BUSINESS ASSOCIATIONS

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I. INTRODUCTION

During the *Survey* period, which ran from June 1, 2008 to May 31, 2009, Michigan state courts reported only one decision concerning business law.[1] However, on the statutory front, there were many

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1. This low output is typical of recent *Survey* periods. *See, e.g.*, Michael K. Molitor, *Business Associations*, 55 WAYNE L. REV. 81 (2009) [hereinafter Molitor 2009] (discussing two reported decisions issued during the June 1, 2007 to May 31, 2008 *Survey* period); Michael K. Molitor, *Business Associations*, 54 WAYNE L. REV. 27 (2008) (discussing two reported decisions and one unreported decision issued during the June 1, 2006 to May 31, 2007 *Survey* period); Michael K. Molitor, *Business Associations*, 53 WAYNE L. REV. 113 (2007) [hereinafter Molitor 2007] (discussing two cases decided during the June 1, 2005 to May 31, 2006 *Survey* period) (hereinafter Molitor 2007); Shawn K. Ohl, *Business Associations*, 52 WAYNE L. REV. 355 (2006) (discussing three cases decided during the June 1, 2004 to May 31, 2005 *Survey* period); Thomas M. Schehr, *Business Associations*, 51 WAYNE L. REV. 571 (2005) (discussing one case decided during the June 1, 2003 to May 31, 2004 *Survey* period); Thomas M. Schehr, *Business Associations*, 50 WAYNE L. REV. 341 (2004) (discussing one case decided during the June 1, 2002 to May 31, 2003 *Survey* period); Shawn K. Ohl, *Business Associations*, 49 WAYNE L. REV. 247, 247 (2003) (discussing three cases decided during

important amendments to the Michigan Business Corporation Act (BCA)[2] and the Michigan Limited Liability Company Act.[3] There were no amendments to the Michigan Uniform Partnership Act[4] or the Michigan Revised Uniform Limited Partnership Act[5] during the *Survey* period. Somewhat surprisingly, no amendments to the Michigan Professional Service Corporation Act[6] were made in the wake of *Miller v. Allstate Insurance Co.*,[7] which was decided during the prior *Survey* period.

II. AMENDMENTS TO THE MICHIGAN BUSINESS CORPORATION ACT

A. Interested Director Transactions

Suppose that a corporation's board of directors consists of five persons: A, B, C, D, and E. One of the directors (let's say A) owns a piece of real estate that the corporation would like to buy. Director A, knowing that he or she has a conflict of interest with respect to this transaction, abstains from voting on the transaction and takes refuge in the procedural protections of section 545a of the BCA[8] by having the transaction approved by the disinterested directors (here, Directors B, C, D, and E) after disclosure of the material facts relating to the transaction and Director A's interest in it.[9] As a result, Director A will not be liable

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the June 1, 2001 to May 31, 2002 *Survey* period and noting that the *Survey* period "was somewhat more active than it has been in the past few years in the business associations area.").

2. MICH. COMP. LAWS ANN. §§ 450.1101 - .2099 (West 2002 & Supp. 2009).

3. MICH. COMP. LAWS ANN. §§ 450.4101 - .5200 (West 2002 & Supp. 2009).

4. MICH. COMP. LAWS ANN. §§ 449.1 - .48 (West 2002 & Supp. 2009).

5. MICH. COMP. LAWS ANN. §§ 449.1101 - .2108 (West 2002 & Supp. 2009).

6. MICH. COMP. LAWS ANN. §§ 450.221 - .235 (West 2002 & Supp. 2009).

7. 481 Mich. 601, 751 N.W.2d 463 (2008). *See generally* Molitor 2009, *supra* note 1, at 82-86; Justin G. Klimko, *New Amendments to the Michigan Business Corporation Act*, 29 MICH. BUS. L. J. 10, 10 (Spring 2009) ("After all of the wrangling over the issues raised by *Miller*, the *Miller*-related provisions were ultimately dropped from" the legislation that amended the BCA in 2009).

8. MICH. COMP. LAWS ANN. § 450.1545a (West 2002).

9. Section 545a provides that a "transaction in which a director or officer is determined to have an interest shall not, because of the interest, be enjoined, set aside, or give rise to an award of damages or other sanctions," if (1) the transaction was "fair" to the corporation, (2) the transaction was approved by the board, a committee of the board, or the independent director(s) after disclosure of the "material facts of the transaction and the director's or officer's interest" in the transaction, or (3) the disinterested shareholders approve the transaction after similar disclosures. MICH. COMP. LAWS ANN. § 450.1545a(1). An "interested" director would not be well-advised to rely on his or her ability to establish that the transaction was "fair" because courts have interpreted this as requiring "entire fairness," that is, fair dealing and fair price, and hold that the interested

for breaching his or her duty of care with respect to this transaction because he or she abstained from voting on it due to the conflict of interest.[10] Similarly, Director A has no liability for breaching his or her duty of loyalty by virtue of having it "sanitized" under section 545a.[11]

But, suppose that Directors B, C, D, and E do a horrendously bad and lazy job of investigating and negotiating the transaction and cause the corporation to pay an excessively high price for the real estate. May an unhappy shareholder maintain a derivative lawsuit against these four directors for breach of their duty of care to the corporation? Logically, the answer should be yes; after all, section 545a only provides that an interested-director transaction that was properly approved by the disinterested directors or the disinterested shareholders, or that was fair to the corporation, is not actionable "because of the interest."[12] Directors B, C, D, and E had no personal interest in the transaction, but in this example, they could have breached their duty of care to the corporation.

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director has the burden of establishing fairness (at least where the transaction was not approved by the disinterested directors or the disinterested shareholders). *See, e.g.*, HMG/Courtland Props. v. Gray, 749 A.2d 94 (Del. Ch. 1999). Also, disinterested shareholder approval is typically somewhat procedurally difficult to obtain, as it typically will require the holding of a shareholders' meeting. Thus, it is usually advisable for an interested director to seek approval from the disinterested directors. For this purpose, subsection (2) of section 545a requires that the transaction be approved by a majority of the disinterested directors on the board. Alternatively, the transaction could be approved by a majority of the disinterested directors on a board committee, or by all of the disinterested "independent" directors. *See* MICH. COMP. LAWS ANN. § 450.1545a(2) (West 2002). The term "independent director" is defined in section 107(3) of the BCA. MICH. COMP. LAWS ANN. § 450.1107(3) (West 2002).

10. *Cf.* MICH. COMP. LAWS ANN. § 450.1551(1) (West 2002) (making directors who "vote for, or concur in," certain corporate actions jointly and severally liable to the corporation); *see also* MICH. COMP. LAWS ANN. § 450.1553 (West 2002):

A director who is present at a meeting . . . is presumed to have concurred in . . . action unless his dissent is entered in the minutes of the meeting or unless he files his written dissent to the action with the person acting as secretary of the meeting before or promptly after the adjournment thereof. . . . A director who is absent from a meeting of the board, or a committee thereof of which he is a member, at which any such action is taken is presumed to have concurred in the action unless he files his dissent with the secretary of the corporation within a reasonable time after he has knowledge of the action.

11. This is because Section 545a provides that the transaction may not be enjoined, set aside, or give rise to damages "because of the [director's] interest" in it. MICH. COMP. LAWS ANN. § 450.545a(1). Situations involving a breach of a director's duty of loyalty (as opposed to the duty of care) inherently involve a conflict of interest. *See, e.g.*, FRANKLIN A. GEVURTZ, CORPORATION LAW 321 (2000) (explaining that duty-of-loyalty cases essentially involve complaints that directors are "greedy and put their own financial interests ahead of the interests of the corporation and its shareholders").

12. MICH. COMP. LAWS ANN. § 450.1545a(1).

Nonetheless, in the 2000 case of *Camden v. Kaufman*,[13] the Michigan Court of Appeals stated that section 545a precluded suit against the directors for breaching their duties under section 541a (which in part requires a director to discharge his or her duties "[w]ith the care an ordinarily prudent person in a like position would exercise under similar circumstances") when the transaction at issue had been approved by the disinterested directors and the disinterested shareholders under section 545a.[14] As the court observed in that case:

> In the present case, plaintiff contends that the claim of breach of fiduciary duty [of care under section 541a] continues in spite of . . . [section 545a]. However, review of the two statutes, which were enacted at the same time, reveals that they relate to unique circumstances. That is, [section 541a] addresses fiduciary duties of directors and officers generally. [Section 545a] addresses the circumstances where a corporate transaction involving interested directors or officers may give rise to an award of damages or other sanctions, or may even be set aside. The statute itself does not name the type of action that is foreclosed, but rather, it appears that *irrespective of the type of action involved*, a transaction will not be set aside if three alternative criteria are present [i.e., disinterested director approval, disinterested shareholder approval, or fairness]. Accordingly, plaintiff's contention that [section 545a] has no bearing on [section 541a] is without merit.[15]

In other words, in the hypothetical situation described above, B, C, D, and E might escape possible sanction for breaching their duty of care simply because they were "disinterested." The *Camden* opinion[16] could be read as precluding *any* challenges to the transaction after it had been approved by the disinterested directors or disinterested shareholders (or was established to have been fair). As one commentator recently observed, this "produced the anomalous result that transactions in which a director or officer is interested may be afforded *greater* protection than transactions in which no such interest is present."[17]

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13. 240 Mich. App. 389, 613 N.W.2d 335 (2000).

14. Of course, section 545a only requires approval by *either* the disinterested directors or the disinterested shareholders (or fairness). *See supra* note 9.

15. *Camden*, 240 Mich. App. at 395-96, 613 N.W.2d at 339 (emphasis added).

16. Technically, this portion of the court's opinion was dictum due to the fact that the court earlier in the opinion ruled that the plaintiff lacked standing to challenge the transaction. *See id.* at 392-93, 613 N.W.2d at 338.

17. Klimko, *supra* note 7, at 13.

In order to remedy the result in *Camden*, a new subsection (4)[18] was added to section 545a. This subsection provides that:

> Satisfying the requirements of subsection (1) does not preclude other claims relating to a transaction in which a director or officer is determined to have an interest. Those claims shall be evaluated under principles of law applicable to a transaction in which a director or officer does not have an interest.[19]

B. Entity Conversions

Suppose that you have a corporation that you wish to convert into a limited liability company (LLC), or a corporation that is incorporated in one state but you would like to change its state of incorporation to Michigan. The traditional way to accomplish these results involved a merger. In the first example, you would form an LLC and then merge the corporation into the new LLC. In the second example, you would form a new Michigan corporation and then merge the foreign corporation into the new Michigan corporation. This method may now be obsolete.

1. Converting a Domestic Corporation into a Domestic or Foreign Business Organization

New section 745[20] provides that a corporation may "convert into a business organization"[21] if certain requirements are met. First, the conversion must be "permitted by the law that will govern the internal affairs of the business organization after conversion."[22] This actually presents a problem under current Michigan law, because the Michigan Limited Liability Company Act and other statutes have not yet been amended to permit conversions of corporations into LLCs and other types of business organizations. Of course, it is only a matter of time before the appropriate amendments are made to those statutes. Nonetheless, at present, a domestic corporation could only use section

18. Former subsection (4) was redesignated as subsection (5).

19. MICH. COMP. LAWS ANN. § 450.1545a(4) (West 2002 & Supp. 2009).

20. MICH. COMP. LAWS ANN. § 450.1745 (West 2002 & Supp. 2009).

21. The term "business organization" means a "domestic or foreign limited liability company, limited partnership, general partnership, or any other type of domestic or foreign business enterprise, incorporated or unincorporated, except a domestic corporation." MICH. COMP. LAWS ANN. § 450.1736(1)(a) (West 2002 & Supp. 2009).

22. MICH. COMP. LAWS ANN. § 450.1745(1)(a). In addition, the surviving business organization must actually comply with that applicable law in conducting the conversion. *Id.*

745 to convert into a *foreign* business organization (if the relevant foreign law permitted the conversion).[23]

Second, the board of directors must adopt a plan of conversion.[24] One important topic that must be addressed in the plan is:

> [t]he terms and conditions of the proposed conversion, including the manner and basis of converting the shares [of the corporation] into ownership interests or obligations of the surviving business organization, into cash, into other consideration that may include ownership interests or obligations of an entity that is not a party to the conversion, or into a combination of cash and other consideration.[25]

Third, the plan of conversion must be approved by the shareholders in the same manner as they must approve a merger under section 703a.[26] As discussed below, dissenters' rights may also be available to shareholders with respect to the conversion.[27] Next, assuming the conversion is properly approved, the corporation must file with the appropriate state any documents that are necessary to form the new entity (such as articles of organization, if the corporation were converting into an LLC), and file with the Michigan administrator a certificate of conversion setting forth the information required in section 745(1)(e).[28]

When the conversion takes effect,[29] the corporation will not be wound up,[30] but, instead, will be converted into the surviving business organization, which will have all of the assets and liabilities of the former corporation.[31] The new business organization will be considered

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23. Similarly, section 746 cannot be used at present to convert a domestic business organization into a domestic corporation. *See infra* notes 37 to 48 and accompanying text.

24. If the corporation has not yet commenced business, issued shares, or elected a board, no plan of conversion or shareholder approval would be necessary. MICH. COMP. LAWS ANN. § 450.1745(1)(d).

25. MICH. COMP. LAWS ANN. § 450.1745(1)(b)(iii) (West Supp. 2009).

26. For a discussion of a few potential interpretive problems in applying the merger-voting provisions to conversions, see Klimko, *supra* note 7, at 11-12.

27. *See infra* notes 49 to 52 and accompanying text.

28. MICH. COMP. LAWS ANN. § 450.1745(1)(e).

29. Section 745 states that section 131 determines when the conversion takes effect. MICH. COMP. LAWS ANN. § 450.1745(2). In other words, it will take effect when the certificate of conversion is endorsed by the administrator, unless a later effective date is specified in the document.

30. MICH. COMP. LAWS ANN. § 450.1745(3)(h) ("Unless otherwise provided in a plan of conversion . . . , the domestic corporation is not required to wind up its affairs or pay its liabilities and distribute its assets.").

31. *See* MICH. COMP. LAWS ANN. §§ 450.1745(3)(b), (c). Furthermore:

"to be the same entity that existed before the conversion" and to have been organized when the former corporation was incorporated,[32] and may use the former corporation's name and assumed names.[33] Proceedings against the former corporation may be continued against the new business organization.[34]

If the surviving business organization is a foreign business organization, it must obtain a certificate of authority if it transacts business in Michigan.[35] Furthermore, a surviving business organization (including a foreign one) will be liable for the obligations of the former corporation and "is subject to service of process in a proceeding in this state."[36]

2. Converting a Domestic or Foreign Business Organization into a Domestic Corporation

New section 746[37] is essentially a mirror image of section 745, providing a method to convert a domestic or foreign business organization into a domestic corporation.[38] As with section 745, one requirement for such a conversion is that it is permitted by the law that currently governs the business organization.[39] As noted above, however, because the Michigan Limited Liability Company Act and other

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The conversion of the domestic corporation into a business organization . . . shall not be considered to affect any obligations or liabilities of the domestic corporation incurred before the conversion or the personal liability of any person incurred before the conversion, and the conversion shall not be considered to affect the choice of law applicable to the domestic corporation with respect to matters arising before the conversion.

MICH. COMP. LAWS ANN. § 450.1745(b).

32. MICH. COMP. LAWS ANN. § 450.1745(3)(f).

33. With respect to assumed names, section 217(5) now provides that:

> A business organization into which a corporation has converted under section 745 may use an assumed name of the converting corporation, if the corporation has a certificate of assumed name for that assumed name on file with the administrator before the conversion, by providing for the use of the name as an assumed name in the certificate of conversion. The use of an assumed name under this subsection may continue for the remaining effective period of the certificate of assumed name on file before the conversion, and the surviving business organization may terminate or extend the certificate of assumed name in the manner described in subsection (1).

MICH. COMP. LAWS ANN. § 450.1217(5) (West Supp. 2009).

34. MICH. COMP. LAWS ANN. § 450.1745(3)(e).

35. MICH. COMP. LAWS ANN. §§ 450.2001 - .2099 (West 2002).

36. *Id.*

37. MICH. COMP. LAWS ANN. § 450.1746 (West Supp. 2009).

38. *Id.*

39. MICH. COMP. LAWS ANN. § 450.1746(1)(a).

Michigan statutes have not yet been updated to provide for entity conversions, at present, section 746 may only be used to convert a *foreign* business organization into a domestic corporation.[40]

A plan of conversion is required for a section 746 conversion which must describe, among other things, how the ownership interests in the business organization will be converted into other consideration such as (but not necessarily including) shares in the new corporation.[41] The plan of conversion must also be approved by the owners of the business organization to the extent required under the law that currently governs the business organization.[42] If approved, the business organization must file a certificate of conversion with the administrator containing specified information.[43]

Similar to section 745, the new corporation will own all of the assets of the former business organization and be subject to all of its liabilities.[44] However, the conversion does not "affect any obligations or liabilities of the business organization incurred before the conversion or the personal liability of any person incurred before the conversion."[45] The new corporation may use the former business organization's name and assumed names.[46] Any proceeding against the former business organization may be continued against the new corporation,[47] which "is considered to be the same entity that existed before the conversion and is considered to be organized on the date that the business organization was originally organized."[48]

C. Dissenters' Rights

Section 762 was amended to provide that shareholders of a corporation may dissent from a plan of conversion on which they have the right to vote, if the conversion occurs.[49] However, dissenters rights:

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40. *See supra* note 23 and accompanying text.

41. MICH. COMP. LAWS ANN. § 450.1746(1)(b)(iii).

42. MICH. COMP. LAWS ANN. § 450.1746(1)(c).

43. MICH. COMP. LAWS ANN. § 450.1746(1)(d).

44. MICH. COMP. LAWS ANN. §§ 450.1746(3)(b)-(c).

45. MICH. COMP. LAWS ANN. § 450.1746(3)(b). Thus, for example, the partners of a partnership could not attempt to convert the partnership into a corporation and then claim that they are no longer personally liable for partnership liabilities that were incurred before the conversion.

46. MICH. COMP. LAWS ANN. § 450.1746(3)(d). Certain filings may be required with respect to assumed names. *See* MICH. COMP. LAWS ANN. § 450.1217(6).

47. MICH. COMP. LAWS ANN. § 450.1746(3)(e).

48. MICH. COMP. LAWS ANN. § 450.1746(3)(f).

49. MICH. COMP. LAWS ANN. § 450.1762(1)(d) (West 2002 & Supp. 2009).

> are not available if [the] corporation is converted into a foreign corporation and the shareholder receives shares that have terms as favorable to the shareholder in all material respects, and represent at least the same percentage interest of the total voting rights of the outstanding shares of the corporation, as the shares held by the shareholder before the conversion.[50]

In addition, as with mergers, share exchanges, asset sales, and articles amendments, dissenters' rights are not available with respect to a conversion for exchange-listed stock.[51] Furthermore, dissenters' rights would not be available if the shareholders of the converting corporation will receive cash, exchange-listed stock, or a combination thereof.[52]

D. Director Indemnification

Under section 563 of the BCA,[53] "[t]o the extent that a director or officer . . . has been successful on the merits or otherwise" in defending a proceeding for which indemnification is available under sections 561 or 562, the corporation must "indemnify him or her against actual and reasonable expenses, including attorneys' fees, incurred by him or her in connection with" the proceeding, as well as any proceedings to enforce "the mandatory indemnification provided in this section [563]."[54] However, section 564a provides that in some situations indemnification may be made only after the corporation determines that the indemnified person "met the applicable standard of conduct set forth in sections 561 and 562" and evaluates "the reasonableness of expenses and amounts paid in settlement."[55] Section 564a was amended to clarify that this determination is not necessary if indemnification is required under

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50. *Id.*

51. MICH. COMP. LAWS ANN. § 450.1762(2)(a).

52. MICH. COMP. LAWS ANN. § 450.1762(2)(e).

53. MICH. COMP. LAWS ANN. § 450.1563 (West 2002 & Supp. 2009).

54. *Id.* Generally speaking, section 562 of the BCA allows indemnification of certain persons with respect to lawsuits where the corporation is the plaintiff, as well as derivative lawsuits (i.e., lawsuits "in the right of the corporation"), whereas section 561 allows indemnification of certain persons with respect to other types of lawsuits. *See* MICH. COMP. LAWS ANN. §§ 450.1561, 450.1562 (West 2002).

55. MICH. COMP. LAWS ANN. § 450.1564a(1) (West 2002 & Supp. 2009). Sections 561 and 562 require that the indemnitee "acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the corporation or its shareholders." With respect to criminal proceedings under section 561, the indemnitee must not have had "reasonable cause to believe his or her conduct was unlawful." *See* MICH. COMP. LAWS ANN. §§ 450.1561, 450.1562.

section 563.[56] In addition, section 564b was amended to provide that advances of indemnified expenses "and a determination of [the] reasonableness of advances or selection of a method for determining reasonableness may be made in a single action or resolution covering an entire proceeding."[57] In other words, each advance relating to the same proceeding need not be approved separately.[58]

E. Repeal of Michigan Control Share Act

The Michigan Control Share Act[59] was also repealed. This statute had generally provided that "control shares" in "issuing public corporations" with certain ties to Michigan would not have voting rights unless the other shareholders of the corporation voted to confer voting rights on the control shares.[60] "Control shares" were defined as shares that, when added to the stock already owned by the acquiring person, would exceed three different percentage thresholds.[61] For example, one threshold was 20% of the voting power of all of the corporation's outstanding stock. So, if a person already owned 19% of the outstanding voting stock and then acquired, say, an additional 2% of the voting shares, these additional 2% of the shares would not have voting rights unless the other shareholders voted to confer voting rights on them in accordance with the statute. The Control Share Act was repealed in part because the Corporate Laws Committee of the State Bar of Michigan Business Law Section "believed that [it] was not an effective protection for corporations facing hostile takeover attempts and could serve as a trap for the unwary in transactions unrelated to its original purpose."[62]

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56. Section 564(a)(1) now provides:.

> [A]n indemnification under section 561 or 562, unless ordered by the court *or required under section 563*, shall be made by the corporation only as authorized in the specific case upon a determination that indemnification of the director, officer, employee, or agent is proper in the circumstances because he or she has met the applicable standard of conduct set forth in sections 561 and 562 and upon an evaluation of the reasonableness of expenses and amounts paid in settlement.

MICH. COMP. LAWS ANN. § 450.1564a(1) (emphasis added).

57. MICH. COMP. LAWS ANN. § 450.1564b(3).

58. However, "the authorizing or determining authority may subsequently terminate or amend the authorization or determination with respect to advances not yet made," unless the original action or resolution providing for the advances provides otherwise. *Id.*

59. MICH. COMP. LAWS ANN. §§ 450.1790-.1799 (West 2002) (repealed 2008). Section 762 was also amended to delete dissenters' rights with respect to control share acquisitions. *See* MICH. COMP. LAWS ANN. § 450.1762(1)(h) (repealed 2008).

60. *See* MICH. COMP. LAWS ANN. §§ 450.179-.1799 (repealed).

61. *See* MICH. COMP. LAWS ANN. § 450.1790(2) (repealed).

62. Klimko, *supra* note 7, at 14 (footnote omitted).

F. Certificates of Dissolution Filed in June 2003 (Yes, June 2003)

Section 131 of the BCA[63] provides that documents that are required or permitted to be filed under the BCA must be delivered to the "administrator," that is, the Michigan Department of Energy, Labor and Economic Growth. Generally speaking, if a document "substantially conforms" to the BCA's requirements, subsection (2) provides that the administrator will endorse it as "filed," along with the "date of receipt and of filing."[64] Under subsection (6), "a document filed under subsection (2) is effective at the time it is endorsed" by the administrator.[65] However, the administrator might not endorse a document on the same day that it is submitted, such as where a document is delivered to the administrator late in the day. A proposed amendment in 2005, providing that if the administrator endorses a document it would be considered filed as of the day it was *received*, did not pass.[66] However, the statute was amended as of January 1, 2006 to provide a schedule of fees for expedited filings, "implicitly allowing the administrator to endorse and file a document in as little as one hour after it is submitted."[67]

In the most recent round of amendments to the BCA, section 806[68] was added. Section 806 provides that a certificate of dissolution will be effective as of the time it was "first received by the administrator, not the date of filing" if, among other things, the certificate of dissolution was received after June 21, 2003 and before June 30, 2003, and the corporation published notice of its dissolution during that same eight-day period in 2003.[69]

On its face, this amendment is bizarre, as it only relates to an eight-day period more than five years before section 806 took effect on January 1, 2009. It may be related to *Petit v. Duro Supply*,[70] an unpublished 2003 case in which the court of appeals held that notices of dissolution published under section 842a[71] before the corporation's

63. MICH. COMP. LAWS ANN. § 450.1131 (West 2002 & Supp. 2009).

64. MICH. COMP. LAWS ANN. § 450.1131(2).

65. MICH. COMP. LAWS ANN. § 450.1131(6).

66. *See* Molitor 2007, *supra* note 1, at 127.

67. *Id.* at 128.

68. MICH. COMP. LAWS ANN. § 450.1806 (West Supp. 2009).

69. *Id.* As such, section 131(6) was amended to make an explicit reference to the different timing provisions in section 806. MICH. COMP. LAWS ANN. § 450.1131(6).

70. No. 238243, 2003 WL 22976175, at *2 (Mich. Ct. App. Dec. 18, 2003).

71. Section 842a provides that dissolved corporations may bar certain claims by publishing a notice of dissolution "in a newspaper of general circulation in the county where the dissolved corporation's principal office, or if there is no principal office in this

certificate of dissolution was endorsed as "filed" did not cut off claims against the corporation.[72] In other words, to cut off claims, the publication must occur after the certificate of dissolution was endorsed by the administrator. However, "it is unknown how many corporations will actually benefit from new section 806 or how many claims will be impacted. According to the records of the Corporation Division, however, the agency received sixty-one Certificates of Dissolution after June 21, 2003, and before June 30, 2003."[73] It seems likely that one of these sixty-one corporations had a hand in adding this provision to the BCA.[74]

G. Miscellaneous Amendments

In addition, several minor or technical amendments were made to the BCA. For example, section 201[75] was amended to provide that

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state, its registered office, is or was last located." MICH. COMP. LAWS ANN. § 450.1842a(2)(a) (West 2002).

72. *Petit*, No. 238243, 2003 WL 22976175, at *2.

73. G. Ann Baker, *Did You Know?*, 29 MICH. BUS. L.J. 5, 5 (Spring 2009).

74. Section 806 of the BCA was part of Public Act 402 of 2008, which originated as House Bill (H.B.) 5356. *See* Mich. H.B. 5356, Regular Sess. (2007). Neither the original version of Mich. H.B. 5356, which was introduced into the Michigan House of Representatives on October 24, 2007, nor the version passed by the House in December 2007, contained what is now section 806 of the BCA. (Mich. H.B. 5356 contained several other amendments to the BCA which are discussed elsewhere in this article.) On December 11, 2007, Mich. H.B. 5356 was transferred to the Michigan Senate and referred to the Senate Committee on Economic Development and Regulatory Reform. Following a December 3, 2008 meeting of this senate committee, the bill was reported out of committee on December 4, 2008, with a substitute bill, S-3. *See* MICH. SENATE J. No. 90, at 2400 (2008). This page of the senate journal does not contain the text of Mich. H.B. 5356, or the text of the substitute bill S-3, but because section 806 is not mentioned in the title of the bill, it implies that section 806 was not in the bill at that time. Sens. Alan Sanborn, Randy Richardville, Jason Allen, Buzz Thomas, Tupac Hunter, and Gilda Jacobs unanimously voted in favor of reporting the bill out of the committee. *Id.* Senator Jud Gilbert was also a member of the committee at that time, but did not vote on the bill. The minutes for the December 3, 2008 meeting of the committee, a copy of which is on file with the author, contain neither the text of the bill nor a mention of section 806. On December 10, 2008, the Committee of the Whole concurred in Mich. H.B. 5356 (with the substitute, S-3) and scheduled the bill for a third reading. *See* MICH. SENATE J. No. 91, at 2454 (2008). Section 806 does not appear in the title of the bill on this page of the senate journal. However, when the bill was read for a third time, the senate journal indicates that section 806 was in the bill because it appears in the title of the bill for the first time. *Id.* at 2456. Thus, it is unclear when section 806 first appeared. It could have been added by someone on the Senate Committee on Economic Development and Regulatory Reform or by someone on the Senate Committee of the Whole (which consists of the entire senate). In any event, it is likely that section 806 was intended to help a specific company.

75. MICH. COMP. LAWS ANN. § 450.1201 (West 2002 & Supp. 2009).

incorporators no longer have to sign a corporation's articles of incorporation "in ink."[76] Section 211[77] was amended to provide that the corporate abbreviations "corp.", "co.", "inc.", or "ltd." may appear with or without periods.[78] Section 241 now provides that limited liability companies may serve as resident agents (along with, of course, individuals and corporations).[79] Finally, section 2002[80] was amended to provide that the BCA "does not authorize this state to regulate the organization or internal affairs of a foreign corporation" that has a certificate of authority to transact business in Michigan.[81] Given longstanding corporate law doctrines, this provision hardly seems necessary; of course, Michigan law does not regulate the internal affairs of foreign corporations and one wonders why anyone would have thought otherwise.

III. "LOW PROFIT" LIMITED LIABLITY COMPANIES

The legislature recently amended the Michigan Limited Liability Company Act to permit "low profit limited liability companies," or "L3Cs."[82] An L3C can be thought of as a combination of a nonprofit entity and a for-profit entity. The nonprofit aspect means that an L3C must be primarily charitable in nature (although an L3C will not qualify as a section 501(c)(3) tax-exempt entity unless all of its members are tax-exempt entities and it meets certain other requirements).[83] Specifically, the statute requires an L3C to include in its articles of organization a purpose that meets the following requirements (and to continually conduct its operations so as to meet the following requirements):

- The L3C "significantly furthers the accomplishment of 1 or more charitable or educational purposes described in section 170(c)(2)(B) of the internal revenue code, 26 U.S.C. 170, and

76. *Id.*

77. MICH. COMP. LAWS ANN. § 450.1241 (West 2002 & Supp. 2009).

78. MICH. COMP. LAWS ANN. § 450.1211 (West 2010) ("The corporate name of a domestic corporation shall contain the word 'corporation', 'company', 'incorporated' , or 'limited' or shall contain 1 of the following abbreviations: corp., co., inc., or ltd., with or without periods.").

79. MICH. COMP. LAWS ANN. § 450.1241(b).

80. MICH. COMP. LAWS ANN. § 450.2002(2) (West 2002 & Supp. 2009).

81. *Id.*

82. MICH. COMP. LAWS ANN. § 450.4102 (West 2002 & Supp. 2009).

83. *See* Deanna M. Deldin & Joseph S. Kopietz, *The Michigan Low-Profit Limited Liability Company—Encouraging Investment in Socially Beneficial Enterprises*, 29 MICH. BUS. L. J. 27, 27 (2009).

would not have been formed except to accomplish those charitable or educational purposes."[84]

- The "production of income or appreciation of property is not a significant purpose" of the L3C,[85] and

- The L3C's purposes "do not include accomplishing 1 or more political or legislative purposes described in section 170(c)(2)(D) of the internal revenue code . . . ."[86]

On the other hand, an L3C has at least two for-profit aspects: it may generate profits in the conduct of its business, and it may distribute after-tax profits to its owners.[87] And, of course, it retains the two primary advantages of the LLC: flow-through taxation and limited liability of the owners.[88]

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84. MICH. COMP. LAWS ANN. § 450.4102(m)(i). Section 170(c)(2)(B) of the Internal Revenue Code refers to corporations, trusts, community chests, funds, or foundations that are "organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals . . . ." I.R.C. § 170(c)(2)(B) (2008); *see also* I.R.C. § 501(c)(3) (2006). Meanwhile, the term "charitable" is defined in an I.R.S. regulation in part as follows:

> The term charitable is used in section 501(c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of charity as developed by judicial decisions. Such term includes: Relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency.

26 C.F.R. § 1.501(c)(3)-1(d)(2) (2008).

85. MICH. COMP. LAWS ANN. § 450.4102(m)(ii). However, the statute also provides that, "in the absence of other factors, the fact that a limited liability company produces significant income or capital appreciation is not conclusive evidence of a significant purpose involving the production of income or the appreciation of property." *Id.*

86. MICH. COMP. LAWS ANN. § 450.4102(m)(iii). Section 170(c)(2)(D) of the Internal Revenue Code relates to attempts to influence legislation or participation in political campaigns "on behalf of (or in opposition to) any candidate for public office." I.R.C. § 170(c)(2)(D).

87. *See* Deldin & Kopietz, *supra* note 83, at 27.

88. *See, e.g.*, JAMES R. CAMBRIDGE & GEORGE J. CHRISTOPOULOS, MICHIGAN LIMITED LIABILITY COMPANIES, § 1.1 at 1-1 (2d ed. 1998 & Supp. 2008).

One major impetus for the creation of the L3C was the fact that the Internal Revenue Code limits investments by private foundations in for-profit ventures that do not qualify as "program related investments" (PRIs).[89] In other words, if a for-profit enterprise qualifies as a PRI, then a foundation may invest in it without fear of losing its tax-exempt status or otherwise being subject to penalties.[90] However, due to the difficulty of determining whether a for-profit venture qualifies as a PRI, many foundations (at least if they do not want to go to the trouble and expense of obtaining an I.R.S. private letter ruling) decline to invest in for-profit ventures.[91] The promise of the L3C is that its articles of organization must include a purpose that qualifies as a PRI, thereby possibly making foundations more likely to invest in L3Cs than other for-profit entities.[92]

An L3C must have the words "low-profit limited liability company" or "L.3.C." or "l.3.c." (with or without periods) in its name.[93] Also, the attorney general can bring an action to dissolve an L3C if it "ceased to meet any of the requirements described in section 102(m) and for 60 days after it ceased to meet those requirements failed to file a certificate of amendment amending its name to conform with the requirements of section 204."[94]

IV. KNOWLEDGE OF AGENTS NOT ALWAYS IMPUTED TO CORPORATION

Several issues were considered in *New Properties, Inc. v. George D. Newpower, Jr., Inc.*,[95] but the issue that is relevant to this Article concerns when a corporate agent's knowledge is imputed to the corporation itself. Although a corporation, as a principal, generally is

89. Specifically, section 4944(a) of the Internal Revenue Code imposes certain taxes and penalties "[i]f a private foundation invests any amount in such a manner as to jeopardize the carrying out of any of its exempt purposes." I.R.C. § 4944(a)(1) (2008). However, subsection (c), which is entitled "Exception for program-related investments," provides that "investments, the primary purpose of which is to accomplish one or more of the purposes described in section 170(c)(2)(B), and no significant purpose of which is the production of income or the appreciation of property, shall not be considered as investments which jeopardize the carrying out of exempt purposes." I.R.C. § 4944(c).

90. *See supra* note 89.

91. Deldin & Kopietz, *supra* note 83, at 29 ("The time and expense required to obtain a private letter ruling . . . has traditionally deterred many foundations from making PRIs.").

92. In addition, the I.R.S. may introduce a way for foundations to confirm that an L3C qualifies as a PRI without having to obtain a private letter ruling. *See id.*

93. MICH. COMP. LAWS ANN. § 450.4204(2) (West 2002 & Supp. 2009).

94. MICH. COMP. LAWS ANN. § 450.4803(1)(d) (West 2002 & Supp. 2009).

95. 282 Mich. App. 120, 762 N.W.2d 178 (2009).

deemed to possess the knowledge that its agents possess, an exception exists where the agent is acting in a manner adverse to the corporation.[96]

In *Newpower*, George Newpower and Robert and Harriet Kitchen were the shareholders of New Properties, Inc. (NPI).[97] Apparently, Mr. Newpower also served as the sole officer of NPI.[98] Mr. Newpower and the Kitchens agreed to contribute equal amounts of money to NPI to fund its operations.[99] In January 1996, Mrs. Kitchen sent Mr. Newpower a check for $200,000, which was made out to Mr. Newpower personally but was intended to fund the Kitchens' half of a purchase by NPI of real estate in Kalkaska.[100] But, Mr. Newpower did not contribute $200,000 of his own money to NPI.[101] Instead, he deposited the Kitchens' $200,000 check in his *personal* bank account.[102] Later, he transferred some of the money that was in his personal bank account into the account of Lakes of the North Realty, Inc. (Lakes of the North), of which he was the sole officer and shareholder.[103] "Thus, the source of the . . . deposits into the Lakes of the North accounts by Newpower was the [Kitchens'] $200,000.00 check."[104] One month later, Mr. Newpower transferred additional funds from the NPI account to the Lakes of the North account.[105] All told, Mr. Newpower transferred $775,000 from NPI to Lakes of the North.[106] All of this money had been contributed to NPI by

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96. *See* Nat'l Turners Bldg. & Loan Ass'n v. Schreitmueller, 288 Mich. 580, 586, 285 N.W.2d 497 (1939).

97. Mr. Newpower owned half of NPI's stock, and the Kitchens owned the other half. *Newpower*, 282 Mich. App. at 127, 762 N.W.2d at 184.

98. While it is unclear from the court's opinion exactly what director or officer positions Mr. Newpower held with NPI, the Kitchens had moved to Alaska and left Newpower "in charge" of NPI. *Id.* Also, under arrangements with NPI's bank, Newpower "had broad authority to endorse, sign and draw checks on NPI's account" and "was the only signatory authority on the NPI account." *Id.*

99. *Id.* at 127, 762 N.W.2d at 184 ("[F]or each deposit the Kitchens made, Newpower was to deposit an equal amount into an NPI bank account.").

100. *Id.* at 128, 762 N.W.2d at 184. Mrs. Kitchen also sent a check for $2,000, made out to NPI, which covered the price of shares of the NPI stock purchased by the Kitchens. Mr. Newpower deposited this check in NPI's bank account. *Id.*

101. *Newpower*, 282 Mich. App. at 128, 762 N.W.2d at 184.

102. *Id.*

103. *See id.* at 122, 762 N.W.2d at 181 ("Newpower was the Principal Broker with Lakes of the North, served as its President, Vice President, Director, Chief Executive Officer and Chief Operating Officer and was the sole signatory of its trust accounts at the bank."). Presumably, this means that Mr. Newpower was also the sole shareholder of Lakes of the North.

104. *Id.* at 128, 762 N.W.2d at 184.

105. *Id.* at 128, 762 N.W.2d at 181.

106. *See id.* at 123, 762 N.W.2d at 181. The plaintiffs later recovered $248,000 of the embezzled funds. *Newpower*, 282 Mich. App at 129, 762 N.W.2d at 185.

the Kitchens.[107] And of course Mr. Newpower never made any of his required matching contributions to NPI.[108]

The Kitchens eventually discovered that Mr. Newpower had embezzled their money by transferring it from NPI to Lakes of the North.[109] They sued several defendants, including the bank at which the NPI and Lakes of the North accounts were held and the bank's branch manager.[110] The trial court found the bank and the branch manager jointly and severally liable for more than $1.8 million in damages, including statutory treble damages.[111] However, the trial court dismissed the Kitchens' claim against Lakes of the North, finding that Lakes of the North did not have imputed knowledge of Mr. Newpower's illicit activities, and therefore NPI (and apparently also the Kitchens) could not recover from Lakes of the North.[112]

The court of appeals reversed, finding that Mr. Newpower's knowledge could be imputed to Lakes of the North because his activities in depositing the funds were within the scope of his employment with Lakes of the North and "he was in no way privileged not to disclose or act upon the knowledge he had .... Thus, the knowledge of Newpower is considered to be the knowledge of Lakes of the North."[113] As a result, Lakes of the North could be liable for Mr. Newpower's fraud. On remand, the trial court entered a judgment against Lakes of the North.

Lakes of the North then appealed, arguing that:

> [T]he trial court failed to properly comply with the [prior court of appeals] decision . . . because it did not apply the doctrine of imputable knowledge to *both* Lakes of the North and to [NPI]. According to Lakes of the North, the trial court should have deemed the delivery of money to Lakes of the North to have been known by the Kitchens. Under this approach, Lakes of the North was equally a victim of Newpower's embezzlement scheme and should not be liable to the Kitchens, because they

107. *Id.* at 128, 762 N.W.2d at 184-85.

108. *Id.* at 128, 762 N.W.2d at 185.

109. *Id.* at 129, 762 N.W.2d at 185.

110. *Id.* at 122, 762 N.W.2d at 181.

111. For a discussion of the grounds for these defendants' liability, see *id.* at 129-30, 762 N.W.2d at 185.

112. *See Newpower*, 282 Mich. App. at 130, 762 N.W.2d at 186.

113. *Id.* at 130-31, 762 N.W.2d at 186 (quoting New Props., Inc. v. Newpower, No. 259932, 2006 WL 2632310, at *18 (Mich. Ct. App. Sept. 14, 2006)).

> are both equally worthy of blame, or equally innocent, and because both parties knew about Newpower's actions.[114]

The court of appeals rejected this argument, basing its decision on the doctrine of imputed knowledge:

> When a person representing a corporation is doing a thing which is in connection with and pertinent to that part of the corporation business which he is employed, or authorized or selected to do, then that which is learned or done by that person pursuant thereto is in the knowledge of the corporation. The knowledge possessed by a corporation about a particular thing is the sum total of all the knowledge which its officers and agents, who are authorized and charged with the doing of the particular thing[,] [acquire] while acting under and within the scope of their authority.[115]

At first glance, this would seem to support Lakes of the North's argument that NPI also had knowledge of Mr. Newpower's fraud (and thus could not recover from Lakes of the North) because Newpower was an agent of NPI. However, the court of appeals found that the "adverse interest" exception applied, which meant that NPI did *not* have imputed knowledge of Mr. Newpower's wrongful actions:

> The general rule which imputes an agent's knowledge to his principal is subject to an exception where the agent acts in his own interest, adversely to his principal.
> Here, Newpower was acting adversely to the Kitchens' interests by embezzling money from them and therefore his knowledge cannot be imputed to [NPI].[116]

An attentive reader will note here that the court of appeals glossed over the fact that Mr. Newpower was technically an agent of NPI and not of the Kitchens (who were only shareholders in NPI). In other words, the "real" principal in this case was NPI, not the Kitchens. However, it is

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114. *Newpower*, 282 Mich. App. at 131, 762 N.W.2d at 186. This argument appears to assume that Mr. Newpower was an agent of *the Kitchens*, as opposed to NPI. However, the Kitchens were merely shareholders in NPI. Corporate employees and officers are not agents of the corporation's shareholders, but are instead agents of the corporation.

115. *Id.* at 134, 762 N.W.2d. 187-88 (quoting Upjohn Co. v. N.H. Ins. Co., 438 Mich. 197, 214, 476 N.W.2d 392 (1991)).

116. *Id.* at 134-35, 762 N.W.2d at 188 (quoting Nat'l Turners Bldg. & Loan Ass'n, 288 Mich. at 586, 285 N.W. at 499 (1939)).

also true that Mr. Newpower was acting adversely to NPI's interests by transferring its funds to Lakes of the North.