COMMERCIAL LITIGATION: RECENT DEVELOPMENTS IN MICHIGAN LAW

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I. INTRODUCTION

This Article discusses developments in commercial litigation during the 2019–2020 *Survey* period (June 1, 2019 to May 31, 2020). Commercial litigation spans many areas of law. Accordingly, this Article does not address every case issued during the *Survey* period involving commercial entities. Instead, it primarily focuses on cases addressing shareholder disputes and contract-related matters.

The discussion below is divided into three sections. Part II summarizes legislative changes relevant to commercial entities. Part III discusses published opinions issued during the *Survey* period, all of which are

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precedentially binding.[1] Part IV discusses noteworthy unpublished opinions, which are nonbinding but still insightful.[2]

II. MICHIGAN LEGISLATION

The Michigan Legislature made minor changes to statutes within the Michigan Business Corporation Act (BCA)[3] and the Michigan Limited Liability Company Act (LLCA).[4] None of the changes have noteworthy substantive effects.[5] Otherwise, there were no significant changes to the BCA, LLCA, Uniform Partnership Act,[6] Revised Uniform Limited Partnership Act,[7] or Michigan Uniform Commercial Code (UCC).[8]

III. PUBLISHED OPINIONS

A. Nicholl v. Torgow*: The Applicability of MCL 450.1545a and the Elements of a Material-Omission Claim*

The litigation in *Nicholl v. Torgow*[9] arose from the merger of Talmer Bancorp, Inc., and Chemical Financial Corporation.[10] In 2015, Talmer's growth strategy shifted from an exclusive focus on acquiring other regional banking institutions to considering both mergers and acquisitions.[11] Talmer reached out to several companies, and two (Chemical and another company referred to as "Company E") expressed interest in a deal.[12]

Under an agreement with Talmer's board of directors, Keef Broyette & Woods, Inc. (KBW), agreed to serve as Talmer's representative in negotiations with Company E.[13] Less than a month later, Company E withdrew from the negotiations.[14]

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1. *See* MICH. CT. R. 7.215(C)(2).
2. Unpublished opinions are not precedentially binding, but they have persuasive value. Paris Meadows, LLC v. City of Kentwood, 287 Mich. App. 136, 145 n.3, 783 N.W.2d 133, 139 n.3 (2010).
3. MICH. COMP. LAWS §§ 450.1101–450.2099 (1973).
4. MICH. COMP. LAWS §§ 450.4101–450.4106 (1993).
5. *See* MICH. COMP. LAWS § 450.2060, as amended by 2019 Mich. Pub. Acts 68; MICH. COMP. LAWS § 450.5101, as amended by 2019 Mich. Pub. Acts 70.
6. MICH. COMP. LAWS §§ 449.1–449.48 (1917).
7. MICH. COMP. LAWS §§ 449.1101–449.2108 (1983).
8. MICH. COMP. LAWS §§ 440.1101–440.11102 (2013).
9. Nicholl v. Torgow, 330 Mich. App. 660, 950 N.W.2d 535 (2019).
10. *Id*. at 665, 950 N.W.2d at 539.
11. *Id*.
12. *Id*.
13. *Id*.
14. *Id*.

However, KBW also "made contacts with Chemical . . . regarding a possible merger with Talmer."[15] In December 2015, KBW agreed to represent Talmer in negotiations with Chemical.[16] The following month, Chemical and Talmer executed a merger agreement.[17] Under the transaction, Chemical paid Talmer shareholders ninety percent stock and ten percent cash.[18] It also offered twenty-five percent cash for outstanding stock options.[19] And two of Talmer's directors were offered positions on Chemical's board of directors.[20]

The Talmer board of directors unanimously approved the merger.[21] So did ninety-nine percent of the Talmer shareholders.[22]

Subsequently, Talmer shareholders initiated three lawsuits (two filed in 2016 and one filed in 2017) against individual members of Talmer's board of directors and KBW.[23] The plaintiffs alleged that the Talmer board members breached their fiduciary duties in multiple respects and that KDW aided and abetted the breaches.[24] The two actions filed in 2016 were consolidated (subsequently referred to as "the 2016 action"), but the trial court declined to consolidate the 2016 action with "the 2017 action."[25]

Ultimately, the trial court granted summary disposition in favor of the defendants in the 2016 and 2017 actions.[26] The plaintiffs appealed, challenging the trial court's grants of summary disposition and other adverse rulings.[27]

First, the Michigan Court of Appeals affirmed the trial court's grant of summary disposition in favor of the Talmer defendants under Michigan Court Rule (MCR) 2.116(C)(10) on several grounds.[28] It began by addressing the plaintiffs' arguments concerning the application of Michigan Compiled Laws (MCL) 450.1545a, which limits when a shareholder or other person with an interest in a corporation can obtain relief for a transaction involving an interested director or officer.[29] The court of appeals held that the trial court properly concluded that section

15. *Id*.
16. *Id*.
17. *Id*.
18. *Id*.
19. *Id*.
20. *Id*.
21. *Id*.
22. *Id*.
23. *Id*.
24. *Id*.
25. *Id*.
26. *Id*. at 665–66, 950 N.W.2d at 540.
27. *Id*., 950 N.W.2d at 539–40.
28. *Id*. at 666–73, 950 N.W.2d at 540–44.
29. *Id.* at 667–69, 950 N.W.2d at 540–41.

545a barred the plaintiffs from maintaining their lawsuits.[30] The court rejected the plaintiffs' argument that section 545a only applies to transactions between a corporation and its officers or directors.[31] The clear and unambiguous language of the statute does not distinguish between the types of transactions to which it applies.[32]

The court of appeals also rejected the plaintiffs' other arguments concerning whether the transaction was properly validated under section 545a(1).[33] Contrary to the plaintiffs' contentions, it was irrelevant whether the transaction was tainted at a particular point or whether the defendants benefitted in certain ways.[34] The proper focus was whether the merger was properly validated under section 545a(1)(b) or (c) through board or shareholder approval after disclosure of the material facts.[35] The evidence revealed that ninety-nine percent of the shareholders and the full twelve-member board—seven of whom had no interest in the transaction—approved the merger after full disclosure of the material facts.[36] Thus, section 545a barred the plaintiffs' attempts to challenge the transaction.[37]

Next, the court of appeals rejected the plaintiffs' other breach-of-fiduciary-duty claims.[38] It explained that the evidence did not show (1) that KBW was working on both sides of the transaction; (2) that the Talmer board and shareholders approved the merger without knowledge of KBW's possible conflicts; or (3) that KBW tainted the transaction by preparing a discounted cash flow analysis that falsely depressed the value of Talmer.[39] Additionally, the court of appeals disagreed that KBW made a "material omission" (i.e., breached a duty of disclosure) by failing to disclose financial models prepared for the Federal Deposit Insurance Corporation (FDIC).[40] In rejecting this claim, the court of appeals adopted the elements articulated by the Delaware Court of Chancery: "In order for a plaintiff to state properly a claim for breach of a disclosure duty by omission, he must plead facts identifying (1) material, (2) reasonably available (3) information that (4) was omitted from the proxy materials."[41] To establish the materiality element, the plaintiff must show "a 'substantial

30. *Id*. at 669–74, 950 N.W.2d at 541–44.
31. *Id*. at 669, 950 N.W.2d at 541.
32. *Id*.
33. *Id*. at 670, 950 N.W.2d at 542.
34. *Id*.
35. *See id*.
36. *Id*. at 670–71, 950 N.W.2d at 542.
37. *See id*.
38. *Id*. at 671–74, 950 N.W.2d at 542–44.
39. *Id*. at 671–73, 950 N.W.2d at 542–43.
40. *Id*. at 673–74, 950 N.W.2d at 544.
41. *Id*. (quoting Orman v. Cullman, 794 A.2d 5, 31 (Del. Ch. 2002)) (internal quotation marks omitted).

likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available' to the shareholder."[42] Applying these elements, the court of appeals held that there was no material omission because, among other reasons, KBW disclosed the factors that were and were not included in its projections.[43]

Second, the court of appeals affirmed the trial court's grant of summary disposition in favor of KBW on the plaintiffs' claim for aiding and abetting a breach of fiduciary duty.[44] The trial court properly granted summary disposition of the plaintiffs' direct breach-of-fiduciary-duty claim against Talmer, so the plaintiffs could not establish the existence of an independent wrong (a necessary element of their aiding-and-abetting claim).[45]

Third, the court of appeals rejected the plaintiffs' contention that summary disposition was premature.[46] It reasoned that the plaintiffs failed to make "a persuasive showing that further discovery was fairly likely to yield support for their position."[47]

Lastly, because the trial court properly granted summary disposition in favor of the defendants, the court of appeals declined to consider the plaintiffs' arguments regarding the timeliness of their motion for class certification.[48] The court of appeals also affirmed the trial court's dismissal of two plaintiffs named in the 2017 action under MCR 2.116(C)(6).[49]

B. Franks v. Franks*: An Extremely Detailed Analysis of When Summary Disposition of a Shareholder-Oppression Claim Is Proper*

In *Franks v. Franks*,[50] the plaintiffs and defendants were shareholders in Burr Oak, a company that manufactures and sells tools for use in the heat-transfer business.[51] All of the parties were related in some manner to Newell A. Franks, the founder of Burr Oak.[52] The defendants owned voting shares in the corporation—all of which received dividends—or played an active role in the corporation's management.[53] The plaintiffs

42. *Id*. at 674, 950 N.W.2d at 544 (quoting *Orman*, 794 A.2d at 31–32 (Del. Ch. 2002)).
43. *Id*.
44. *Id*. at 674–75, 950 N.W.2d at 544–45.
45. *Id*. at 675, 950 N.W.2d at 544–45.
46. *Id*., 950 N.W.2d at 545.
47. *Id*. at 676, 950 N.W.2d at 545.
48. *Id*. at 676–77, 950 N.W.2d at 545.
49. *Id*. at 677–78, 950 N.W.2d at 545–46.
50. Franks v. Franks, 330 Mich. App. 69, 944 N.W.2d 388 (2019) (per curiam).
51. *Id*. at 76, 944 N.W.2d at 392.
52. *Id*.
53. *Id*.

owned nonvoting shares in the company—only some of which received dividends—and played no role in the corporation's management.[54]

Between 1950 and 2004, Burr Oak distributed dividends to its shareholders almost every year.[55] However, after Newell A. Franks died in 2007, Burr Oak stopped distributing dividends.[56]

In 2012, the defendants commenced efforts to buy back the nonvoting shares held by the plaintiffs.[57] The shares had an estimated value of between $250 and $360 per share (taking into account discounts for marketability).[58] But under the defendants' control, Burr Oak offered to buy the plaintiffs' shares for only $62 per share.[59] (Deposition testimony and email correspondence later revealed that the defendants were aware that the offer was not supported by any valuation and that the offer was not made in good faith.[60]) Subsequently, Burr Oak made two additional offers to purchase the plaintiffs' shares at $141.26 and $248 per share.[61] The plaintiffs rejected all three offers.[62]

Soon after Burr Oak made the last offer, the plaintiffs sued the defendants, alleging a series of claims related to the defendants' control and management of the company.[63] Their amended complaint alleged "shareholder oppression under MCL 450.1489, breach of fiduciary duties, accounting, fraud, constructive fraud, breach of contract, and aiding and abetting the scheme to deprive [the] plaintiffs of their interests as shareholders."[64] The plaintiffs' primary claim was that the defendants leveraged their control of Burr Oak to advantage themselves and their families at the expense of the plaintiff-minority shareholders.[65] Among other remedies, the plaintiffs requested an order requiring the defendants to buy the plaintiffs' shares at fair value.[66]

The parties filed cross-motions for summary disposition.[67] The plaintiffs also requested an order requiring Burr Oak to issue a dividend.[68] The remaining proceedings in the trial court were confusing and

54. *Id*.
55. *Id*.
56. *Id*.
57. *Id*. at 77, 944 N.W.2d at 392.
58. *Id*. at 102–03, 944 N.W.2d at 405–06.
59. *Id*. at 77, 104, 944 N.W.2d at 393, 406.
60. *Id*. at 77–78, 944 N.W.2d at 393.
61. *Id*. at 78, 944 N.W.2d at 393.
62. *Id*.
63. *Id*. at 79, 944 N.W.2d at 393.
64. *Id*.
65. *Id*.
66. *Id*.
67. *Id*. at 79–81, 944 N.W.2d at 393–95.
68. *Id*. at 79, 944 N.W.2d at 393–94.

protracted.[69] After its initial hearing on the parties' motions, the trial court denied the defendants' motion for summary disposition but "found 'infringement of the minority shareholders' rights.'"[70] But the court was unsure of the proper remedy, so it took the matter under advisement until it could hold a hearing on the issue.[71] The court also reserved its ruling on the plaintiffs' motion for summary disposition.[72]

Almost two years later, the court held a second hearing on the plaintiffs' request for summary disposition, granting the motion based on its conclusion that the majority shareholders suppressed the minority shareholders.[73] The court "determined that the appropriate remedy was to compel the corporation to buy the nonvoting members' shares at a price to be determined after an evidentiary hearing."[74] After denying the defendants' motion for reconsideration, the court held a trial on the plaintiffs' remedy.[75] Ultimately, the court "adopted [the] plaintiffs' proposed findings of fact and found that [the] plaintiffs' shares were worth $712 per share," noting that it "could not apply a discount to lower the fair value of the shares."[76] Subsequently, the court entered an order requiring Burr Oak to purchase the plaintiffs' shares within two years at $712 price.[77] After entering other orders, the court eventually dismissed the plaintiffs' remaining claims with prejudice.[78]

On appeal, the defendants challenged the trial court's rulings on numerous grounds.[79] In a forty-page opinion, the court of appeals reversed the trial court's rulings.[80]

First, the court of appeals rejected the defendants' argument that summary disposition of a shareholder-oppression claim is improper because the claim involves an element of motive or intent.[81] The court explained that a review of the opinions cited by the defendants and related case law revealed "that Michigan does not apply a rule precluding summary disposition whenever a claim or defense involves an individual's motive or intent."[82] The majority of cases referencing "a credibility

69. *See id.* at 82–84, 944 N.W.2d at 395–96.
70. *Id*. at 82, 944 N.W.2d at 395.
71. *Id*.
72. *Id*.
73. *Id*.
74. *Id*. at 83, 944 N.W.2d at 395.
75. *Id*.
76. *Id*. at 84, 944 N.W.2d at 396.
77. *Id*.
78. *Id*.
79. *Id*. at 86–115, 944 N.W.2d at 397–412.
80. *Id*. at 115, 944 N.W.2d at 412.
81. *Id*. at 85–86, 91, 944 N.W.2d at 397, 399.
82. *Id*. at 86, 944 N.W.2d at 397.

exception to the grant of summary disposition" trace back to Justice Souris's plurality opinion in *Durant v. Stahlin*.[83] There, Justice Souris agreed that summary disposition was proper under the facts of that case.[84] However, he cautioned that courts should generally disfavor the procedure and only grant summary disposition in limited circumstances.[85] Justice Souris's opinion also indicated "that summary judgment would be inappropriate in cases in which, 'notwithstanding the opposing party's failure to attempt even to discredit the honesty of [an] affiant by counter-affidavits or other proofs,' the affiant's credibility is 'crucial to [the] decision of a disputed fact issue . . . .'"[86]

However, in the decades after *Durant* was decided, Michigan courts have "moved away from the notion that summary disposition should be disfavored."[87] Accordingly, *Franks* explained that the *Durant* rule now has limited application in Michigan:

> To the extent that this [c]ourt's decisions seem to apply an absolute exception to the application of summary disposition premised on the mere possibility that a jury might disbelieve an essential witness, as first articulated in *Durant*, the application of that rule is limited to those situations in which the moving party relies on subjective matters that are exclusively within the knowledge of its own witness and those in which the witness would have the motivation to testify to a version of events that are favorable to the moving party.[88]

The court of appeals further concluded that *Franks* did not fall within the scope of the *Durant* rule.[89] Thus, the trial court was able to grant summary disposition if the defendants failed to rebut the plaintiffs' evidence of intent.[90]

Second, the court of appeals rejected the defendants' argument that summary disposition was improper because the case involved claims for equitable relief.[91] The court explained that summary disposition of an

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83. *Id.* at 86–87, 944 N.W.2d at 397 (citing Durant v. Stahlin, 375 Mich. 628, 135 N.W.2d 392 (1965) (Souris, J.) (plurality opinion)).

84. *Id.* at 87–89, 944 N.W.2d at 397–98.

85. *Id*.

86. *Id*. at 88, 944 N.W.2d at 398 (alterations in original) (quoting *Durant*, 375 Mich. at 647–48, 135 N.W.2d at 398 (Souris, J.) (plurality opinion)).

87. *Id.* at 89–90, 944 N.W.2d at 398–99.

88. *Id*. at 90–91, 944 N.W.2d at 399.

89. *Id.* at 91, 944 N.W.2d at 399.

90. *Id*.

91. *Id*. at 91–92, 944 N.W.2d at 399–400.

equitable claim is appropriate "when the material facts are not in dispute."[92] Accordingly, in cases where there is no material factual dispute, a trial court may grant summary disposition on some or all of the elements of a shareholder-oppression claim under MCL 450.1489(1).[93]

Third, the court of appeals addressed the parties' dispute as to whether a shareholder-oppression claim under MCL 450.1489 includes an element of intent.[94] It began by explaining the purpose and scope of the statute.[95] It then applied the cannons of statutory construction to the text, rejecting the plaintiffs' contention that MCL 450.1489 does not require proof of intent.[96] Instead, the court of appeals concluded that (1) the statute requires proof of an "intent to substantially interfere with the 'interests of the shareholder as a shareholder'" and (2) a defendant can avoid liability by showing a lack of intent:

> Therefore, we hold that with regard to acts that are willfully unfair and oppressive, the complaining shareholder must prove that the directors or persons in control of the corporation engaged in a "continuing course of conduct" or took "a significant action or series of actions" that substantially interfered with the interests of the shareholder as a shareholder and that they did so with the intent to substantially interfere with the "interests of the shareholder as a shareholder." Thus, a defendant can avoid liability by showing that he or she did not have the requisite intent when he or she took the acts that interfered with the shareholder's interests.[97]

To summarize, then, there are four elements that plaintiffs must establish to prove a shareholder-oppression claim under MCL 450.1489: "(1) that they were shareholders of the corporation; (2) that defendants were 'directors' or 'in control of the corporation'; (3) that defendants engaged in acts; and (4) that those acts were 'illegal, fraudulent, or willfully unfair and oppressive' to the corporation or to them as shareholders."[98]

Significantly, the court of appeals also explained how a defendant may establish a question of fact on the intent element:

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92. *Id*., 944 N.W.2d at 400.

93. *Id*.

94. *Id*. at 92–100, 944 N.W.2d at 400–04. Section 489(1) provides "a cause of action to redress certain wrongs by those in control of a closely held corporation when the acts interfere with a shareholder's property rights[.]" *Id*. at 92, 944 N.W.2d at 400.

95. *Id*. at 92–95, 944 N.W.2d at 400–02.

96. *Id*. at 96–99, 944 N.W.2d at 402–04.

97. *Id*. at 98–99, 944 N.W.2d at 404 (citations omitted).

98. *Id*. at 99, 944 N.W.2d at 404 (citing MICH. COMP. LAWS § 450.1489(1) (2006)).

> [The] defendants could establish a question of fact on this element by proffering evidence from which a finder of fact could conclude that [the] defendants' actions, though the actions may have substantially interfered with the shareholder's interests as a shareholder, *were nevertheless done for a legitimate business reason and otherwise not done with the intent to harm the shareholder's interests as a shareholder*.[99]

Fourth, the court of appeals rejected the defendants' argument that "their decision to retain cash and refrain from paying out dividends cannot serve as evidence of shareholder oppression because their decisions are protected by the business-judgment rule."[100] The court explained that the plaintiffs were not seeking review of the propriety of the defendants' business decisions.[101] And by alleging and supporting their claim of shareholder oppression under MCL 450.1489, the plaintiffs necessarily overcame the business-judgment rule.[102] This is because, under the statute, "the Legislature identified acts by directors or persons of a corporation that are inherently wrongful and would warrant court intervention."[103] So the trial court could consider the "defendants' dividend policy, their failure to divulge [Burr Oak's accountant's] valuation, or the fairness of their $62 per share offer" in determining whether the plaintiffs established the elements of shareholder oppression.[104]

Fifth, the court of appeals addressed the defendants' argument that summary disposition was improper because there were genuine issues of material fact as to whether their actions met the elements of MCL 450.1489(1).[105] Based on its detailed review of the evidence presented by both parties, the court of appeals agreed with the defendants.[106] It first concluded that the plaintiffs' evidence "established that [the] defendants acted in concert to take acts that were willfully unfair and oppressive to [the] plaintiffs as shareholders":

> The evidence, if left unrebutted, showed that [the] plaintiffs could only realize value in their shares if Burr Oak issued dividends or purchased their shares. The evidence further established that Burr Oak had not been paying dividends for years, which left [the]

99. *Id*. (emphasis added).
100. *Id*. at 100–01, 944 N.W.2d at 404.
101. *Id*. at 100, 944 N.W.2d at 404.
102. *Id*. at 100–01, 944 N.W.2d at 404–05.
103. *Id*. at 100, 944 N.W.2d at 404–05.
104. *Id*. at 101, 944 N.W.2d at 405.
105. *Id*.
106. *Id*. at 101–07, 944 N.W.2d at 405–08.

> plaintiffs without income from their shares for a substantial period. The evidence showed that [the] defendants knew that the Class B and C shares had a substantial value when considered in light of Burr Oak's actual market value and historical dividend practices, but the evidence showed that they also understood that they could—in effect—devalue those shares by refusing to pay dividends. The evidence showed that [the] defendants then made an extremely low offer to purchase the Class B and C shares after obtaining a report that strongly suggested that the shares were worth hundreds of dollars more per share. In the absence of evidence to justify the $62 per share offer or to establish a legitimate business reason for refusing to pay dividends despite the company's ability to pay and historical practices, the evidence cited by [the] plaintiffs established that [the] defendants collectively took acts that substantially interfered with [the] plaintiffs' interests as shareholders—their right to receive reasonable dividend payments or to sell their shares at a fair value—and that they did so with the intent to substantially interfere with those shareholder rights.[107]

Thus, the plaintiffs' evidence comprised a prima facie case of shareholder oppression, which would entitle them to summary disposition if the defendants failed to rebut it.[108]

But the court of appeals next concluded that the "[d]efendants' evidence, if believed, . . . support[ed] a finding that [the] defendants caused Burr Oak to hold its cash, rather than pay dividends to its shareholders, for legitimate business reasons and not with the intent to substantially interfere with [the] plaintiffs' interests as shareholders."[109] It also "permitted an inference that the board made the various offers to purchase [the] plaintiffs' shares as part of a legitimate bargaining tactic and not as an attempt to force [the] plaintiffs to sell their shares at a severe discount under the pressure created by the failure to pay dividends."[110] Affidavits proffered by the defendants explained that they withheld dividends for reasons that benefitted the company and maximized the value of the shareholders' shares and that Burr Oak's net cash position was negative in June 2014.[111] The defendants also provided evidence that they ultimately

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107. *Id*. at 104–05, 944 N.W.2d at 406–07.

108. *See id*. (citing Barnard Mfg. Co. v. Gates Performance Eng'g, Inc., 285 Mich. App. 362, 370, 775 N.W.2d 618, 623 (2009)).

109. *Id*. at 106, 944 N.W.2d at 407 (citing MICH. COMP. LAWS § 450.1489(3) (2006)).

110. *Id*. at 106, 944 N.W.2d at 407–08 (citing MICH. COMP. LAWS § 450.1489(3) (2006)).

111. *Id*. at 105–06, 944 N.W.2d at 407.

offered to buy the plaintiffs' shares for an amount that was "reasonably based on an earlier offer" and that they eventually divulged a share valuation report that allowed the plaintiffs to evaluate the value of their shares.[112] The court of appeals concluded that this evidence established a genuine issue of material fact regarding the plaintiffs' shareholder-oppression claim.[113] Thus, the trial court's grant of summary disposition was improper.[114]

Sixth, the court of appeals agreed with the defendants that issues of fact precluded summary disposition as to the appropriate remedy for the plaintiffs' shareholder-oppression claim.[115] The court of appeals noted the wide range of potential remedies available to the trial court and the potential impact of the most drastic options on the interests of innocent third parties.[116] Summary disposition was improper because the trial court was unable to "decide as *a matter of law* what remedy best fit the equities of the case" considering the conflicting evidence in the record.[117]

Seventh, the court of appeals rejected the defendants' argument "that the trial court erred in its valuation of the shares at issue and that it ought to have discounted the price for the shares on the basis of marketability and lack of control."[118] The court of appeals emphasized that MCL 450.1489(1)(e) recognizes, as a remedy for shareholder-oppression, the purchase of a shareholder's shares "at fair value," not at "fair market value."[119] Considering the general definition of "fair market value,"[120] and authority from other jurisdictions distinguishing between "fair value" and "fair market value" in parallel contexts, the court of appeals concluded that "the Legislature used the term 'fair value' to distinguish the remedy from purchase at 'fair market value.'"[121] Thus, a court may consider fair market value in determining a stock's fair value, but it is not required to do so.[122] Nothing in the statute requires a court—or precludes a court—from

112. *Id*. at 106, 944 N.W.2d at 407.
113. *Id*. at 106–07, 944 N.W.2d at 408.
114. *Id*. at 107, 944 N.W.2d at 408.
115. *Id*.
116. *Id*. at 107–09, 944 N.W.2d at 408–09.
117. *Id*. at 109, 944 N.W.2d at 409 (emphasis added).
118. *Id*.
119. *Id*. at 110, 944 N.W.2d at 409 (citing MICH. COMP. LAWS § 450.1489(1)(e) (2006)).
120. The court of appeals explained, "'Fair market value' generally refers to 'the amount of money that a ready, willing, and able buyer would pay for the asset on the open market[.]'" *Id*. (citing Wolfe-Haddad v. Oakland Cty., 272 Mich. App. 323, 326, 725 N.W.2d 81, 81 (2006)). "A fair market value would, therefore, take into consideration the fact that a ready, willing, and able buyer might discount the value of the shares on the basis of limitations inherent in the shares." *Id*.
121. *Id*. at 111, 944 N.W.2d at 410.
122. *Id*. at 111–12, 944 N.W.2d at 410.

valuing the shares in a particular manner.[123] "Because the trial court had authority to value the shares in any way that was equitable under the totality of the circumstances, the trial court erred to the extent that it felt compelled to value the shares without any discounts."[124]

Lastly, the court of appeals rejected the defendants' argument that the trial court erroneously denied their motion for summary disposition of the claims against LeeAnn McConnell, who was not a director or officer of Burr Oak.[125] All of the claims against her were premised on a concert-of-action theory.[126] The court of appeals concluded that, based on the plaintiffs' evidence, a reasonable juror "could conclude that LeeAnn McConnell knowingly acted in concert with the other defendants to oppress the nonvoting members' interests as shareholders by repeatedly supporting their membership on the board and actively working behind the scenes to further their agenda."[127] Thus, the trial court properly denied the defendants' request for summary disposition.[128]

C. Sutariya Properties v. Allen & I-75*: MCL 566.132's Limitation on Actions Against a Financial Institution*

In *Sutariya Properties LLC v. Allen & I-75, LLC*,[129] Allen & I-75—a limited liability company in the gas station business—entered into a loan agreement with Warren Bank to borrow $1,650,000 for the purchase of real property.[130] In conjunction with the agreement, Allen & I-75 executed a mortgage in favor of Warren Bank, an assignment of leases and rents in favor of the bank, and a promissory note.[131] Bilal Saad, the sole member of Allen & I-75, signed a guaranty for the debt.[132] All of these documents were referred to as "the Allen Loan Package."[133]

The loan agreement contained a "tender-back" (or "put-back") provision.[134] Under that term, Allen & I-75 could deed the property to Warren Bank in full satisfaction of Allen & I-75's and Saad's liability for the remaining balance due on the loan as long as "'no Event of Default

123. *Id*.
124. *Id*. at 112–13, 944 N.W.2d at 411.
125. *Id*. at 113–15, 944 N.W.2d at 411–12.
126. *Id*. at 113, 944 N.W.2d at 411.
127. *Id*. at 114–15, 944 N.W.2d at 412.
128. *Id*. at 115, 944 N.W.2d at 412.
129. 331 Mich. App. 521, 953 N.W.2d 434 (2020).
130. *Id.* at 524, 953 N.W.2d at 436.
131. *Id.* at 525, 953 N.W.2d at 436.
132. *Id.*
133. *Id*.
134. *Id*. at 524–25, 953 N.W.2d at 436.

exists[.]'"[135] The provision included two important time restrictions: Allen & I-75 was required to provide "not less than [thirty] days' [and no] more than [sixty] days' prior written notice to" Warren Bank, and Allen & I-75 could only exercise the option between May 1, 2011 and November 1, 2011.[136] (The tender-back provision also included other conditions and limitations that were not relevant to the issue raised on appeal.[137])

Subsequently, the Michigan Office of Financial and Insurance Regulation closed Warren Bank.[138] As the appointed receiver for Warren Bank's holdings, the Federal Deposit Insurance Corporation (FDIC) formed North CRE Venture 2010-2, Inc., with Colony Capital, a real estate private equity firm.[139] The FDIC had a sixty percent controlling interest in North CRE, and Colony Capital served as North CRE's "managing member to resolve nonperforming debts . . . ."[140] Ultimately, North CRE held the Allen Loan Package within its portfolio of debts.[141]

Between May 2011 and July 2011, Saad and Allen & I-75 repeatedly contacted North CRE and individuals associated with the corporation, attempting to invoke the tender-back provision.[142] After a significant delay—during which North CRE questioned whether Allen & I-75 was current on its payment obligations—North CRE finally recognized that Allen & I-75 could exercise the tender-back option.[143] However, North CRE believed that it could not accept title to the property under the FDIC's agreement with Colony Capital.[144] So, "in an effort to resolve the issue, North CRE informally agreed to extend the six-month period within which [the tender-back provision] required Allen & I-75 to convey the property to North CRE."[145] The parties also agreed "that Allen & I-75 would remain on the property, without making further loan payments, to operate the gas station business and would still be able to exercise its tender-back rights . . . when a final resolution was reached."[146] (On appeal, the parties disputed whether this modification was oral or reduced to a writing that satisfied the statute of frauds.[147])

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135. *Id*.
136. *Id*.
137. *Id*.
138. *Id*. at 525, 953 N.W.2d at 437.
139. *Id*.
140. *Id*.
141. *Id*.
142. *Id*. at 525–26, 953 N.W.2d at 437.
143. *Id*. at 526, 953 N.W.2d at 437.
144. *Id*.
145. *Id*.
146. *Id*.
147. *Id*. at 526 n.1, 953 N.W.2d at 437 n.1.

In 2014, FRACN Holdings, LLC, purchased the Allen Loan Package from North CRE.[148] FRACN received an email discussing the prior modification of the loan agreement, but North CRE did not provide a written loan disclosure explaining the modification.[149] Soon after the purchase, FRACN assigned the Allen Loan Package to Sutariya Properties, LLC.[150] FRACN did not notify Sutariya that there were issues surrounding the enforceability of the loan agreement.[151]

Sutariya then sued Saad and Allen & I-75, "alleging that the 2009 promissory note was in default and seeking to foreclose on the mortgage, have a receiver appointed, and recover the balance of the promissory note."[152] In the trial court, the parties disputed the enforceability of the loan agreement modification.[153] Sutariya argued that the modification was oral and unenforceable under MCL 566.132(2), which bars actions against a financial institution based on certain types of oral promises or commitments.[154] The trial court disagreed and granted summary disposition in favor of Saad and Allen & I-75.[155] The court concluded "that MCL 566.132 did not apply because there was no attempt to enforce an oral agreement against a 'financial institution,' and the statutory language did not indicate that it applied to 'an individual who takes an assignment of a note, in the course of business, further down the road.'"[156] The trial court further held that the tender-back provision of "the loan agreement had been modified so as to release Allen & I-75 and Saad from liability on the outstanding indebtedness and that the negotiated release was conveyed to FRACN's broker."[157]

On appeal, Sutariya contended that Saad and Allen & I-75 could not "enforce the modification of Paragraph 8.11 of the loan agreement because the modification is oral and, therefore, its enforcement is barred by the statute of frauds set forth in MCL 566.132(2)."[158] Because the statute only limits claims against "financial institutions," the court of appeals focused on whether North CRE qualified under the statutory definition of that term in MCL 566.132(3).[159] Sutariya claimed that North CRE fell within the

148. *Id*. at 526, 953 N.W.2d at 437.
149. *Id*. at 526–27, 953 N.W.2d at 437.
150. *Id*. at 527, 953 N.W.2d at 437.
151. *Id*.
152. *Id*.
153. *Id*. at 527, 953 N.W.2d at 438.
154. *Id*.
155. *Id*. at 527–28, 953 N.W.2d at 438.
156. *Id*.
157. *Id*. at 528, 953 N.W.2d at 438.
158. *Id*. at 529, 953 N.W.2d at 438.
159. *Id*. at 530, 953 N.W.2d at 439.

scope of that definition as an "affiliate or subsidiary" of "a state or nationally chartered bank."[160] Specifically, Sutariya contended that the FDIC qualified as "a state or nationally chartered bank" based on the fact that "it was appointed as the receiver for Warren Bank."[161] The court of appeals disagreed. It explained that the FDIC "is a corporation created pursuant to the [F]ederal [D]eposit [I]nsurance [A]ct to insure deposits held by various institutions and act as receiver for insured institutions under certain circumstances."[162] The FDIC's appointment as receiver for Warren Bank did not make the FDIC a state or nationally chartered bank.[163] Thus, because the Legislature did not "include *receivers* of state or nationally chartered banks within the" statutory definition of "financial institutions," the FDIC did not qualify as a financial institution.[164] Consequently, North CRE was outside the statutory definition as its affiliate or subsidiary.[165] So the court of appeals affirmed the trial court's grant of summary disposition in Saad and Allen & I-75's favor because MCL 566.132 did not bar their claims.[166]

D. Cadillac Rubber & Plastics v. Tubular Metal Systems*: Requirements Contracts Need Not Be Exclusive Under Michigan Law*

In *Cadillac Rubber & Plastics, Inc. v. Tubular Metal Systems, LLC*,[167] the parties disputed the nature of the agreement arising from blanket purchase orders that Tubular Metal Systems, LLC, issued to Cadillac Rubber & Plastics, Inc., and Avon Automotive Holdings, Inc. (together referred to as "Avon"). The purchase orders issued in 2012 and 2016 incorporated Tubular's "terms and conditions of purchase" by reference.[168] They also stated that Avon would supply hoses in accordance with the amounts specified in Tubular's weekly material authorization releases.[169] So, under the purchase orders and incorporated terms and conditions, Tubular was only required to purchase the quantity of parts specified in each material authorization release.[170]

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160. *Id*.
161. *Id*.
162. *Id*. (citation omitted).
163. *Id*. at 530–31, 953 N.W.2d at 439–40.
164. *Id*. (emphasis added)
165. *Id*. at 531, 953 N.W.2d at 440.
166. *Id*.
167. 331 Mich. App. 416, 952 N.W.2d 576 (2020).
168. *Id*. at 419, 952 N.W.2d at 576.
169. *Id*.
170. *Id*.

Starting with the 2012 purchase order, Tubular disseminated weekly material authorization releases that delineated the number of parts it needed and provided a reasonable projection of future requirements.[171] Avon provided parts consistent with the releases for several years.[172]

Then, in 2018, Avon filed an action for declaratory relief.[173] It also sought damages for breach of contract.[174] Most significantly, Avon contended that it had the right to accept or reject each release issued by Tubular because the "per-releases" quantity term in Tubular's terms and conditions created a series of "spot-buy" or "fixed-quantity" contracts, not a single requirements contract.[175] Avon also alleged that the "irrevocable option" allegedly established under Tubular's terms and conditions was invalid or unenforceable because, contrary to MCL 440.2205, Avon did not separately sign the part of the form that contained the purported firm offer.[176] Additionally, Avon alleged that Tubular breached the parties' agreements by compelling Avon to supply Tubular's requirements.[177]

Avon moved for summary disposition at the same time that it filed its complaint.[178] The trial court issued a written opinion granting summary disposition in favor of Tubular under MCR 2.116(I)(2).[179] Avon appealed.[180]

The court of appeals affirmed the trial court's grant of summary disposition in a two-to-one decision.[181] The majority first rejected Avon's contention that the firm offer in Tubular's terms and conditions was unenforceable because Avon did not separately sign it.[182] The court explained that (1) the plain language of MCL 440.2205, (2) the official comments to the corresponding provision of the UCC, (3) persuasive authority from other jurisdictions, and (4) a prominent treatise all confirmed that the separate-signature requirement only applies when the firm offer is not supported by consideration.[183] Because Tubular's firm offer was supported by consideration, section 2205 did not apply.[184]

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171. *Id*. at 420, 952 N.W.2d at 578.
172. *Id*.
173. *Id*.
174. *Id*.
175. *Id*.
176. *Id*.
177. *Id*. at 420–21, 952 N.W.2d at 579.
178. *Id*.
179. *Id*.
180. *Id*.
181. *Id*. at 431, 952 N.W.2d at 584.
182. *Id*. at 422–23, 952 N.W.2d at 580.
183. *Id*. at 423–25, 952 N.W.2d at 581.
184. *Id*. at 425, 952 N.W.2d at 581.

Second, the court of appeals rejected Avon's argument that the parties' agreement created a "spot-buy" contract, not a requirements contract.[185] Citing MCL 440.2306(1), the official comments to the corresponding section of the UCC, and federal case law analyzing requirements contracts, the court of appeals held that Avon and Tubular had a requirements contract as a matter of law.[186] Pursuant to material authorization releases issued in accordance with Tubular's 2012 and 2016 purchase orders and Tubular's terms and conditions—which were incorporated by reference into the purchase orders—Tubular purchased all or some of its requirements from Avon.[187] The court of appeals explained that "[r]equirements contracts need not be exclusive."[188] An agreement may qualify as a requirements contract even if the buyer is not required to purchase one hundred percent of its requirements from the seller.[189] Accordingly, the trial court properly granted summary disposition in favor of Tubular.[190]

Judge Douglas Shapiro concurred in part and dissented in part.[191] He agreed that "a separate, signed document was not required to create a valid irrevocable option because there was consideration for that option."[192] But he disagreed with the majority's conclusion that the written agreement was a requirements contract as a matter of law.[193] He believed that parol evidence was necessary to determine whether the contract was a requirements contract.[194]

Relatedly, Judge Shapiro disagreed with the majority's unqualified conclusion that requirements contracts need not be exclusive; he explained, "For an agreement to unambiguously create a requirements contract it is not necessary that the agreement be exclusive, but it must define a practicable estimate or range of future requirements."[195] "[W]ithout a baseline estimate, a non-exclusive contract does not provide sufficient information to meet the requirement that the 'output or requirements will approximate a reasonably foreseeable figure.'"[196] He did not believe that the parties' contract in this case met the standard for a

185. *Id*. at 426, 952 N.W.2d at 581.
186. *Id*. at 426–31, 952 N.W.2d at 581–84.
187. *Id*. at 430, 952 N.W.2d at 583–84.
188. *Id*. at 430, 952 N.W.2d at 584.
189. *Id*., 952 N.W.2d at 583.
190. *Id*. at 431, 952 N.W.2d at 584.
191. *Id.* (Shapiro, J., concurring in part and dissenting in part)
192. *Id*.
193. *Id*.
194. *Id*.
195. *Id*. at 433, 952 N.W.2d at 585.
196. *Id*. at 434, 952 N.W.2d at 586 (quoting MICH. COMP. LAWS § 440.2306 cmt. 2 (1964)).

requirements contract because "the range [was] nothing more than 'whatever we order.'"[197] Accordingly, Judge Shapiro would have reversed the trial court's grant of summary disposition and remanded for further proceedings.[198]

IV. NOTABLE UNPUBLISHED DECISIONS

A. Harkins v. Sun Pharmaceutical Industries*: The Nuances of a Former Shareholder's Dissent to Corporate Action*

In *Harkins v. Sun Pharmaceutical Industries, Inc.*,[199] the plaintiffs, Donald and Mila Harkins, "were beneficial owners of a minority of the shares in Caraco Pharmaceutical Laboratories, Ltd."[200] Cede & Company (Cede & Co.) was the record holder of the shares.[201] Caraco issued a notice that a special stockholder meeting would be held to consider and to vote on a proposed merger of Caraco with Sun Laboratories, Inc. (the controlling shareholder of Caraco).[202] Under the proposed merger, the shares of minority stockholders would be cancelled, and the holders of those shares would receive $5.25 per cancelled share.[203]

More than two weeks before the meeting, Donald sent written correspondence to Caraco stating that he and Mila were asserting dissenter rights and requesting that Caraco pay them $47.03 for each of their shares.[204] One week before the meeting, Cede & Co. also sent written correspondence to Caraco, asserting dissenter rights on behalf of the Harkinses and stating that Donald should receive all future correspondence.[205]

A few days after the meeting, Caraco sent written correspondence to Cede & Co., with courtesy copies to Donald and the Harkinses' broker, notifying them that the merger was completed and providing a deadline for dissenting shareholders to file a payment demand.[206] Approximately one week before the deadline, Donald sent a written demand to Caraco, enclosing the endorsed certificates for the Harkinses' shares and

197. *Id*.
198. *Id*. at 435, 952 N.W.2d at 586.
199. No. 344505, 2019 WL 6977838, at *1 (Mich. Ct. App. Dec. 19, 2019) (per curiam).
200. *Id*. at *1.
201. *Id*.
202. *Id*.
203. *Id*.
204. *Id*.
205. *Id*.
206. *Id*.

demanding a payment of $47.03 per share.[207] One day before the deadline, Caraco sent written correspondence to Cede & Co.—with courtesy copies to Donald and the Harkinses' broker— enclosing a payment of $5.25 per share and stating that Donald did not properly assert shareholder dissenter rights.[208] Caraco also stated that it was reserving its rights and defenses.[209]

The Harkinses filed suit against Caraco's corporate successor, Sun Pharmaceutical, seeking to recover their requested payment of $47.03 per share plus interest under the dissenter rights provisions of the BCA.[210] The Harkinses later requested leave to add a conversion claim, which the trial court denied.[211] Subsequently, the trial court granted summary disposition in favor of Sun Pharmaceutical, holding that the Harkinses' complaint was time-barred.[212] The Harkinses appealed.[213]

On appeal, the court of appeals first held that the Harkinses' claim was not time-barred.[214] Their action was subject to the six-year residual period of limitations under MCL 600.5813, not the two- and three-year periods of limitation under MCL 450.1489(1).[215] The period of limitations under section 489(1) only applies to actions brought by *current* shareholders against those in control of a corporation.[216] Because the Harkinses' shares were cancelled under the merger, they were *former* shareholders, meaning that section 489(1) did not apply.[217]

The court of appeals then analyzed when the Harkinses' claim accrued for purposes of calculating the six-year period of limitations.[218] Under MCL 450.1773(1), Caraco had sixty days to file an appraisal proceeding after it received the Harkinses' payment demand.[219] Caraco issued correspondence stating "that Donald did not properly assert his dissenter rights and that Caraco reserved its rights and defenses."[220] But "this letter did not definitively indicate that Caraco would refuse to pay the demand or to commence an appraisal proceeding within the [sixty]-day period."[221] Thus, Caraco's alleged violation of section 773(1) did not occur until the

207. *Id*.
208. *Id*.
209. *Id*.
210. *Id*. (citing MICH. COMP. LAWS §§ 450.1101–450.2098 (1972)).
211. *Id*.
212. *Id*.
213. *Id*.
214. *Id*. at *2.
215. *Id*.
216. *Id*.
217. *Id*.
218. *Id*.
219. *Id*.
220. *Id*.
221. *Id*.

sixty-day deadline passed.[222] The Harkinses then had six years after that deadline to file their legal action.[223] They filed their complaint eight days before the limitations period expired, so their action was timely.[224]

Next, the court of appeals held that the trial court properly granted summary disposition in favor of Sun Pharmaceutical, albeit for the wrong reason, because the Harkinses failed to perfect their dissenter rights under MCL 450.1763.[225] Pursuant to MCL 450.1763(2)(a), "a beneficial shareholder may assert dissenter rights 'only if,' among other things, he or she 'submits to the corporation the record shareholder's written consent to the dissent not later than the time the beneficial shareholder asserts dissenters' rights.'"[226] The notice of dissent that Donald gave to Caraco "did not provide any indication of the required written consent of Cede & Co., the record holder of the shares, to the dissent."[227] The separate correspondence submitted by Cede & Co. was insufficient to satisfy the statutory requirements for two reasons.[228] First, the letters indicated that Cede & Co. was dissenting *on behalf of the Harkinses*, not that Cede & Co. had taken its own position on the dissent.[229] Second, Cede & Co. did not send its correspondence until after Donald sent his notice, which was too late under the statute.[230] Accordingly, summary disposition was proper.[231]

Lastly, the court of appeals affirmed the trial court's denial of the Harkinses' motion to amend their complaint to add a conversion claim.[232] The court held that the amendment was futile on two grounds. First, "[t]he parties' differing opinions regarding the value of [the] plaintiffs' shares" neither "establish[ed] that Caraco or Sun Pharmaceutical obtained money without [the] plaintiffs' consent to the creation of a debtor-creditor relationship" nor "that Caraco or Sun Pharmaceutical had an obligation to return any specific money or distinct funds entrusted to their care."[233] Second, a conversion claim was subject to the three-year period of

222. *Id*.
223. *Id*.
224. *Id*.
225. *Id*. at *3.
226. *Id*. at *3 (quoting MICH. COMP. LAWS § 450.1763(2)(a) (1989)).
227. *Id*. at *3.
228. *Id*. at *3.
229. *Id*.
230. *Id*.
231. *See id*.
232. *Id*. at *3–4.
233. *Id*. at *4 (citing Lawsuit Fin., L.L.C. v. Curry, 261 Mich. App. 579, 592, 683 N.W.2d 233, 241 (2004)).

limitations under MCL 600.5805(2).[234] Thus, the Harkinses' proposed conversion claim was time-barred.[235]

B. Murphy v. Inman*: Former Shareholder Standing to Directly Sue Directors and Officers*

In *Murphy v. Inman*,[236] the court of appeals addressed a former shareholder's standing to bring a direct claim against the former directors and officers of Covisint Corporation for breach of fiduciary duties. In 2017, Covisint's directors and officers arranged, and a majority of the outstanding shareholders approved, a cash-merger between Covisint and OpenText Corporation.[237] Later that year, Leslie Murphy sued Covisint's former directors and officers, alleging that the defendants breached various fiduciary duties during the merger process.[238] The trial court granted summary disposition under MCR 2.116(C)(5).[239] It agreed with the defendants that Murphy lacked standing to maintain his breach-of-fiduciary-duty claim in an individual capacity.[240] Murphy appealed.[241]

First, the court of appeals held that the trial court should not have decided the defendants' motion for summary disposition under MCR 2.116(C)(5).[242] Dismissal is proper under that subdivision when a party lacks the legal capacity to sue.[243] A request for summary disposition based on a real-party-in-interest defense should be brought under MCR 2.116(C)(8) or (C)(10).[244] Accordingly, the court of appeals reviewed the

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234. *Id*.
235. *Id*.
236. No. 345758, 2020 WL 2095942, at *1 (Mich. Ct. App. Apr. 30, 2020).
237. *Id*.
238. *Id*. Specifically, Murphy alleged that:

> [T]he defendants, in the process of the merger: (1) inadequately compensated shareholders; (2) engaged in a flawed sales process; (3) sold Covisint at an unfair price rather than pursuing other strategic alternatives to maximize shareholder value; (4) acted in their self-interest; (5) acted in bad faith and in breach of their fiduciary duties by including certain provisions in the confidentially agreements with other interested potential buyers; and (6) breached their duty of candor when they issued a materially incomplete and misleading proxy statement that omitted information necessary to enable the shareholders to cast an informed vote.

Id.
239. *Id*.
240. *Id*.
241. *Id*.
242. *Id*. at *2.
243. *Id*.
244. *Id*.

trial court's grant of summary disposition for lack of standing within the framework of MCR 2.116(C)(8).[245]

Next, the court of appeals rejected Murphy's attempt to separate his singular breach-of-fiduciary-duties claim into statutory and common-law components.[246] The distinction drawn by Murphy was inapposite because it "d[id] not alter the outcome."[247] So, in determining whether Murphy had standing to sue, the court of appeals considered the applicable statutes and case law in tandem.[248]

The court of appeals then addressed Murphy's ability to directly sue Covisint's former officers and directors under MCL 450.1541a.[249] The defendants contended that Murphy lacked standing to bring a direct claim for breach of fiduciary duties because section 541a requires such actions to "be brought derivatively on behalf of the corporation."[250] Murphy argued that he had standing because section 541a(4) does not limit the parties who may sue for breach of a statutory fiduciary duty.[251] The court of appeals explained that the distinctions drawn in *Estes v. Idea Engineering & Fabricating, Inc.*,[252] between MCL 450.1489 and section 541a revealed that an individual shareholder cannot maintain an individual claim for damages under section 541a.[253] This is because (1) section 541a seeks to remedy wrongs to a corporation; (2) plaintiffs who file lawsuits under section 541a usually represent a corporation, bringing their claims as derivative actions under MCL 450.1492a; and (3) the remedy available under section 541a inures to the benefit of a corporation and the specific harms that it has sustained, not to the benefit of an individual shareholder.[254] Thus, under *Estes*, Murphy could not maintain "a direct statutory claim under § 541[a] against [the] defendants for breach of duties owed directly to the shareholder independent of the corporation."[255]

The court of appeals further held that Murphy lacked standing under Michigan's common law because the applicable case law does not allow a shareholder to pursue a direct lawsuit against corporate officers or directors for breach of fiduciary duties.[256] Under Michigan's common law,

245. *Id*.
246. *Id*.
247. *Id*.
248. *Id*.
249. *Id*.
250. *Id*.
251. *Id*.
252. 250 Mich. App. 270, 285, 649 N.W.2d 84, 93 (2002).
253. *Murphy*, 2020 WL 2095942, at *2–3.
254. *Id*.
255. *Id*. at *3.
256. *Id*.

officers and directors owe fiduciary duties to the corporation's shareholders.[257] However, "a suit to enforce corporate rights or to redress or prevent injury to the corporation, whether arising out of contract or tort, must be brought in the name of the corporation and not that of a stockholder, officer, or employee."[258] Michigan's appellate courts have recognized two exceptions to this rule: when "the individual has 'sustained a loss separate and distinct from that of other stockholders generally'"[259] and when "the individual shows a violation of a duty owed directly to the individual that is independent of the corporation."[260] But neither exception applied to Murphy's claim.[261] First, none of Murphy's allegations indicated that the defendants breached a duty owed to the shareholders that was independent of their duties to Covisint.[262] Rather, all of Murphy's claims—including his allegation that the defendants breached their duty of candor to the shareholders—were grounded in the defendants' decisions in connection with the cash-out merger that harmed the corporation.[263] Second, Murphy could not show that he sustained an injury that was separate and distinct from that sustained by the other shareholders.[264]

Accordingly, the court of appeals affirmed the trial court's grant of summary disposition.[265] Murphy lacked standing to maintain his breach-of-fiduciary-duties claim in an individual capacity.[266] And he was unable to "pursue a derivative claim because he d[id] not allege or argue that he complied with the requirements necessary to commence a derivative proceeding under" MCL 450.1493a.[267]

C. Other Unpublished Opinions Worth Consideration

During the *Survey* period, the court of appeals issued several other unpublished opinions that applied well-established rules to factual scenarios involving commercial entities. A detailed summary of these

257. *Id*.
258. *Id*. (quoting Michigan Nat'l Bank v. Mudgett, 178 Mich. App. 677, 679, 444 N.W.2d 534, 536 (1989)).
259. *Id*. (quoting Christner v. Anderson, Nietzke & Co., P.C., 433 Mich. 1, 9, 444 N.W.2d 779, 783 (1989)).
260. *Id*. (quoting Belle Isle Grill Corp. v. City of Detroit, 256 Mich. App. 463, 474, 666 N.W.2d 271, 278 (2003) and citing *Mudgett*, 178 Mich. App. at 679–80, 444 N.W.2d at 536) (internal quotation marks omitted).
261. *Id*.
262. *Id*.
263. *Id*. at *3–4.
264. *Id*.
265. *Id*. at *4.
266. *Id*.
267. *Id*.

cases is not provided here because the court of appeals' rulings were fact-intensive, and its reasoning did not establish or expand the applicable law. However, practitioners may wish to consider the following cases if they are confronted with similar circumstances:

- *Chalk Supply LLC v. Ribbe Real Estate LLC*[268] examined and applied the first-breach rule, the doctrine of repudiation or anticipatory breach, and contract abandonment.

- *State Farm Fire & Casualty v. General Electric Co.*[269] applied the economic loss doctrine to determine whether the plaintiffs' claims were subject to the statute of limitations under the UCC.

- *Fraternal Enterprises, Inc. v. Lemieux*[270] analyzed whether the counter-plaintiff established the requisite elements to pierce the corporate veil, among other issues.

- *Erlich Protection Systems, Inc. v. Flint*[271] concluded that the plaintiff established issues of fact precluding summary disposition of a claim under the Michigan Uniform Trade Secrets Act.[272] It also explained that a misappropriation claim under the Act does not require proof that the defendant used the alleged trade secrets without authorization.[273]

- *Niewiek v. Berends Hendricks Stuit Insurance Agency, Inc.*[274] considered a variety of issues related to the valuation of stock in the context of a forced buyout. The valuation of the shares was controlled by the shareholder agreement. The court of

268. Chalk Supply LLC v Ribbe Real Estate, No. 345805, 2020 WL 39991, at *1 (Mich. Ct. App. Jan. 2, 2020).

269. State Farm Fire & Cas. v. Gen. Elec. Co., No. 345992, 2020 WL 39992, at *1 (Mich. Ct. App. Jan. 2, 2020), *leave to appeal denied*, 506 Mich. 890, 947 N.W.2d 799 (2020).

270. Fraternal Enters., Inc. v. Lemieux, No. 344982, 2019 WL 6799714, at *1 (Mich. Ct. App. Dec. 12, 2019).

271. Erlich Prot. Sys., Inc. v. Flint, No. 345323, 2019 WL 5851938, at *1 (Mich. Ct. App. Nov. 7, 2019).

272. MICH. COMP. LAWS §§ 445.1901–445.1910 (1998).

273. *Erlich Prot. Sys.*, 2019 WL 5851938, at *4.

274. Niewiek v. Berends Hendricks Stuit Ins. Agency, Inc., No. 343088, 2019 WL 4855941, at *1 (Mich. Ct. App. Oct. 1, 2019).

appeals addressed the plaintiffs' allegations that the valuation was inaccurate and erroneous for a variety of reasons.[275]

V. CONCLUSION

During the *Survey* period, Michigan's legislature did not enact or amend legislation with significant consequences for commercial entities. However, the court of appeals was active. It issued several opinions that provide significant guidance in applying sections of the BCA, UCC, and other statutes relevant to business entities. Decisions issued during the *Survey* period also provide insight and guidance for practitioners seeking to obtain or survive summary disposition.

275. *Id*. at *3–8.