



# Michigan Business Courts and Oppression

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

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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*,<sup>1</sup> 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.<sup>2</sup> 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<sup>3</sup> 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.<sup>4</sup>

In *Castle v Sbobam*,<sup>5</sup> 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.<sup>6</sup>

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.’”<sup>7</sup> 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.<sup>8</sup>

In *Brikho v Shirinian*,<sup>9</sup> 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.<sup>10</sup> 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.”<sup>11</sup> Indeed, a “director is a fiduciary. So is a dominant or controlling stockholder or group of stockholders.”<sup>12</sup> 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.<sup>13</sup> In *Blankenship v Super Controls, Inc*,<sup>14</sup> 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.<sup>15</sup>

### Surviving a motion for summary disposition

In *Pitsch v Pitsch Holding Co, Inc*,<sup>16</sup> 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.<sup>17</sup>

Of course, documentary evidence helps defeat a motion for summary disposition. For example, in *Antakli v Antakli*,<sup>18</sup> 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.<sup>19</sup>

### 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.’”<sup>20</sup>

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.”<sup>21</sup> 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.”<sup>22</sup> 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.<sup>23</sup>

### 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.<sup>24</sup> The Court of Appeals and the business courts have tended to apply the plain language of the statute.

For example, in *Dart v Cendrowski*,<sup>25</sup> 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.<sup>26</sup> Because the company’s operating agreement explicitly authorized the conduct, the plaintiff failed to state a claim for member oppression.<sup>27</sup>

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.<sup>28</sup> 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*,<sup>29</sup> the Oakland County Business Court quoted with



approval the reasoning in *Berger v Katz*<sup>30</sup>: “[a]lthough the by-laws 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.”<sup>31</sup>

### 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.<sup>32</sup> In contrast, Michigan courts have been reluctant to apply this heightened standard to controlling members in the LLC context.<sup>33</sup>

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.”<sup>34</sup> 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.”<sup>35</sup>

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.<sup>36</sup> 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.”<sup>37</sup> 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.<sup>38</sup>

In *Demil v RMD Holdings*,<sup>39</sup> 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.<sup>40</sup> *Demil* highlights the broad discretion trial courts have under the oppression statutes.<sup>41</sup>

### 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*,<sup>42</sup> 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).<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup>

### 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 inequity or bad faith with respect to the matter in which the party seeks relief.”<sup>46</sup> 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.”<sup>47</sup> 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.”<sup>48</sup>

### 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.<sup>49</sup> 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.<sup>50</sup> ■



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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"](http://courts.mi.gov/opinions_orders/businesscourtssearch/BusinessCourtDocuments/C16-2014-3568-CB%20(Jan%2021,%202016)(Second%20Opinion).pdf#search='castle%20v%20shoham')>. 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 Ladden*, 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=">](http://courts.mi.gov/opinions_orders/businesscourtssearch/BusinessCourtDocuments/C10-2015-11014229-CB-3%20(Aug%207,%202015).pdf#search='>).
21. *Pitsch*, unpub op.
22. *Gusmano 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 Engg & 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"](http://courts.mi.gov/opinions_orders/businesscourtssearch/BusinessCourtDocuments/C16-2014-3568-CB%20(Feb%2010,%202015).pdf#search='castle%20v%20shoham')>.
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>>.