BUSINESS ASSOCIATIONS

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During the *Survey* period (June 1, 2013 to May 31, 2014), Michigan state courts reported a few decisions concerning the law of business associations, which are discussed in Part II below.[1] There were also several interesting unpublished decisions, which are discussed in Part III below.

It was fairly quiet on the statutory front during the *Survey* period: there were only a few amendments to the Michigan Business Corporation Act (BCA)[2] and one amendment to 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

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1. Recent *Survey* periods have also had small numbers of business law cases. *See* James L. Carey & Justin G. Klimko, *Amendments to Michigan's Business Corporation Act and Repeal of the Professional Service Corporation Act*, 59 WAYNE L. REV. 1293 (2014) (discussing statutory amendments, but no cases, issued during June 1, 2012 to May 31, 2013 *Survey* period); Evan J. Leibhan & Clara L. Seymour, *Business Associations*, 57 WAYNE L. REV. 737 (2011) (discussing three reported decisions issued during the June 1, 2010 to May 31, 2011 *Survey* period); Michael K. Molitor, *Business Associations*, 56 WAYNE L. REV. 933 (2010) (discussing two reported decisions issued during the June 1, 2009 to May 31, 2010 *Survey* period); Michael K. Molitor, *Business Associations*, 56 WAYNE L. REV. 131 (2010) (discussing one reported decision issued during the June 1, 2008 to May 31, 2009 *Survey* period).

2. MICH. COMP. LAWS ANN. §§ 450.1101–450.2099 (West 2015).

3. *Id.* §§ 450.4101–450.5200.

4. *Id.* §§ 449.1–449.48.

Act[5] during the *Survey* period.[6] However, the Michigan Uniform Securities Act was amended during the *Survey* period to add a "crowdfunding" exemption.[7] Because this was probably the most significant business law development during the *Survey* period, this Article will begin there.

I. STATUTORY CHANGES DURING SURVEY PERIOD

A. *Crowdfunding Legislation*

In general, the term "crowdfunding" refers to raising money for a project from a large number of persons who contribute relatively small amounts.[8] Crowdfunding is often conducted over the Internet, on websites such as kickstarter.com, where one can contribute money to various projects in return for non-monetary rewards.[9] For example, you might contribute money to help a rock band make a record and receive backstage passes if the band plays a concert in your town. Note here, however, that websites like this are not selling any *securities*, and you are not making an *investment* in the traditional sense when you fund such projects.

But what if a company wanted to offer and sell stock or other securities to investors in a crowdfunding arrangement? Here, things become difficult because section 5 of the Securities Act of 1933[10] generally requires that a person who wants to offer and sell "securities"[11] must first register the securities with the Securities and Exchange Commission (SEC), unless an exemption from the registration requirement is available.[12] State securities laws are generally to the same

5. *Id.* §§ 449.1101–449.2108.

6. In early 2013, during the prior *Survey* period, the Professional Service Corporation Act was repealed as a separate statute and moved to chapter 2A of the BCA, and several other significant changes were made to the BCA. *See* Carey & Klimko, *supra* note 1.

7. *See infra* Part I.A.

8. *Crowdfunding*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/crowdfunding (last visited Mar. 1, 2015).

9. *What Is Kickstarter?*, KICKSTARTER, https://www.kickstarter.com/hello?ref=footer (last visited Mar. 1, 2015).

10. 15 U.S.C.A. § 77e (West 2014).

11. Section 2a(1) of the Securities Act defines the term "security." *Id.* § 77b(a)(1). While this definition is very lengthy, note that stock in a corporation is clearly a "security."

12. There are generally two types of exemptions: exempt *securities* and exempt transactions. *See, e.g.*, 15 U.S.C.A. §§ 77c, 77d, 77z-3. Further, exemptions may exist under the statute itself or pursuant to SEC rules. *See id.* § 77z-3.

effect.[13] Thus, a company that wants to do a stock offering through a crowdfunding arrangement must either register the stock with the SEC beforehand, which likely would be prohibitively time-consuming and expensive for a small offering, or find an exemption. The problem is that few, if any, of the currently available federal exemptions from the registration requirement would work well with a crowdfunding offering.

However, in April 2012, President Obama signed the Jumpstart Our Business Startups Act, otherwise known as the "JOBS Act."[14] Title III of the JOBS Act added new section 4(a)(6) to the Securities Act[15] and directed the SEC to implement rules for a crowdfunding exemption, within the following parameters:

- the issuer may sell no more than $1 million worth of securities during a twelve-month period pursuant to the crowdfunding exemption;[16]

- while there would be no limit on the number of *investors*, there would be limits on the amount of money that any given investor may invest;[17]

- the offering must be conducted through a broker or "funding portal" that complies with the requirements of new section 4A(a) of the Securities Act;[18] and

- the issuer must comply with the requirements of new section 4A(b) of the Securities Act, which concerns matters such as providing information to investors and restrictions on advertising and compensating promoters.[19]

As noted above, the JOBS Act did not actually *create* a crowdfunding exemption; instead, it directed the SEC to do so under its rulemaking authority.[20] Unfortunately, while the statute gave the SEC until the end of 2012 to finalize the crowdfunding rules, as of May 2015

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13. *See, e.g.*, MICH. COMP. LAWS ANN. § 450.2301 (West 2014).

14. Jumpstart Our Business Startups Act, Pub. L. No. 112–106, 126 Stat. 306 (2012) (codified as amended at 15 U.S.C.A. §§ 77b, 77c–77g, 77r, 78c, 78d, 78k-1, 78m, 78n–78n-1, 78o, 78o6, 7213, 7262).

15. 15 U.S.C.A. § 77d(a)(6).

16. *Id.* § 77d(a)(6)(A).

17. *Id.* § 77d(a)(6)(B).

18. *Id.* §§ 77d(a)(6)(C), 77d-1(a).

19. *Id.* §§ 77d(a)(6)(D), 77d-1(b). In addition, publicly traded companies and certain other issuers may not use the crowdfunding exemption. *See id.* § 77d-1(f).

20. *See supra* note 15 and accompanying text.

it still had not done so.[21] Impatient with this delay, Michigan and several other states have implemented their own crowdfunding rules.[22]

21. The SEC proposed rules in November, 2013. *See* Crowdfunding, 78 Fed. Reg. 66427 (proposed Nov. 5, 2013), *available at* http://www.sec.gov/rules/proposed/2013/33-9470.pdf. As of May 2015, the proposed rules remain just that—proposed, but not final. *See also* Steven D. Solomon, *SEC's Delay on Crowdfunding May Just Save It*, N.Y. TIMES DEALBOOK (Nov. 18, 2014, 2:56 PM), http://dealbook.nytimes.com/2014/11/18/s-e-c-s-delay-on-crowdfunding-may-just-save-it-2/?_r=0. Although the crowdfunding rules under Title III of the JOBS Act haven't been finalized, the SEC did adopt new rules under Title IV of the JOBS Act in March 2015. Section 401 of Title IV of the JOBS Act amended section 3(b) of the Securities Act to direct the SEC to adopt an exemption allowing public offerings of up to $50 million (subject to periodic increases to be determined by the SEC) of equity or debt securities in a 12-month period. Section 401 also provided, among other things, that securities sold pursuant to such an exemption would not be "restricted securities" (which would make them easier for investors to resell), that civil liability under section 12(a)(2) of the Securities Act would not apply to such offerings (making issuers breathe easier), and that issuers may "solicit interest in the offering prior to filing any offering statement, on such terms and conditions as the [SEC] may prescribe in the public interest or for the protection of investors" (allowing issuers to gauge potential interest in the offering before undertaking the time and expense of undertaking the offering). Unlike Title III of the JOBS Act, however, Congress did not specify any deadlines for implementation of these rules, leading some to think that they would be a long time in coming.

In a "surprise" development, however, in late 2013, the SEC proposed rules to implement section 401 (see Proposed Rule Amendments for Small and Additional Issues Exemptions Under Section 3(b) of the Securities Act, 79 Fed. Reg. 3926 (proposed Jan. 23, 2014), *available at* http://www.sec.gov/rules/proposed/2013/33-9497.pdf) and adopted final rules in March 2015 (see Amendments for Small and Additional Issues Exemptions Under the Securities Act (Regulation A), 80 Fed. Reg. 21806 (Apr. 20, 2015), *available at* http://www.sec.gov/rules/final/2015/33-9741.pdf). Although this is not the place for an extended discussion of the new rules (and the reader should understand that any brief discussion of SEC rules will omit important details), a few words are in order. The new rules, which have been dubbed "Regulation A+," create two "tiers" of offerings: Tier 1 allows U.S. or Canadian non-public issuers to sell up to $20 million in a 12-month period (including up to $6 million by existing security holders that are affiliates of the issuer), and Tier 2 allows up to $50 million (including up to $15 million by existing security holders that are affiliates). Importantly, in Tier 2 offerings, issuers will not be required to register the securities at the state level, but would be subject to additional disclosure requirements such as audited financial statements and annual reporting. In Tier 1 offerings, issuers may be able to take advantage of a multiple-state coordinated review process, which could also lessen the burden of state registration. In Tier 2 offerings, non-accredited investors may not purchase securities worth more than the greater of 10% of their annual income or 10% of their net worth. (These limits do not apply to accredited investors, or to any investors in a Tier 1 offering.) Importantly, neither tier has a prohibition on general advertising or general solicitation, which means that offerings under Regulation A+ could be conducted as crowdfunding offerings (although remember that the rules do contain detailed disclosure requirements not discussed here). Obviously, there is much more to say about Regulation A+, but it will be interesting to see how many issuers utilize it and how much capital is raised under it.

Michigan's crowdfunding exemption is Public Act 264 of 2013, which was effective on December 26, 2013.[23] It amended several sections of the Michigan Uniform Securities Act and also added section 202a to that statute.[24] New section 202a,[25] known as the "Michigan invests locally exemption,"[26] provides that securities offerings that meet the following conditions are exempt from Michigan's registration requirement:

- The issuer must be incorporated or organized under Michigan law and authorized to do business in Michigan.[27] Further, it cannot (1) be an "investment company" as defined in the Investment Company Act of 1940 (or "an entity that would be an investment company but for the exclusions provided in" section 3(c) of the Investment Company Act),[28] (2) a reporting company under section 13 or 15(d) of the Securities Exchange Act of 1934,[29] or (3) subject to certain disqualification provisions.[30]

- The transaction must meet the requirements of section 3(a)(11) of the Securities Act *and* SEC Rule 147, known as the "intrastate exemption" and discussed below.[31]

- The amount of the offering may not exceed (1) $1 million in any twelve-month period, if the issuer has *not* made audited financial statements for its most recent fiscal year available to prospective investors, or (2) $2 million in any twelve-month period, if the issuer *has* made such audited financial statements

22. Anthony J. Zeoli, *State of the States: List of Current Active and Proposed Intrastate Crowdfunding Exemptions (Updated)*, CROWDFUNDINGLEGALHUB.COM, http://crowdfundinglegalhub.com/2015/01/16/state-of-the-states-list-of-current-active-and-proposed-intrastate-exemptions/ (last updated Apr. 4, 2015).

23. 2013 Mich. Legis. Serv. 264 (West).

24. *Id.*

25. MICH. COMP. LAWS ANN. § 451.2202a (West 2014).

26. *Id.* § 451.2202a(ii).

27. *Id.* § 451.2202a(1)(a). This is a little puzzling because all corporations or limited liability companies that are organized under Michigan law would be authorized to do business in Michigan. Instead, *foreign* entities (that is, entities formed under the law of another state) must obtain a certificate of authority to transact business in Michigan. *Id.* § 450.2011.

28. *Id.* § 451.2202a(1)(f).

29. *Id.*

30. *Id.* § 451.2202a(5).

31. *See infra* notes 51–66 and accompanying text.

available to prospective investors.[32] (These amounts are subject to adjustment for inflation every five years.[33] In addition, amounts sold to "controlling persons" as defined in subsection (10) do not count against these limits.[34])

- No purchaser may invest more than $10,000, unless he or she is an "accredited investor" as defined by SEC Rule 501.[35] (This amount is also subject to adjustment for inflation every five years.[36]) However, the "issuer may rely on confirmation that the purchaser is an accredited investor from a licensed broker-dealer or another third party in making a determination that the purchaser is an accredited investor."[37]

- The issuer must pay a $100 fee[38] and file a notice with the Department of Insurance and Financial Services at least ten days before making an offer or using a publicly available website in connection with the crowdfunding offering.[39] The notice must include, among other things, a copy of the disclosure statement that the issuer will provide to prospective investors,[40] which must contain several disclosures about the issuer and other matters specified in the statute.[41] Further, the filing must include an escrow agreement with a Michigan bank or depository institution under which all offering proceeds will be deposited and which provides that the proceeds will only be released to the issuer if the minimum or target offering amount is met; if that

32. MICH. COMP. LAWS ANN. § 451.2202a(1)(c).

33. *Id.* § 451.2202a(2).

34. *Id.* § 451.2202a(4).

35. 17 C.F.R. § 230.501 (2013).

36. MICH. COMP. LAWS ANN. § 451.2202a.

37. *Id.* § 451.2202a(1)(d). One wonders whether such a "third party" needs any qualifications to make this confirmation.

38. *Id.* §451.2202a(7).

39. *Id.* §451.2202a(1)(e).

40. Under subsection (1)(m), this disclosure statement must be provided to prospective investors when offers are first made to them, along with "additional information material to the offering, including, where appropriate, a discussion of significant factors that make the offering speculative or risky." Furthermore, "[t]his discussion must be concise and organized logically and should not present risks that could apply to any issuer or any offering." *Id.* § 2202a(1)(m).

41. *Id.* § 451.2202a(1)(e)(ii).

amount is not met, the escrow agreement must provide that funds will be returned to investors.[42]

- The issuer must inform prospective investors that the securities are unregistered and are subject to resale limitations on transfer and must also provide a specified legend to that effect "conspicuously on the cover page of the disclosure statement."[43]

- The issuer must also have each purchaser sign (and initial each paragraph of) a document in which he or she certifies various understandings, including (among other things) that: "I understand and acknowledge that . . . I am investing in a high-risk, speculative business venture. I may lose all of my investment, and I can afford the loss of my investment."[44]

- If the offering is made through a website, certain additional requirements must be met by both the issuer and the website's operator.[45]

- The issuer may not, directly or indirectly, pay "any commission or remuneration to an executive officer, director, managing member, or other individual who has a similar status or performs similar functions in the name of and on behalf of the issuer for offering or selling the securities unless he or she is registered as a broker-dealer, investment adviser, or investment adviser representative . . . ."[46]

- The offering may not continue for more than 12 months.[47]

Following completion of the offering, the issuer must provide quarterly reports to purchasers for as long as the securities remain outstanding.[48] The reports must include specified information, including

42. *Id.* § 451.2202a(1)(e)(iii); *see also id.* § 451.2202a(1)(j).
43. *Id.* § 451.2202a(1)(g).
44. *Id.* § 451.2202a(1)(h).
45. *Id.* §§ 451.2202a(1)(i), 451.2202a(1)(k).
46. *Id.* § 451.2202a(1)(l). Conversely, such persons are exempt from these registration requirements if they do "not receive, directly or indirectly, any commission or remuneration for offering or selling securities of the issuer that are exempt from registration under this section." *Id.*
47. *Id.* § 451.2202a(1)(n).
48. *Id.* § 451.2202a(3).

(somewhat vaguely) "an analysis by management of the issuer of the business operations and financial condition of the issuer."[49]

Further, websites used for crowdfunding offerings will not be required to register in Michigan as broker-dealers, investment advisers, or investment adviser representatives if they meet certain conditions, including refraining from offering investment advice or recommendations and soliciting purchases (or compensating others for doing so).[50] Note, however, that this pertains only to registration in Michigan; registration with the SEC could still be required in some cases.

As noted above, to qualify for exemption under the "Michigan invests locally" exemption, the offering must comply with both section 3(a)(11) of the Securities Act[51] and SEC Rule 147 thereunder.[52] Generally speaking, section 3(a)(11) has four requirements for a securities offering to be exempt at the federal level: (1) assuming that the issuer is a corporation, it must be incorporated in the state in which the offering is made; (2) the issuer must be "doing business" in that state; (3) every offeree must be a "resident" of that state; and (4) because of the phrase "part of an issue," the securities must come to rest in that state before they may be resold to persons who reside outside the state.[53] Note that this last requirement subjects an issuer to the risk that purchasers will resell the securities outside the state too soon, thereby potentially ruining the section 3(a)(11) exemption.

Because some of the requirements of section 3(a)(11), particularly the "doing business" requirement, are vague, Rule 147 provides a "safe harbor." In other words, if one complies with Rule 147, one has definitively complied with the statutory exemption. Conversely, if one fails to comply with Rule 147, one may still have a valid statutory exemption.[54] Chief among Rule 147's benefits is that it specifies a set of

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49. Subsection (6) gives the administrator authority to adopt rules to implement the crowdfunding exemption. *Id.* § 451.2202a(6). One hopes that such rules would clarify the meaning of this phrase.

50. *Id.* § 451.2202a(8).

51. 15 U.S.C.A. § 77c(a)(11) (West 2014) (exempting from the registration requirements "[a]ny security which is a part of an issue offered and sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within or, if a corporation, incorporated by and doing business within, such State or Territory").

52. 17 C.F.R. § 230.147 (2013).

53. 15 U.S.C.A. § 77c(a)(11).

54. Preliminary note 1 to Rule 147 provides that "[t]his rule shall not raise any presumption that the exemption provided by section 3(a)(11) of the Act is not available for transactions by an issuer which do not satisfy all of the provisions of the rule." 17 C.F.R. § 230.147 prelim. n.1.

clear safe harbor rules for determining whether the issuer is "doing business" in the state[55] and whether an offeree "resides" in the state.[56] It also provides for a nine month "coming to rest" period before securities may be resold outside the state.[57] Nonetheless, the "Michigan invests locally" exemption gives issuers some additional guidance; for example, it provides that certain facts are prima facie evidence that an individual is a Michigan resident.[58]

As noted above, if the securities sold in an intrastate offering are resold outside the state before the "come to rest" period has expired, the offering may not be exempt under section 3(a)(11) and/or Rule 147, which could expose the issuer to damages under (among other things) section 12(a)(1) of the Securities Act.[59] To help guard against this possibility, many issuers require purchasers in intrastate offerings to agree that they will not resell the securities outside the state until after the period has expired.[60] Of course, simply because a person has contractually agreed to something does not mean that he or she will actually abide by that agreement.

However, the document discussed above that each purchaser must sign under the Michigan statute must contain this statement: "If I resell any of the securities I am acquiring in this offering to a person that is not a Michigan resident, within 9 months after the closing of the offering, my contract with the issuer for the purchase of these securities is void."[61] Further, the statute provides that if one of the purchasers in the crowdfunding exemption:

> resells that security within 9 months after the closing of the particular offering . . . to a person that is not a resident of this state, the original investment agreement between the issuer and the purchaser is void. If an agreement to purchase, or the purchase of, a security is void under this subparagraph, the issuer may recover damages from the misrepresenting offeree or

55. *Id.* § 230.147(c)(2).

56. *Id.* § 230.147(d).

57. *Id.* § 230.147(e).

58. *See* MICH. COMP. LAWS ANN. § 451.2202a(1)(b)(i) (West 2015).

59. 15 U.S.C.A. § 77*l*(a) (West 2015). Among other things, this section imposes strict liability on issuers (and certain others) that offer and sell unregistered securities without having a valid exemption. A purchaser can generally recover rescissionary damages, i.e., the purchase price together with interest, less any income (e.g., dividends) that the purchaser received as a result of owning the security.

60. Rule 147(f)(i) requires that issuers disclose the limitations on resale to investors. *See* 17 C.F.R. § 230.147 (2013).

61. MICH. COMP. LAWS ANN. § 451.2202a(h).

> purchaser. These damages include, but are not limited to, the issuer's expenses in resolving the misrepresentation. However, damages described in this subparagraph shall not exceed the amount of the person's investment in the security.[62]

One tension between the state exemption and section 3(a)(11) and Rule 147 may remain problematic, however. As noted above, the state exemption allows the issuer to use websites in connection with the offering, provided certain conditions are met. The SEC or a court, however, could take the view that doing so means the issuer is making offers to persons outside the applicable state and is thus in violation of the requirement of section 3(a)(11) that all *offers* must be only to residents of the applicable state—after all, the Internet is available worldwide. Nonetheless, in April 2014, the SEC posted new "Compliance and Disclosure Interpretations" on its website.[63] The answer to new Question 141.04, which concerns using a third-party portal in a crowdfunding offering, provides in part that "[u]se of the Internet would not be incompatible with a claim of exemption under Rule 147 if the portal implements adequate measures so that offers of securities are made only to persons resident in the relevant state or territory" and then goes on to specify those measures.[64] Similarly, the answer to new Question 141.05, which concerns whether an issuer may use its own website or "social media presence" in connection with Rule 147, observes that using an "established Internet presence to convey information about specific investment opportunities would likely involve offers to residents outside the particular state in which the issuer did business."[65] However, the answer does state in part that:

> We believe . . . that issuers could implement technological measures to limit communications that are offers [of securities] only to those persons whose Internet Protocol, or IP, address originates from a particular state or territory and prevent any offers to be made to persons whose IP address originates in other states or territories. Offers should include disclaimers and

62. *Id.* § 451.2202a(1)(b)(iii).

63. *What's New in the Division of Corporation Finance: April 2014*, U.S. SEC. & EXCHANGE COMMISSION, http://www.sec.gov/divisions/corpfin/cfnew/cfnew0414.shtml (last visited Feb. 10, 2015).

64. *Compliance and Disclosure Interpretations: Securities Act Rules*, U.S. SEC. & EXCHANGE COMMISSION, http://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm#141-04 (last updated Jan. 23, 2015).

65. *Id.*

restrictive legends making it clear that the offering is limited to residents of the relevant state under applicable law.[66]

While it is somewhat encouraging that the SEC is taking the position that it is *possible* to use a website in connection with a section 3(a)(11) intrastate offering, the SEC's guidance is not exactly a model of clarity, which may lead to lawyers giving overly cautious legal advice, particularly because there is no guarantee that a court will agree with this interpretation.

B. Professional Entities Providing Accounting Services

Both the BCA and the Michigan Limited Liability Company Act generally provide that organizations that provide "professional services" *may* be organized as "professional" organizations, that is, a professional corporation (PC) or a professional limited liability company (PLLC). However, a corporation or an LLC *must* be organized as a PC or a PLLC (as applicable) if the professional services that it provides are services in a "learned profession,"[67] which is a narrower term than "professional services."

Further, professional organizations generally may be owned only by persons who are licensed in the appropriate field. For example, this means that a law firm that is organized as a PC or a PLLC may be owned only by licensed lawyers.[68] However, there are some exceptions to this rule set forth in section 284 of the BCA for certain healthcare professionals, and during the *Survey* period new subsection (5) was added, providing that it is permissible for a PC to engage in the practice of public accounting "if more than 50% of the equity and voting rights of the professional corporation are held directly or beneficially by individuals who are licensed or otherwise authorized to engage in the practice of public accounting . . . ."[69] A similar provision was added to the Limited Liability Company Act for PLLCs.[70]

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66. *Id.*

67. *See* MICH. COMP. LAWS ANN. §§ 450.1281(1), 450.4901(1), 450.4201. As noted *supra* note 6, in early 2013, the Professional Service Corporation Act was repealed as a separate statute and moved to chapter 2A of the BCA.

68. *See id.* § 450.1288(1); *see also id.* § 450.4904(1).

69. *Id.* § 450.1284(5). In my opinion, section 284 of the BCA needs to be harmonized with section 288 of the BCA, which provides that a PC may not issue any stock to an individual who is not licensed in the applicable professional field.

70. *Id.* § 450.4904(7).

C. Definition of "Equity Shares" for Purposes of Chapter 7A of the BCA

Finally, during the *Survey* period, the definitions of "equity security," "interested shareholder," and "market value," that apply in Chapter 7A of the BCA were amended in certain respects.[71] Generally, Chapter 7A requires an advisory statement from the board and a supermajority shareholder vote when a corporation will be engaged in a "business combination" with or involving an "interested shareholder."[72] Under the 2013 amendments, for purposes of determining whether a person is an "interested shareholder," shares that the person acquired in a public offering will no longer be "considered to be outstanding or beneficially owned by that person, unless the corporation determines otherwise by a resolution of the board adopted before the person acquired those voting shares."[73]

II. REPORTED DECISIONS

A. Woodbury v. Res-Care Premier, Inc.

This case presents an interesting tale, even though the supreme court ultimately dismissed the appeal and vacated the 2012 court of appeals opinion in the case.[74] The facts begin with a piece of property known as "#2 Center Woods" (the "Property"), which was owned by Ruth Averill but subject to a right of first refusal in favor of Center Woods, Inc. ("Center Woods").[75] Center Woods had been incorporated as a nonprofit corporation in 1941 but was automatically dissolved in 1993 when it failed, for two consecutive years, to file its annual report and to pay the annual filing fee.[76]

Simplifying the facts somewhat, in 2009, Ms. Averill sold the Property to Res-Care Premier, Inc. ("Res Care") without first offering the Property to Center Woods (although she did send a letter about the sale to the head of the homeowners association and never received a reply).[77]

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71. *See id.* § 450.1778(1)–(4).

72. *Id.* §§ 450.1780, 450.776(5).

73. *Id.* § 450.1778(3)(b).

74. Woodbury v. Res-Care Premier, Inc., 295 Mich. App. 232, 814 N.W.2d. 308 (2012).

75. Specifically, the articles of agreement among the homeowners in the Center Woods development provided in part that "[n]o property in Center Woods shall be sold without first giving Center Woods, Inc., thirty (30) days notice thereof and first opportunity to purchase said property at a price equal to a bonafide offer." *Id.* at 236, 814 N.W.2d. at 310.

76. *Id.* at 234, 814 N.W.2d. at 309.

77. *Id.* at 234–35, 814 N.W.2d. at 310–11.

Less than a month later, however, "Center Woods filed renewal-of-existence papers with the state of Michigan,"[78] and then Center Woods (along with Scott and Jeanne Woodbury, who owned the neighboring property, "#3 Center Woods") filed a lawsuit against Res-Care and Averill seeking to prevent Res-Care from occupying the property.[79] Ultimately, the trial court voided the sale, finding that Center Woods had a right of first refusal to purchase the Property and that Ms. Averill had failed to give it sufficient notice of the sale.[80]

On appeal, the court of appeals reversed.[81] Because the agreement required notice to be given to "Center Woods, Inc." but that entity technically did not exist when notice was required, the question became what effect Center Woods's *later* reinstatement had on the notice requirement.[82] The plaintiffs argued that when Center Woods was reinstated under section 925 of the Nonprofit Corporation Act,[83] it was as if "the dissolution essentially never took place."[84] Under that view, Center Woods would have been in existence at the time notice was required.[85]

The court of appeals, however, disagreed. After reviewing two prior cases that involved similar issues, the court noted that neither of them "provides guidance in answering the question whether a party who is required to provide notice of some event to the corporation, which has ceased to exist for 16 years, could be deemed to have failed to properly

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78. *Id.* at 234, 814 N.W.2d at 309.
79. *Id.* at 233–38, 814 N.W.2d at 309–12.
80. *Id.* at 239–40, 814 N.W.2d. at 312–14.
81. *Id.* at 233, 814 N.W.2d at 309.
82. *Id.* at 245–46, 814 N.W.2d at 315.
83. MICH. COMP. LAWS ANN. § 450.2925 (West 2015). This section provides in part:

> (1) A domestic corporation that is dissolved under section 922(1), or a foreign corporation whose certificate of authority is revoked under section 922(2) or section 1042, may renew its corporate existence or its certificate of authority by filing the annual reports under section 911 for the last 5 years or any lesser number of years in which the reports were not filed and paying the annual filing fees for all the years for which they were not paid, together with a penalty of $5.00 for each delinquent report. When the reports are filed and the fees and penalties are paid, the corporate existence or the certificate of authority is renewed. The administrator may require that the corporation adopt or use in this state a corporate name that conforms to the requirements of section 212.
> (2) The rights of a corporation that complies with this section are the same as if a dissolution or revocation has not taken place, and all contracts entered into and other rights acquired during the interval are valid and enforceable.

Id.

84. *Woodbury*, 295 Mich. App. at 245, 814 N.W.2d. at 315.
85. *Id.*

give notice on the grounds that, sometime in the future, the corporation might seek reinstatement."[86] The court further noted:

> It is not reasonable to require persons to give notice to a nonexistent corporation on the contingent basis that at some unknown time in the future, some unknown person might elect to reinstate the corporation. Simply because someone can reinstate a corporation under MCL 450.2925 does not mean anyone will. And the law certainly should not require people to assume otherwise. Indeed, some corporations that dissolve automatically never seek reinstatement, even when they continue to do business. Others fail to seek reinstatement even when attempting to file suit in their own name.[87]

As a result, the court of appeals held that Center Woods was not entitled to notice of the sale between Averill and Res-Care because Center Woods did not exist at that time.[88]

The Michigan Supreme Court granted leave to appeal in 2012, stating that the parties should address issues such as whether the de facto corporation doctrine and/or the corporation-by-estoppel doctrine had survived enactment of the Nonprofit Corporation Act.[89] In 2013, the supreme court ordered the parties to file supplemental briefs and invited the Business Law Section, the Michigan Chamber of Commerce, and the Department of Licensing and Regulatory Affairs to file *amicus* briefs addressing additional issues such as whether section 925(2) of the Nonprofit Corporation Act applies retroactively or prospectively; whether renewal under section 925 permits an administratively dissolved corporation to enforce contracts and rights not related to winding up; and whether *Bergy Brothers, Inc. v Zeeland Feeder Pig, Inc.*[90] had correctly interpreted the analogous provision[91] in the BCA.[92] Although the supreme court later delayed oral argument in the case due to a stipulation by the parties, the attorney general's office "sent a letter the [sic] Supreme Court on October 9, 2013, on behalf of the [Corporations,

86. *Id.* at 244, 814 N.W.2d. at 317.

87. *Id.* at 249, 814 N.W.2d. at 317–18 (footnotes omitted).

88. *Id.* at 251, 814 N.W.2d at 318.

89. Woodbury v. Res-Care Premier, Inc., 493 Mich. 881, 821 N.W.2d 888 (2012) (citations omitted) (order granting leave to appeal).

90. 415 Mich. 286, 327 N.W.2d 305 (1982).

91. MICH. COMP. LAWS ANN. § 450.1925 (West 2015).

92. Woodbury v. Res-Care Premier, Inc., 494 Mich. 879, 833 N.W.2d 330 (2013) (order directing parties to file supplemental briefs); *see also* G. Ann Baker, *Did You Know?*, 33 MICH. BUS. L.J., Fall 2013, at 5.

Securities and Commercial Licensing] Bureau, urging the Court 'that rather than simply dismissing the case upon the parties' stipulation, the Court also vacate the Court of Appeals' decision given the mischief it may cause if left in place.'"[93]

Eventually, in March 2014, the supreme court dismissed the appeal because the parties had settled the case and stipulated that the appeal should be dismissed.[94] It did, however, vacate the prior decision of the court of appeals. Whether one agrees with the court of appeals decision or not, the unfortunate side effect of vacating the opinion is that it leaves open the question of what effect an administratively dissolved corporation's later reinstatement has. Personally, I feel that the language of section 925(2) of the Nonprofit Corporation Act is clear when it provides that the "rights of a corporation that complies with this section are the same as if a dissolution or revocation had not taken place, and all contracts entered into and other rights acquired during the interval are valid and enforceable."[95] I also believe that *Bergy Bros., Inc. v Zeeland Feeder Pig, Inc.*,[96] the case referred to by the supreme court in its 2013 order, was correctly decided. Granted, the facts of the *Res-Care* case were very compelling for the defendants but, to modify a saying, bad facts should not make bad law.

B. Madugula v. Taub

Although it was decided shortly after the *Survey* period ended, *Madugula v. Taub*,[97] which concerns Michigan's shareholder-oppression statute,[98] is an important case, so a (relatively) short discussion of it is in order here.[99]

In *Madugula*, the three shareholders of Dataspace, Inc. (Taub, Madugula, and Flower) entered into a shareholder agreement that provided that (1) Taub would be president, secretary, and treasurer of Dataspace, and Madugula and Flower would be vice presidents; (2) the

93. Baker, *supra* note 92, at 6.

94. *Woodbury*, 495 Mich. at 961, 843 N.W.2d at 746 (2014).

95. MICH. COMP. LAWS ANN. § 450.2925(2).

96. 415 Mich. 286, 327 N.W.2d 305 (1982).

97. 496 Mich. 685, 853 N.W.2d 75 (2014).

98. MICH. COMP. LAWS ANN. § 450.1489 ("[A] shareholder may bring an action in the circuit court . . . to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder. If the shareholder establishes grounds for relief, the circuit court may make an order or grant relief as it considers appropriate . . . .").

99. For another case involving oppression (this time of a member of an LLC) that was decided after the *Survey* period ended, see Altobelli v. Hartmann, 307 Mich. App. 612, 861 N.W.2d 913 (2014).

corporation would have a five-person board, with Taub having the ability to elect three directors and the other two shareholders having the ability to elect one director each; and (3) approval by 70 percent of the shares was necessary "for material changes in the nature of the business, compensation for the shareholders, or methods of determining compensation for the shareholders."[100]

Flower later left the company, and Taub and Madugula each bought some of his shares.[101] Taub, however, remained the majority shareholder.[102] Some time later, "with Dataspace allegedly struggling, Taub switched the focus of Dataspace to marketing a new product that it developed called JPAS, a software platform for jails."[103] Madugula argued that this was a "material change" from Dataspace's prior software focus, but "Taub claim[ed] that it was simply an attempt to market the firm's existing jail consulting products to other counties. At the time, Madugula did not object to the new focus."[104] Later in the same year, Taub fired Madugula.[105] Obviously, this meant that "Madugula no longer received a salary from Dataspace . . . ."[106] However, he remained a director and shareholder (and even continued to receive dividends).[107]

Madugula later sued Taub for oppression under section 489 of the BCA, among other causes of action.[108] Taub filed a motion to have the case heard in equity.[109] He argued that Madugula did not have a right to a jury trial for the oppression claim, relying on an unpublished court of appeals opinion.[110] The trial court disagreed and denied Taub's motion.[111] Eventually, a jury determined that Taub had oppressed Madugula within the meaning of the statute, awarded Madugula nearly $200,000 in damages, and also required Taub to buy Madugula's stock in Dataspace for $1.2 million.[112] Taub moved for a new trial, but the trial

100. *Madugula*, 496 Mich. at 690–91, 853 N.W.2d at 77–78. Note that such an agreement would likely need to comply with section 489 of the BCA in order to be valid. *See* MICH. COMP. LAWS ANN. § 450.1489.

101. *Madugula*, 496 Mich. at 691, 853 N.W.2d at 78.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 692, 853 N.W.2d at 78.

109. *Id.* at 692, 853 N.W.2d at 79.

110. Forsberg v. Forsberg Flowers, Inc., No. 253762, 2006 WL 3500897 (Mich. Ct. App. Dec. 5, 2006).

111. *Magdula*, 496 Mich. at 693, 853 N.W.2d at 79.

112. *Id.* at 693, 853 N.W.2d at 79.

court denied this motion.[113] The court of appeals affirmed in an unpublished opinion.[114] The supreme court granted leave to appeal,[115] asking the parties to address: (1) whether claims brought under section 489 are equitable claims that must be decided by a court of equity; (2) whether a shareholder agreement can create shareholder interests protected by section 489; and (3) "whether the plaintiff's interests as a shareholder were interfered with disproportionately by the actions of the defendant-appellant, where the plaintiff retained his corporate shares and his corporate directorship."[116]

With respect to the issue of whether section 489 provides a right to a jury trial, the court held that it did not. As the court wrote:

> At issue in this case is whether the Legislature's inclusion of the phrase "[a]n award of damages" indicates that it intended to provide a § 489 claimant seeking damages the right to a jury trial when the language of § 489 is read as a whole .... "[A]ctual damages" is a term of art and is generally considered a legal remedy that is traditionally tried by a jury. Thus, we recognize that the inclusion of a damages remedy in a statute, given the peculiar meaning it has acquired in our law, may be an indication that the Legislature intended to provide a right to a jury trial. However, when we consider the damages remedy under § 489(1)(f) as part of the statute as a whole, we cannot conclude that the Legislature intended to attach a statutory right to a jury trial to a claim for damages.
>
> Under § 489, once a shareholder establishes "grounds for relief"—i.e., that oppression occurred—"the circuit court may make an order or grant relief as it considers appropriate," including an award of money damages .... [T]his language emphasizes the court's affirmative authority to award relief and does not inherently contemplate another fact-finder whose determinations the court may be effectuating. Indeed, through the use of the word "may," the phrase "as it considers appropriate," and, significantly, the statement that the court is "without limitation" with respect to determining the appropriate relief available, the Legislature provided the circuit court wide

113. *Id.*
114. Magdula v. Taub, No. 298425, 2012 WL 5290285 (Mich. Ct. App. Oct. 25, 2012).
115. *Madugula*, 494 Mich. 862, 831 N.W.2d 235 (2013).
116. *Id.*

> discretion in deciding what relief, if any, should be awarded after shareholder oppression is established . . . . [S]uch wide latitude to fashion relief is consistent with an action in equity. So too is the presence of damages within the nonexhaustive list of remedies enumerated in § 489, for while damages are generally considered legal relief awarded by a jury, a court of equity is likewise capable of awarding that relief.[117]

Further, the court found that there was no constitutional right to a jury trial in a section 489 action because it was equitable in nature.[118] As such, a section 489 claim must be tried before court of equity "in its entirety."[119] The result was that:

> The trial court abused its discretion by not granting Taub's motion for a new trial because Madugula did not have a right to a jury trial for his § 489 claim; instead, Taub had a right to have the controversy heard by a court of equity. Because of the equitable nature of Madugula's claim, the case should have been tried at a bench trial. In addition, the trial court erred by allowing the jury to consider the purely equitable remedy of a forced buyout of stock . . . . [A]fter Madugula established his claim for shareholder oppression, it was the job of the court sitting in equity to fashion an appropriate remedy under § 489, not the jury. Therefore, the trial court erred by allowing a jury trial on Madugula's § 489 claim.[120]

The court further held that even when a court uses an advisory jury under Michigan Court Rule 2.509(D) to decide factual issues, "the court must still state its own findings of the facts and conclusions of law,"[121] which did not happen in this case. As such, the supreme court remanded the case to the trial court "to determine whether, on the present record, it can make the requisite findings of fact and conclusions of law . . . or whether a new trial is necessary."[122]

However, the court did hold that a breach of the shareholders agreement described above could be used as evidence of "oppression" under the statute. At first, this conclusion seems obvious because the

117. *Madugula*, 496 Mich. at 701–03, 853 N.W.2d. at 83–84 (footnotes omitted) (citations omitted).

118. *Id.* at 704–15, 853 N.W.2d at 85–91.

119. *Id.* at 715, 853 N.W.2d at 91.

120. *Id.* at 715–17, 853 N.W.2d at 91–92 (footnotes omitted) (citations omitted).

121. *Id.* at 716–17, 853 N.W.2d at 92.

122. *Id.* at 717, 853 N.W.2d at 92.

shareholder agreement had to do with the plaintiff's rights as a shareholder and the statute defines oppression (or, more precisely, "willfully unfair and oppressive conduct") in part as "a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder."[123] However, Taub argued that *contractual* rights could not give rise to an oppression claim.[124] Apparently, the thinking was that contractual rights and shareholder rights are two separate things; the statute provides that willfully unfair and oppressive conduct "does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure."[125]

The court correctly determined that Taub was wrong in this argument; as the court observed, "Taub fails to recognize that several of the rights modified in the stockholders' agreement were Madugula's rights as a shareholder."[126] As such, a breach of the agreement could be considered as evidence of oppression, a result that no one should find surprising given the nature of the agreement at issue in the case.

C. Shotwell v. Department of Treasury

In *Shotwell v. Department of Treasury*,[127] which has been vacated in part,[128] the court held that the petitioner, Deena Shotwell, was not personally liable for certain unpaid tax obligations of People's True Taste (PTT), a Kentucky corporation. Specifically, PTT had unpaid assessments under the Michigan Tobacco Products Tax Act.[129] The Department of Treasury argued that she was personally liable for these amounts as a result of section 27a(5) of the Revenue Collection Act, which generally provides that if a business fails to pay any of several specified taxes, "any of its officers, members, managers of a manager-managed limited liability company, or partners who the department determines, based on either an audit or an investigation, is a responsible

123. MICH. COMP. LAWS ANN. § 450.1489(3) (West 2015).

124. *Madugula*, 853 N.W.2d at 719, 853 N.W.2d at 93.

125. MICH. COMP. LAWS ANN. § 450.1498(3).

126. *Madugula*, 496 Mich. at 719, 853 N.W.2d at 93.

127. 305 Mich. App. 360, 853 N.W.2d 414 (2014).

128. On March 25, 2015, outside of the *Survey* period, the Michigan Supreme Court issued an order vacating the part of the court of appeals opinion related to de facto officers, holding that the court of appeals had erred in concluding that there was a material issue of fact as to whether the petitioner was a de facto officer; the supreme court denied the application for leave to appeal for all other issues. Shotwell v. Dep't of Treasury, No. 150024, 2015 WL 1402168 (Mich. Mar. 25, 2015).

129. MICH. COMP. LAWS ANN. §§ 205.421–205.436.

person" will be personally liable for the taxes.[130] A "responsible person" is defined as "an officer, member, manager of a manager-managed limited liability company, or partner for the business who controlled, supervised, or was responsible for the filing of returns or payment of any of the [specified] taxes . . . during the time period of default and who, during the time period of default, willfully failed to file a return or pay the tax due for any of the [specified] taxes . . . ."[131] Meanwhile, the "time period of default" is defined as "the tax period for which the business failed to file the return or pay the tax due . . . and through the later of the date set for the filing of the tax return or making the required payment."[132]

The unpaid tobacco taxes at issue in *Shotwell* were with respect to the years 2006 and 2007. However, Mrs. Shotwell technically did not become an officer or director of PTT until October 29, 2010. Before that time, things were a little murky. Until March 17, 2007, her husband, William Shotwell, was the sole shareholder and director of PTT.[133] After William died, Mrs. Shotwell and her daughter, Suzanne, were appointed as co-administrators of William's estate and empowered by a Kentucky court "to conduct any business that [William] could have conducted" with respect to PTT.[134] Afterward, Mrs. Shotwell, while technically not being an officer, director, or shareholder of PTT, signed a tobacco products tax filing for PTT listing herself as "co-owner" and checking a box indicating that her role was to "prepare tax returns"; signed a power of attorney on behalf of PTT on which she indicated that her title was "president"; signed state and federal tax returns for PTT as "principal officer or chief accounting officer"; and listed herself as the president and a director of PTT on its 2007 annual report to the State of Kentucky.

On October 29, 2010, Mrs. Shotwell and her daughter officially became directors of PTT and Mrs. Shotwell officially became its President and:

> [u]pon their appointment to these positions, [Mrs. Shotwell] and Suzanne ratified and approved their previous activities

130. *Id.* § 205.27a(5).

131. *Id.* § 205.27a(15)(b).

132. *Id.* § 205.27a(15)(c). The language of this statute was somewhat different in 2006 and 2007, the time periods for which the tobacco taxes at issue in *Shotwell* were assessed. However, the court of appeals found that amendments to the statute that took effect in 2014 should be applied retroactively. *See Shotwell*, 305 Mich. App. at 367–70, 853 N.W.2d at 415–19. Thus, the court applied the current version of the statute to the facts of the case.

133. *Id.* at 363, 853 N.W.2d at 415.

134. *Id.* at 362–63, 853 N.W.2d at 415.

> undertaken on behalf of PTT. In particular, the resolution for their appointment as directors provided that: "all acts of Deena Shotwell and/or Suzanne Shotwwell [sic] taken in their capacity as directors of the Corporation's [sic] since the death of [William] Shotwell . . . are ratified." Similarly, the resolution appointing officers provided that "all acts of Deena Shotwell and/or Suzanne Shotwwell [sic] heretofore taken in their capacity as officers of the Corporation . . . are ratified and approved."[135]

In the meantime, the Department of Treasury had notified PTT of unpaid tobacco tax assessments for 2006 and 2007.[136] Because PTT never appealed these assessments in a timely manner, they became final.[137] And because these amounts were never paid, the Department of Treasury sought payment from Mrs. Shotwell, arguing that she was an officer of PTT who was personally liable for taxes.[138] However, the Michigan Tax Tribunal disagreed, finding that she was not a "responsible person" at the relevant times, that is, 2006 and 2007.[139] The Department of Treasury then appealed to the court of appeals.[140]

The court of appeals found in favor of Mrs. Shotwell, finding that the plain language of the statute meant that she could only be personally liable for the taxes if she had been an officer of PTT during 2006 or 2007 or before the tax payments or returns for those years were due (which would be by April 15 of the following years).[141] As the court observed:

> [A]n officer may only be held personally liable when he or she controlled, supervised, or was responsible for filing returns or paying taxes during "the time period of default," which consists of the relevant tax period extending to "the later of the date set for the filing of the tax return or making the required payment." Conversely, it follows that an individual who did not control, supervise, or bear responsibility for filing returns or paying taxes during the relevant timeframe may not be held personally liable. Thus, an officer assuming his or her position after taxes come due and after the date for filing the return has passed, is not a responsible person for the corporation's failures in respect to

135. *Id.* at 363, 853 N.W.2d at 415–16.
136. *Id.* at 363, 853 N.W.2d at 415.
137. *Id.*
138. *Id.* at 363, 853 N.W.2d at 415–16.
139. *Id.* at 365, 853 N.W.2d at 416.
140. *Id.*
141. *Id.* at 416–419, 853 N.W.2d at 366–70.

> these obligations and is, therefore, not personally liable under [the statute].[142]

However, the Department of Treasury then argued that Mrs. Shotwell was a de jure and/or a de facto officer of PTT during these periods and therefore should be personally liable for the taxes.[143] With respect to the first argument, the court disagreed, finding that a de jure officer of a corporation is a "duly authorized corporate officer," which means one appointed in accordance with the corporation's bylaws.[144] Although the Kentucky probate court had essentially given Mrs. Shotwell the same *powers* that an officer of PTT would have, that appointment nonetheless did not make her a de jure officer because the court obviously did not appoint her to an officer position *pursuant to PTT's bylaws*.[145]

What about whether Mrs. Shotwell was a de facto officer of PTT during the relevant periods? The court of appeals first observed that a de facto officer is a person "acting under color of right and with apparent authority, but who is not legally a corporate officer," and who is "in possession of the office, and . . . [is] exercising its duties under an appearance of right, while not being an officer . . . de jure, by reason of ineligibility or lack of qualification, or being unlawfully elected."[146] Under the facts of this case, Mrs. Shotwell *might* be considered a de facto officer of PTT:

> In this case, the facts could reasonably give rise to the conclusion that petitioner was a de facto officer of the corporation following William's death. Acting on the authority of the district court, petitioner signed numerous documents on PTT's behalf, including tax-related documents, she made decisions for PTT, and she indicated her status at various times as "co-owner," "president," and "principal officer or chief accounting officer." She also drew a salary from the corporation. When the estate was settled, petitioner and Suzanne were the only shareholders, they proceeded to formally elect themselves as directors and officers, and, tellingly, they ratified their previous conduct "heretofore taken in their capacity *as officers* . . . ." (Emphasis added.) These facts could reasonably give rise to the conclusion that petitioner

142. *Id.* at 369–70, 853 N.W.2d at 419 (citations omitted).
143. *Id.* at 370, 853 N.W.2d at 419.
144. *Id.* at 370–71, 853 N.W.2d at 419 (citation omitted).
145. *Id.* at 371, 853 N.W.2d at 419.
146. *Id.* at 371–72, 853 N.W.2d at 420 (citations omitted).

> qualified as a de facto officer with responsibility for PTT's taxes. Consequently, a material question of fact may have remained regarding petitioner's status as a de facto officer and her role in the preparation of PTT's taxes.[147]

Nonetheless, it ultimately would not matter whether Mrs. Shotwell was a de facto officer of PTT. This is because the court found that the plain language of section 27a(5) of the Revenue Collection Act only applies to "officers"; because it makes no mention of "de facto" officers as well, de facto officers cannot be personally liable for unpaid taxes under the statute.[148] As such, Mrs. Shotwell dodged a bullet (pun intended).

D. Other Cases

Readers who are interested in business law may find a few other decisions that were reported during the *Survey* period to be instructive, although this article will only discuss them briefly. First, *Bellevue Ventures, Inc. v. Morang-Kelley Investment, Inc.*[149] contains a helpful discussion of apparent authority, which is one theory under which the actions of an agent (or other person) can bind a principal to a contract with a third party.[150] Also, the *Bellevue* court held that the fact that the plaintiff sold equipment to the defendant under the name of a non-existent corporation did not give the defendant a defense to the plaintiff's claim for unjust enrichment.[151]

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147. *Id.* at 372, 853 N.W.2d at 420. As discussed *supra* note 128, however, the Michigan Supreme Court vacated this part of the opinion, holding that the court of appeals erred when it concluded that there was a material question of fact as to whether Ms. Shotwell was a de facto officer. Shotwell v. Dep't of Treasury, No. 150024, 2015 WL 1402168 (Mich. Mar. 25, 2015).

148. 305 Mich. App. at 372–73, 853 N.W.2d at 420–21.

149. 302 Mich. App. 59, 836 N.W.2d 898 (2013).

150. *Id.* at 64–65, 836 N.W.2d at 902. Citing a prior case, the court ruled that apparent authority is when:

> the principal, by statements or conduct, places the agent in a position where he appears with reasonable certainty to be acting for the principal, or without interference suffers the agent to assume such a position, and thereby justifies those dealing with the agent in believing that he is acting within his mandate, an apparent authority results which replaces that actually conferred as the basis for determining rights and liabilities.

Id. at 65, 836 N.W.2d at 902 (citation omitted); *see also* Wienhold v. Pearsall, No. 303635, 2013 WL 3198129, at *7–9 (Mich. Ct. App. June 25, 2013).

151. *Bellevue*, 302 Mich. App. at 64, 836 N.W.2d at 901–02.

Second, *AFP Specialties, Inc. v. Vereyken*[152] concerned, among other things, whether a land contract vendee could be considered an "implied agent" of a land contract vendor. Under the facts of the case, the court held that there was no implied agency because the vendor did not have the requisite control over the vendee,[153] but the case contains a helpful discussion of when such an agency relationship would arise. Specifically, the court ruled that the "facts and circumstances giving rise to an implied agency must be (1) known to the alleged principal, (2) within the control of the alleged principal, and (3) either explicitly acknowledged or at least acquiesced in by the alleged principal."[154]

The discussion of *Madugula v. Taub*[155] above probably violates the rule that this Article should only discuss decisions from the *Survey* period. While I will not break that rule again with an extended discussion of another case outside the *Survey* period, readers who are interested in a good discussion of several aspects of partnership law should read *Urbain v. Beierling*,[156] a 2013 decision from the Michigan Court of Appeals.

III. NOTABLE UNPUBLISHED DECISIONS

There were also a few interesting—but unpublished[157]—opinions from Michigan courts involving business associations during the *Survey* period.[158]

152. 303 Mich. App. 497, 844 N.W.2d 470 (2013).

153. *Id.* at 504–11, 844 N.W.2d at 476–80.

154. *Id.* at 507, 844 N.W.2d at 478 (citation omitted). This theory of implied agency appears to be more similar to estoppel under section 2.04 of the *Restatement (Third) of Agency* than to either of the other types of contractual authority an agent may have under the *Restatement*, which are actual authority and apparent authority. *See* RESTATEMENT (THIRD) OF AGENCY §§ 2.01–2.03, 2.05 (2006).

155. 496 Mich. 685, 853 N.W.2d 75 (2014); *see supra* notes 97–115 and accompanying text.

156. 301 Mich. App. 114, 835 N.W.2d 455 (2013).

157. Under the Michigan Court Rules, an "unpublished opinion is not precedentially binding under the rule of stare decisis." MICH. CT. R. 7.215(c). Subsection (b) of this rule lists the situations in which an opinion must be published.

158. *See also* Banker & Brisebois Co. v. Maddox, No. 310993, 2014 Mich. App. LEXIS 798 (Apr. 29, 2014) (holding that accountants did not owe fiduciary duties to clients). *Banker* also contains a good discussion of when the actions of a partner will bind the partnership to a contract with a third party. *Id.* at *28–30. There were two more somewhat interesting unpublished cases that were decided shortly after the *Survey* period ended. Both of these cases involved, among other things, claims of either shareholder or LLC member oppression. *See* BSA Mull, LLC v. Garfield Invest. Co., Nos. 310989, 311911, 315359, 315544, 2014 WL 4854306 (Mich. Ct. App. Sept. 30, 2014); Goldberg v. First Holding Management Co., No. 314874, 2014 WL 5066163 (Mich. Ct. App. Oct. 9, 2014).

In *English Trust v. Equity Logistics, Inc.*,[159] the plaintiff, a shareholder in Equity Logistics, Inc., sued the corporation and various other defendants for oppression under section 489 of the BCA.[160] The trial court awarded the plaintiff $50,000 based on a case evaluation that was accepted by all of the parties.[161] After the defendants did not pay the judgment, the plaintiff submitted a proposed order that "mirrored the case evaluation award."[162] The defendants objected; one of their arguments was that the court "should find that the entire stock issue matter—past, present, and future—has been resolved."[163] Nonetheless, the trial court entered the proposed order.[164] The defendants then appealed, arguing that the case evaluation award "reflected the value of plaintiff's interest in [the corporation], and that the award therefore terminated any interest plaintiff had in that corporation."[165]

The court of appeals disagreed, finding that "the case evaluation was clear on its face: it simply declared that plaintiff was entitled to a monetary award of $50,000 and made no mention of the effect, if any, the case evaluation had on plaintiff's interest in Equity Logistics."[166] As such, the plaintiff was still a shareholder in the company, which meant that the defendants' argument that claims for *future* violations should be barred failed.[167] The lesson of this case for defense counsel is to be careful in accepting any proposed settlements or case evaluations of oppression lawsuits. While such lawsuits often are resolved by the defendants purchasing the plaintiff's shares for fair value,[168] the language of the case evaluation and proposed order in *English Trust* clearly did not have that effect. Nor, for that matter, did any of the defendants actually redeem or purchase the shares. That being the case, the plaintiff's shares obviously still existed.

Turner v. J & J Slavik, Inc.[169] featured a somewhat similar scenario; the question was whether the plaintiff's shares still existed, that is, whether the defendant corporation had—or had not—redeemed them

159. No. 314057, 2014 Mich. App. LEXIS 564 (Mar. 27, 2014).

160. MICH. COMP. LAWS ANN. § 450.1489 (West 2015); *see supra* note 98.

161. *English Trust*, 2014 Mich. App. LEXIS 564 at *1.

162. *Id.* at *2.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at *3.

167. *Id.* at *3–4.

168. *Cf.* MICH. COMP. LAWS ANN. § 450.1489(1)(e) (West 2015) (Relief in an oppression lawsuit could include the "purchase at fair value of the shares of a shareholder, either by the corporation or by the officers, directors, or other shareholders responsible for the wrongful acts.").

169. No. 313936, 2014 Mich. App. LEXIS 673 (April 15, 2014).

more than a decade earlier.[170] More specifically, the plaintiff was a shareholder and an employee of the defendant corporation.[171] The parties had an agreement that provided that if the plaintiff's employment with the corporation was terminated, the corporation would redeem all of his shares.[172] The purchase price would be the fair market value of the shares as of the last day of the previous month.[173] Meanwhile, "fair market value" was defined as "the amount of [the corporation's] assets less the amount of its liabilities (book value) . . . divided by the number of shares outstanding."[174] Although difficult to discern from the opinion, it appears that the agreement also contained provisions whereby the shares (or the company's assets) would be valued by up to three appraisers if the parties did not agree upon a valuation.[175] It also contained provisions calling for a closing within thirty days after the price was determined and requiring the parties to execute and deliver necessary instruments to conduct the closing.[176]

After the plaintiff's employment was terminated in January 1992, the corporation sent him a letter stating that it did not owe him anything for his shares, apparently because the book value of the shares (as defined above) as of the end of the prior month was negative, and paying the plaintiff for his shares would therefore violate the BCA.[177] The letter further stated that "by necessary implication, the [agreement] indicates that there be no redemption of stock having a negative value under the valuation provisions of the [a]greement."[178] Apparently, nothing happened for a long time afterward; the plaintiff did not challenge that assertion at the time, and the defendant corporation did not follow the procedures set forth in the agreement as to how to determine the valuation of the shares.[179] Years later, however, the question arose as to

170. *Id.* at *1.
171. *Id.*
172. *Id.* at *2–3.
173. *Id.* at *3.
174. *Id.* at *3.
175. *See id.* at *6.
176. *See id.* at *11.
177. The BCA provides that a distribution (which includes a stock redemption) may not be made if it would render the corporation unable to pays its debts as they become due in the ordinary course of business, or if the payment would result in the corporation's assets being less than its liabilities (plus, if applicable, the liquidation preferences of shares who have "superior" rights to the shares receiving the distribution, such as preferred stock). MICH. COMP. LAWS ANN. §§ 450.1106(4), 450.1345(3) (West 2015).
178. *Turner*, 2014 Mich. App. LEXIS at *4.
179. *See id.* at *4–5.

whether the plaintiff's shares had been redeemed in 1992 or whether they still existed.[180]

The trial court found for the corporation, reasoning that the termination of the plaintiff's employment "instantly terminated [p]laintiff's status as a shareholder," creating an "unconditional obligation for [p]laintiff to transfer his shares to [d]efendant."[181] Further, because the plaintiff's stock had a negative value at that time, the trial court found that "there was no need for [d]efendant to write [p]laintiff a check for 'zero' to 'redeem' the stock . . . ."[182] The court of appeals, however, observed that:

> The flaw with this conclusion is that it relies on the trial testimony of . . . defendant's former attorney, to value plaintiff's shares in defendant, when the parties specifically established a valuation procedure that was not used. Only after that procedure was followed would it then have been between plaintiff and defendant to decide whether any payment was warranted. The bargained-for valuation procedure was substantially more transparent—providing, if necessary, for three real-estate appraisers—than the unsupported claims plaintiff received from defendant, and plaintiff had a right to be secure in the knowledge that his shares had no objective value.[183]

In sum, the plaintiff's stock had never actually been redeemed.[184] The court thus reversed the trial court's opinion and remanded the case with instructions to enter a judgment that the plaintiff was still a shareholder of the defendant.[185] One wonders what these shares were worth in 2014. Even if the shares did have a negative fair market value in 1992, this case serves as a cautionary tale to carefully follow agreements, even if doing so may seem like a waste of time.

In *Wienhold v. Pearsall*,[186] the trial court held that a corporation was neither a de jure corporation nor a de facto corporation because even though its articles of incorporation had been properly filed in the state of New York, it had never held any shareholder or director meetings and had not issued any shares before the events in the case occurred.[187] As a

180. *See id.* at *5.
181. *Id.*
182. *Id.* at *5–6.
183. *Id.* at *6.
184. *Id.*
185. *Id.* at *11.
186. No. 303635, 2013 WL 3198129 (Mich. Ct. App. June 25, 2013).
187. *Id.* at *11.

result, the trial court found two of the corporation's officers personally liable on a promissory note that had been signed in the corporation's name.[188] The court of appeals correctly reversed, discussing the corporation-by-estoppel theory, which holds that a person who deals with an entity as a corporation will be estopped from later claiming that it was not a corporation and that its officers or owners should therefore be personally liable for its debts.[189]

Ward v. Idsinga[190] involved many legal issues, but one interesting aspect of the case was its discussion of the effect that a failure to follow a corporation's bylaws would have on a transaction. In the case, the corporation's bylaws provided that the shareholders could take action without a meeting if the holders of a majority of the voting shares signed a written consent resolution approving the action, as permitted by the BCA.[191] However, the bylaws also provided that, unless *all* of the shareholders had been solicited to sign a written consent resolution, prompt notice had to be given to the shareholders who had not signed the consent resolution.[192] Specifically, "as to approvals [of transactions] (i) in which a director has a financial interest, . . . notice of the approval will be given at least 10 days before the consummation of any action authorized by the approval."[193]

Simplifying the facts greatly, a transaction in which some of the directors had a financial interest was approved by a written consent resolution by the holders of a majority of the shares.[194] However, the corporation never sent the notice required by the bylaws to the other shareholders.[195] As a result, the court held that the transaction was void.[196] The case contains a very interesting discussion of how cases in other jurisdictions have treated corporate transactions that were not approved in accordance with statutes and/or a corporation's articles or bylaws, and when a director is deemed to have a "financial interest" in a transaction.[197]

188. *Id.*

189. *Id.* at *10.

190. No. 302731, 2013 WL 4404246 (Mich. Ct. App. Aug. 15, 2013).

191. Technically, such a provision must be in the corporation's articles, but I assume that the corporation in *Ward* did have such a provision in its articles. *See* MICH. COMP. LAWS ANN. § 450.1407(1) (West 2015).

192. *Ward*, 2013 WL 4404246 at *4.

193. *Id.* at *4.

194. *Id.* at *1–2.

195. *Id.* at *1–3.

196. *Id.*

197. *Id.* at *3–8.

Souden v. Bleich[198] discusses the difference between a "joint venture" and a "joint enterprise." An extended discussion of the facts probably is not helpful; essentially, the plaintiff made strained—and unsuccessful—arguments that the attorney whom he had originally hired to handle his divorce case in Berrien County was engaged in a "joint venture" and/or a "joint enterprise" with the attorney who later took over the case when it was re-filed in Oakland County.[199]

In discussing the issues, the court noted that while many people use these terms interchangeably, joint ventures and joint enterprises are separate legal concepts.[200] A joint venture is "an association to carry out a single business enterprise for a profit" and requires six elements: "(a) an agreement indicating an intention to undertake a joint venture; (b) a joint undertaking of; (c) a single project for profit; (d) a sharing of profits as well as losses; (e) contribution of skills or property by the parties; [and] (f) community interest and control over the subject matter of the enterprise."[201] On the other hand, a joint enterprise "requires that every member have management and control of the enterprise, a right to be heard, and an equal right of control and joint responsibility for decision making and expenses."[202] Unlike a joint venture, no profit-sharing is required to find a joint enterprise.[203] One thing that the two concepts have in common, however, is that all of the members of a joint venture or joint enterprise will be liable for actions of the other members, such as negligence.[204]

One can be forgiven for not grasping the distinction between a joint venture and a joint enterprise (or appreciating why it is significant). Indeed, the court in *Lego v. Liss*[205] did not seem to understand this either. In *Lego*, the allegation was the plaintiff and the defendant—two police officers in two different police task forces—were engaged in a joint *venture*.[206] (Confusingly, this apparently would have meant that the parties were *co-employees* and that the plaintiff's exclusive remedy for injuries he suffered when the defendant shot him would be under the worker's compensation statute.) Citing *Berger v. Mead*, the same case relied on by the *Souden* court discussed above, the *Lego* court found that

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198. No. 314143, 2014 Mich. App. LEXIS 728 (Apr. 17, 2014).
199. *Id.* at *6–14.
200. *Id.* at *8.
201. *Id.* at *8–9 (citing Berger v. Mead, 129 Mich. App. 209, 338 N.W.2d 919 (1983)).
202. *Id.* at *9 (quoting Helsel v. Morcom, 219 Mich. App. 14, 21–22, 555 N.W.2d 852, 855 (1996)).
203. *Id.* at *9–10.
204. *Id.*
205. Nos. 312392, 312406, 2014 Mich. App. LEXIS 552 (Mar. 27, 2014).
206. *Id.* at *1, *5–6

a "joint venture has the following six elements: an agreement showing an intention to undertake a joint venture, a joint undertaking, a single project, involving the contribution of skills or property by the parties, involving community interest, and control over the subject matter."[207] Note that there is no mention of profit-sharing or, for that matter, anything to indicate that a joint venture must be business-related. Strangely, this is a somewhat correct reading of *Berger*—although it is correct only insofar as joint *enterprises* are concerned, not joint *ventures*. This is because even though *Berger* did list profit and loss sharing as one of the requirements for a joint *venture*, that case also found that non-commercial undertakings (like *Lego*, *Berger* also involved a police task force) can be joint *enterprises*.[208]

207. *Id.* at *6 (citing Berger v. Mead, 129 Mich. App. 209, 215, 338 N.W.2d 919, 922 (1983)).
208. *See Berger*, 129 Mich. App. at 215–16, 338 N.W.2d at 923.