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NAVIGATING THE WORLD OF FIDUCIARY DUTY WITHIN THE CORPORATE CONTEXT

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IN MISSOURI, AS IN OTHER STATES, CORPORATIONS, SHAREHOLDERS OF CORPORATIONS, AND MEMBERS OF LIMITED LIABILITY COMPANIES ("LLCS"), CAN BE DAMAGED BY BREACHES OF FIDUCIARY DUTIES BY THOSE IN CHARGE OF THE COMPANY. IN GENERAL, TO ESTABLISH A BREACH OF FIDUCIARY DUTY CLAIM UNDER MISSOURI LAW, THE PLAINTIFF MUST PROVE: (1) THAT A FIDUCIARY DUTY EXISTED BETWEEN THE PLAINTIFF AND THE DEFENDANT, (2) THAT THE DEFENDANT BREACHED THE DUTY, AND (3) THAT THE BREACH CAUSED THE PLAINTIFF TO SUFFER HARM.[2]

As to the first requirement:

> A fiduciary relationship may arise as a matter of law by virtue of the parties' relationship, e.g., attorney-client, or it may arise as a result of the special circumstances of the parties' relationship where one places trust in another so that the latter gains superiority and influence over the former. The question in determining whether a fiduciary or confidential relationship exists is whether or not trust is reposed with respect to property or business affairs of the other.[3]

In Missouri, fiduciary relationships in corporations and LLCs are created largely by statute. Corporations are governed by the General and Business Corporation Law of Missouri [4] ("Business Corporation Act"), and LLCs are governed by the Missouri Limited Liability Company Act [5] ("LLC Act"). But to say that a corporate officer, or another, is a fiduciary is simply to "begin[] the 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?"[6] Any analysis of corporate and LLC fiduciary duties must begin with these questions. This article examines some of the legal protections under Missouri law that enable companies, shareholders, and members to hold those in charge of the company accountable for breaches of fiduciary duties. The article first reviews what fiduciary duties, if any, are owed by officers, directors, and shareholders of corporations, as well as members and managers of LLCs. The article then goes on to discuss ways in which these duties may be breached, and concludes with a discussion of pitfalls of which every plaintiff must be cautious when bringing a breach of fiduciary duty suit.

Fiduciary Duties of Directors, Officers, and Shareholders in Corporations

Duties Owed by Officers and Directors to Corporations and Shareholders

There is no doubt that officers and directors of corporations owe fiduciary duties to the corporation and its shareholders. This has been confirmed by the Supreme Court of Missouri, which has held that "[t]he officers and directors of a corporation occupy a fiduciary relation to the corporation and to the stockholders; their position is one of trust and they are bound to act with fidelity and subordinate their personal interest to the interest of the corporation should there be a conflict."[7] "[T]his fiduciary duty requires corporate directors and officers 'to exercise the utmost good faith in the discharge of the duties arising out of their trust, and to act for the corporation and its stockholders, giving all the benefit of their best judgment.'"[8]

The fiduciary duty of officers and directors is typically divided into a series of distinct obligations, such as the duty of care, duty of loyalty, duty to account, duty of confidentiality, duty of full disclosure, and duty of good faith and fair dealing. Perhaps the most commonly invoked of these sub-duties involved in litigation is the duty of loyalty. This duty "exists to shareholders by virtue of their status as shareholders, and not as a result of any contractual arrangement."[9]

"Moreover, officers of a closely-held corporation owe a higher degree of fiduciary duty to shareholders than do [officers of] public corporations."[10] In fact, § 351.850.1(1) specifically provides that "directors or those in control" of a closely held corporation are liable to a minority shareholder if they "have acted, are acting, or will act in a manner that is illegal, oppressive, fraudulent, or unfairly prejudicial to the petitioner, whether in his capacity as shareholder, director, or officer, of the corporation."[11] Indeed, "[t]he intent of the legislature in adopting the close corporation section [of the Business Corporation Act] ... was to increase the standard of care between officers, directors and shareholders in a close corporation to that duty owed between partners in a partnership."[12]

Duties Owed by Controlling Shareholders to Minority Shareholders

Missouri law recognizes that majority shareholders of a corporation owe a fiduciary duty to minority shareholders.[13] For example, in *Fix v. Fix Material Company, Inc.* the court explained that "[s]hareholders in control are under a fiduciary duty to refrain from using their control to obtain a profit for themselves at the injury or expense of the minority, or to produce corporate action of any type that is designed to operate unfairly to the minority."[14]

Missouri courts have analyzed shareholder *oppression* cases in the context of whether shareholders owe fiduciary duties to each other and to the corporation. To illustrate, in *Fix*[15] the court stated that minority shareholders may be entitled to a remedy of dissolution in a closely-held corporation depending on whether the controlling shareholders breached a fiduciary duty by obtaining a profit for themselves at the injury or expense of the minority or by taking corporate action designed to operate unfairly upon the minority shareholders.[16] The court also held that the determination of whether the action of the directors or those in control of a close corporation is "oppressive" is determined on a case-by-case basis.[17]

The Business Corporation Act uses expansive language to describe the wrongful conduct of directors or "those in control" in order to determine whether minority oppression has been established.[18] Section 351.850 provides that for a shareholder to seek a remedy for minority oppression, a shareholder must establish: "The directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, fraudulent, or unfairly prejudicial." In *Whale Art Co. v. Docter,*[19] the court provided guidance on what is oppressive conduct within the corporate environment:

> Allegations of oppressive conduct are analyzed in terms of fiduciary duties owed by directors or controlling shareholders to minority shareholders. Although controlling shareholders are not fiduciaries in the strict sense, the general concepts of fiduciary law are useful in measuring the conduct of those in control, particularly in the context of a small closely-held corporation.[20]

Thus, Missouri courts appear to analyze the same criteria for making a finding of a breach of fiduciary duty as for making a finding of corporate oppression.

Examples of Breaches of Fiduciary Duties

As discussed, officers, directors, and controlling shareholders owe fiduciary duties to the corporation and the remaining shareholders. The question that next needs to be addressed is: When are these duties breached? Missouri courts recognize that "fiduciary duty" is a broad concept that is used to cover a multitude of situations dealing with improper conduct. The conduct does not have to be necessarily illegal or fraudulent. Recently, Missouri courts expanded on the types of conduct that may be a breach of fiduciary duty. In *Waters v. G & B Feeds, Inc.*,[21] the court noted a litany of actions in which the corporate controller had disregarded the shareholder's interests, including: "operating the business and making decisions on behalf of the corporation without" obtaining permission from the shareholder; "borrowing money and refinancing debts without [the shareholder's] input"; "refusing to cooperate in the sale of [corporate property]" to the detriment of shareholders; and generally leaving the shareholder out of all corporate affairs.[22] The court found that there was "sufficient evidence supporting the trial court's determination that [the defendant] breached his fiduciary duty . . . in his dealings with [the minority shareholder] and in his operation of the affairs of [the company]."[23] In fact, his actions were not only breaches of his fiduciary duties to the shareholder, but also constituted "shareholder oppression."[24]

Other examples of breaches of fiduciary duty have included: "engaging in undisclosed transactions with another company in which [the officer or director] has an interest which are not fair to the corporation";[25] selling corporate treasury stock at a reduced price in order to give a specific group control of the corporation;[26] profiting at the expense of shareholders without a full and fair disclosure of the material facts;[27] and causing the issuance of stock for the controlling shareholder's own personal aggrandizement to the detriment of other shareholders or for the purpose of obtaining control of the corporation.[28]

The Supreme Court of Missouri has specifically cited David S. Ruder in identifying 10 substantive areas that may entail a breach of the duty of loyalty:

> [S]elf-dealing, dealings by a corporate parent with its subsidiaries, majority shareholder injury to minority shareholders in corporate acquisition and reorganization transactions, excessive compensation, use of corporate funds to perpetuate control, sale of control at a premium, insider trading, corporate opportunities, competition by corporate officers and directors with their corporation, and fiduciary obligations in bankruptcy.[29]

An exhaustive list of acts constituting a breach of fiduciary duty cannot be prepared given the flexible definition of the concept of fiduciary duty and how the concept is applied on a case-by-case basis. Moreover, fiduciary duty breaches rarely occur in isolation. Instead, each act is often a part of a series of actions perpetrated by the majority against the minority. Whether conduct is a breach of fiduciary duty is determined by the fact finder. Therefore, it is important for attorneys to explain to a jury how the conduct is improper within the corporate context at trial. For example, in *Robinson v. Lagenbach*, the "[d]irector of a closely held corporation brought . . . claims" of breach of fiduciary duty and shareholder oppression "against the other two [trustee] directors [challenging] her removal as the corporation's president and treasurer."[30] The trial court granted summary judgment in favor of the defendants, but the appellate court reversed, stating a factual dispute was evident and summary judgment was improper:

> Virtually every action taken by [the defendants] is portrayed as appropriate and justified by the one who took the action and as sinister and self-serving by the other side. Resolution of ... shareholder oppression, breach of the defendants' fiduciary duty ... require the trial court to make credibility determinations and to choose among competing inferences, which is not permitted at the summary-judgment stage.[31]

Thus, plaintiffs should be prepared to go forward with evidence as to specific conduct that they believe constitutes a breach of fiduciary duty in order for a jury or judge to make such a finding.[32]

Remedies Available Under Missouri Law

Breaches of fiduciary duty may give rise to "actions for damages for breach of contract or tort."[33] For example, "[i]f a corporation suffers losses to its corporate assets as a result of a director's or officer's breach of fiduciary duty, it can bring an action in tort to recover those damages."[34] Additionally, "where directors waste or misappropriate the funds or convert assets of a corporation in violation of their trust or lose them, a recovery at law may be had against the defaulting directors."[35] "An action for [such] damages . . . does not depend on whether or not the officer or director [received] a monetary profit" from the breach.[36]

In addition to compensatory relief, aggrieved plaintiffs may also receive equitable relief for breaches of fiduciary duty. For example, if the fiduciary profits from the breach, then this breach gives rise to an action for an accounting.[37] Additionally, "if a corporate officer or director violates a fiduciary duty to the corporation and derives a personal, unconscionable and secret profit, that officer may be held to be a trustee of those profits for the benefit of the corporation and may be compelled to restore those profits to it."[38]

Defenses to Corporate Decisions

There are several potent defenses to a breach of fiduciary duty claim.

Business Judgment Rule

Aggrieved corporations, shareholders, officers, or directors are limited in their actions against fiduciaries by the business judgment rule. This "rule protects the directors and officers of a corporation from liability for *intra vires* decisions within their authority and made in good faith, uninfluenced by any consideration other than an honest belief that the action promotes the corporation's best interest."[39]

"The business judgment rule vests the directors and shareholders with wide latitude in making judgments that affect the running of the corporation."[40] The rule has been applied in Missouri courts for decades, and finds its basis in equity:

> And in the conduct of a corporation's internal affairs the principle that the majority must rule is rigidly upheld in equity in the absence of fraud, oppression, etc.... Nor should a court of equity interfere in doubtful cases where the action of the majority may be susceptible of different constructions; but [only] where such action is so wholly opposed to the interests of the corporation *and* the minority stockholders that the conduct of the majority amounts to a wanton or fraudulent destruction of the rights of the minority, a court of equity will take cognizance of the matter.[41]

Essentially,"[t]he rule precludes courts from interfering with the decisions of corporate officers and directors absent a showing of fraud, illegal conduct, an *ultra vires* act, or an irrational business judgment."[42] The business judgment rule permits directors to run the company without fear of reprisal in the event they make an unwise business decision. Additionally, it limits courts from interfering in decisions made by the company's board of directors – individuals who are not only chosen by the shareholders, but have a more intimate knowledge of the company than the court. However, the rule is not insurmountable, and will not protect defendants who act fraudulently, illegally, or abusively.

Direct v. Derivative Actions

A shareholder must first determine whether the suit should be brought directly or derivatively when the shareholder files suit for breach of fiduciary duty against an officer or director. "A derivative action is a suit by the corporation conducted by the shareholders as the corporation's representative."[43] In a derivative suit, "[t]he shareholder is only a nominal plaintiff, and the corporation is the real party in interest."[44] Generally, "Missouri courts [have determined] that shareholders . . . must bring a derivative action to file suit against an officer or director." [45] This is true even when the suit is for breach of fiduciary duty.[46] Such an action is derivative because the fiduciary duty of a director or officer of a corporation "is generally held to be between the directors and the shareholders *as a whole*."[47] As such, because the wrong is against the corporation itself, or all of its shareholders, permitting judgment for just one shareholder may lead to a multiplicity of suits, in which later shareholders may not be able to fully recover.[48] Therefore, such an action must be brought derivatively.

Importantly, even if all shareholders have joined the suit against the offending officer or director (and therefore the entire corporation is presumably represented), this still would not be sufficient to protect a suit from being dismissed for failure to bring a derivative claim. This is because "the rule requiring shareholders to bring derivative actions is not only to protect other shareholders, but also to protect creditors of the corporation."[49]

Despite this rule, certain suits may still be brought directly by one shareholder in his or her own right. A direct suit is permitted when the shareholder "asserts violation of rights individual" to him or her.[50] This includes claims that shareholders were "personally denied their right to inspect the corporate books," deprived of personal corporate shares, or denied individual shareholder rights.[51]

In *Centerre Bank of Kansas City, N.A. v. Angle*,[52] the court held that the shareholders' suit must be brought derivatively on behalf of the corporation – not directly by the individual shareholders – because the shareholders brought suit to recover assets of the corporation allegedly diverted by an officer of the company. Because the diversion of funds harmed the corporation directly, and only harmed the shareholders indirectly, "any recovery of corporate assets would belong . . . not to the individual shareholders," but to the corporation.[53] The court remanded the case to provide the shareholders with the opportunity to replead their lawsuit as a derivative claim.[54]

In *Gieselmann v. Stegeman*,[55] the Supreme Court of Missouri permitted a direct suit where the plaintiff-shareholder was deprived of his shares of stock by the defendant's actions. In *Gieselmann*, a defendant canceled the plaintiff's interest in the corporation, and reissued the plaintiff's shares to himself. Because the canceled stock had been individually issued to the plaintiff, it was not the corporation's property, and the suit could be brought directly by the plaintiff.[56] The Court held that "[s]tockholders may maintain an action on an individual basis, as distinguished from a derivative action, against directors, officers, or others for the redress of wrongs constituting a direct fraud upon them, as in the case where wrongdoers by fraud have seized control of the corporation from the complaining stockholders."[57]

Accordingly, plaintiffs must ensure they satisfy the requirements for bringing a derivative action if they cannot bring a direct action.

> [I]n order for a shareholder to maintain a derivative action against and on behalf of a corporation, he or she must: (1) have been a shareholder at the time of the complained-of action; (2) have served demand upon the board of directors and, if necessary, the shareholders as a whole; and (3) adequately represent the interests of all shareholders.[58]

"There is an exception to [the demand] requirement if the shareholder shows '*a state of facts from which it appears that such demand or effort within the corporation and through corporate channels would have been futile and unavailing.*'"[59]

Fiduciary Duties of Members and Managers in Limited Liability Companies

Limited liability companies ("LLCs"), while still a relatively modern and developing idea, have become more prevalent in Missouri and nationwide in recent years. LLCs can be thought of as a "hybrid business entity having attributes of both a corporation and a partnership"[60] because "[a] limited liability company is a creature of statute and its corresponding rights and obligations are derived from statute."[61] In Missouri, the governing statute is the Missouri Limited Liability Company Act ("Missouri LLC Act").[62] LLCs involve two types of participants – "members" and "managers." Members are "[t]hose individuals or entities that hold an ownership interest" in the LLC, whereas managers are those who manage the LLC's operations, but may or may not be members.[63] LLCs' status as hybrid entities with characteristics of both corporations and partnerships begs the question of whether LLCs, like corporations and partnerships, are instilled with certain fiduciary duties. If so, which fiduciary duties are present, and to whom are they owed?

Duties Owed by Managers and Members to the LLC

The Missouri LLC Act sets forth the duties owed by managers and members to the LLC. Specifically, § 348.088 mandates that

> an authorized person shall discharge his or her duty under [the statute] and the operating agreement in *good faith*, with the *care a corporate officer of like position* would exercise under similar circumstances, *in the manner a reasonable person* would believe to *be in the best interest* of the limited liability company.[64]

Additionally, that individual "shall not be liable for any such action so taken or any failure to take such action, if he or she performs such duties in compliance with this subsection." [65] These duties have been confirmed by Missouri courts, including the Missouri Court of Appeals, holding that "[t]he plain language of the statute, validated by Missouri precedent, evidences that managers (member or non-member managers) and members of an LLC owe fiduciary duties to the LLC, itself."[66]

While application of statutory duties in the LLC context has not been fully fleshed out due to the developing nature of LLCs, Missouri courts have provided some idea of when such duties may be triggered. For example, Missouri case law

> gives rise to a rebuttable presumption of self-dealing where the evidence establishes that a fiduciary was involved in a transaction between two companies in which he or she has an interest.
>
> *****
>
> [T]he Missouri legislature has determined that there is nothing inherently insidious about a manager of a limited liability company doing business with [the] company.[67]

In other words, while a fiduciary's duties are triggered when a manager of the LLC does business with the company in his or her individual capacity, the duty will not be breached so long as the fiduciary has not placed his interests before that of the company.[68]

Thus, there is no doubt that members and managers owe fiduciary duties to the LLC to act in good faith, and in the best interests of the company. The question becomes: Do members and managers also owe duties to other members of the LLC?

Duties Owed by Managers of the LLC to Members of the LLC

For many years, the issue of whether managers of an LLC owed fiduciary duties to members of the LCC was unsettled in Missouri. However, in 2014 the Missouri Court of Appeals, Eastern District, addressed this issue in *Hibbs v. Berger.* [69] To determine whether managers owed duties to members of the company, the court reviewed the plain language of the statute, which explicitly requires that managers "discharge their duties 'in good faith, with the care a corporate officer of like position would exercise under similar circumstances, in the manner a reasonable person would believe to be in the best interest of the limited liability company. . . .'" [70]

The *Hibbs* court then reviewed how courts in other jurisdictions have interpreted similar LLC statutes, and found that jurisdictions fall on both sides of the issue, with some courts interpreting similar statutory language as instilling managers of LLCs with duties to the company's members, while other courts have found to the contrary and "prohibit LLC members from bringing a breach of fiduciary duty claim against an LLC manager." [71] After analyzing cases from other jurisdictions and the statutes which those courts interpreted, the court held that "Missouri's Limited Liability Company Act is most analogous to those jurisdictions that impose fiduciary duties upon managers [of LLCs] to the members." [72]

The court also found that such an analysis was in accord with the language of the statute and with rules of equity. Specifically, the statute states "...with the care a *corporate officer of like position* would exercise under similar circumstances...," which the court interpreted as a comparison with corporate law, which imposes a fiduciary relationship between the directors of a corporation and the corporation's shareholders. [73] The court determined that "logically and in accord with the rules and law of equity, the statute clearly envisioned imposing the same duties upon managers of an LLC as those duties imposed upon directors of a corporation." [74] In other words, managers of LLCs are fiduciaries, with concomitant duties to the LLC's members.

Duties Owed by Members to Other Members of the LLC

The *Hibbs* court similarly addressed whether members of an LLC owe fiduciary duties to other members. The court looked solely to the plain language of the Missouri LLC Act and determined that members do *not* owe fiduciary duties to other members. Specifically, "[u]nder the . . . Act, 'one who is a member of a limited liability company in which management is vested in one or more managers and who is not a manager shall have no duties to the limited liability company or to the other members solely by reason of acting in his capacity as a member.' Section 347.088.4."[75]

The court acknowledged that while "[s]ome jurisdictions have found that *controlling* members . . . owe fiduciary duties to minority members," Missouri courts have not yet made that determination, and the court elected not to address it at that time. [76] As such, whether *controlling* members owe duties to *minority* members is still an open question under Missouri law.

Defenses to LLC Actions

The fiduciary duties that arise in the operation of an LLC are limited by the LLC statute, the LLC's operating agreement, and advice from professionals.[77]

Business Judgment Rule

Similar to the business judgment rule that applies to corporations, the LLC business judgment rule protects members and managers of LLCs. The rule, which is codified in § 347.088.1, provides that directors and officers of a limited liability company shall not be liable for business decisions that they believe in good faith are in the best interests of the company. The rule provides: "The business judgment rule precludes the courts of [Missouri] from interfering with the decisions of corporate officers and directors absent a showing of fraud, illegal conduct, an *ultra vires* act, or an irrational business judgment."[78]

LLC's Operating Agreement and Advice from Professionals

The *Hibbs* court explained that, "[u]nlike corporations and partnerships, Missouri's Limited Liability Company Act grants

limited liability companies the power to effectively limit or define the scope of the fiduciary duties imposed upon an LLC's members and managers."[79] This grant is found in § 347.088.2(2), which states that the "member's, manager's or other person's duties and liabilities may be expanded or restricted by provision in the operating agreement." Additionally, "a manager of a Missouri LLC may reasonably rely on the opinions of professionals such as lawyers and accountants."[80]

An example of these limitations can be found in *Hibbs*, in which the company's operating agreement specifically limited fiduciary duties by stating that managers and members

> shall not be liable for damages or otherwise to the Company or any Member for any act, omissions, or error in judgment performed, omitted, or made by it or them in good faith and in a manner reasonably believed by it or them to be within the scope of authority granted to it or them by this [Operating] Agreement and in the best interests of the Company, provided that such act, omission or error in judgment does not constitute bad faith, fraud, gross negligence, willful misconduct or breach of fiduciary duty.[81]

Because of the existence of such a limitation, while statutorily the manager in *Hibbs* owed the plaintiff (as a member of the LLC) fiduciary duties, those duties were abridged by the LLC's operating agreement. As a consequence, the manager did not owe the plaintiff fiduciary duties.[82]

Similarly, in *Urban Hotel Development Company, Inc. v. President Development Group, L.C.*,[83] the court held that because the defendant-members relied in good faith on the operating agreement when they removed the plaintiff-member from the LLC, the district court did not err in determining that there was no breach of the remaining members' fiduciary duties of care and loyalty.[84] Likewise, in *In re Tri-River Trading, LLC*,[85] the court found no breach of fiduciary duty where the LLC's operating agreement insulated members

> for any wrongful acts in connection with the LLC except to the extent that those acts were based on gross negligence or misconduct and, consistent with Missouri Statute 347.090, it further immunized conduct by providing that any challenged action was conclusively presumed not to constitute misconduct or gross negligence if the member acted on advice of counsel.[86]

Ratification

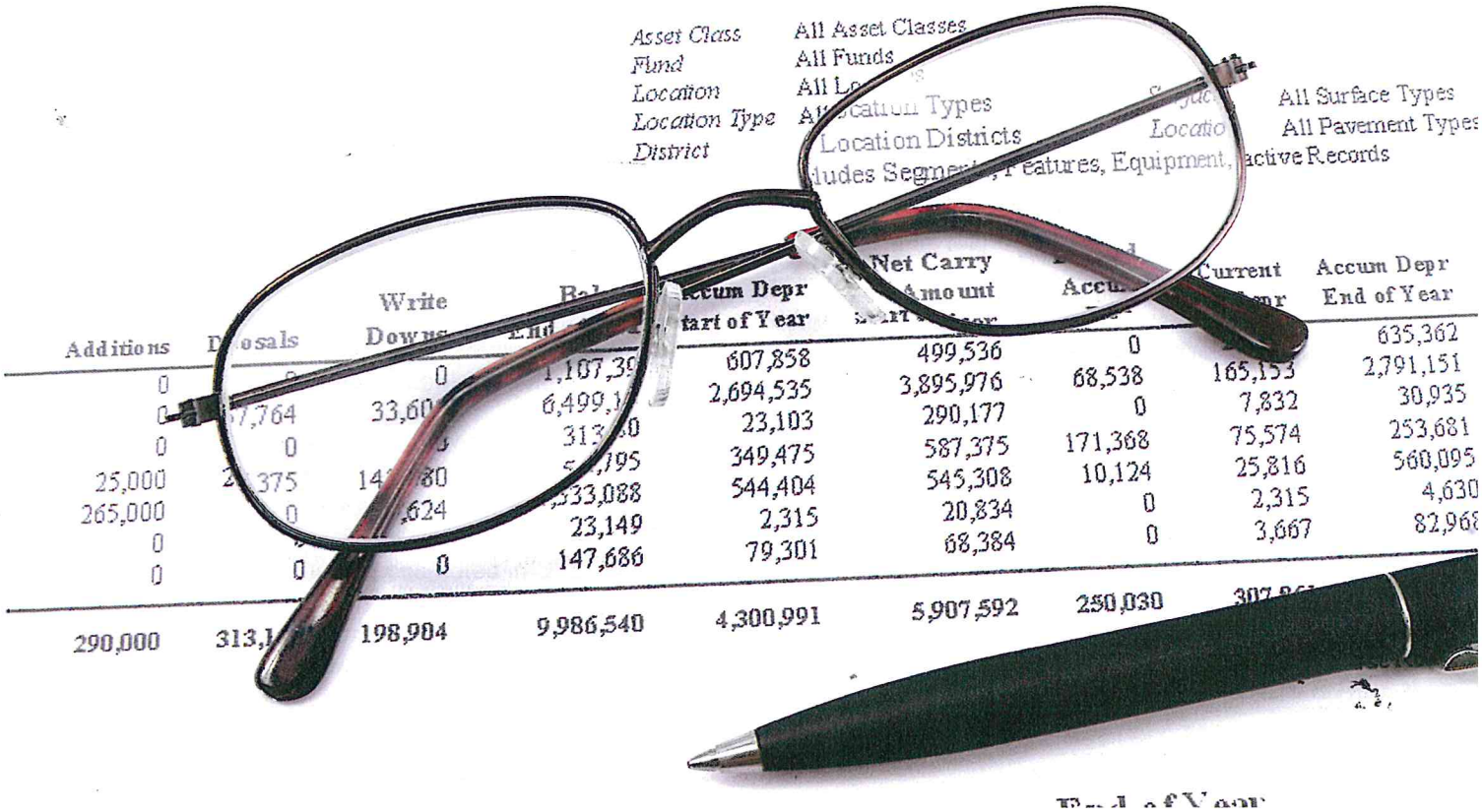
The Missouri LLC Act permits members of a limited liability company to ratify the acts and transactions of its managers. "Ratification is an adoption or confirmation upon full knowledge of the facts by one entity of an act (such as entering into a contract) performed on that entity's behalf by another without authority.... Ratification relates back and is the equivalent of authority at the commencement of the act."[87] Section 347.065.3 provides that:

> An act of a member or manager which is not apparently for the carrying on the usual way of the business or affairs of the limited liability company does not bind the limited liability *company unless authorized in accordance with the terms of the operating agreement, at the time of the transaction or at any other time*.[88]

Thus, an act of a fiduciary that would seemingly breach that individual's duties may later be authorized by the members through ratification.

Conclusion

The fiduciary duties of those in control of corporations and LLCs are recognized in Missouri statutory and common law.



Obviously, a company could not function properly if its managers and majorities owed no duty to the corporate entity. By following the roadmaps contained in this article, parties can navigate the world of corporate fiduciary duties and protect their rights.

Endnotes

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2 *Birkenmeier v. Keller Biomedical, LLC*, 312 S.W.3d 380, 391 (Mo. App. E. D. 2010).

3 *Id.*

4 Sections 351.010 – 351.1228, RSMo Supp. 2016.

5 Sections 347.010 – 347.187, RSMo Supp. 2016.

6 *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 86 (1943). This is one of Justice Frankfurter's most quoted opinions, in which the Court rejected "a lax view of fiduciary obligations and insist[ed] upon their scrupulous observance." *Id.* at 85.

7 *Johnson v. Duensing*, 351 S.W.2d 27, 32 (Mo. banc 1961). *See also Western Blue Print Co. v. Roberts*, 367 S.W.3d 7, 15 (Mo. banc 2012) ("Missouri law is clear that officers and directors of public and closely held corporations are fiduciaries because they occupy positions of the highest trust and confidence and are required to exercise the utmost good faith when using the powers conferred upon them to both the corporation and their shareholders.") *Id.*

8 *Moore v. Moore*, 189 S.W.3d 627, 633 (Mo. App. W.D. 2006) (quoting *Bromschwig v. Carthage Marble & White Lime Co.*, 66 S.W.2d 889, 892 (1933)). *See also Robinson v. Lagenbach*, 439 S.W.3d 853, 860 (Mo. App. E. D. 2014).

9 *Peterson v. Continental Boiler Works, Inc.*, 783 S.W.2d 896, 904 (Mo. banc 1990).

10 *Moore*, 189 S.W.3d at 633.

11 Section 351.850.1(1), RSMo Supp. 2016.

12 Gary D. Justis, *Avoiding a Minority Shareholder Oppression Claim in a Close Corporation in Missouri: The Impact of the New Close Corporation Statutes*, 56 Mo. L. Rev. 258 (1991).

13 *Peterson*, 783 S.W.2d at 904; *see also Forinash v. Daugherty*, 697 S.W.2d 294, 301 (Mo. App. S.D. 1985) ("As a matter of general law, it may be said that the officers and directors of a corporation owe fiduciary duties to their corporation and to the other shareholders. These fiduciary duties possibly extend to controlling shareholders.") *Id.*

14 *Fix v. Fix Material Co.*, 538 S.W.2d 351, 358 (Mo. App. E.D. 1976).

15 *Id. Fix* was decided under the predecessor statute, § 351.485, RSMo 1969. The current statute is § 351.494(2)(b), RSMo Supp. 2016.

16 *Id.* at 358.

17 *Id.*

18 Section 351.850, RSMo Supp. 2016.

19 743 S.W.2d 511 (Mo.App. E.D.1987).

20 *Id.* at 514.

21 306 S.W. 3d 138 (Mo. App. S.D. 2010).

22 *Id.* at 147.

23 *Id.*

24 *Id.*

25 *Zakibe v. Ahrens & McCarron, Inc.*, 28 S.W.3d 373, 383 (Mo. App. E. D. 2000) ("[I]t is certain that, as a general proposition, neither the executive officers nor the directors of an incorporated company have a right to convert its assets to their own use, or give them away, or make any self-serving disposition of them against the interest of the company.") *Id.*

26 *Johnson v. Duensing*, 351 S.W.2d 27, 31 (Mo. banc 1961).

27 *Ramacciotti v. Joe Simpkins, Inc.*, 427 S.W.2d 425 (Mo. 1968).

28 *Gieselmann v. Stegeman*, 443 S.W.2d 127, 136 (Mo. 1969).

29 *Peterson*, 783 S.W.2d at 904-05 (*citing* David S. Ruder, *Duty of Loyalty — A Law Professor's Status Report*, 40 Bus. Law. 1383, 1384 (1985)).

30 439 S.W.3d 853 (Mo. App. E.D. 2014).

31 *Id.* at 860.

32 *Accord Hibbs*, 430 S.W.3d 296 (citing *W. Blue Print Co. v. Roberts*, 367 S.W.3d 7, 15 (Mo. banc 2012) ("The existence of a fiduciary duty is a question of law, while the breach of that duty is for the trier of fact")). *Id.* at 312.

33 *Zakibe*, 28 S.W.3d at 383.

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.* at 382 ("In an equitable action to recover profits, once the corporation's transaction with a director, officer, or entity in which he or she has an interest has been established, the burden shifts to the officer or director who must show that he or she did not obtain secret profits and that the transaction was conducted fairly, honestly and openly."). *Id.*

39 *Robinson*, 439 S.W.3d at 860.

40 *Herbik v. Rand*, 732 S.W.2d 232, 235 (Mo. App. E. D. 1987).

41 *Id.* (quoting *Brown v. Citizens State Bank*, 134 S.W.2d 116, 121 (1939)).

42 *Robinson*, 439 S.W.3d at 860. Recently, the Missouri Court of Appeals, Eastern District, addressed the issue of the business judgment rule in a shareholder oppression case. In *Virgil Kirchoff Revocable Trust Dated 06/19/2009 v. Moto, Inc.*, 482 S.W.3d 834 (Mo. App. E.D. 2016), minority shareholders of a close corporation alleged shareholder oppression against the company, alleging that the company's valuation of the company's stock was arbitrary. The minority shareholders argued that the company, as a closely held corporation, had a fiduciary duty to use reasonable care in valuing its stock: "Appellants assert such act was burdensome, harsh and wrongful conduct and a visible departure from the standards of fair dealing and a violation of fair play." *Id.* at 840. "Appellants assert the Board should have used a different method of valuation and that they were induced to sell their shares at 'lower than their true worth.'" *Id.* The court held that the trial court did not err in granting the corporation's motion for summary judgment, because nothing in the company's by-laws or any other written agreement requires the company to repurchase its stock or to do so at a specific price. The court further found that:

> in the absence of actual fraud, the judgment of a board of directors as to the value of the consideration received for stock will not be interfered with…Here, Appellants do not allege Moto's actions in valuing the stock were fraudulent, only that the Board failed to take reasonable care. Although Appellants contend reasonable care was required because Moto assumed a duty by voluntarily valuing its shares, this assertion is not legally supported. *Id.* at 841.

The Court further held that the Board's alleged failure to use reasonable care in choosing a valuation method was not sufficient to show oppressive conduct. *Id.*

43 *Nickell v. Shanahan*, 439 S.W.3d 223, 227 (Mo. banc 2014).

44 *Id.*

45 *Id.*

46 *Id.*

47 *Dawson v. Dawson*, 645 S.W.2d 120, 125 (Mo. App. W. D. 1982).

48 *Centerre Bank of Kansas City, N.A. v. Angle*, 976 S.W.2d 608, 613 (Mo. App. W.D. 1998) ("If the initial plaintiffs could sue for the entire wrong, they would either recover disproportionately or else would be required to hold part of the recovery in trust for the other shareholders and the creditors. To avoid these and similar problems, Missouri and other states require suits for wrongs to the corporation to be brought derivatively, on behalf of the corporation."). *Id.*

49 976 S.W.2d at 615.

50 976 S.W.2d at 614.

51 *Id.*

52 976 S.W.2d 608 (Mo. App. W. D. 1998).

53 *Id.* at 614.
54 *Id.* at 615.
55 443 S.W.2d 127 (Mo. 1969).
56 *Id.* at 131.
57 *Id.*
58 *New England Carpenters Pension Fund v. Haffner*, 391 S.W.3d 453, 460 (Mo. App. S. D. 2012).
59 *Id.*
60 *Hibbs v. Berger*, 430 S.W.3d 296, 313 (Mo. App. E. D. 2014).
61 *Pitman Place Dev., LLC v. Howard Inv., LLC*, 330 S.W.3d 519, 530 (Mo. App. E.D. 2010).
62 Sections 347.010 – 347.187, RSMo Supp. 2016.
63 430 S.W.3d at 314.
64 Section 347.088, RSMo Supp. 2016 (emphasis added).
65 *Id.*
66 *Hibbs*, 430 S.W.3d at 315. *See also Sutherland v. Sutherland*, 348 S.W.3d 84, 91-92 (Mo. App. W. D. 2011)("[C]ertainly a manager has a duty to act in good faith and in the best interests of the limited liability company…").
67 *Sutherland*, 348 S.W.3d at 91-92.
68 *Id.*
69 430 S.W.3d 296, 314 (Mo. App. E.D. 2014).
70 *Hibbs*, 430 S.W.3d at 315.
71 *Id.*
72 *Id.*
73 *Id.* (emphasis added).
74 *Id.* at 316.
75 *Id.* at 317.
76 *Id.* (emphasis added).
77 *Urban Hotel Dev. Co. v. President Dev. Group, L.C.*, 535 F.3d 874 (8th Cir.). "Operating agreements are interpreted by ascertaining the intent of the parties and giving effect to it. This court enforces a clear and unambiguous operating agreement, giving maximum effect to Missouri's policy of freedom of contract and the enforceability of operating agreements." *Id.* at 878 (internal citations omitted).
78 *Sutherland*, 348 S.W.3d at 90.
79 *Hibbs*, 430 S.W.3d at 316.
80 *In re Tri-River Trading, LLC*, 329 B.R. 252, 267 (Bankr. App. 8th Cir. 2005) *aff'd sub nom. DeBold v. Case*, 452 F.3d 756 (8th Cir. 2006) (citing § 347.090).
81 *Hibbs*, 430 S.W.3d at 316.
82 *Id.* at 317 ("Therefore, while, statutorily, Berger owed Plaintiff fiduciary duties, Berger's fiduciaries were abridged by Tavern Creek's Operating Agreement, in accordance with the statutory rights to do so. Thus, Berger did not owe Plaintiff fiduciary duties.").
83 535 F.3d 874 (8th Cir. 2008) (interpreting Missouri law).
84 *Id.* at 879. *See also* 329 B.R. at 267. ("[T]he statute goes on to provide that a member, manager, or other person performing duties for or with fiduciary duties to the LLC may rely in good faith on provisions of the operating agreement.") (*citing* § 347.088.2(1)).
85 *In re Tri-River Trading, LLC*, 329 B.R. 252, 267 (Bankr. App. 8th Cir. 2005)
86 *Id.* at 268.
87 *Sutherland*, 348 S.W.3d at 93.
88 Section 347.065.3, RSMo Supp. 2016 (emphasis added).

Are Your Trust Accounting Procedures Up to Speed? (A Checklist for Trust Accounting Practices)

Ever wonder if you are keeping your trust account in accordance with every provision of the Rules of Professional Conduct? The Office of Chief Disciplinary Counsel (OCDC) wants to help you protect your clients, reduce risks and avoid (often accidental) overdrafts by providing a self-audit. It is intended to help any firm or solo practitioner set up – and review – trust accounting policies and procedures. This 26-point checklist contains references to Supreme Court rules and comments, and may be downloaded for your law firm's use.

Questions in the checklist include:

4(a) Before any disbursements are made from my trust account, I confirm that:

A. I have reasonable cause to believe the funds deposited are both "collected" and "good funds." *Rule 4-1.15(a)(6) and Rule 1.15, Comment 5.*

B. I have talked with my banker and I understand the difference between "good funds," "cleared funds" and "available funds." *Rule 4-1.15, Comment 5.*

C. I have allowed a reasonable time to pass for the deposited funds to be actually collected and "good funds." *Rule 4-1.15(a)(6).*

D. I have verified the balance in the trust account.

6(c). All partners in my firm understand that each may be held responsible for ensuring the availability of trust accounting records. *Rule 4-1.15, Comment 12.*

7(a). As soon as my routine bank statements are received, I reconcile my trust account by carefully comparing these records:

- bank statements;
- related checks and deposit slips;
- all transactions in my account journal;
- transactions in each client's ledger; and
- explanations of transactions noted in correspondence, settlement sheets, etc. *Rule 4-1.15(a)(7); Comment 18.*

To obtain the self-audit, go to the websites for the OCDC or The Missouri Bar: www.mochiefcounsel.org/articles *or* www.mobar.org/lpmonline/practice