. Ct. App. 2017), the court was asked to interpret an operating agreement that granted managing member RLB unilateral authority "to act for the company in any banking transaction, sale, mortgage, lease, or other transaction involving assets

or property owned by the company." It also provided that any transaction by a manager involving company property required a majority vote of membership. Finding that RLB had authority to transfer property without other members' consent, the court held that the majority vote provision applied only to acts of managers other than RLB because other interpretations would render the first provision meaningless.

Elsewhere, the defendants alone were not authorized to designate a special litigation committee in *LNYC Loft, LLC v. Hudson Opportunity Fund I, LLC*, 154 A.D.3d 10 (N.Y. App. Div. 2017). Such action constituted a "major decision" under the operating agreement, requiring the plaintiff's consent.

In *Conrad Black Capital Corp. v. Horizon Publs, Inc.*, 2015 IL. (1st) 132116-U (Ill. App. Ct. Dec. 23, 2015), the plaintiff's claim for breach failed even though the court found that the defendants did not comply with the shareholder agreement. The agreement provided that once a shareholder gives notice of his intent to sell shares, the shareholders must meet to determine whether the corporation will exercise its right of first refusal. Because the defendants indefinitely postponed the shareholder meeting, they breached the agreement. The plaintiff sought specific performance in the form of a buyout, claiming that the defendant corporation failed to exercise its right of first refusal. However, the court determined that the shareholder meeting was a condition precedent to the right of first refusal, and the plaintiff was only entitled to compel a meeting, not a buyout.

Control and Membership

Courts tend to strictly construe provisions in shareholder or operating agreements that restrict control by the owners. Relying in part on the shareholder agreement, the court in *Sciabacucchi v. Liberty Broadband Corp.*, 2017 WL 2352152 (Del. Ch. May 31, 2017) concluded that Liberty was not in control of Charter even though Liberty held itself out to the Securities and Exchange Commission as controlling. The shareholder agreement prohibited Liberty from acquiring more than 35% of Charter's stock, from

designating more than four out of 10 directors, and from soliciting proxies or consents; it also required majority or disinterested approval for many transactions.

The plaintiff in *Kilpatrick v. White Hall on MS River, LLC*, 207 So. 3d 1241 (Miss. 2016) was found not to be a member of the LLC because he failed to fully pay his contribution required under the operating agreement, even though he was designated as a member on exhibits to the agreement and on entity tax returns. In *McDonough v. McDonough*, 169 N.H. 537 (N.H. 2016), an operating agreement provided that the LLC "shall continue in full force and effect for a term of twenty (20) years, unless sooner terminated or continued pursuant to the further terms of this Agreement." The court held that the second clause, when read with the LLC Act, permitted a majority of its members to revoke the dissolution provision – the agreement permitted unanimous amendments, and the Act permitted members to revoke dissolution by a majority vote.

Unintended Consequences

Unintended consequences can arise when operating and shareholder agreements are not amended as the entity's operations or goals change. Still, courts will sometimes apply the agreement to effectuate the parties' intent and apply it to the new factual context. For example, an amendment expressly acknowledging a two-year period was held to be a permanent amendment to an operating agreement in *Daniel v. Ripoli*, 2016 IL App (1st) 122607-U (Ill. App. Ct. Nov. 16, 2016), because it had no beginning or end date. Conversely, a strict reading was applied in *Veterans Contracting Group, Inc. v. United States*, 2017 WL 6505208 (Fed. Cl. Dec. 20, 2017). There, the court looked to a shareholder agreement to determine whether the plaintiff met certain ownership and control standards. Because the agreement required redemption of shares under certain circumstances (e.g., death or bankruptcy), the plaintiff did not "unconditionally" own his shares, and was therefore ineligible for the program at issue.

Judicial Approaches to Disputes

Generally, courts seek to interpret shareholder and operating agreements to effectuate the parties' intent and not to infringe on parties' freedom to contract. Courts will typically work to find the agreements binding, even where terms are missing and sometimes when closely affected parties are not signatories to the agreement.

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1. *See* e.g., Mich. Comp. L. 450.4401 (Michigan LLCs are generally subject to restrictions, or enlargement of management rights and duties, contained in operating agreements); N.Y. Ltd. Liab. Co. Law 402 (member voting in New York LLCs is subject to operating agreement modifications).
2. *See* e.g., *Madugula v. Taub*, 496 Mich. 685 (2014).
3. *See also Bulloch v. Bulloch*, 214 So. 3d 930 (La. Ct. App. 2017) (agreement dictating valuation of shares made by ex-husband prior to divorce controlled valuation of shares in divorce proceeding).
4. *See also Horn v. Kirey*, 2017 WL 6453330 (E.D.N.Y. Dec. 14, 2017) (forum-selection clause covered the plaintiff's tort claims where New York was the

designated forum "over any and all controversies arising directly or indirectly from this Agreement." The plaintiff's defamation claims stemmed from the agreement because they caused alleged breaches of the agreement).

5. *Cf. William Beaumont Hosp v. W. Bloomfield Mob*, 2016 WL 4008637 (unpublished, Mich. Ct. App. July 26, 2016) (where all claims were covered by arbitration language in different agreements, arbitration was appropriate even though not all claims were covered by the same arbitration clause).
6. *Cf. Larkho v. Nisar*, 2017 IL App (5th) 160141-U (Ill. App. Ct. March 27, 2017) (the plaintiff who never signed operating agreement was not bound by its arbitration clause; it was insufficient that the plaintiff allegedly reviewed agreement before investing in LLC).

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EXHIBIT 5

Litigation Between Shareholders In Closely-Held Corporations: Protecting Minority Shareholders From Abuse at the Hands of Majority Owners

By Gerard V. Mantese and Ian M. Williamson[1]

This article examines case law from both Michigan and across the country that has considered shareholder oppression claims (including claims based on fiduciary obligations between shareholders in closely-held corporations) and distills from these cases common fact patterns that courts have found to either constitute, or state claims for, oppressive conduct.

I. Introduction

When opinions about business management and policy diverge, owners of minority shareholding interests in closely-held corporations, who are not part of a control group, often find themselves at the mercy of controlling shareholders. If mere disagreements become heated disputes (or if self-interest wins out over the combined interests of all shareholders), controlling shareholders sometimes exercise their power over corporate affairs to marginalize or "freeze out" minority owners. Under such circumstances, when the minority owner has been a victim of abuse and overreaching by those in control, shareholder oppression claims can be important tools for owners of minority (non-controlling) interests.[2]

[1] Mr. Mantese is the senior partner at Mantese Honigman, P.C., a firm with extensive experience litigating shareholder oppression and related business disputes in Michigan and across the country. Mr. Williamson is also a partner at Mantese Honigman, and has litigated disputes among owners of closely held businesses with Mr. Mantese for the past 12 years. Mantese Honigman maintains offices in Troy, Michigan and St. Louis, Missouri; its lawyers are admitted to a variety of state and federal courts across the country.

[2] The controlling shareholder (or shareholder group) typically owns more than 50% of the stock in a corporation. However, some states recognize that the heart of oppression is the unfair exercise of control, which cannot always be limited to a situation in which one individual or group owns the majority of stock or exercises superior voting power. Thus, even where corporate owners are equal shareholders, the controlling shareholder may be liable for oppression. "The critical question is not whether one shareholder is a minority and the other a majority, but rather whether one owner so dominated the corporation that he or she can be said to have been in control to the exclusion of the other." *Kirila v. Kirila Contrs., Inc.*, 2016-Ohio-5469, ¶ 31, 2016 WL 4426409. For example, in Delaware, shareholders owe fiduciary duties to

Because minority shareholders do not control the affairs of the company, they are unable to prevent controlling shareholders from taking unfair or oppressive actions against them. Furthermore, with no liquid or easily accessible market for shares in closely-held companies, minority shareholders cannot easily escape oppressive behavior by selling their shares.[3] Often, oppressed minority shareholders in closely-held corporations are left with no recourse other than to seek judicial relief through a lawsuit asserting shareholder oppression.[4]

A prefatory explanation about nomenclature is in order. Several jurisdictions expressly provide a cause of action for minority shareholder oppression. Other jurisdictions permit recovery for oppressive actions but style the cause of action as one for breach of a fiduciary duty

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other shareholders if they either own a majority interest in the company, or exercise control over the company's business affairs. *See e.g., Harris v. Carter,* 582 A.2d 222, 234 (Del. Ch. 1990).

[3] *See, e.g., Muellenberg v. Bikon Corp.,* 669 A.2d 1382, 1386 (N.J. 1996). As explained in *Schimke v Liquid Dustlayer, Inc,* affirming the trial court's order for the defendant company to redeem the plaintiff's shares, "in a closely held corporation, such as this one, 'a shareholder . . . is unable to escape an oppressive situation by dispensing of his shares of ownership in the public arena[.]'" No. 282421, 2009 WL 3049723, at *6-7 (Mich.Ct.App. Sept 24, 2009) As such, "§ 489(1)(e) specifically authorizes a court to order the purchase of a plaintiff's shares," and, "[i]f necessary . . . to order '[t]he dissolution and liquidation of the assets and business of the corporation.'" *Id.*

[4] Estes v. Idea Eng'g & Fabrications, Inc., 250 Mich.App. 270, 281, 649 N.W.2d 84, 90–91 (2002). "[C]orporate governance in a close corporation presents a distinct risk that a controlling shareholder will manipulate the corporate structure to harm minority interests without necessarily harming the corporation itself." Walker v. Pope, No. 3:15-CV-359-WHA, 2015 WL 4715082, at *4 (M.D. Ala. Aug. 7, 2015). [4] "Most modern courts . . . see the oppression statutes as intended to expand shareholder remedies." O'Neal & Thompson, 2 Close Corp and LLCs: Law and Practice § 9:32 (Rev 3d ed). *See also* Moll, *Reasonable Expectations v Implied-in-Fact Contracts: Is the Shareholder Oppression Doctrine Needed?,* 42 BC L Rev 989, 1018 (2001) ("The breadth of remedies for shareholder oppression provides the courts with great flexibility to choose a remedial scheme that most appropriately responds to the aggrieved shareholder's harm.").

(owed by the majority or controlling shareholders to the minority owners).[5] Regardless of the cause of action asserted, the actions that courts accept by those in control of corporations as potentially oppressive against those who are not in control tend to be similar from state to state.

There is no consensus in the United States as to the precise definition of oppressive conduct. Even in states with statutes authorizing a remedy for oppression, a surprising number of these statutes fail to actually define oppressive conduct,[6] with some exceptions.[7] Michigan's shareholder oppression statute defines "willfully unfair and oppressive conduct" as "a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder."[8]

[5] *See* Wallack v. Idexx Labs., Inc., No. 11CV2996-GPC KSC, 2013 WL 5206190, at *13 (S.D. Cal. Sept. 12, 2013) ("California law clearly recognizes that . . . controlling stockholders owe a fiduciary duty to minority stockholders"); *see also* Calesa Associates, L.P. v. Am. Capital, Ltd., No. CV 10557-VCG, 2016 WL 770251, at *10 (Del. Ch. Feb. 29, 2016) ("A stockholder is controlling, and owes fiduciary duties to the other stockholders, 'if it owns a majority interest in or *exercises control* over the business affairs of the corporation.'") (Emphasis in original).

[6] *See, e.g.*, Iowa Code § 490.1430(2)(b) (2014); Wis. Stat. §180.1430 (2016); 805 IL CS 5/12.56(a)(3) (West 2016); Maryland Code Annotated § 3–413 (2016).

[7] *See, e.g.*, Jorgensen v. Water Works, Inc., 218 Wis. 2d 761, 783; 582 N.W.2d 98, 107 (Wisc.Ct.App. 1998) ("The definition of 'oppressive conduct' generally employed for the purpose of such a statute is: 'burdensome, harsh and wrongful conduct; a lack of probity and fair dealing in the affairs of the company to the prejudice of some of its members; or a visual departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely.'").

[8] Mich.Comp.Laws §450.1489(2016) ("'[W]illfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder. The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure.") Such definitions leave substantial room for interpretation, and many courts examine such allegations by reference to traditional fiduciary duties. *See* Bromley v. Bromley, No. 05-71798, 2006 WL 2861875 at *5 (E.D. Mich, Oct. 4,

Despite the lack of uniformity in defining oppression or what constitutes oppressive acts, case law reveals substantial similarity across a variety of definitions. Some courts have defined actionable minority shareholder oppression as "burdensome, harsh and wrongful conduct . . . or a visible departure from the standards of fair dealing and violation of fair play" on which a shareholder is entitled to rely.[9] Other courts have simply equated oppression with the violation of fiduciary duties of good faith and loyalty owed by shareholders of close corporations to each other.[10] The "reasonable expectations" test, which is often simply defined as "frustration of the reasonable expectations of the corporations' shareholders," appears in several different jurisdictions.[11] A fourth definition finds oppression when a corporate director or manager abuses his authority over the corporation "with the intent to harm the interests of one or more of the

2006) ("[I]t is reasonable to conclude that the type of conduct amounting to a breach of fiduciary duties in close corporations is the type of conduct prohibited by §450.1489").

[9] *See* Buar v. Buar Farms, Inc., 832 N.W.2d 663, 670 (Iowa 2013) (discussing various approaches in other jurisdictions). *See e.g*., Booth v. Waltz, No. HHDX04CV106011749S, 2012 WL 6846552, at *22 (Conn. Super. Ct. Dec. 14, 2012) (noting that neither Connecticut's supreme court not its appellate court have defined "oppression" under the state statute, but its superior courts have found decisions from other states persuasive, concluding that "[o]ppression in the context of a dissolution suit suggests a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members, or a visible departure from the standards of fair dealing and a violation of fair play as to which every shareholder who entrusts his money to a company is entitled to rely.").

[10] *Buar*, 832 N.W.2d at 670. *See also* Calesa Associates, L.P. v. Am. Capital, Ltd., 2016 WL 770251, at *10 (Del. Ch. Feb. 29, 2016); Wallack v. Idexx Labs., Inc., No. 11CV2996-GPC KSC, 2013 WL 5206190, at *13 (S.D. Cal. Sept. 12, 2013).

[11] *Buar*, 832 N.W.2d at 670-671, citing *inter alia, See* 2 F. Hodge O'Neal & Robert B. Thompson, *Oppression of Minority Shareholders and LLC Members* § 7:11, at 7–105 to 7–108 (rev. 2d ed. 2012). *See, e.g*., Kaible v. Gropack, No. A-5666-11T3, 2013 WL 2660995, at *3 (N.J. Super. Ct. App. Div. June 14, 2013) ("To determine whether a particular course of conduct has oppressed a minority shareholder in violation of [New Jersey's oppression statute] courts should examine the understanding of the parties concerning their roles in corporate affairs. After determining the parties' initial understanding of the shareholders' roles, the court can then decide whether the shareholders acted oppressively. Oppressive conduct includes 'that which frustrates the reasonable expectations of the minority shareholder.'") (citations omitted).

shareholders, in a manner that does not comport with the honest exercise of their business judgment, and by doing so create a serious risk of harm to the corporation."[12]

Delaware, though lacking a statutory approach to shareholder oppression, has through case law adopted two tests in defining "oppression."[13] In 1992, the Delaware Court of Chancery considered the definition of "oppression" for the first time, and applied two separate, but familiar, tests.[14] The Court first applied the "reasonable expectations" test, defining oppression as a violation of the "reasonable expectations" of the minority. The Court then applied a second test, which defines oppressive conduct as "burdensome, harsh and wrongful conduct; a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members; or a visible departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely."

Regardless of the test applied, most courts recognize that actionable "oppression" encompasses a wide variety of improper conduct, which can be—but is not necessarily—illegal or fraudulent.[15] Here, the focus is on Michigan case law and various other jurisdictions that

[12] Ritchie v. Rupe, 443 S.W.3d 856, 871 (Tex. 2014), *reh'g denied* (Oct. 24, 2014).

[13] Under Delaware law, evidence of unfair or oppressive conduct may support a claim for breach of fiduciary duty. *See, e.g., Delaware Open MRI Radiology Associates, P.A. v. Kessler*, 898 A.2d 290, 344 (2006) (squeeze-out merger was unfair to minority shareholders, and thus amounted to a breach of fiduciary duty by majority shareholders).

[14] Litle v. Waters, No. CIV. A. 12155, 1992 WL 25758, at *7-8 (Del. Ch. Feb. 11, 1992).

[15] *See, e.g.*, Balvik v. Sylvester, 411 N.W.2d 383, 386 (N.D. 1987); Herrmann v. Rain Link, Inc., No. 11-1123-RDR, 2014 WL 1641973, at *16 (D. Kan. Apr. 24, 2014) (oppressive conduct usually occurs where the majority shareholder engages in a series of otherwise legal acts, which effectively prevent the non-controlling shareholder from participating in the operation and management of the corporation); AW Power Holdings, LLC v. FirstLight Waterbury Holdings, LLC, No. CV146047836S, 2015 WL 897785 (Conn.Super.Ct. Feb. 17, 2015) ("Minority shareholder oppression ... is not synonymous with the statutory terms 'illegal' or 'fraudulent.' The term can contemplate a continuous course of conduct and includes a lack of probity in corporate affairs to the prejudice of some of its shareholders.").

analyze shareholder oppression claims (including claims based on fiduciary obligations between shareholders in closely-held corporations), and distills from these cases common behavior that most courts are likely to find oppressive.[16] No attempt is made here to survey every state's oppression laws. Because courts have broad discretion in finding and remedying shareholder oppression, however, behavior that states a claim for oppression under one set of facts may not be deemed oppressive in every case.[17]

Given the case-by-case manner in which courts apply the concept of shareholder oppression, this article addresses general categories of oppressive actions in topical fashion. But oppressive actions seldom occur in isolation. Individual oppressive acts are often part of a series of actions deliberately perpetrated by the majority against the minority.[18] Indeed, at least one Michigan court has found that an oppression claim is more compelling when there are multiple acts of oppression, as opposed to just one.[19]

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[16] This article is intended as an overview of oppression actions across the country. As such, it discusses cases that are unpublished and cases that may not be cited as precedential under operative court rules. The reader is expressly advised to consider this issue before citing any case discussed herein as precedential.

[17] Schimke v Liquid Dustlayer, Inc., No. 282421, 2009 WL 3049723 at *13 (Mich. Ct. App. Sept. 24, 2009) (MCL 450.1489 "grants a court broad discretion to fashion a remedy it 'considers appropriate.'").

[18] *See, e.g.*, Kirkiades v. Atlas Food Systems & Services, Inc., 541 S.E.2d 257, 267 (S.C. 2001), citing Douglas K. Moll, *Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective,* 53 Vand. L.Rev. 749, 757-758 (April 2000).

[19] *See* Juliano v. Smith, No. 308296, 2013 WL 6670838 (Mich. Ct. App. Dec. 17, 2013) (A shareholder will not necessarily be successful under the 450.1489 "based on one instance of misconduct; rather, a shareholder who would be likely to prevail under this statute is one who presented an ongoing pattern of oppressive misconduct.").

Oppressive schemes by controlling parties to cut off a minority shareholder's access to the benefits of ownership are frequently described as a "squeeze out" or "freeze out" of the minority shareholder. Which specific actions combine to constitute a squeeze out or freeze out can vary widely from case to case, though common themes emerge that are discussed below.[20] What does not vary is the motivation driving the oppressive actions: a conscious and deliberate attempt to deprive the minority shareholder from participation in the operation of, and benefits from, a closely held corporation.[21]

[20] *See, e.g.,* Balvik v. Sylvester, 411 N.W.2d 383, 387 (N.D. 1987). ("A variety of freeze-out techniques exist, with the withholding of dividends being by far the most commonly applied technique. This technique is often combined with the discharge of the minority shareholder from employment and removal of the minority shareholder from the board of directors. If the minority shareholder is employed by the corporation full time, as is typical, and if she relies on her salary as her primary means of obtaining a return on her investment, as is typical, she is suddenly left with little or no income and little or no return on her investment. The controlling shareholders may effectively deprive the minority shareholder of every economic benefit that she derives from the corporation. Meanwhile, the controlling shareholders may continue to receive a substantial return based on their continuing employment with the corporation.") *See also* McCann v. McCann, 152 Idaho 809, 816, 275 P.3d 824, 830 (2012) ("The squeezers may cut off the flow of income to the minority by refusing to declare dividends or they may deprive minority shareholders of corporate offices and of employment by the company. At the same time, the squeezers can protect their own income stream from the business by exorbitant salaries and bonuses to the majority shareholder-officers and perhaps to their relatives, by high rental payments for property the corporation leases from majority shareholders, or by unreasonable payments under contracts between the corporation and majority shareholders"); F. Hodge O'Neal, "Problems of Minority Shareholders in Michigan Close Corporations," Wayne Law Review, Vol 14, No. 3, pg. 732 (1969)("The oppression of minority shareholders and 'squeeze plays' designed to eliminate them from the business are serious problems in close corporations. Even in a family company discord is common. As a matter of fact, dissension and squeeze plays occur more often in family corporations than in other close corporations.") Citing Stott Realty Co v Orloff, 262 Mich. 375 (1933); Wabunga Land Co v Schwanbeck, 245 Mich. 505 (1929)(emphasis added).

[21] *See, e.g.*, Bros. v. Winstead, 129 So. 3d 906, 918 (Miss. 2014) ("In its most classic form, a freeze-out of the minority shareholders by the majority occurs when the majority purposefully denies the minority member from sharing proportionally in corporate earnings or gains."); Goret v. H. Schultz & Sons, Inc., No. A-4281-10T1, 2013 WL 4792847, at *7 (N.J. Super. Ct. App. Div. Sept. 10, 2013) ("Shareholder 'freeze-out' has been defined as 'a manipulative use of corporate control or inside information to eliminate minority shareholders from the enterprise, or to reduce to relative insignificance their voting power or claims on

II. Common Indicia of Oppression

A. Failing to Pay Dividends On a Pro Rata Basis To Both Majority and Minority Shareholders, Alike

1. Dividend Starvation

It is axiomatic that shareholders have a right to receive corporate dividends.[22] One of the most frequent grounds for a shareholder oppression claim is dividend starvation: withholding of corporate dividends from minority shareholders when the corporation has the financial means to make a dividend distribution.[23] Courts in Michigan and elsewhere recognize that a plaintiff can state a claim for oppression where the majority shareholder withholds or refuses to declare dividends in such circumstances.[24]

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corporate earnings and assets or otherwise deprive them of corporate income or advantages to which they are entitled.'").

[22] *See, e.g.*, Franchino v. Franchino, 263 Mich.App. 172, 184; 687 N.W.2d 620 (2004) (Michigan Court of Appeals held that shareholder rights include "receiving corporate dividends."); Argo Data Res. Corp. v. Shagrithaya, 380 S.W.3d 249, 267–68 (Tex. App. 2012).

[23] *See* Balvik v. Sylvester, 411 N.W.2d 383, 387 (N.D. 1987) (withholding of dividends is the most commonly used technique used to freeze-out minority shareholders).

[24] *See, e.g.*, Schimke v. Liquid Dustlayer, Inc., No. 282421, 2009 WL 3049723, at *5 (Mich. Ct. App. Sept. 24, 2009) (upholding trial court finding that defendants engaged in "willfully unfair and oppressive conduct" under MCL §450.1489(3) where majority shareholder "remained steadfast in refusing to pay dividends, despite Liquid Dustlayer's substantial cash reserves, essentially preventing plaintiff from receiving any benefit whatsoever from his nearly one-third ownership of Liquid Dustlayer"); Bromley v. Bromley, No. 05-71798, 2006 WL 2861875, at *5 (E.D. Mich. Oct. 4, 2006) (listing examples of oppressive conduct, including "refusing to declare dividends"); Natale v. Espy Corp., No. CIV.A. 13-30008-MGM, 2015 WL 3632227, at *6–7 (D. Mass. June 2, 2015) (refusal to declare dividends for an improper purpose, is actionable as a breach of fiduciary duty). *See* Berger v Katz, No. 291663, 2011 WL 3209217 (Mich. Ct. App, July 28, 2011). In *Berger*, the Michigan Court of Appeals ordered a redemption of the minority shareholder's stock where the defendants had cut off distributions to a minority shareholder. The court affirmed the trial court's finding of oppression where the defendants stopped making distributions to plaintiff and stopped consulting with him on matters involving the company. *Id.* at *4. In finding oppression, the Court also held that the defendants were not shielded from liability even where the bylaws actually authorized their actions, holding that such

Not every corporate refusal to declare dividends constitutes actionable oppression, as directors must balance a corporation's future needs with their responsibility to maximize shareholder value. Defendants charged with oppression frequently claim that their decision not to pay dividends should be shielded by the business judgment rule.[25] There is a split of opinion among various jurisdictions over whether the business judgment rule should apply at all in the context of a shareholder oppression action in a closely-held corporation.[26] As a result, application of this rule is varied, and many courts apply modified versions of the rule.

For example, the Sixth Circuit Court of Appeals (applying Michigan law) recently stated, "[c]ourts will not interfere with the decision of management not to declare a dividend 'unless it is

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corporate authorization "does not mean that defendants were permitted to act in a manner that was willfully unfair and oppressive to plaintiff, as a minority shareholder." *Id.*

[25] The business judgment rule (which is premised on the notion that those to whom the management of the corporation has been entrusted, and not the courts, are best able to judge whether a particular act or transaction is one which is helpful to the conduct of corporate affairs) generally requires courts to presume that directors' decisions are based on sound business judgment. *See, e.g.*, Hill v. State Farm Mut. Auto. Ins. Co., 166 CalApp. 4th 1438, 1452, 83 Cal. Rptr. 3d 651, 659 (2008).

[26] *See, e.g.*, Ritchie v. Rupe, 443 S.W.3d 856, 903–04 (Tex. 2014), reh'g denied (Oct. 24, 2014), citing commentators who observe that the oppression doctrine is "implicitly premised on the notation that the close corporation employment, management and dividend decisions require more than mere surface inquiry into the majority's conduct." *See also* Kaible v. Gropack, No. A-5666-11T3, 2013 WL 2660995, at *3 (N.J. Super. Ct. App. Div. June 14, 2013) (business judgment rule has "only limited validity in small business corporations."); Grill v. Aversa, No. 1:12-CV-120, 2014 WL 4672461, at *9 (M.D. Pa. Sept. 18, 2014) (business judgment rule "presupposes actions that are taken in good faith. As we view it, this issue of motive is precisely the factual question which lies at the heart" of the plaintiff's oppression case, so trial is necessary to resolve questions of motive, intent and of state of mind). *But see* Calesa Assocs., L.P. v. Am. Capital, Ltd., No. CV 10557-VCG, 2016 WL 770251, at *9 (Del. Ch. Feb. 29, 2016) (business judgment rule establishes a presumption in favor of the directors, which a plaintiff can overcome by adequately alleging facts to support a reasonable inference that (1) a controlling stockholder stands on both sides of a transaction or (2) at least half of the directors who approved the transaction were not disinterested or independent. Where the business judgment rule is rebutted, entire fairness is the applicable standard of review.).

clearly made to appear that [the directors] are guilty of fraud or misappropriation of the corporate funds, or refuse to declare dividends when the corporation has a surplus of net profits which it can without detriment to its business, divide among its stockholders, and when a refusal to do so would amount to such an abuse of discretion as would constitute fraud, or breach of that good faith which [directors] are bound to exercise toward shareholders."[27]

Thereafter, applying this specific articulation of the business judgment rule, the U.S. District Court for the Eastern District of Michigan found a question of fact in another case asserting oppression where the minority shareholder presented evidence that the corporation was financially able to distribute profits without detriment to its operations, and the company's failure to distribute dividends had disproportionately affected the minority shareholder.[28] Thus, while some courts may apply the business judgment rule to a decision not to declare dividends, this defense may not be successful if the company has surplus cash and the directors do not have a valid reason for failing to pay dividends.

2. Paying A Majority Shareholder Compensation That Amounts to a *De Facto* Dividend (To The Exclusion of A Minority Shareholder)

Another common tactic used by oppressors is to pay selective dividends only to majority shareholders, or to provide majority shareholders with other forms of compensation in a manner that suggests that the compensation is a de facto dividend made only to those in control of the company.[29] "[I]f a minority shareholder can show that another shareholder employed by the

[27] Wolding v. Clark, 563 F. App'x 444, 453–54 (6th Cir. 2014) (brackets in original) quoting Matter of Estate of Butterfield, 418 Mich. 241, 341 N.W.2d 453, 458 (1983).

[28] Blankenship v. Superior Controls, Inc., 135 F. Supp. 3d 608, 621 (E.D. Mich. 2015).

[29] *See, e. g.*, Toscano v. Koopman, 148 F. Supp. 3d 679, 682 (N.D. Ill. 2015) (finding that "consulting fees" of $11,666 per month which were not disclosed to all shareholders, were not approved by the board of directors and for which majority shareholder performed no actual

company is receiving compensation so far in excess of what is reasonable for his position and level of responsibility that he is, in actuality, receiving a de facto dividend to the exclusion of the minority shareholder, such an act may support a finding of minority shareholder oppression."[30]

B. Majority Shareholder Treating Themselves Better Than They Treat Minority Shareholders

Case law provides various examples of actions that have been found to be oppressive when taken by and for the benefit of majority owners, when those same majority owners curtailed or denied the benefit of those same acts to minority shareholders.[31]

Perhaps the most common oppressive actions of this type relate to salary and compensation in general. As Professors O'Neal and Thompson state:

> In another commonly-used squeeze-out technique, majority shareholders siphon off corporate wealth by causing a corporation to pay its majority shareholders, and perhaps members of their immediate family or other relatives, excessively high compensation for services rendered as directors, officers or employees.
>
> * * *
>
> Instead of treating all of the stock alike, and distributing the profits fairly and proportionately by way of dividends, the majority first elect themselves directors, then as directors elect themselves officers, and then distribute among themselves a substantial part of the profits in the way of excessive salaries, additional compensation and other devices.[32]

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services, were "disguised dividend payments which should have been provided to all shareholders.").

[30] Argo Data Res. Corp. v. Shagrithaya, 380 S.W.3d 249, 268 (Tex. App. 2012).

[31] Edelman v. JELBS, 2015-Ohio-5542, ¶ 30, 57 N.E.3d 246, 255–56, *appeal not allowed*, 2016-Ohio-3028, ¶ 30, 145 Ohio St. 3d 1471, 49 N.E.3d 1313 ("In a close corporation, a majority shareholder breaches a fiduciary duty when that shareholder manipulates his or her control over the close corporation in order to unfairly acquire personal benefits owing to or not otherwise available to minority shareholders of the close corporation.")

[32] *O'Neal and Thompson's Oppression of Minority Shareholders and LLC Members* § 3:7 (rev.2d ed. 2012).

Where those in control of corporations authorized substantial salary increases for majority shareholders, but not minority shareholders, courts have found evidence of oppression.[33] Likewise, the Michigan Court of Appeals found oppression where majority shareholders increased (or continued to increase) their own salaries while claiming that the company was losing money and could not afford to increase salaries or other compensation for minority shareholders.[34]

Unfair valuation of a minority shareholder's interest in a corporation can provide a solid basis for finding oppression.[35] Offering to buy out the minority shareholder's interests on terms that are grossly disproportionate to more favorable terms proposed for majority shareholders has also been deemed oppressive.[36] In that same vein, orchestrating a merger which is based on an unfairly low valuation of the minority owner's shares can also constitute oppression.[37]

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[33] *See, e.g*., *Edelman*, 2015-Ohio-5542, ¶ 30; Colgate v. Disthene Grp., 85 Va. Cir. 286, 2013 WL 691105, at *15 (Aug. 30, 2012); Smith v. Roger Smith & Sons, Inc., 277 P.3d 1193 (Kan.Ct.App. 2012) (plaintiff alleged that defendants "siphoned off corporate assets in the form of excessive compensation and then negotiated the sale of the corporation at a reduced price augmented with substantial financial benefits flowing to them personally").

[34] *See* Berger v. Katz, No. 291663, 2011 WL 3209217, at *5 (Mich. Ct. App. July 28, 2011), holding that the trial court did not clearly err in finding that defendants' use of their power as majority shareholders to pay themselves higher salaries, while at the same time claiming that the corporation was not profitable to justify their refusal to make any distributions to plaintiff, supported the jury determination that defendants engaged in willfully unfair and oppressive conduct.

[35] *See, e.g*, Etowah Envtl. Grp., LLC v. Walsh, 333 Ga. App. 464, 468, 774 S.E.2d 220, 224 (2015), *reconsideration denied* (July 29, 2015), *cert. denied* (Jan. 11, 2016) (discussing arbitrator's application of Delaware law, which applies an "entire fairness" standard to valuation and corporate fiduciary obligations generally).

[36] *See, e.g*, Schimke v. Liquid Dustlayer, Inc., No. 282421, 2009 WL 3049723, at *3 (Mich. Ct. App. Sept. 24, 2009) (discrepancy between price at which defendants were willing to consider redeeming plaintiff's stock and value of majority-held stock affected the value of plaintiff's shareholder interest in corporation and was indicative of substantial interference with plaintiff's rights as a shareholder).

Another tactic that courts have held to be oppressive is the issuance of a capital call when there is little or no financial reason for it. A capital call under these circumstances supports the inference that the primary reason for the action was not economic need, but instead a desire to dilute a minority shareholder's interest in the corporation.[38] When the generated cash is used in some fashion to benefit only those in control of the corporation, a capital call is even more likely to be deemed oppressive.

The payment of "bonuses" of various types, and the manner in which such bonuses are disclosed or approved by the board or the shareholders, has proven to be a fertile basis for oppression claims. In a recent New Mexico case, the majority shareholder was held to have acted improperly where he: (1) knowingly and intentionally paid himself bonuses to the economic detriment of the both the plaintiffs and to the corporation itself; (2) failed to inform plaintiff minority shareholders of these bonuses; (3) knowingly submitted false information about his bonuses to plaintiffs at shareholder meetings; and (4) failed to inform plaintiffs of other material facts generally relating to the corporation's business and financial affairs.[39]

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[37] Owen v. Cannon, No. CV 8860-CB, 2015 WL 3819204, at *31–32 (Del. Ch. June 17, 2015).

[38] *See, e.g.*, Berger v. Katz, No. 291663, 2011 WL 3209217, at *4 (Mich. Ct. App. July 28, 2011) (finding oppression based on, inter alia, the defendant's issuance of "a capital call when the corporation was doing fairly well, which diluted plaintiff's stock and shares and forced plaintiff to put his own money into the corporation").

[39] Jones v. Auge, 344 P.3d 989, 1000 (N.M. App. 2014), *cert. denied*, 345 P.3d 341 (N.M. 2015). The case was analyzed under a theory for breach of fiduciary duty to a minority shareholder. *See also* Beale v. O'Shea, 735 S.E.2d 29 (Ga. App. 2012) (Shareholder sued controlling shareholder for breach of fiduciary duty based on defendant's execution of a Change in Control Agreement which promised a payout of $800,000 to two corporate officers if the company is sold to anyone other than the defendant. Court held that plaintiff stated facts sufficient to survive a summary judgment motion on his breach of fiduciary duty claim because there was evidence that such a provision would cause a potential buyer of the company to pay less for the shares, which would damage plaintiff as a shareholder.).

C. Stealing or Misuse of Corporate Funds, And/Or Misrepresenting the Financial Condition of the Company

Not surprisingly, where a majority or controlling owner uses corporate funds or other assets for his own benefit, such actions can constitute oppression.[40] For example, various courts have held that using corporate funds to pay the personal expenses of controlling shareholders (or those of individuals related to such shareholders) constitutes oppression.[41]

Causing or contributing to a false and artificially low valuation of the company as a whole can also constitute oppression, such as where majority owners refused to cooperate with outside accountants hired to value the corporation; the defendant owners instead supplied

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[40] *See, e.g.*, Favila v. Souther, 2012 WL 5208482, at *11 (Cal. App. Oct. 23, 2012) (corporate bonuses paid to defendant majority shareholders with the objective of reducing the amount of profit in the corporation that was available to be paid to minority shareholder, was actionable as injury); Arunski v. Pet Pool Prod., Inc., No. 1 CA-CV 11-0084, 2012 WL 893091 (Ariz. Ct. App. Mar. 15, 2012) (court found that defendants adequately supported breach of fiduciary duty counterclaim where plaintiff improperly took over $300,000 from the company); Bedi v. Dhaliwal, No. A135784, 2014 WL 280498 (Cal. App. 1st Dist. Jan. 27, 2014), *reh'g denied* (Feb. 21, 2014), *review denied* (Apr. 16, 2014) (plaintiff minority shareholder sued majority shareholder for breach of fiduciary duties due to the defendant's misappropriation of the corporation's earnings to himself, instead of paying proper distributions to all shareholders).

[41] *See, e.g.*, Bromley v. Bromley, No. 05-71798, 2006 WL 2861875, at *6 (E.D. Mich. Oct. 4, 2006) ("The record in the case thus far reveals ample evidence of unfair and oppressive conduct. In his position as majority shareholder, Randall Bromley has caused National to expend exorbitant amounts of money in transactions to which he had an interest. Further, Mr. Bromley has superficially ratified these deals as the majority shareholder."); Kayne v. Mense, No. B254975, 2016 WL 1178671 (Cal. Ct. App. Mar. 25, 2016), *review denied* (June 22, 2016) (Defendant shareholder breached his fiduciary duties to plaintiff by engaging in a series of actions including failure to pay plaintiff amounts due under the Operating Agreement, failure to eliminate plaintiff's personal guaranty, failure to disclose distributions made to himself, and failure to provide financial information. The jury also imposed punitive damages because it found that defendant acted "with oppression, fraud, or malice."); Niloy & Rohan, LLC v. Sechler, 782 S.E.2d 293 (Ga. Ct. App. 2016) (50% shareholder sued other 50% shareholder for paying himself profits from the company, instead of paying the company's debts, as the parties had agreed. The court found that this was a breach of fiduciary duty).

inaccurate and incomplete information with the intent of achieving an artificially low valuation at a time when valuation was critical to the plaintiff's future with the corporation.[42]

Similarly, using (or diverting) corporate funds for the benefit of separate entities owned by, or benefitting only, the controlling shareholders also constitutes oppression.[43] Even where the corporate entities owned jointly by the majority and minority owners were profitable as to all shareholders, the Western District of Michigan held that this did not excuse the majority shareholder's self-dealing when he used the jointly owned entities' funds to make interest-free loans to the majority shareholder's separate wholly-owned entities.[44]

Unfortunately, a majority shareholder may misuse or otherwise dissipate corporate funds so grossly that he diminishes the value of the entire corporation, which includes the minority shareholder's interest, to zero or less. Such was the case in a Sixth Circuit case where the plaintiff alleged that the two controlling shareholders had conspired to devalue the corporation, eventually causing the corporation to entirely cease doing business.[45] Thus, as a practical matter,

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[42] Toscano v. Koopman, 148 F. Supp. 3d 679, 683 (N.D. Ill. 2015).

[43] *See, e.g.*, Pertuis v. Front Roe Restaurants, Inc., No. 2013-002257, 2016 WL 757503, at *5 (S.C. Ct. App. Feb. 24, 2016) (affirming a finding of oppression where defendants, inter alia, unilaterally financed a new venture by borrowing funds from corporations in which plaintiff was a minority owner, without obtaining plaintiff's approval of the loans and without inviting plaintiff to participate in the venture); *See also* Lozowski v. Benedict, No. 257219, 2006 WL 287406, at *3 (Mich App Feb. 7, 2006) (plaintiff stated oppression claim against defendants who collectively controlled 60% of corporation, by alleging that they enriched themselves at the expense of plaintiff and the corporation "by funneling corporate funds to two other corporations that defendants controlled.")

[44] Weiner v. Weiner, No. 1:06-CV-642, 2008 WL 746960, at *9 (W.D. Mich. Mar. 18, 2008).

[45] Meathe v. Ret, 547 F. App'x 683, 686 (6th Cir. 2013). ("[Plaintiff's] allegations simply do not establish with any plausibility that were it not for [the two defendants] allegedly oppressive actions the nearly $40 million gap between obligations and assets would have been covered by additional corporate value. Since the company was so far under water, [plaintiff's]

it is almost always wise to assert an oppression claim promptly, and in any event before the corporation ceases functioning.

Finally, where a minority shareholder knowingly participates with those controlling the corporation in improper or illegal conduct, courts are unlikely to grant relief if the minority shareholder complains of oppression. The Rhode Island Supreme Court made this clear in a case in which the plaintiff and two others formed a closely-held corporation to buy and renovate a horserace track. The plaintiff ultimately lost his investment and sued the two other shareholders for a variety of wrongs including breach of fiduciary duty. The Supreme Court affirmed the trial court's finding that plaintiff's fiduciary duty claim was not actionable, reasoning as follows:

> In his twenty-one-page decision, the trial justice acknowledged that [the corporation] "was extremely poorly run, without adhering to common reasonable business practices of accounting, tax filing and reporting, etc.," but found that [plaintiff] was "well aware of the business venture and its pitfalls and possible reward." The trial justice also found as fact that [plaintiff] had visited the racetrack more frequently than he admitted, and that he "was well aware of the situation involving the extent of the project of developing, rehabilitating and operating the race track facility." Further, the trial justice found that [plaintiff] was aware that standards of corporate accountability were not being met, that [one of the defendants] was signing [plaintiff's] name on checks drawn from the [corporate] account, and that payments were being made to other third parties. While the trial justice was "dismayed at the lack of recordkeeping, accountancy and travel of the funds from the ledger book and checkbook," he was "not convinced by a fair preponderance of the evidence that these funds were misappropriated and put into anyone's pocket." Ultimately, the trial justice noted that while he was "aware of the corporate duties and the fiduciary duty of officers of corporations to their stockholders and shareholders, * * * in this particular instance * * * all three of these stockholders and directors were pretty much in the same boat * * *."[46]

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shares were in all likelihood totally worthless and [he] was entitled to no shareholder distribution whether or not [defendants] actually conspired to devalue the company.")

[46] Wilby v. Savoie, 86 A.3d 362, 376 (R.I. 2014).

Although the Court did not address any of the doctrines of *in pari delicto*, wrongful conduct, or unclean hands, neither the trial justice nor the Rhode Island Supreme Court made any effort to assist the plaintiff.[47]

D. Majority Shareholder Causing Corporation To Engage In Self-Interested Transaction, Or Directly Usurping Corporate Opportunity

A common form of oppression arises when those in control of the corporation commit the corporation to engage in transactions that benefit the controlling shareholder, whether directly or indirectly.[48] This can include causing the corporation to buy from specific vendors in which the controlling shareholder is financially interested,[49] as well as standard usurpation of corporate opportunities by those in control of a corporation.[50]

In addition, once a self-interested transaction is in place, failure to modify the terms when later circumstances viewed objectively would dictate such a change can also constitute oppression. This concept is exemplified by a Delaware Chancery decision in which the

[47] *See also* Ammori v. Nafso, 2014 WL 308845 (Mich. Ct. App Jan. 28, 2014); *Karpiuk v. Myers*, 2006 WL 2271177 (Mich. Ct.App Aug. 8, 2006) (Trial court correctly denied plaintiff equitable relief for breach of fiduciary duty and oppression claims due to plaintiff's own unclean hands.)

[48] *See, e.g.*, Bromley v. Bromley, No. 05-71798, 2006 WL 2861875, at *6 (E.D. Mich. Oct. 4, 2006) (majority shareholder caused corporation to expend exorbitant amounts of money in transactions to which he had an interest and thereafter he "superficially ratified" these deals as the majority shareholder).

[49] *See, e.g.*, Inca Materials, Inc. v. Indigo Const. Servs., Inc., 2015 Ill. App. Ct. (1st) 141345-U, ¶ 38. (affirming trial court's finding that defendant usurped a corporate opportunity when she caused the corporation to purchase materials at marked-up prices from a second "middleman" company that defendant controlled).

[50] *See, e.g*, In re Mandel, 578 F. App'x 376, 387 (5th Cir. 2014) (Tex. law); Scafidi v. Hille, 180 So. 3d 634 (Miss. 2015) (Court affirmed the trial court's finding that the plaintiff adequately pled breach of fiduciary duty and oppression, based on the defendant's actions. Specifically, the defendant had purchased shares of the other minority shareholders during litigation, with money in which the plaintiff had an equal interest, in order to obtain further control over the company and then tried to vote the plaintiff off the board of the directors.)

controlling shareholder made a substantial loan to the corporation, and thereafter refused to refinance the loan, even when it became apparent that the interest rate was "exorbitantly above-market" and there was evidence that financing was available at significantly lower rates.[51]

E. Terminating The Employment of a Minority Shareholder

Termination of a minority shareholder from her employment in a closely-held corporation raises a number of unique considerations. Unlike shareholders in publicly-held corporations, a shareholder in a close corporation often considers himself or herself as a co-owner of the business and expects to exercise the privileges and powers that go with ownership.[52] "Employment by the corporation is often the shareholder's principal or sole source of income [and] providing for employment may have been the principal reason why the shareholder participated in organizing the corporation."[53] Firing a minority shareholder can thus effectively defeat the minority shareholder's purpose in becoming a shareholder.[54]

1. Some States Hold That Termination Can Be Actionable Oppression

[51] Caspian Select Credit Master Fund Ltd. v. Gohl, No. CV 10244-VCN, 2015 WL 5718592, at *9 (Del. Ch. Sept. 28, 2015).

[52] Balvik v. Sylvester, 411 N.W.2d 383, 386 (N.D. 1987), quoting 1 F. O'Neal and R. Thompson, *O'Neal's Close Corporations* § 1.07 (3d ed. 1987).

[53] *Balvik*, 411 N.W.2d at 386.

[54] *See, e.g.*, Knights' Piping, Inc. v. Knight, 123 So. 3d 451, 458 (Miss. Ct. App. 2012) (terminating a minority shareholder's employment can be "especially pernicious" given that a minority stockholder typically depends on his salary as the principal return on his investment, since the earnings of a close corporation are distributed in major part in salaries, bonuses, and retirement benefits. Thus, terminating a minority stockholder's employment effectively frustrates the minority stockholder's purposes in entering on the corporate venture and deny him a return on his investment); Folie v. Aging Joyfully, Inc., No. A14-0793, 2015 WL 1959854, at *4 (Minn.Ct.App. May 4, 2015) ("Shareholder-employees of a closely held corporation commonly have an expectation of continuing employment and, therefore, discharge of a shareholder-employee may be grounds for equitable relief.") (internal quote omitted).

In light of the realities of closely-held corporations, many states recognize that termination of a minority shareholder from such employment can constitute actionable oppression.[55] "Depending on the facts, denying salaried employment in a close corporation could be a form of minority shareholder oppression, which in turn is a breach of fiduciary duty."[56]

In states that recognize termination of employment as oppression, actual termination may not be necessary; intentional withholding of salary can also constitute oppression.[57] However, the mere fact that a minority shareholder may have been "demoted" may not be sufficient if he was not terminated from employment or otherwise deprived of income.[58]

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[55] Since a 2006 statutory amendment, Michigan permits a minority shareholder to assert a claim for willfully unfair and oppressive conduct, including "termination of employment or limitations on employment benefits to the extent the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder." MCL § 450.1489(3); *See* Berger v. Katz, 2011 WL 3209217, at *5 (Mich.Ct.App. July 28, 2011) ("MCL 450.1489(3) now allows a minority shareholder to claim willfully unfair and oppressive conduct as a result of reductions in salary or other employment benefits."). *See also* Kirila v. Kirila Contrs., Inc., 2016-Ohio-5469, ¶ 33, 2016 WL 4426409 ("[A] minority shareholder's employment in a close corporation often constitutes the major return on the shareholder's investment. Without the employment, the minority shareholder is denied an equal return on the investment. Accordingly, [m]ajority shareholders in a close corporation may not terminate minority shareholders without a legitimate business purpose.") (citations omitted).

[56] De-Chu Christopher Tang v. Vaxin, Inc., No. 2:13-CV-401-SLB, 2015 WL 1487063, at *8 (N.D. Ala. Mar. 31, 2015). *See also* Selmark Associates, Inc. v. Ehrlich, 467 Mass. 525, 539, 5 N.E.3d 923, 935 (2014) (ample evidence that defendants' termination of plaintiff "violated the duty of utmost good faith and loyalty owed to [plaintiff] as a minority" shareholder, where plaintiff had worked for six years and given up profits to which he was entitled to enable the company to make necessary payments to the company's former owner, where there was no evidence of plaintiff's poor performance, and where he was terminated just prior to the date on which he would have had opportunity to convert his stock to ownership in a new entity).

[57] De-Chu Christopher Tang, No. 2:13-CV-401-SLB, 2015 WL 1487063, at *8 (N.D. Ala. Mar. 31, 2015).("Plaintiff is right: holding salary hostage for years is effective to oppress a minority shareholder whether or not it is finally released.")

[58] Iversen v. C.J.C. Auto Parts & Tires, Inc., 2014 IL App (2d) 130706-U, ¶ 34, 2014 WL 2812849, *appeal denied*, 21 N.E.3d 714 (Ill. 2014).

Note, however, that even in states where termination may constitute oppression, termination of a minority shareholder's employment may be justified when it is related to the advancement of a general corporate interest:

> What distinguishes a proper corporate purpose from an improper one is that, with the former, removal of the minority shareholders furthers the objective of conferring some general gain on the corporation. The benefit need not be great, but it must be for the corporation. Only then will the fiduciary duty of good and prudent management of the corporation serve to override the concurrent duty to treat all shareholders fairly.[59]

2. Other States Do Not View Termination As Oppression

Other states, particularly those that recognize at-will employment, do not recognize that shareholders in a closely held corporation have any "fiduciary-rooted entitlements to their jobs."[60] Thus, unless there is an operating agreement or shareholder agreement guaranteeing a plaintiff employment with the closely-held corporation, termination in such states is unlikely to constitute actionable oppression. Furthermore, even where a minority shareholder is a party to an employment agreement, liability for breach of its terms in those states may be limited to contract-based claims and not oppression.[61]

3. Post-Termination Issues

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[59] Federico v. Brancato, 43 Misc. 3d 1231(A), 993 N.Y.S.2d 644 (N.Y. Sup. Ct. 2014) (citations omitted).

[60] *See, e.g.*, Bros. v. Winstead, 129 So. 3d 906, 920 (Miss. 2014), citing Hollis v. Hill, 232 F.3d 460, 470 (5th Cir.2000). *See also* Bontempo v. Lare, 444 Md. 344, 371, 119 A.3d 791, 807 (Md.2015) (minority shareholders' "reasonable expectation" of future employment at the time he became a shareholder insufficient to supersede his at-will employment status).

[61] *See, e.g.*, Federico v. Brancato, 43 Misc. 3d 1231(A), 993 N.Y.S.2d 644 (Sup. Ct. 2014) ("In order to be actionable, a claim for breach of fiduciary duty must be separate, distinct, and independent of the contract itself. Thus, a shareholder of a closely held corporation who is also an employee cannot recover for breach of fiduciary duty when the claim is essentially an employment dispute.")

What the parties do or do not do after a minority shareholder is terminated can also be relevant to oppression claims. Thus, even where a majority shareholder is justified in terminating a minority shareholder, the fact of termination does not justify excluding that individual from participation in other aspects of the corporation; such a person has "two separate interests, one as an owner and the other as an employee."[62] Thus, excluding a terminated minority shareholder from shareholder meetings and precluding him from participating in other corporate management decisions violated his "reasonable expectation to manage the company as a shareholder" even though his termination had been entirely appropriate.[63]

Finally, the fact that a minority shareholder has been terminated in a demonstrably oppressive manner (or otherwise frozen out) does not grant that individual license to compete with the corporate entity or to otherwise violate his own fiduciary obligations to the corporation.[64]

F. Withholding Corporate Information

[62] Piche v. Braaten No. A13-0406, 2014 WL 349712, at *5 (Minn. Ct. App. Feb. 3, 2014), *review denied* (Apr. 15, 2014).

[63] *Id*.

[64] *See* Selmark Assocs.,, Inc. v. Ehrlich, 467 Mass. 525, 551–53, 5 N.E.3d 923, 943–44 (2014), where the squeezed out plaintiff/counter-defendant asserted that because he was fired and frozen out, his fiduciary obligations to the company were extinguished and he therefore could compete freely with his former company. The Court rejected this argument, reiterating that "shareholders in close corporations owe fiduciary duties not only to one another, but to the corporation as well" and that "[a]llowing a party who has suffered harm within a close corporation to seek retribution by disregarding its own duties has no basis in our laws and would undermine fundamental and long-standing fiduciary principles that are essential to corporate governance…[i]f shareholders take it upon themselves to retaliate any time they believe they have been frozen out, disputes in close corporations will only increase."

Not every form of oppression involves money.[65] There are a wide variety of ways to oppress a minority shareholder by denying that individual access to essential information about either the corporation or the shareholder's interest in the corporation.

It is commonly understood that the right to examine corporate financial books and records is a key shareholder right.[66] Thus, failing to provide copies of financial statements and other corporate information to which a shareholder is entitled can be actionable.[67] The likelihood of a finding oppression increases when a defendant majority shareholder's refusal to produce financial records is combined with other actions, such the case in which the defendant responded to a minority owner's request for financial records by dissolving the corporation.[68]

In similar vein, a majority owner's failure to provide all documents necessary for a minority shareholder to evaluate his interests in a proposed corporate merger can also state a claim for oppression.[69] Indeed, in a 2013 California decision, a plaintiff premised an oppression

[65] Kaible v. Gropack, No. A-5666-11T3, 2013 WL 2660995, at *3 (N.J. Super. Ct. App. Div. June 14, 2013) ("Ordinarily, oppression by shareholders is clearly shown when they have awarded themselves excessive compensation, furnished inadequate dividends, or misapplied and wasted corporate funds,' but that is not always the case.")

[66] *See, e.g.*, Franchino v. Franchino, 263 Mich App 172, 184; 687 N.W.2d 620, 628 (2004) ("Shareholder's rights are typically considered to include . . . examining the corporate books.")

[67] Baker v. Baker, No. A-10-901, 2011 WL 3505500, at *5 (Neb.Ct.App. Aug. 9, 2011) (failure to provide financial statements to plaintiffs between 2004 and 2007 creates an issue of fact as to whether defendants have engaged in oppressive conduct against plaintiffs).

[68] *See* McConnell v. Bare Label Prods., Inc., 2015-Ohio-1206, 2015 WL 1432464, at *8 (Ohio Ct. App 2015), where the court affirmed an award of *punitive* damages, upon uncontradicted testimony establishing that plaintiff had never received a single payment in salary or dividend, and after the defendant dissolved the corporation, she was able to acquire the corporation's real estate for a price that was less than its tax value.

[69] Bull v. BGK Holdings, LLC, 859 F. Supp. 2d 1238, 1245–46 (D.N.M. 2012) (complaint alleging that plaintiff was not provided all necessary documents to independently

claim on, *inter alia*, allegations that the oppressor concealed important corporate information.[70] In support of his claim, plaintiff alleged that the defendant majority shareholders failed to: (1) disclose the company's "true financial condition" for the period after one of the defendants had taken control of the books and accounting; (2) reveal the results of communications and work product received from the corporate accountants; (3) hold properly noticed board of directors meetings (instead conducting at least 16 secret meetings); (4) provide reliable financial documents; (5) insure that the person who handles accounting responds truthfully to inquiries about the condition of the corporation; (6) provide copies of *revised* financial records and statements after they were altered to reflect information that was inconsistent with prior published financials; and (7) document proposed (and actual) transfers of corporate assets/funds to other companies.[71]

G. Failing to Satisfy Dictates Of Internal Corporate Agreements

When those in charge of the corporation breach the terms of the governing corporate documents (bylaws, operating agreements, shareholder agreements, etc.) such action is universally recognized as a breach of contract. Courts in some states go further and recognize that such action can also constitute actionable oppression, when the challenged breaches satisfy the jurisdiction's standards to prove oppression or a breach of fiduciary duty claim.

The Michigan Supreme Court recently so held, recognizing that a majority shareholder's breach of express terms contained in a shareholder agreement could constitute conduct that

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evaluate his interest in considering a specific merger was sufficient to withstand a motion to dismiss).

[70] Wallack v. Idexx Labs., Inc., No. 11CV2996-GPC KSC, 2013 WL 5206190, at *14 (S.D. Cal. Sept. 12, 2013).

[71] *Id.*

"substantially interferes with the interests of the shareholder as a shareholder"[72] and thus such a breach could be used to establish statutory shareholder oppression.[73]

H. Denying Minority Shareholders/Members Involvement in the Corporation

Denying a minority shareholder the right to participate in management of the corporation or denying her a voice in decision-making can also constitute oppression.[74] This is especially likely to be oppressive where it represents a change in the status quo, such as where a plaintiff is arbitrarily assigned to a different position within the company or excluded from participation in management or decision-making.[75]

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[72] Michigan's oppression statute, MCL §450.1489(3), provides that: "'[W]illfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that *substantially interferes with the interests of the shareholder as a shareholder.* Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder. The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure." (Emphasis added).

[73] Madugula v. Taub, 496 Mich 685, 717–20, 853 N.W.2d 75, 92–94 (2014). The Court had no difficulty reaching this result there, reasoning: (1) that Michigan statutes permit shareholders to modify several of their statutory rights and interests; (2) that the shareholder agreement at issue had in fact modified certain of the plaintiff shareholder's rights in a manner that was effective among all shareholders; so (3) violation of this agreement could be evidence of shareholder oppression because its terms violated the minority shareholder's interests as a shareholder.

[74] *See, e.g.*, In re Dissolution of Clever Innovations, Inc., 94 A.D.3d 1174, 1176, 941 N.Y.S.2d 777 (2012) ("We hold that petitioner's admitted conduct in operating the company to the exclusion of respondent substantially defeated the estate's reasonable expectations for cooperation and disclosure of relevant business information between the parties."); *See also* Villalobos v. Villalobos, No. 32,973, 2015 WL 8676440 (N.M.Ct.App. Nov. 24, 2015), *cert. denied*, 370 P.3d 1213 (N.M. 2016) (Oppression found where majority shareholder froze minority shareholder out of important decisions concerning the company and prohibited minority shareholder from participating in corporate affairs).

[75] Kaible v. Gropack, No. A-5666-11T3, 2013 WL 2660995, at *4 (N.J. Super. Ct. App. Div. June 14, 2013). The recent case of *Madagula v. Taub*, Case No. 2008-537-CK (MI Washtenaw Cir. Ct., May 26, 2016) is illustrative. On remand from the Michigan Supreme Court, the trial court held that there was clear evidence of shareholder oppression where the

Unilateral changes to number or identity of the corporation's board of directors can also constitute oppression where such actions adversely impact the plaintiff. Typical of this form of oppression is the Michigan case in which the defendant decided to reduce the number of directors from seven to four (thereby excluding the plaintiff minority shareholders), and then immediately after plaintiffs were eliminated from the board, increasing the number of directors back to seven and placing three new directors on the board who were selected and controlled by the majority shareholder.[76]

Modification of by-laws by those in control of the corporation can be undertaken in an oppressive manner, even where the changes made are in fact permitted under state law, if the changes are made for the *purpose* of allowing the majority owner to control matters and preclude minority owners from participating in corporate affairs.[77] For example, in a Michigan federal case, the majority member changed the attendance policy for shareholder meetings to require in-person attendance (thereby preventing plaintiffs from participating via telephone), and amended

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defendant cut the plaintiff out of management of the company and violated the parties' Stockholders' Agreement: "The Court finds that Taub's cutting off and freezing out Madugula from Dataspace's decision-making and involvement in Dataspace's operations constituted "illegal, fraudulent, or willfully unfair and oppressive" conduct under MCL 450.1489. The Court finds that Taub's denial of access to and withholding from Madugula information regarding Dataspace's operations constituted "illegal, fraudulent, or willfully unfair and oppressive" conduct under MCL 450.1489." *See also* Ballard v. Roberson, 399 S.C. 588, 733 S.E.2d 107 (S.C.2012) (Court found oppression where there was clear intent by defendants to "freeze-out" the plaintiff and exclude him from involvement in the company, and from the benefits of ownership).

[76] *Bromley,*2006 WL 2861875, at *3.

[77] *See e.g.*, Sterling Laurel Realty, LLC v. Laurel Gardens Co-Op, Inc., 444 N.J. Super. 470, 473, 134 A.3d 27, 28-29 (N.J. Super App. Div. 2016) (Majority shareholders attempted to amend the company's by-laws to change the definition of a quorum (for purposes of shareholder meetings) from a majority of the shareholders to twenty percent of the shareholders. The Court held that, because permitting the Board to change the quorum definition by amending the bylaws would allow it to reduce the rights of the shareholders without their involvement, the bylaw amendment was invalid.).

the bylaws to: (1) allow meetings to be adjourned without providing notice to persons not in attendance; (2) permit notification of shareholders ten days before the meetings despite the fact that this was the same day that shareholders had to tender their proxies; (3) increase the number of directors from four to seven; (4) permit the corporation to issue stock for promises to provide services evidenced by a written contract; (5) permit the company to issue promissory notes as dividends; (6) allow directors to issue options and warrants for company stock; and (7) provide for the indemnification of parties affiliated with the corporation in the event of litigation (including other companies controlled by the majority owner).[78] The Court there held:

> When read together and in light of the timing and other circumstances of the case, the amendments give the appearance that Defendants are using their majority and control position to keep Plaintiffs out of corporate affairs. Individually, the amendments are legal, yet collectively they could be used oppressively. This substantially affects Plaintiffs' rights as shareholders.[79]

It may be important to examine how the corporation has conducted its business over a number of years when considering oppression claims. While "[t]he absence of regular meetings does not give rise to oppression if the company's past practices indicate that infrequent meetings were the norm" where the corporation regularly held shareholder meetings during periods when profits diminished or dividends ceased, and then failed to hold such meetings without explanation, this pattern may be relevant to oppression claims.[80]

III. Conclusions

[78] *Bromley*, 2006 WL 2861875, at *3, 6, 7.

[79] *Bromley*, 2006 WL 2861875, at *6. *Id*. at *6 Interestingly, the bylaw changes were made *after* the oppression lawsuit was filed.

[80] Goret v. H. Schultz & Sons, Inc., No. A-4281-10T1, 2013 WL 4792847, at *5 (N.J. Super. Ct. App. Div. Sept. 10, 2013), quoting Exadaktilos v. Cinnaminson Realty Co., 167 N.J. Super. 141, 154–55 (Law Div.1979), *aff'd*, 173 N.J. Super. 559, 414 A.2d 994 (App.Div.1980).

The definitions of conduct necessary to establish actionable minority shareholder oppression and actionable breach of fiduciary duty obligations by majority shareholders vary from jurisdiction to jurisdiction, but fact patterns found in case law reflect a significant degree of uniformity across the country regarding the actions that courts seem willing to accept as actionable oppressive conduct. Perhaps, like Justice Potter Stewart and obscenity, judges experienced in business matters tend to know oppressive acts when they see them.[81] Even in jurisdictions that do not recognize a separate cause of action for shareholder oppression, minority shareholders can usually bring suit for a different cause of action (typically breach of fiduciary duty) and obtain relief when faced with oppressive behavior by those in control of a closely-held corporation.

[81] Jacobellis v. Ohio 378 U.S. 184, 197, 84 S. Ct. 1676, 1683 (1964), (Stewart, J., concurring). ("I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it*, and the motion picture involved in this case is not that." (emphasis added).

EXHIBIT 6

Michigan Business Courts and Oppression

A Review of How Michigan Business Courts Have Treated Oppression Issues Since *Madugula v Taub*

By Gerard V. Mantese, Douglas L. Toering, and Fatima M. Mansour

Michigan's corporate shareholder oppression statute, MCL 450.1489, was enacted in 1989. MCL 450.4515, the limited liability company (LLC) counterpart, was enacted eight years later. The purpose of these two statutes is to protect shareholders and LLC members from illegal, fraudulent, and willfully unfair and oppressive conduct by those in control of the entity.

In the 2014 case of *Madugula v Taub*,[1] the Michigan Supreme Court held that 450.1489 does not provide a right to a jury trial. Instead, shareholder oppression claims are equitable. In that seminal case, the Court confirmed that the trial court has broad discretion to grant relief, if any, as it considers appropriate. Further, the Court explained that shareholders may modify the rights and interests provided to them in the Michigan Business Corporation Act through shareholder agreements. Because these modified rights and interests are effective

Fast Facts:

The purpose of the two oppression statutes is to protect shareholders and LLC members from illegal, fraudulent, and willfully unfair and oppressive conduct.

Violation of an operating agreement or a shareholder agreement can be a basis for an oppression claim.

The trial court has broad discretion in fashioning a remedy when there is oppression.

among shareholders and the corporation, violation of a shareholder agreement may be evidence of oppression.[2] The logic of *Madugula* applies to LLCs as well.

This article reviews developments in Michigan oppression law by the Michigan Court of Appeals and the Michigan business courts[3] since *Madugula*.

What is oppressive conduct?

MCL 450.1489 and 450.4515 define "willfully unfair and oppressive" conduct as "a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests" of the shareholder as a shareholder, or member as a member. This may include "termination of employment or limitations on employment benefits" to the extent the actions disproportionately affect the oppressed member or shareholder.

On remand in *Madugula*, the trial court considered the entire mosaic of the parties' relationship and held that there was clear evidence of oppression. The defendant had cut the plaintiff out of management of the company, terminated the plaintiff's employment, violated the parties' shareholder agreement, and withheld information. The court awarded damages and a buyback of the plaintiff's stock.[4]

In *Castle v Shoham*,[5] a minority member of Filter Depot, LLC sued the majority member, Midwest Air Filter (MAF), alleging that MAF engaged in oppressive conduct, including its unilateral decision to increase the management fee paid to it by Filter Depot and terminate Castle's employment. The Macomb County Business Court denied MAF's motion for summary disposition, finding that Castle had alleged facts demonstrating oppression under MCL 450.4515. The court confirmed that under *Madugula*, "a violation of the Operating Agreement, such as a refusal to allow a member to exercise his right to vote on certain matters," can be a basis for an oppression claim.[6]

The court explained that "when reviewing a claim under MCL 450.4515(3), the court is required to take into account the *entire factual landscape*, not one particular action, as the statute provides that oppression can be formed through 'a continuing course of conduct.'"[7] Castle's right to vote was oppressed when MAF unilaterally approved the fee increase. Further, MAF's actions affected Castle particularly. By increasing the fee, MAF could divert Castle's assets and lower Castle's profitability while increasing its own profitability.[8]

In *Brikho v Shirinian*,[9] the Macomb County Business Court, on reconsideration, held that the following actions by the defendant could demonstrate oppression: (1) failing to satisfy obligations under an oral contract, (2) controlling day-to-day operations of the company, (3) keeping the company's books and records at a location that made it difficult for the plaintiff to inspect them, and (4) breaching the operating agreement.

In Oakland County, the court found that oppression of the minority member's *agent* could constitute oppression of the member himself.[10] The minority member alleged oppression as a result of the defendants' actions, which involved excluding the member's agent from day-to-day operations of the company, making misleading statements about the business, refusing to provide financial information, and threatening to take steps to benefit the majority members. The court held that a trier of fact could conclude that the defendants' actions constituted oppression.

In another Oakland County case, the court explained that "'directors and officers of corporations are fiduciaries who owe a strict duty of good faith to the corporation which they serve.'"[11] Indeed, a "'director is a fiduciary. So is a dominant or controlling stockholder or group of stockholders.'"[12] In this case, the plaintiff alleged that the defendants engaged in oppressive conduct by failing to conduct votes, failing to provide notice of meetings, making distributions in violation of the statute, paying excessive salaries, terminating the plaintiff's membership interests, and neglecting to disclose fundamental information about the company. The court denied the defendants' motion for summary disposition.

Of course, the failure to declare dividends, or "dividend starvation," can be a classic case of oppression, depending on the facts of the case.[13] In *Blankenship v Super Controls, Inc*,[14] the company had surplus cash, was financially able to distribute profits without detriment to the business, and the control group did not have a valid reason for refusing to pay dividends.[15]

Surviving a motion for summary disposition

In *Pitsch v Pitsch Holding Co, Inc*,[16] the Kent County Business Court considered the entire landscape of oppression, including events that occurred both before and after suit was filed. The court found no basis for oppression, as the company was prospering financially because of the defendants' responsible management.[17]

Of course, documentary evidence helps defeat a motion for summary disposition. For example, in *Antakli v Antakli*,[18] the court held that the plaintiff provided sufficient documentary evidence to survive summary disposition on her oppression claim, including meeting minutes, e-mails, deposition transcripts, and her own affidavit. The court explained that

resolution of the claim was so substantially intertwined with fact finding and credibility determinations that summary disposition was inappropriate.

But when neither side presents sufficient evidence to support their allegations, the court is likely to deny the motion for summary disposition.[19]

What does it mean to be "in control" of the company?

Generally, the business courts have taken a literal view of whether someone is "in control" of the company. The key factor in many of these cases is actual "control." The Saginaw County Business Court has explained that "[t]o be subject to a charge of 'oppression,' MCL 450.4515 reasonably requires that one possess the ability to oppress, and this ability comes from being 'in control.' The key is 'control.'"[20]

For example, the Kent County Business Court held that shareholder oppression did not occur because the plaintiffs and defendants each collectively owned 50 percent of the company. Because the ownership interests were exactly equal, the defendants were not "in control."[21] Likewise, if a party provides advice to the company's decision-making body but does not have final decision-making authority, the court may find that the defendant is not truly "in control."[22] Further, a member vested with the power to unilaterally remove a manager may not sustain a claim for oppression against that manager, as he or she may remove the manager at any time.[23]

Can actions taken consistently with an operating agreement be considered oppressive?

Pursuant to MCL 450.1489 and 450.4515, actions permitted by organic documents (such as bylaws or operating agreements) or by agreement are by definition not oppression.[24] The Court of Appeals and the business courts have tended to apply the plain language of the statute.

For example, in *Dart v Cendrowski*,[25] the plaintiff alleged oppression owing to the refusal of the company's managers to allow the plaintiff to withdraw from the company or receive a withdrawal distribution. However, the operating agreement stated that no member was entitled to either action without the written consent of the manager.[26] Because the company's operating agreement explicitly authorized the conduct, the plaintiff failed to state a claim for member oppression.[27]

Nevertheless, even if the operating agreement generally permits the activity, plaintiffs may be able to avoid dismissal by demonstrating that the defendants did not follow the *specific* requirements set forth in the agreement.[28] Further, simply because an operating agreement permits certain general activity does not mean those in control may execute such power in an oppressive manner. In *Ambulatory Anesthesia Assoc, PC v Borrego*,[29] the Oakland County Business Court quoted with approval the reasoning in *Berger v Katz*[30]: "[a]lthough the bylaws gave defendants the general authority to make business decisions…that does not mean that defendants were permitted to act in a manner that was willfully unfair and oppressive to plaintiff, as a minority shareholder."[31]

What about fiduciary duties?

Under Michigan law, controlling shareholders in closely held corporations owe a heightened fiduciary duty directly to minority shareholders, akin to partnership law.[32] In contrast, Michigan courts have been reluctant to apply this heightened standard to controlling members in the LLC context.[33]

However, the Macomb County Business Court has recognized that "the two situations that would allow a minority shareholder to pursue a breach of fiduciary duty claim in the context of corporations would also allow a member to bring a breach of fiduciary duty claim against a majority member."[34] Those situations are (1) where a minority shareholder (and therefore, a minority member) "has sustained a loss separate and distinct from that of other stockholders generally, and (2) [w]hen he can show a violation of a duty owed directly to him that is independent of the corporation."[35]

In a related case, the court held that the defendant's unilateral decision to make a capital call involved an actual or potential conflict of interest.[36] Specifically, the capital call, which required only the plaintiff to make the contribution, would ultimately be used to pay the defendant's management fee, which the defendant had unilaterally raised. The defendant was on both sides of the transaction, and a conflict of interest existed.

Moreover, in another case, the Macomb County Business Court stated that "under certain circumstances a minority member may maintain a breach of fiduciary duty claim against a majority member."[37] There, the court found that the plaintiff sufficiently pled a claim for breach of fiduciary duty.

What other oppression issues are the business courts considering?

Remedy for oppression

The trial court has broad discretion in fashioning a remedy. Remedies may include dissolution, canceling a provision in various documents, an injunction, purchase at fair value of the oppressed party's shares, or damages. The list of remedies is not exhaustive.[38]

In *Demil v RMD Holdings*,[39] for example, the business court ordered a buyout, then a forced sale of the company as a result of the defendant's oppression. After further consideration—and because both parties were interested in buying out the other's shares—the court ruled that a "buy-out procedure different than that specifically set forth in MCL 450.1489" was necessary. The court ordered the company sold through an auction.[40] *Demil* highlights the broad discretion trial courts have under the oppression statutes.[41]

Statute of limitations

For damages, the statute of limitations under §§ 1489 and 4515 is three years after the cause of action has accrued or two years after the shareholder-member discovers or reasonably should have discovered the cause of action, whichever occurs first. In *Frank v Linkner*,[42] the court confirmed that § 4515 is a statute of limitation, not a statute of repose. Thus, the statute of limitations does not begin to run until accrual of the claim. Further, it can be tolled by principles such as fraudulent concealment. The Michigan Supreme Court granted leave to appeal and oral argument occurred on December 8, 2016.

Business courts have also considered statute of limitations issues. One court dismissed an oppression claim that related to employment termination because it was barred by the statute of limitations in MCL 450.1489(1)(f).[43] Further, the Oakland County Business Court held that the plain language of MCL 450.4515(1)(e) creates a three-year limitations period only for damages.[44] On the other hand, actions seeking relief under the remaining subsections of the statute are governed by the six-year limitations period found in MCL 600.5813.[45]

Unclean hands

"A party seeking the aid of equity must come in with clean hands. The clean hands doctrine closes the door of equity to a party tainted with inequitableness or bad faith with respect to the matter in which the party seeks relief."[46] Shareholder and member oppression are equitable claims. The "clean hands" doctrine may preclude a defendant from raising certain equitable defenses or may prevent a plaintiff from obtaining any recovery.

For example, the Macomb County Circuit Court explained that "one who seeks equity must first offer to do equity, and since laches is an equitable doctrine, a defendant with unclean hands may not assert the defense."[47] Because shareholder oppression is an equitable claim, "if Plaintiff is successful in establishing his claim he will have established that Defendants acted in an inequitable manner. Consequently, the court is convinced that Defendants may not utilize the doctrine of laches to defeat plaintiff's shareholder oppression claim."[48]

Venue

MCL 450.1489(1)'s venue provision provides: "A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located…." The Macomb County Business Court has interpreted this provision as permissive, not mandatory.[49] As such, a shareholder may bring an action in a county other than just those venues specified in the statute.

Conclusion

The Michigan business courts have been active in oppression cases. Before filing a motion in the business courts, one may wish to consult the decisions of the business court judges, which are available online.[50] ■

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ENDNOTES

1. *Madugula v Taub*, 496 Mich 685; 853 NW2d 75 (2014). Gerard V. Mantese argued *Madugula* in the Michigan Supreme Court for the plaintiff.
2. *Id.* at 720.
3. For a discussion of the Michigan business courts and Michigan's business court statute, please see Toering, *The New Michigan Business Court Legislation: Twelve Years in the Making*, 22 Bus L Today 1 (2013).
4. *Madugula v Taub*, unpublished opinion of the Washtenaw County Circuit Court, issued May 26, 2016 (Docket No. 2008-537-CK).
5. *Castle v Shoham*, unpublished opinion of the Macomb County Circuit Court, issued January 21, 2016 (Docket No. 2014-3568-CB) <http://courts.mi.gov/opinions_orders/businesscourtssearch/BusinessCourtDocuments/C16-2014-3568-CB%20(Jan%2021,%202016)(Second%20Opinion).pdf#search="castle v shoham">. All websites cited in this article were accessed December 9, 2016.
6. *Id.* at 4.
7. *Id.* at 6 (emphasis added).
8. *Id.* at 5.
9. *Brikho v Shirinian*, unpublished opinion of the Macomb County Circuit Court, issued August 18, 2015 (Docket No. 2014-3977-CB).
10. *Lorenzo Cavaliere v DRSN Assoc*, unpublished opinion of the Oakland County Circuit Court, issued May 20, 2015 (Docket No. 13-138079-CZ), p 7.
11. *Wayne v Lodden*, unpublished opinion of the Oakland County Circuit Court, issued May 27, 2015 (Docket No. 14-144499-CZ), quoting *Salvador v Connor*, 87 Mich App 664, 675; 276 NW2d 458 (1978).
12. *Id.*, quoting *Pepper v Litton*, 308 US 295, 305; 60 S Ct 238; 84 L Ed 281 (1939).
13. See *Blankenship v Superior Controls, Inc*, 135 F Supp 3d 608 (ED Mich, 2015) (failing to declare dividends was oppressive and was not protected by the business judgment rule).
14. *Id.*
15. *Id.*; see also *De Young v Town & Country Elec*, unpublished opinion of the Ottawa County Circuit Court, issued April 25, 2016 (Docket No. 14-03816-CB) (The plaintiff, a former employee and minority shareholder, suffered oppression when the defendants refused to pay dividends; but the defendants' termination of his employment did not support an oppression claim, even if done in retaliation, because such termination was permitted by the parties' at-will employment relationship.).
16. *Pitsch v Pitsch Holding Co, Inc*, unpublished opinion of the Kent County Circuit Court, issued May 31, 2016 (Docket No. 07-04719-CR).
17. *Id.*; see also *Sidney Rosenberg Trust Dated 4/26/2011 v Hanses-Shroeger*, unpublished opinion of the Ingham County Circuit Court, issued March 15, 2016 (Docket No. 14-1038-CR) (finding no oppression when a 50 percent shareholder in control operated a company in the manner she and a fellow 50 percent shareholder had always conducted business).
18. *Antakli v Antakli*, unpublished opinion of the Oakland County Circuit Court, issued January 14, 2015 (Docket No. 13-135553-CB).
19. See, e.g., *K&W Doo, Inc v Wissinger*, unpublished opinion of the Macomb County Circuit Court, issued March 10, 2016 (Docket No. 2015-1008-CB) (denying movants' motion because neither side presented any evidence as to whether a vote was required to take the disputed actions); *Canu v Clark Graphic Servs, Inc*, unpublished opinion of the Macomb County Circuit Court, issued May 4, 2016 (Docket No. 2015-3693-CB) (denying summary disposition where neither side addressed the relevant allegations).
20. *Sargent Docks and Terminal, Inc v Webber*, unpublished opinion of the Saginaw County Circuit Court, issued August 7, 2015 (Docket No. 11-014229-CB), p 3 <http://courts.mi.gov/opinions_orders/businesscourtssearch/BusinessCourtDocuments/C10-2015-11014229-CB-3%20(Aug%207,%202015).pdf#search="">.
21. *Pitsch*, unpub op.
22. *Gusmanso v Giarmarco, Mullins & Horton, PC*, unpublished opinion of the Macomb County Circuit Court, issued March 14, 2016 (Docket No. 2015-2670-CB).
23. *Con-Sys-Int Mfg USA, LLC v Bassakos*, unpublished opinion of the Macomb County Circuit Court, issued August 2, 2016 (Docket No. 2016-505-CB), p 5.
24. MCL 450.1489(3).
25. *Dart v Cendrowski*, unpublished opinion of the Oakland County Circuit Court, issued August 7, 2015 (Docket No. 15-145064-CB).
26. *Id.* at 10.
27. *Id.*; see also *Goldberg v First Holding Mgt Co*, unpublished opinion per curiam of the Court of Appeals, issued June 21, 2016 (Docket No. 325960) (finding that actions taken consistent with the company's operating agreement were not oppressive).
28. *Stockton v Partners Title Agency, LLC*, unpublished opinion of the Oakland County Circuit Court, issued September 14, 2016 (Docket No. 16-151595-CB).
29. *Ambulatory Anesthesia Assoc, PC v Borrego*, unpublished opinion of the Oakland County Circuit Court, issued January 20, 2016 (Docket No. 15-146034-CZ).
30. *Berger v Katz*, unpublished opinion per curiam of the Court of Appeals, issued July 28, 2011 (Docket Nos. 291663 and 293880).
31. *Ambulatory Anesthesia*, unpub op at 10 n 4, quoting *Berger*, unpub op.
32. See, e.g., *Estes v Idea Eng'g & Fabrications, Inc*, 250 Mich App 270, 281; 649 NW2d 84 (2002). The oppressed owner is typically a minority shareholder or member, but that is not always the case. Occasionally, the control group could oppress a majority owner.
33. See *Frank v Linkner*, 310 Mich App 169, 180–181; 871 NW2d 363 (2015); *Dawson v DeLisle*, unpublished opinion per curiam of the Court of Appeals, issued July 21, 2009 (Docket No. 283195), p 4; see also *Con-Sys-Int Mfg*, unpub op (manager's fiduciary duties owed to company, not members).
34. *Castle v Shoham*, unpublished opinion of the Macomb County Circuit Court, issued February 10, 2016 (Docket No. 2014-3568-CK), p 4 <http://courts.mi.gov/opinions_orders/businesscourtssearch/BusinessCourtDocuments/C16-2014-3568-CB%20(Feb%2010,%202015).pdf#search="castle v shoham">.
35. *Id.* at 3.
36. *Castle*, unpub op, issued January 21, 2016.
37. *Brikho*, unpub op, citing *Dawson*, unpub op.
38. *Id.*
39. *Demil v RMD Holdings, Ltd*, unpublished opinion of the Macomb County Circuit Court, issued August 11, 2014 (Docket No. 2012-889-CK); *Demil v RMD Holdings, Ltd*, unpublished opinion of the Macomb County Circuit Court, issued June 1, 2015 (Docket No. 2012-889-CK) (*Demil II*).
40. *Demil II*, unpub op at 6.
41. See also *Legacy Capital Partners, LLC, v Kailunas*, unpublished opinion of the Kent County Circuit Court, issued December 15, 2015 (Docket No. 13-09947-CKB) (the court utilized discretion to apply damage calculation based on a similar company in similar circumstances).
42. *Frank*, 310 Mich App 169.
43. *K&W Doo*, unpub op.
44. *Stockton v Partners Title Agency, LLC*, unpublished opinion of the Oakland County Circuit Court, issued September 14, 2016 (Docket No. 16-151595-CB).
45. *Id.* at 4.
46. *DC Mex Holdings, LLC v Affordable Land, LLC*, unpublished opinion per curiam of the Court of Appeals, issued May 5, 2015 (Docket No. 318791) (citations omitted).
47. *Castle*, unpub op, issued January 21, 2016, at 7.
48. *Id.*
49. *D'Agostini v D'Agostini*, unpublished opinion of the Macomb County Circuit Court, issued April 21, 2015 (Docket No. 2015-908-CB).
50. Michigan Courts, *Business Courts* <http://courts.mi.gov/administration/admin/op/business-courts/pages/business-courts.aspx>.

EXHIBIT 7

Fiduciary Duty in Business Litigation

By Gerard V. Mantese and Ian M. Williamson

> "[T]o say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?"
>
> —Justice Frankfurter, *SEC v Chenery Corp*, 318 US 80, 85–86; 63 S Ct 454; 87 L Ed 626 (1943)

Fiduciary duties arise in many contexts, both under statute and common law. This article examines Michigan statutory law and caselaw on fiduciary duty in the context of close corporations and limited liability companies (LLCs). We address who is a fiduciary and to whom, the conduct required of fiduciaries, and standing to bring claims against fiduciaries.

Overview of fiduciary duty

The Michigan Supreme Court has defined a fiduciary relationship as "a relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship."[1] Fiduciary relationships arise (1) where one reposes trust in the faithful integrity of another, who gains influence over that person; (2) where one assumes control and responsibility over another; (3) where one has a duty to act for or advise another on matters within the scope of the relationship; and (4) when the specific relationship has traditionally been recognized as involving fiduciary duties, such as between lawyer and client.[2]

Fiduciary relationships may be created informally or even unintentionally, without any specific intent of the parties.[3] When one party places trust and reliance in the other's judgment, an abuse of that relationship may result in viable legal claims.[4] However, the placement of trust must be reasonable.[5]

Closely held businesses involve various fiduciary duties

For directors, officers, or managers of closely held businesses, the scope of fiduciary duty focuses on the duties of loyalty and care along with duties of good faith and disclosure. These duties protect against a fiduciary's service to himself at the expense of the company or the shareholders. In Michigan, these duties are based in common law, but have been largely codified in Michigan's Business Corporation Act[6] and Limited Liability Company Act.[7]

The duty of loyalty requires the fiduciary to place the interests of his principal ahead of his own and prohibits the fiduciary "from acting in any antagonistic position whether for [his] own personal benefit or for the benefit of other competitive corporations."[8] This duty "is typically implicated when directors engage in self-dealing, or when they take personal benefits not shared with all the shareholders."[9]

The duty of care requires attentiveness to the affairs of the company, requiring the fiduciary to make decisions as would a reasonably prudent person in a similar situation. The "general rule by which to measure the degree of care and diligence required"

by fiduciaries in control of a business enterprise is that they "must answer for ordinary neglect; and 'ordinary neglect' is understood to be the omission of that care which every man of common prudence takes of his own concerns."[10]

The fiduciary duty of good faith, frequently cited in Michigan and other jurisprudence, is typically addressed within the context of alleged breaches of the duties of loyalty and care. In the context of the duty of care, a showing of "bad faith" may preclude a fiduciary's reliance on the business judgment rule to escape liability.[11] In connection with the duty of loyalty, authorizing a transaction for some purpose other than the best interests of the corporation may constitute bad faith.[12]

The fiduciary duty of disclosure is rooted in agency principles and may be viewed as appurtenant to the duty of loyalty. This duty requires the fiduciary to disclose to the corporation and shareholders all information the fiduciary knows is relevant to the affairs of the corporation, and which the fiduciary knows the shareholders would desire to have.[13] This duty often comes into play where the fiduciary has withheld material information as part of a scheme to advance his own interests.

Statutory duties of directors, officers, and managers

MCL 450.1541a codifies the duty of care for corporate officers and directors and includes the duty of loyalty—addressed indirectly in the concept of "good faith" set forth in (1)(a) of the statute. The duty of loyalty is also addressed in MCL 450.1545a, which establishes a safe harbor for interested party transactions involving directors or officers where (1) the transaction was fair to the corporation when entered into; or (2) the material facts were disclosed to the board, a board committee, or the independent directors, and the same approved or ratified the transaction; or (3) the material facts were disclosed to the shareholders and they approved or ratified the transaction.[14]

FAST FACTS

The Michigan Business Corporation Act and Limited Liability Company Act codify fiduciary duties of care, loyalty, and good faith for directors, officers, and managers of closely held business entities.

"Those in control" of closely held business entities are likely fiduciaries even if they are not formally named as directors, officers, or managers.

Shareholders or members may be able to pursue claims based on breaches of fiduciary duties even in nonderivative actions.

In Michigan, LLCs may be managed by their members or by managers, subject to specific operating agreement provisions.[15] A *manager* is a person "designated to manage the limited liability company pursuant to a provision in the articles of organization stating that the business is to be managed by or under the authority of managers."[16] Managers have statutory duties of care essentially identical to those of corporate officers and directors, as well as a codified duty of loyalty, set forth in MCL 450.4404.

Managers of LLCs also have a statutory safe harbor parallel to that of MCL 450.1545a for interested party transactions that are fair or were disclosed and approved.[17] Further, managers are statutorily deemed agents of the LLC for the purpose of its business and therefore owe the LLC as principal all fiduciary duties applicable to agents.[18]

Members of member-managed LLCs are subject to the same duties that attach to managers under MCL 450.4404.[19] Further, in member-managed LLCs, *all* members are deemed agents of the LLC for the purpose of its business unless the operating agreement provides otherwise.

Common law fiduciary duties of directors and officers

Corporate officers and directors in Michigan owe common law duties of loyalty and good faith both to the corporation they serve and to its shareholders.[20] The common law duty of good faith includes a duty of disclosure requiring officers and directors "to communicate to [their] principal facts relating to the business which ought in good faith be made known to the latter."[21]

While corporate directors and officers owe fiduciary duties directly to shareholders, Michigan courts generally prohibit shareholders from bringing direct claims for breach of those duties because such breaches typically cause injury to the corporation as a whole. Under Michigan caselaw governing the direct/derivative distinction, suits to redress injury to a corporation must be brought derivatively in the name of the corporation, but exceptions to this general rule exist when (1) the individual plaintiff is owed a duty independent of the corporation[22] or (2) the individual plaintiff has sustained an injury separate and distinct from the corporation's shareholders generally.[23]

Direct shareholder suits under oppression statutes

The statutory duties discussed above flow from directors, officers, or managers to the entity they serve and are therefore enforceable directly by the entity and derivatively by shareholders or members.[24] However, Michigan law allows shareholders of close corporations to bring direct claims against directors or those in control of a corporation for conduct that is "illegal, fraudulent, or willfully unfair and oppressive to the corporation or the shareholder."[25] Since the statute uses the word "or" between the terms "the corporation" and "the shareholder," a shareholder may bring a direct action against the directors to address any actionable conduct under § 489 that harms the corporation, including a breach of statutory duty.

In the LLC context, members may bring an action "to establish that acts of the managers or members in control…are illegal or fraudulent or constitute willfully unfair and oppressive conduct toward the limited liability company or the member."[26] If a member sues under MCL 450.4515, that member should, therefore, have standing to sue for any actionable conduct under the statute that harms the company or the member, including a breach of statutory duty.[27]

Some commentators, arguing that legislative intent on this issue is not sufficiently clear, have misguidedly called for a narrowed interpretation of § 489 which would preclude shareholders from bringing direct actions to address "illegal" or "fraudulent" conduct toward the corporation.[28] But this call disregards the meaning of the word "or" as used in MCL 450.1489 and is therefore at odds with its plain language, which provides expanded remedies for a variety of directorial misconduct whether it harms the corporation or the shareholder.

As the Michigan Supreme Court recently recognized in *Madugula v Taub*, direct shareholder actions permissible under § 489 are "often derivative in nature because the remedies sought affect the corporation."[29] In close corporations, it makes sense to permit shareholders to bring traditionally derivative claims like those for breach of fiduciary duties directly, even where such breaches damage the corporation. Noncontrolling shareholders often lack a ready means of selling or redeeming their shares, and are more likely to bear the brunt of any damage to the corporation resulting from illegal or fraudulent acts by directors or those in control.[30]

Duties of controlling shareholders and members

Nondirector/officer shareholders with actual control over a corporation's actions are common law fiduciaries. In *Estes v Idea Engineering & Fabrications, Incorporated*,[31] the Court of Appeals held that those in control of a closely held corporation have "a higher standard of fiduciary responsibility, a standard more akin to partnership law."[32] In *Miner v Bell Isle Ice Company*,[33] the Michigan Supreme Court held that when majority combinations of shareholders exert control, "they become, for all practical purposes, the corporation itself, and assume the trust relation occupied by the corporation towards its stockholders."[34] Some Michigan courts have defined this as a duty to manage the corporation "as to produce to each stockholder the best possible return on his investment."[35]

Michigan law allows shareholders of close corporations to bring direct claims against directors or those in control of a corporation for conduct that is "illegal, fraudulent, or willfully unfair and oppressive to the corporation or the shareholder."

Nonmanager members in a manager-managed LLC are not automatically subject to statutory duties of care, and Michigan courts have been reluctant to find fiduciary duties among equally positioned LLC members.[36] However, Michigan appellate courts tend to look to corporation law. Further, members "in control of" an LLC, whether through majority ownership or otherwise, are subject to a statutory duty not to commit illegal or fraudulent or willfully unfair and oppressive actions toward the company or its members.[37]

The business judgment rule

The "business judgment rule" provides some protection against claims of fiduciary breaches. The rule protects directors and officers from liability for making honest and reasonable judgments on company operations that turn out, in hindsight, to be unwise.[38]

The business judgment rule creates "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[39] The rule implicates the fiduciary duty of loyalty in that it protects *only* business decisions reached by disinterested officers and directors.[40] To enjoy the protection of the rule, officers and directors must also act with due care and inform themselves "of all material information reasonably available to them" before making a decision.[41] The rule also requires that officers and directors act "in good faith and in the honest belief that the action taken was in the best interests of the company."[42]

To rebut the presumptions of the business judgment rule, a plaintiff must show that those presumptions are factually inapplicable. If the directors or officers had an interest in the transaction at issue, the rule may not apply.[43] Also, a showing of bad faith will typically preclude application of the rule's protections.[44]

No Michigan appellate court has specifically addressed whether the rule's protections apply to managers or members of an LLC, though trial courts do apply it in the LLC context.[45] Given the similarities in statutory duties of corporate officers and directors and LLC managers, parties should presume that the same protections apply.[46]

Conclusion

A fiduciary must be loyal and diligent to the interests of his charges—and aware of who those varying charges may be. While those in control of a business entity have some protection under the business judgment rule, they should be aware that shareholders or members may raise allegations of fiduciary breach even in nonderivative actions and for harm to a shareholder or member as well as harm to a corporation or LLC. If a fiduciary duty exists, the facts in question must be closely analyzed to determine if the fiduciary acted in self-interest, imprudently, or in bad faith. ■

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ENDNOTES

1. *In re Karmey Estate*, 468 Mich 68, 74, n 2; 658 NW2d 796 (2003), citing Black's Law Dictionary (7th ed).
2. *Id.*; cf. *Banker & Brisebais Co v John C. Maddox, CPA*, unpublished opinion per curiam of the Court of Appeals, issued April 29, 2014 (Docket No. 310993) ("accountant-client relationship is not a traditionally recognized fiduciary relationship").
3. See *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992) (an agency relationship exists where the principal suggests the agent may act on his account); *Bykker v Mannes*, 465 Mich 637, 653; 641 NW2d 210 (2002) (a partnership exists where individuals carry on business for profit regardless of intentions).
4. See *Vicencio v Ramirez*, 211 Mich App 501, 508; 536 NW2d 280 (1995).
5. *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Inst*, 266 Mich App 39, 44; 698 NW2d 900 (2005) (citations omitted).
6. MCL 450.1101 *et seq.*
7. MCL 450.4101 *et seq.* Partnerships and joint ventures are outside the scope of this article.
8. *Wagner Electric Corp v Hydraulic Brake Co*, 269 Mich 560, 566; 257 NW2d 884 (1934).
9. Gold, *The new concept of loyalty in corporate law*, 43 UC Davis L R 457, 459 (2009).
10. *Martin v Hardy*, 251 Mich 413, 416; 232 NW 197 (1930). This standard of care is modified by the business judgment rule.
11. See *Dodge v Ford Motor Co*, 204 Mich 459, 500; 170 NW 668 (1919) (finding that the discretion of directors is not interfered with by courts in absence of bad faith, willful neglect, or abuse).
12. See Bishop, *Directorial abdication and the taxonomic role of good faith in Delaware corporate law*, 2007 Mich St L R 905, 932 (Winter 2007) (discussing Delaware law; Michigan courts have not closely analyzed the specific parameters of what constitutes "bad faith" in the business entity context).
13. *Pinnacle Express, Inc v Trout*, unpublished opinion of the Michigan 6th Circuit Court, issued June 26, 2002 (Docket No. 01-441-CZ).
14. See MCL 450.1545a(1)(a), (b), and (c). Notably, under MCL 450.1545a(4), "satisfying the requirements of subsection (1) does not preclude other claims relating to a transaction in which a director or officer is determined to have an interest."
15. See MCL 450.4401.
16. MCL 450.4102(2)(o).
17. MCL 450.4409(1). Member votes are also taken into account in determining whether this safe harbor is applicable, unless the articles or an operating agreement provide otherwise. MCL 450.4502(5).
18. MCL 450.4406; see also Miller, *Limited Liability Companies: A Common Core Model of Fiduciary Duties* (2014 ed).
19. See MCL 450.4401(a) and (b).
20. *Pittiglio v Michigan Nat'l Corp*, 906 F Supp 1145, 1154 (ED Mich, 1995).
21. *Production Finishing Corp v Shields*, 158 Mich App 479, 486; 405 NW2d 171 (1987).
22. *Michigan Nat'l Bank v Mudgett*, 178 Mich App 677, 679; 444 NW2d 534 (1989).
23. *Christner v Anderson, Nietzke & Co, PC*, 433 Mich 1, 9; 444 NW2d 779 (1989).
24. See *Estes v Idea Engineering & Fabrications, Inc*, 250 Mich App 270, 285; 649 NW2d 84 (2002).
25. MCL 450.1489(1) (emphasis added).
26. MCL 450.4515(1) (emphasis added).
27. See *Ewie Co, Inc v Mahar Tool Supply, Inc*, unpublished opinion per curiam of the Court of Appeals, issued October 8, 2008 (Docket No. 276646) at *5, rev'd in part on other grounds, *Ewie Co, Inc v Mahar Tool Supply, Inc*, 483 Mich 905; 762 NW2d 160 (2009) (member had standing to sue directly after the managing member moved the contract from the LLC into a new company).
28. Hauck & Koloszvary, *Shareholder oppression and the direct/derivative distinction*, 27 MI Bus L J 18, 22 (Summer 2007); Quick & Pawlowski, *The Tyranny of the Minority*, 15 ABA Commercial and Business Litigation Newsletter 7 (Winter 2014).
29. *Madugula v Taub*, ___ Mich ___; ___ NW2d ___ (2014).
30. This is consistent with MCL 450.1103 (requiring that Michigan's Business Corporation Act be liberally construed to "give special recognition to the legitimate needs of close corporations"). See *Bromley v Bromley*, unpublished opinion of the U.S. District Court for the Eastern District of Michigan, issued June 7, 2006 (Docket No. 05-71798) at *4. ("Defendants further ignore both *Estes*' and the statute's clear language that an action may be brought for minority oppression resulting in harm either to the shareholder *or* to the corporation. Plaintiff's Complaint alleges numerous claims of mismanagement of the corporation resulting in harm both to the corporation and to the interests of the shareholders and therefore satisfies the basic standing requirement of § 489.") (Emphasis added.)
31. *Estes*, n 24 *supra*.
32. *Id.* at 281.
33. *Miner v Bell Isle Ice Co*, 93 Mich 97; 53 NW 218 (1892).
34. *Id.* at 114.
35. *Veeser v Robinson Hotel Co*, 275 Mich 133, 138; 266 NW 54 (1936). "The overarching objective of the corporate entity is its own common good, which is generally to make profits." Bayne, *A philosophy of corporate control*, 112 U Pa L R 22, 42 (1963).
36. See *Alliance Associates, LLC v Alliance Shippers, Inc*, unpublished opinion per curiam of the Court of Appeals, issued June 1, 2006 (Docket No. 265101) (finding there is no fiduciary duty between equal members of the LLC).
37. MCL 450.4515(1).
38. The business judgment rule does not protect failures to act unless such inaction arises from a conscious decision not to act. Varallo, Dreisbach & Rohrbacher, *Fundamentals of Corporate Governance: A Guide for Directors and Corporate Counsel* (2d ed), p 60.
39. *Aronson v Lewis*, 473 A2d 805, 812 (Del 1984); see also *In re Butterfield Estate*, 418 Mich 241, 255; 418 NW2d 453 (1983) ("In the absence of bad faith or fraud, a court should not substitute its judgment for that of corporate directors….").
40. *Aronson*, n 39 *supra* at 812.
41. *Id.*
42. *Id.*
43. *Id.* But see MCL 450.1545a (providing safe harbors for interested transactions in some circumstances).
44. See *Dodge*, n 11 *supra* at 500.
45. See *Savas v Yaker*, unpublished opinion per curiam of the Court of Appeals, issued April 20, 2010 (Docket No. 288991) (noting trial court's application of business judgment rule in LLC dispute).
46. Courts regularly apply a version of the business judgment rule to LLC management decisions in the employment context. See, e.g., *Crawford v TRW Automotive US LLC*, unpublished opinion of the U.S. District Court for the Eastern District of Michigan, issued December, 28, 2007 (Docket No. 06-14276) at *3.