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Can't We All Just Get Along? Fiduciary Duties in the Corporate and LLC Context

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Introduction

In business, litigation disputes often arise out of questionable actions of a shareholder, officer, or manager that harm the business entity or others. To redress wrongful conduct in this context, a claim of breach of fiduciary duty is frequently made, often in a suit brought by the entity and one or more individuals.[1] Increasingly, however, fiduciary duty claims are brought by individual shareholders or members alleging that the control group has breached its duty to *them*.

The contours of the duties owed by a majority shareholder to a minority shareholder of a corporation, and owed by a manager to members in a limited liability company (LLC), are far from settled, both nationally and in Michigan. The Michigan legislature has created statutory causes of action for shareholder or member oppression that overlap with common law principles of fiduciary law. Whether Michigan law imposes a fiduciary duty on majority shareholders/controlling members towards minority shareholder/non-controlling members, outside the scope of oppression statutes, depends on the facts of the case. This article will review some of the national trends in fiduciary duty caselaw. It will then review recent caselaw in Michigan discussing fiduciary duties between majority and minority shareholders, and between LLC members.

Fiduciary Duties in the Corporate Context

It is settled under Michigan statutory law that corporate officers and directors owe a duty to the corporation. MCL 450.1541a imposes a duty of care on corporate officers and directors who possess discretionary authority. Michigan courts have interpreted this duty of care to mean that a corporate director or officer "must answer for ordinary neglect, and that 'ordinary neglect' is understood to be omission of that care which every man of common prudence takes in regard to his own affairs."[2] Officers and directors also owe a duty of loyalty to the corporation; they must act "in a manner [that the officer] reasonably believes to be in the best interests of the corporation."[3] The corporate fiduciary duty may be breached intentionally, as where a director engages in self-dealing and conceals relevant information from the corporation, or negligently, by failing to disclose information that the director knew or should have known was relevant and material to the corporation.[4]

Judge Denise Langford Morris' 2002 circuit court opinion in *Pinnacle Express, Inc*[5] illustrates some of the contours of the fiduciary duties owed by officers to the corporation. At issue in *Pinnacle* was whether a corporate officer could negligently usurp a corporate opportunity. Trout, the President of Pinnacle Express (a trucking company), testified that when he formed Bogie's Express—a competing trucking company—he was under the belief that he would soon become the sole owner of Pinnacle Express, and that Pinnacle would benefit from the creation and operation of Bogie's Express. Therefore, he argued, he never intended to usurp a corporate opportunity, nor did he divert any trucking jobs from Pinnacle to Bogie's for his own personal gain.[6] The court ruled that the argument was unavailing because if Trout usurped the opportunity unintentionally, he would have violated his duty of care. On the other hand, if he knew that he was not going to become the sole owner of Pinnacle Express, he violated his duty of loyalty. Either way, he breached his fiduciary duty to the corporation.[7]

The National Debate on Shareholders' Fiduciary Duties in Close Corporations

The more difficult question is what duty, if any, a majority shareholder of a closely held corporation owes *to other shareholders*. On this question, there has been much debate nationally. On one end of the spectrum, some jurisdictions hold that majority shareholders in a close corporation owe a duty to minority shareholders akin to the duties owed in

a partnership. On the other end of the spectrum, some jurisdictions hold that majority shareholders owe a duty only to the corporation, and no duty to other shareholders.

For example, Massachusetts courts have held that a majority shareholder's duty to other shareholders is almost the same as a partner's fiduciary duty to other partners.[8] The Massachusetts Supreme Judicial Court ruled that even in a close corporation, with a specific and clear operating agreement, the existence of a contract "does not relieve stockholders of the high fiduciary duty owed to one another in all their mutual dealings."[9] However, the court also ruled that "where the parties have defined in a contract the scope of their rights and duties in a particular area, good faith action in compliance with that agreement will not implicate a fiduciary duty."[10] When acting within the ambit of an operating agreement, the guiding principle is good faith. Yet, even beyond the operating agreement, the majority owes a fiduciary duty to the minority shareholders, as the court held:

> Although a shareholder in a close corporation always owes a fiduciary duty to fellow shareholders, good faith compliance with the terms of an agreement entered into by the shareholders satisfies that fiduciary duty. A claim for breach of fiduciary duty may arise only where the agreement does not entirely govern the shareholder's actions.[11]

Therefore, in Massachusetts, the relationship among shareholders in a corporation may be viewed as a *fiduciary* relationship, even though those duties may be amended or limited by agreement.

Delaware, on the other hand, does not recognize that a majority shareholder has any common law fiduciary duty to minority shareholders in a closely held corporation, unless specified in the operating agreement.[12] The Delaware Court of Chancery held in *Blaustein*, that the minority shareholder cannot assert more rights than those to which the parties had agreed. The court stated, in very stark terms:

> [Blaustein's] predicament is not enviable, but she must live with the Shareholders' Agreement for which she bargained. She had an opportunity to negotiate specific buyout terms. Her attorneys were sophisticated and well-regarded. The Court cannot read into the Shareholders' Agreement obvious terms that she did not secure during the bargaining process. Nor can the Court, on these facts, utilize fiduciary principles to help her case.[13]

The Delaware rule, then, is *contractual*—that is, in close corporations, the fiduciary duty owed by majority shareholders is specified and defined in the corporate governance documents.[14] In either context—the Massachusetts/fiduciary approach or the Delaware/contractual approach—shareholders may owe a fiduciary duty to the other shareholders. The difference between the two views is whether the common law recognizes a duty that may be disclaimed by agreement, or whether there is no duty by default, and any duty must be imposed by agreement.[15]

Recent Michigan Cases

While older caselaw holds that a common law fiduciary duty exists between the majority and minority shareholders,[16] Michigan law continues to evolve. More recent disputes between shareholder groups are typically brought under the shareholder oppression statute, MCL 450.1489.[17] The Michigan legislature may have been attempting to temper the harsh Delaware contractual approach when it enacted the shareholder oppression statute. Indeed, the wrongful actions that might have previously given rise to a minority shareholder's breach of fiduciary duty suit may well be the predicate for a shareholder oppression suit.[18] However, the difference between a breach of fiduciary duty claim and a shareholder oppression claim can be important under certain circumstances.[19]

The Michigan legislature has created statutory causes of action for shareholder or member oppression that overlap with common law principles of fiduciary law.

The recent decision in *Antakli v Antakli*[20] illustrates the interplay between fiduciary duty law and shareholder oppression law. In that case, the plaintiff-minority shareholder, who was also the president, COO, and director of defendant Intraco Corporation, brought suit against the majority Intraco shareholders (who were the plaintiff's mother, sister, and brothers).[21] The plaintiff sued for, among other claims, shareholder oppression and breach of fiduciary duty.[22] With regard to the shareholder oppression claim, the plaintiff argued that she was oppressed because the majority shareholders interfered with:

- her voting rights;
- full access to corporate financial information;
- her distribution and dividend rights;

- her rights to expense reimbursements;
- her shareholder management rights; and,
- a tax liability distribution.

With regard to the breach of fiduciary duty claim, the plaintiff alleged that she had been "frozen...out of Intraco;" had "[her] salary [halved] and...her total compensation [reduced] by over 80 percent;" and that the she was repeatedly denied expense reimbursement—while the other shareholders reimbursements were readily paid.[23]

While the underlying acts of the majority shareholders were the same as in the oppression claim, in the breach of fiduciary duty claim the court focused on how the treatment of the minority shareholder was different from the treatment of the other shareholders.[24] The court agreed with the plaintiff's argument that "it is the 'differential treatment' that she receives relative to other shareholders that constitutes a breach of fiduciary duty." Implicitly the court was looking to a fiduciary standard that is (1) owed by the majority shareholder group to the minority shareholder; and, (2) distinct from the standards imposed by the shareholder oppression claim, namely, the "differential treatment" she received, which was not a focus of the court's shareholder oppression analysis. Ultimately, since the plaintiff had adduced voluminous documentary evidence, the court denied summary disposition to the defendants, and allowed the claim to proceed to trial.[25]

While older caselaw holds that a common law fiduciary duty exists between the majority and minority shareholders, Michigan law continues to evolve.

Cavaliere v DRSN Assocs[26] provides an excellent parallel for the interplay between oppression and breach of fiduciary duty in the LLC context. Unlike corporations, caselaw involving limited liability corporations (LLCs) is generally less developed. This may be because LLCs have only been in existence since the mid-1970s. Regardless, under the text of the Michigan LLC Act, a manager's statutory fiduciary duties appear to be owed to the company, not the individual members.[27]

It is probable that, for this reason, the plaintiff in *Cavaliere* did not pursue a claim for breach of fiduciary duty, and only proceeded on a member oppression claim.[28] In *Cavaliere*, the parties were involved in the business of building and operating skilled nursing and related health-care facilities, and affiliated office and residential facilities. The plaintiffs collaborated with others to create defendant DRSN Associates. At the end of his involvement with DRSN, Cavaliere was employed as the director of development. Plaintiffs claimed, among other things, that the majority members of DRSN embarked on a course of "willfully unfair and oppressive conduct" to punish them for refusing to sell their minority interest to the other members.[29] The defendants argued that the operating agreement authorized the alleged conduct. Since the exclusive management authority was vested in DRSN's managers in accordance with the operating agreement, they argued, there could be no member oppression.

The court disagreed, holding that "although the Operating Agreement may allow certain actions, said actions cannot be done in a willfully unfair and oppressive manner."[30] The court cited to *Salvadore v Connor*,[31] in which the Michigan Court of Appeals held that "[the] law requires the majority in control of the corporation the utmost good faith in its control and management as to the minority." The court's reliance on *Salvadore* is noteworthy, both because the court was applying corporate common law to an LLC,[32] but, more importantly, because the court was adopting a view more akin to the "fiduciary" view described by Massachusetts' jurisprudence.[33] The court rejected the defendant's argument that the LLC's operating agreement controlled over any presumed fiduciary duty, and held that, at least for the purposes of member oppression, there were duties owed to the non-controlling members beyond the LLC's operating agreement.[34] The court, however, did not discuss whether that duty extended beyond the member oppression context.[35]

Perhaps no other recent decision walks the fiduciary duty tightrope more finely than *Castle v Shoham*.[36] The court summarized the facts of the case by noting that "in his complaint, Plaintiff alleges that [defendant Midwest Air Filter ("MAF")] at the direction of the Shoham Defendants has engaged in various improper activities." The court then stated: "[t]he core issue of the parties' dispute with respect to Plaintiff's breach of fiduciary duty claim against MAF is whether a majority member of an LLC owes a fiduciary duty to the minority member(s)."[37] The Shohams, as majority members of MAF, argued that under the holding of *Dawson v Delise*,[38] "a majority member of an LLC, unlike a ma-

jority shareholder of a corporation, does not owe minority members a fiduciary duty."[39]

The court noted that *Dawson* does not go so far as to hold that there is *no* fiduciary duty outside of the requirements of the member oppression statute, but rather that *Dawson* holds that there were *limited* situations where an individual member or shareholder may bring a direct action: "(1) When [a shareholder or member] has sustained a loss separate and distinct from that of other [owners] generally,[40] and (2) when he can show a violation of a duty owed directly to him that is independent of the [corporation or LLC]."[41] The court concluded that, in *Dawson*, the plaintiff failed to establish a factual basis for a breach of fiduciary duty claim; nevertheless, "under certain circumstances a minority member may maintain a breach of fiduciary duty claim against a majority member."[42] Thus, the court recognized that a minority member may bring an action for breach of a fiduciary duty against a controlling member outside of the context of an oppression action. But those actions are limited to the two exceptions described in *Christner* and *Belle Isle Grill Corp*, *i.e.*, when the shareholder sustains a loss separate and distinct from the other owners (*Christner*), or a violation of a duty owed that is independent of the corporate entity (*Belle Isle Grill Corp*).[43] Because Castle alleged that the defendants breached a duty independent of the corporation by allegedly taking Castle's share of profits for itself and other entities owned by MAF principals, the case fell within the *Christner* exception. As such, the defendants' motion for summary disposition was denied.[44]

Conclusion

In Michigan corporate litigation, the debate between the contractual and fiduciary views of duties owed between members or shareholders may be viewed as a microcosm for a similar debate nationally. At one end of the spectrum, majority shareholders owe a duty akin to the partnership duty described by Judge Cardozo's famous line in *Meinhard v Salmon*,[45] "[n]ot honesty alone, but the punctilio of an honor the most sensitive...," as they do in Massachusetts.[46] On the other end, majority shareholders have no direct common law duties to minority shareholders, outside of agreed upon contractual requirements, as in Delaware. Michigan law appears to lie somewhere in between these two views, with the oppression statutes providing the clearest imposition of fiduciary standards on those in control not to abuse their power.

NOTES

1. *Cf.*, *Coppola v Manning*, No 323994, 2015 Mich App LEXIS 2152 (Nov 17, 2015) (unpublished) (receiver, on behalf of the corporation, could sue former directors and officers for breach of fiduciary duty).

2. *Dykema v Muskegon Piston Ring Co*, 348 Mich 129, 136, 82 NW2d 467 (1957)(quoting *Martin v Hardy*, 251 Mich 413, 232 NW 197 (1930).

3. MCL 450.1541a(1)(c).

4. *Pinnacle Express, Inc v Trout*, No 01-441 CZ, 2002 WL 1547540, at *1 (Mich Cir Ct June 26, 2002).

5. *Id.*

6. *Id.* at *3.

7. *Id.* ("Although Trout may not have intended to usurp an opportunity belonging to Pinnacle, it is clear nonetheless that he violated either his duty of loyalty or his duty of care, or both.")

8. See, e.g., *Merriam v Demoulas Super Markets, Inc*, 985 NE2d 388, 464 Mass 721 (2013).

9. *Blank v Chelmsford Ob/Gyn, PC*, 420 Mass 404, 408–409, 649 NE2d 1102 (1995).

10. *Merriam*, *supra*, at 395 (discussing *Blank*).

11. *Id.*

12. *Blaustein v Lord Baltimore Capital Corp*, No CIV A 6685-VCN, 2013 Del Ch LEXIS 108, at *56 (Apr 30, 2013) aff'd 84 A3d 954 (Del 2014) (citing *Riblet Prods Corp v Nagy*, 683 A2d 37, 39 (Del 1996); *Nixon v Blackwell*, 626 A2d 1366, 1381 (Del 1993); and *Ueltzhoffer v Fox Fire Dev Co*, No CIV A 9871, 1991 Del Ch LEXIS 204 (Dec 19, 1991) *aff'd*, No 208, 1992 Del LEXIS 459 (Nov 24, 1992)).

13. *Id.* at *18.

14. *Nixon v Blackwell*, 626 A2d 1366 (Del 1993); see also, e.g., *In re Wayport, Inc Litig*, 76 A3d 296 (Del Ch 2013); *Arnold v Society for Sav Bancorp*, 678 A2d 533 (Del 1996); *Thorpe by Castleman v CERBCO*, 676 A2d 436, 444 (Del 1996); *Blaustein supra* ("Delaware law does not recognize that a majority stockholder has a special fiduciary duty to minority stockholders in a closely-held corporation.")

15. Most states fall somewhere in-between; see, *Fix v Fix Material Co*, 538 SW2d 351 (Mo Ct App 1976). While there may not be a specific "fiduciary" relationship, the Missouri courts use the concepts of fiduciary law as a prism in which they view majority shareholder actions and decide whether minority shareholders may be deserving of compensation or equitable relief under the state's oppression statutes.

16. *Salvadore v Connor*, 87 Mich App 664, 675, 276 NW2d 458 (1978) ("the law requires the majority in control of the corporation the utmost good faith in its control and management *as to the minority* and it is the essence of this trust that it must be so managed so as to produce *to each shareholder*, the best possible return upon his investment.")(emphasis added); *Veeser v Robinson Hotel Co*, 275 Mich 133, 138, 266 NW 54 (1936); *Kearney v Jandernoa*, 979 F Supp 576, 579 (WD Mich 1997) (citing *Pepper v Litton*, 308 US 295, 306 (1939)) ("A controlling shareholder of a corporation is a fiduciary."); *Fenestra Inc v Gulf Am Land Corp*, 377 Mich 565, 599-600, 141 NW2d 36 (1966) ("[I]t is unlawful for a majority stockholder to use its fiduciary capacity to obtain access to the resources of the company for the benefit of that majority stockholder, and which is not to the best interests of all of the stockholders. If a majority stockholder is in control and management of a corporation then the

principle is valid.")(internal quotations omitted).

17. MCL 450.1489(1) ("A shareholder may bring an action...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...").

18. *See Bromley v Bromley*, No 05-71798, 2006 US Dist LEXIS 72398, at *16 (ED Mich Oct 4, 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"). The interplay between the two causes of action was the subject of an opinion by the New York Federal District Court, which discussed Michigan law in *Fox v Idea Sphere, Inc.* No 12 Civ 1342, 2013 US Dist LEXIS 42674, at *48 (SDNY Mar 21, 2013) ("Michigan courts appear to allow plaintiffs to pursue parallel claims of breach of fiduciary duty and minority shareholder oppression under Section 450.1489. All of the [oppressive actions taken by the defendants] are things that qualify as breaches of fiduciary duty under *Bromley*.") (internal citations omitted).

19. As just one example, a judgment for shareholder oppression could warrant an exception from a bankruptcy discharge, whereas a judgment for a breach of fiduciary duty might be subject to the discharge. *Kasishke v Frank (In re Frank)*, 425 BR 435 (Bankr WD Mich 2010). Under 11 USC 523(a)(6), debts arising from a "willful and malicious injury by the debtor to another entity or to the property of another entity" are excepted from a discharge.

20. *Antakli v Antakli*, No 13-135553-CB (Oakland Cir Ct, Jan 15, 2015).

21. The defendant family majority shareholders described the situation as a "family dispute," and not a matter for the courts. *Id.* The court disagreed.

22. *Id.*

23. *Id.*

24. *Id.* The court rejected the defendant's defense under the business judgment rule, holding that the business judgment rule only protects actions taken in good faith.

25. The court had previously recognized a common law fiduciary duty between majority and minority shareholders in its earlier decision considering the same defendants' original summary disposition motion. *Antakli v Antakli*, No 13-135553-CB (Oakland Cir Ct, Jan 22, 2014). In the 2014 opinion, the court disagreed with the defendants' contention that plaintiff only had a statutory claim against officers and directors under MCL 450.1541(a), and explained that Salvador "recognizes a common law claim for breach of fiduciary duty owed from majority shareholders to other shareholders." *See also Wojcik v McNish*, No 267005, 2006 Mich App LEXIS 2386, at *6-7 (July 25, 2006) (unpublished).

26. *Cavaliere v DRSN Assocs*, No 13-138079-CZ (Oakland Cir Ct, May 20, 2015)(Alexander, J).

27. MCL 450.4404(1) ("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*") (emphasis added).

28. *Cavaliere, supra.* The plaintiff, however, also included a claim for breach of contract.

29. *Id.* Specifically, plaintiff alleged that the defendant refused to send the plaintiff agendas for member meetings; defendant made "misleading statements about the business;" defendant refused to send plaintiff financial statements regarding the business; and one of the defendants threatened "to squash" the plaintiff if he withheld approval to sell the business.

30. *Id.* (*quoting Berger v Katz*, No 291663, 2011 Mich App LEXIS 1408 (July 28, 2011) (per curiam).

31. *Salvadore v Connor*, 87 Mich App 664, 675, 276 NW2d 458 (1978).

32. This is also in accord with Massachusetts law, where the court often equivocates between corporations and LLCs, to the point where the distinction may have become judicially meaningless. *See* Thomas M. Madden, *Do Fiduciary Duties of Managers and Members of Limited Liability Companies Exist as with Majority Shareholders of Closely Held Corporations?* 12 Duq Bus L J 211. (citing *Pointer v Castellani*, SJC-10352 (2009)). Madden goes on to conclude, "[t]his corporate common law has, in part, directly informed, if not controlled, certain decisions regarding fiduciary duties in limited liability companies." *Id.*

33. *Cavaliere* is not the first case in which a Michigan court has looked to Michigan corporate common law to determine questions regarding member oppression. In *BSA Mull, LLC v Garfield Inv Co*, Nos 310989, 311911, 315359, 315544, 2014 Mich App LEXIS 1834 (Sept 30, 2014) (unpublished), the Michigan Court of Appeals applied Michigan shareholder oppression law to assist the court in understanding the Michigan LLC Act's definition of "willfully unfair and oppressive conduct." The court applied *Franchino v Franchino*, 263 Mich App 172, 687 NW2d 620 (2004), a case involving shareholder oppression, and held that "only conduct that substantially interferes with rights that automatically accrue to a member by virtue of being a member will be considered for purposes of determining whether such conduct was willfully unfair and oppressive." *BSA Mull, supra* at *10. The court went on to use *Franchino* as setting the standard for what it means to be a "shareholder," and, therefore a "member." *Id.* ("Shareholder interests typically include actions like voting at shareholder's meetings, electing directors, adopting bylaws, amending charters, examining the corporate books, and receiving corporate dividends. *Franchino*, 263 Mich App at 184. Again, by association, these same interests could be deemed typical of a member in an LLC.")(internal quotations removed.). *See also Brikso v Shirinian*, No 2014-3977-CB (Macomb Cir Ct, Aug 18, 2015) (Viviano, K) (same).

34. For membership oppression actions, whether the alleged oppressor is actually in "control" is a key requirement. *See e.g., Sargent Docks and Terminal, Inc v Thomas Weber*, (Saginaw Cir Ct, Aug 7, 2015) (Jurrens, R). ("[W]ithout control, conduct is not actionable regardless of how unfair or oppressive it may be.")

35. *See also Wayne v Lodden*, No 14-144499-CZ (Oakland Cir Ct, May 27, 2015) (Alexander, J) (citing *Salvadore* and stating that a dominant or controlling stockholder is a fiduciary).

36. *Castle v Shoham* ("*Castle*"), No 2014-3568-CK (Macomb Cir Ct, Feb 10, 2015) (Foster, J).

37. *Id.*

38. *Dawson v DeLisle*, No 283195, 2009 Mich App LEXIS 1553 (July 21, 2009)(unpublished).

39. *Castle*, supra.

40. Citing *Christner v Anderson, Nietzke & Co, PC*, 433 Mich 1, 9, 444 NW2d 779 (1989).

41. Citing *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 464, 666 NW2d 271 (2003).

42. *Castle*, supra.

43. While the *Castle* court highlighted the *Dawson* distinctions, other courts addressing the issue have held that *Dawson* mandates an outright holding that "a manager's fiduciary duties are owed to the company, not the individual members." *Talaski v Carpenter*, No 14-138663-CK (Oakland Cir Ct, Oct 09, 2014) (Potts, W) ("Talaski owed no fiduciary duties to the Carpenters and because he was not the managing member he owed no fiduciary duties to CTP.")

44. *See also Blankenship v Superior Controls, Inc*, No 13-CV-12386 2015 US Dist LEXIS 132328, at *21-22 (ED Mich Sept 30, 2015) (applying Michigan law) ("Moreover, Michigan courts have historically held...shareholder-

ers [in a close corporation] to a higher degree of fiduciary duties, stating '[t]he law requires of the majority the utmost good faith in the control and management of the corporation as to the minority, and it is the essence of this trust that it must be so managed as to produce to each stockholder the best possible return upon his investment.' *Veeser v Robinson Hotel Co.* 275 Mich 133, 138, 266 NW 54 (1936).").

45. *Meinhard v Salmon*, 249 NY 458, 464, 164 NE 545 (1928).

46. *Genesis Tech & Fin, Inc v Cast Navigation, LLC*, 74 Mass App Ct 203, 905 NE2d 569 (2009).

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