BUSINESS ASSOCIATIONS

MICHAEL K. MOLITOR†

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I. INTRODUCTION

During the *Survey* period,[1] Michigan state courts reported few decisions concerning business law, as has been the case in recent years.[2] Thus, although *Survey* articles traditionally do not discuss unreported decisions,[3] this Article discusses a few of the more interesting unreported decisions issued during the *Survey* period.

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† Associate Professor of Law, Thomas M. Cooley Law School. B.A., 1991, University of Michigan; J.D., 1994, *cum laude*, Wayne State University Law School.

1. The *Survey* period is from June 1, 2006 to May 31, 2007.

2. *See, e.g.*, Michael K. Molitor, *Business Associations*, 53 WAYNE L. REV. 113 (2007) (discussing two cases decided during the June 1, 2005 to May 31, 2006 *Survey* period); Shawn K. Ohl, *Business Associations*, 52 WAYNE L. REV. 355 (2006) (discussing three cases decided during the June 1, 2004 to May 31, 2005 *Survey* period); Thomas M. Schehr, *Business Associations*, 51 WAYNE L. REV. 571 (2005) (discussing one case decided during the June 1, 2003 to May 31, 2004 *Survey* period); Thomas M. Schehr, *Business Associations*, 50 WAYNE L. REV. 341 (2004) (discussing one case decided during the June 1, 2002 to May 31, 2003 *Survey* period); Shawn K. Ohl, *Business Associations*, 49 WAYNE L. REV. 247 (2003) (discussing three cases decided during the June 1, 2001 to May 31, 2002 *Survey* period and noting that the *Survey* period "was somewhat more active than it has been in the past few years in the business associations area"); David G. Chardavoyne, *Business Associations*, 48 WAYNE L. REV. 405 (2002) (discussing one case decided during the June 1, 2000 to May 31, 2001 *Survey* period). During the *Survey* period, a bill that would create a "business court" (i.e., a division of each county's circuit court) in Michigan was introduced in the Michigan House of Representatives. *See* H.B. 6279, 93rd Leg., Reg. Sess. (Mich. 2006). As of the date of this article, it is unclear whether this legislation will be enacted or, if so, what form it will take. *See generally* Diane L. Akers, *A Business Court in Michigan*, 25 MICH. BUS. L.J. 9 (Fall 2005).

3. Under Michigan Court Rule 7.215, an opinion:

> [M]ust be published if it: (1) establishes a new rule of law; (2) construes a provision of a constitution, statute, ordinance, or court rule; (3) alters or modifies an existing rule of law or extends it to a new factual context; (4) reaffirms a principle of law not applied in a recently reported decision; (5) involves a legal issue of continuing public interest; (6) criticizes existing law; (7) creates or resolves an apparent conflict of authority, whether or not the

On the statutory front, there were no amendments to the Michigan Business Corporation Act,[4] the Michigan Uniform Partnership Act,[5] the Michigan Limited Liability Company Act,[6] or the Michigan Revised Uniform Limited Partnership Act[7] during the *Survey* period. After the *Survey* period, however, legislation was introduced to remedy the effects of the *Miller* case, which is discussed immediately below.

II. WHAT IS A "PROFESSIONAL CORPORATION"?

Because of its far-reaching—and largely unnecessary—consequences, the most important decision during the *Survey* period was *Miller v. Allstate Insurance Co.*[8] *Miller* involved a collision (no pun intended) between the Michigan Business Corporation Act (BCA) and the Michigan Professional Services Corporation Act (PSCA), triggered by the following language from the Michigan no-fault insurance statute:

> [A] physician, hospital, clinic or other person or institution *lawfully rendering treatment* to an injured person for an accidental bodily injury covered by personal protection insurance, and a person or institution providing rehabilitative occupational training following the injury, may charge a reasonable amount for the products, services and accommodations rendered.[9]

In *Miller*, the plaintiff, PT Works, Inc., provided physical therapy services to the insured, William Miller, after he was involved in an automobile accident.[10] However, Mr. Miller's insurer, Allstate, refused to pay PT Works, relying on a creative argument (which Allstate probably hoped would work to deny the claims of other insured motorists): Allstate claimed that PT Works's services were not

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earlier opinion was reported; or (8) decides an appeal from a lower court order ruling that a provision of the Michigan Constitution, a Michigan statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid.

MICH. CT. R. 7.215(B). Also, an "unpublished opinion is not precedentially binding under the rule of stare decisis." MICH. CT. R. 7.215(C).

4. MICH. COMP. LAWS ANN. §§ 450.1101-.2099 (West 2002 & Supp. 2007).

5. MICH. COMP. LAWS ANN. §§ 449.1-.48 (West 2002).

6. MICH. COMP. LAWS ANN. §§ 450.4101-.5200 (West 2002 & Supp. 2007).

7. MICH. COMP. LAWS ANN. §§ 449.1101-.2108 (West 2002 & Supp. 2007).

8. 275 Mich. App. 649, 739 N.W.2d 675 (2007), *leave to appeal granted*, 480 Mich. 938, 741 N.W.2d 19 (2007).

9. MICH. COMP. LAWS ANN. § 500.3157 (West 2006) (emphasis added).

10. Miller v. Allstate Ins. Co., 272 Mich. App. 284, 285, 726 N.W.2d 54, 56 (2006), *vacated*, 477 Mich. 1062, 728 N.W.2d 458 (2007).

"lawfully" rendered because PT Works was incorporated under the BCA instead of the PSCA.[11]

Although the physical therapy services that Mr. Miller received were performed by *properly licensed employees* of PT Works, Allstate argued that PT Works was required to be *incorporated* under the PSCA instead of the BCA because it provided "professional services."[12] In addition, for PT Works to be properly incorporated under the PSCA, all of its shareholders must be licensed physical therapists.[13] However, none of the shareholders of PT Works was licensed as a physical therapist.[14] In sum, Allstate viewed PT Works as a sort of corporate orphan, incorporated under the wrong statute (and also unable to incorporate under the right statute) and therefore not rendering services "lawfully."

The current provisions of the PSCA and the BCA at issue in *Miller* are less than entirely clear. Section 251 of the BCA provides that a "corporation may be formed under [the BCA] for any lawful purpose, except to engage in a business for which a corporation may be formed under any other statute of this state unless that statute permits formation under this act."[15] In other words, if one *can* form a corporation (as opposed to a different type of business entity) under a different statute such as the PSCA, then one cannot incorporate under the BCA *unless* that other statute allows you to incorporate under the BCA.

Meanwhile, the PSCA provides that "[o]ne or more licensed persons may organize under [the PSCA] to become a shareholder or shareholders of a professional corporation . . . ."[16] A "professional corporation" is defined as a corporation organized under the PSCA "for the sole and specific purpose of rendering 1 or more professional services and [that] has as its shareholders only licensed persons . . . ."[17] A "professional service" is defined as:

> [A] type of personal service to the public that requires as a condition precedent to the rendering of the service the obtaining of a license or other legal authorization. Professional service includes, but is not limited to, services rendered by certified or other public accountants, chiropractors, dentists, optometrists, veterinarians, osteopaths, physicians and surgeons, doctors of medicine, doctors of dentistry, podiatrists, chiropodists,

11. *Id.* at 286, 726 N.W.2d at 56.
12. *Id.*
13. *Id.*
14. *Miller*, 275 Mich. App. at 652-53, 739 N.W.2d at 678.
15. MICH. COMP. LAWS ANN. § 450.1251(1) (West 2002).
16. MICH. COMP. LAWS ANN. § 450.224(1) (West 2002).
17. MICH. COMP. LAWS ANN. § 450.222(b) (West 2000).

> architects, professional engineers, land surveyors, and attorneys at law.[18]

Given that rendering physical therapy services requires a professional license in Michigan,[19] one certainly *may* form a corporation that provides such services under the PSCA. But may one form it under the BCA *instead*? Apparently not, because there does not appear to be any provision in the PSCA that would so allow.[20]

Nonetheless, the traditional thinking in Michigan apparently had been that only the "learned professions" of medicine, law, and the clergy, as well as those providing the other "professional services" specifically listed in the PSCA such as accountants, dentists, and veterinarians, needed to incorporate under the PSCA. For other professions, incorporation under the PSCA was considered optional, not required. For example, in 1968 the Michigan Attorney General issued an opinion which stated that corporations that provide architectural, engineering, or land surveying services need not incorporate under the PSCA; they could form under either the PSCA or the BCA.[21] In addition, in a 1989 opinion the Michigan Attorney General found that corporations formed under the BCA may not engage in any of the "learned professions" (i.e., law, medicine, and theology/clergy).[22] Because the PSCA requires that all shareholders be properly licensed in the applicable profession[23] but the BCA does not, and the PSCA has a few other disadvantages compared to the BCA,[24] most corporations would choose the BCA over the PSCA if they could.

In its original decision in the case, which was released on December 27, 2006, the court of appeals wisely sidestepped Allstate's argument, writing that:

> We need not determine . . . whether it was necessary for PT Works to incorporate under the PSCA and whether the shareholders who formed PT Works complied with the PSCA.

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18. MICH. COMP. LAWS ANN. § 450.222(c).

19. *See* MICH. COMP. LAWS ANN. § 333.17820 (West 2001 & Supp. 2007).

20. In addition, the BCA provides that if a professional corporation *were* formed under the PSCA, it could not be formed under the BCA. *See* MICH. COMP. LAWS ANN. § 450.1123(1) (West 2002).

21. 1967-1968 Op. Mich. Att'y Gen. 264, No. 4627 (1968). Note, however, that the PSCA now specifically includes services rendered by architects, professional engineers, and land surveyors in the definition of "professional services."

22. 1989-1990 Op. Mich. Att'y Gen. 166, No. 6592 (1989). This opinion suggests that professions other than attorneys, the clergy, physicians, osteopaths, ophthalmologists, psychiatrists, public accountants, dentists, and psychologists, may incorporate under the BCA. *See id.* at 169.

23. MICH. COMP. LAWS ANN. § 450.224 (West 2002 & Supp. 2007).

24. *See, e.g.*, MICH. COMP. LAWS ANN. § 450.226 (West 2002) (concerning liability issues).

> Assuming, without deciding, that PT Works was improperly incorporated and that its shareholders must be licensed physical therapists, the no-fault act . . . does not bar recovery of benefits for services rendered where the treatment itself was lawfully rendered by licensed physical therapists. [Michigan Compiled Laws section] 500.3157, by its plain and unambiguous language, requires that the treatment itself be lawfully rendered. Reference to the terms "rendering" and "treatment" clearly places the focus on the act of actually engaging in the performance of services, here conducting physical therapy sessions, rather than on some underlying corporate formation issues that have nothing to do with the rendering of treatment. A clinic or institution is lawfully rendering treatment when licensed employees are caring for, and providing services and treatment to, patients despite the possible existence of corporate defects irrelevant to treatment.25

On appeal, the Michigan Supreme Court vacated the court of appeals decision and remanded the case to the court of appeals with a direction to "determine whether PT Works may properly be incorporated solely under the [BCA] and not the [PSCA], and, once that determination is made, to reconsider (if necessary) whether physical therapy provided by PT Works was 'lawfully rendered' . . . ."[26]

The supreme court's one-paragraph opinion is unfortunate. For one thing, one wonders why it was necessary. If the court of appeals were to conclude on remand that PT Works was properly incorporated under the BCA, which obviously would bolster the court's decision that the services were "lawfully" rendered. However, even if the court of appeals were to rule that PT Works was not properly incorporated, it had already determined that it would not matter—the services were still "lawfully" rendered because they were performed by licensed physical therapists. One can only surmise that the supreme court disagreed with the court of

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25. Miller v. Allstate Ins. Co., 272 Mich. App. 284, 286-87, 726 N.W.2d 54, 56-57 (2006) (footnote omitted), *vacated*, 477 Mich. 1062, 728 N.W.2d 458 (2007). The court also distinguished an earlier case, Cherry v. State Farm Mut. Auto. Ins. Co., 195 Mich. App. 316, 489 N.W.2d 788 (1992). In *Cherry*, the persons actually providing the services were not properly licensed to perform the services, which was not the case in *Miller*. *Miller*, 272 Mich. App. at 287, 726 N.W.2d at 57.

The original *Miller* opinion disposed of at least two other similar cases involving Allstate that were concurrently pending in the court of appeals: Allstate Ins. Co. v. A&A Med. Transp. Servs., Inc., No. 260766, No. 261504, 2007 Mich. App. LEXIS 123 (Mich. Ct. App. Jan. 23, 2007), and Best Care Rehab., Inc. v. Allstate Ins. Co., No. 272395, 2007 Mich. App. LEXIS 769 (Mich. Ct. App. Mar. 20, 2007). In both of these cases, Allstate made essentially the same argument that it made in *Miller*: that it was not required to pay the providers of various services to its insureds because the providers were not incorporated under the PSCA or Article 9 of the Michigan Limited Liability Company Act, as applicable. In both cases, the courts of appeals ruled against Allstate due to the *Miller* precedent.

26. Miller v. Allstate Ins. Co., 477 Mich. 1062, 1062, 728 N.W.2d 458, 458 (2007).

appeals' conclusion that services could be "lawfully" rendered even if the corporation whose (properly licensed) employees performed the services was incorporated under the incorrect statute. But the supreme court did not say so. It also appears not to have considered the practical consequences of a finding that PT Works—along with hundreds, if not thousands, of similarly situated Michigan corporations organized under the BCA—was organized under the wrong statute. But faced with this clear direction from the supreme court, the court of appeals had no choice but to reach the corporate-formation issue.

On remand, the court of appeals concluded that PT Works was improperly organized,[27] but was nonetheless entitled to payment from Allstate for the services that it "lawfully" rendered.[28] In other words, the court of appeals came to the same conclusion as in its earlier opinion (i.e., that even a corporation that is mistakenly organized under the BCA instead of the PSCA may still lawfully render services), but needlessly was forced first to decide that PT Works was improperly organized. On this issue, the court found that PT Works, by providing physical therapy services, was engaged in rendering "professional services" to the public and thus could not be incorporated under the BCA.[29] The court of appeals then essentially repeated the analysis from its earlier decision. In other words, it focused on whether the *treatment* was lawfully rendered by a licensed individual, "rather than on some underlying corporate formation issues that have nothing to do with the rendering of treatment."[30] In the end, Allstate's grand plan of denying claims had failed.

Not surprisingly, the aftermath of *Miller* was confusion and uncertainly at the Michigan Department of Labor and Economic Growth—which was needlessly provoked by the supreme court's vacation of the original court of appeals decision. The court of appeals had decided that corporations engaged in any of the activities that are

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27. Miller v. Allstate Ins. Co., 275 Mich. App. 649, 653, 739 N.W.2d 675, 678 (2007).

28. *Id.* at 655, 739 N.W.2d at 679.

29. Interestingly, because none of its shareholders was a licensed physical therapist, PT Works could not be incorporated under the PSCA either. This left it in a sort of legal limbo: "Considering the status of the incorporators and shareholders in the case at bar and the nature of the business, PT Works could not be incorporated under the BCA, nor could it incorporate under the PSCA." *Id.* at 654 n.2, 739 N.W.2d at 679 n.2.

30. *Id.* at 656, 739 N.W.2d at 679-80 (quoting *Miller*, 272 Mich. App. at 287, 726 N.W.2d at 57). In the final footnote in the case, the court observed that the BCA and the PSCA contain numerous technical requirements. If any such technical violation were to result in a finding that any professional services performed by that corporation were not "lawfully" rendered, then insured patients would be placed in a terrible predicament: "*Any* statutory violation, such as a technical incorporation error, could support a conclusion that a corporate clinic or institution was unlawfully rendering treatment under the expansive and all-encompassing interpretation . . . proposed by Allstate. This was clearly not the intent of the Legislature." *Id.* at 658 n.5, 739 N.W.2d at 681 n.5.

included in the PSCA's long list of "professional services," or that otherwise require a license to perform, could not be incorporated under the BCA. What would this mean for the many existing corporations (including PT Works) that were incorporated under the BCA and engaging in professional services other than the "learned professions"? Would every funeral home or hair salon that had been incorporated under the BCA need to reincorporate under the PSCA? What about the optometrists who operate at Costco or Wal-Mart? What would happen if a corporation attempted to incorporate under the BCA when it appeared that it might instead be required to do so under the PSCA? Would debtors of allegedly improperly formed corporations find creative ways not to pay otherwise valid bills?

In July 2007, the Michigan Department of Labor and Economic Growth published a document in which it listed the various "professional services" that will trigger a requirement to form a corporation under the PSCA instead of the BCA.[31] The document also included a list of activities that the department does not view as professional services. Interestingly, the document did not address the consequences for preexisting corporations that were mistakenly (at least according to *Miller* decision) formed under the BCA instead of the PSCA. However, in a separate document the department noted that "[n]o action will be required of existing licensed [real estate] broker corporations. These licensees should contact legal counsel if they have questions about how the [*Miller*] court's findings may affect the operation of their entity."[32]

Fortunately, *Miller* presents fewer problems for LLCs than for corporations, due to the smaller universe of professions that *must* be organized as a professional limited liability company (a PLC or PLLC) instead of as a "regular" LLC. Under section 201 of the Michigan Limited Liability Company Act, an LLC must be formed as a PLC or PLLC under Article 9 of the statute if it provides "services in a learned

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31. Michigan Department of Labor and Economic Growth, untitled document dated July 23, 2007, *available at* http://www.michigan.gov/ (accessed from homepage by selecting Search and entering keywords "Miller v Allstate") (last visited Aug. 2, 2008).

32. Michigan Department of Labor and Economic Growth, untitled document, *available at* http://www.michigan.gov/ (accessed from homepage by selecting Search and entering keywords "broker license") (last visited Aug. 2, 2008). In addition, the department issued a notice to existing LLCs in which it stated:

> If [an LLC] is providing "services in a learned profession" it should be formed as a professional limited liability company and all of its members and managers should be properly licensed. Any limited liability company providing "services in a learned profession" which is not properly formed or has properly formed but has any members or managers that are not licensed should take appropriate steps to resolve the issue.

Notice Regarding Professional Services, Michigan Department of Labor and Economic Growth, untitled document dated July 23, 2007, *available at* http://www.michigan.gov (accessed from homepage by selecting Search and entering keywords "notice regarding professional services") (last visited Feb. 2, 2008).

profession."[33] Section 102 defines the term "services in a learned profession" as "services rendered by a dentist, an osteopathic physician, a physician, a surgeon, a doctor of divinity or other clergy, or an attorney-at-law."[34] Thus, only these types of professions *must* form a PLC instead of an LLC. However, section 902 of the Michigan Limited Liability Company Act[35] provides a definition of "professional services" that is broader than section 102's definition of "services in a learned profession." Further, section 901 allows an LLC formed to provide such other "professional services" to be formed as a PLC. Thus, some types of LLCs may be organized *either* as "regular" LLCs or as PLCs. But "[g]iven the choice, these other professionals should organize as a general LLC and avoid every possible liability including that imposed by Article 9 for malpractice."[36]

In October 2007, two bills[37] were introduced in the Michigan House of Representatives to remedy the consequences of the *Miller* decision for corporations. Essentially, these bills would provide that (1) corporations providing "services in a learned profession" may only organize under the PSCA, but (2) corporations providing "professional services"—but not "services in a learned profession"—may organize under either the BCA or the PSCA. In addition, one bill contains a "grandfather" clause that would protect existing corporations incorporated under the BCA from the consequences of the *Miller* decision.

Specifically, House Bill No. 5356,[38] would, among other things, add the following to section 123 of the BCA:

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33. MICH. COMP. LAWS ANN. § 450.4201 (West 2002).

34. MICH. COMP. LAWS ANN. § 450.4102(2)(s) (West 2002).

35. Section 4902(b) defines a "professional service" as:

> [A] type of personal service to the public that requires as a condition precedent to the rendering of the service the obtaining of a license or other legal authorization. Professional service includes, but is not limited to, services rendered by a certified or other public accountant, chiropractor, dentist, optometrist, veterinarian, osteopathic physician, physician, surgeon, podiatrist, chiropodist, architect, professional engineer, land surveyor, and attorney-at-law.

MICH. COMP. LAWS ANN. § 450.4902(b) (West 2002). However, House Bill No. 5358, which was introduced in October 2007, would amend section 4902(b) to delete its second sentence. H.B. 5358, 94th Leg., Reg. Sess. (Mich. 2007). If this bill is adopted, the Limited Liability Company Act would define "professional service" simply as a "type of personal service to the public that requires as a condition precedent to the rendering of the service the obtaining of a license or other legal authorization." *Id.*

36. JAMES R. CAMBRIDGE & GEORGE J. CHRISTOPOULOS, MICHIGAN LIMITED LIABILITY COMPANIES § 11.1 (1998 & Supp. 2008).

37. A third bill was also introduced to make corresponding, but for less extensive, amendments to the Michigan Limited Liability Company Act. H.B. 5358, 94th Leg., Reg. Sess. (Mich. 2007).

38. H.B. 5356, 94th Leg., Reg. Sess. (Mich. 2007).

> (3). . . . A corporation that provides 1 or more services in a learned profession[39] may not incorporate under this act.
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> (4) A corporation that engages in providing professional services[40] that was organized . . . before the effective date of . . . this subsection, and that does not provide any services in a learned profession, shall not be considered as improperly organized under this act.[41]

House Bill No. 5356 would also amend section 251 of the BCA to provide that:

> [A] corporation may be formed under this act for any lawful purpose, except for any of the following: (A) to engage in a business for which a corporation may be formed under any other statute of this state unless that statute permits formation under this act, [or] (B) to engage in 1 of more services in a learned profession.[42]

House Bill No. 5357[43] would make complementary changes to the PSCA. For example, it would, among other things, amend section 3(2) and section 4(1) of the PSCA to provide in part as follows:

> Section 3 . . . (2) This act does not apply to any corporation providing professional services that is organized under the [BCA] before the effective date of . . . this subsection, if none of the professional services provided by the corporation are services in a learned profession . . . .
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> Section 4(1) One or more licensed persons may organize under this act to become a shareholder or shareholders of a professional corporation for pecuniary profit. A corporation for pecuniary profit that provides 1 or more professional services that are services in a learned profession may only incorporate under this act and may not elect to incorporate under the [BCA]. A corporation that provides 1 or more professional services may elect to incorporate under this act or the [BCA] if it does not

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39. Bill No. 5356 would add to the BCA the following definition: "'Services in a learned profession' means services rendered by a dentist, an osteopathic physician, a physician, a surgeon, a doctor of divinity or other clergy, or an attorney-at-law." *Id.*

40. Bill No. 5356 would also add the following definition: "'Professional service' means a type of personal service to the public that requires a condition precedent to the rendering of the service the obtaining of a license or other legal authorization." *Id.*

41. *Id.*

42. *Id.*

43. H.B. 5357, 94th Leg., Reg. Sess. (Mich. 2007).

provide any professional services that are services in a learned profession.[44]

In addition, on November 21, 2007, the Michigan Supreme Court granted leave to appeal the *Miller* decision.[45] In its order, the court invited, among others, the Michigan Attorney General, the Michigan Insurance Federation, the Insurance Institute of Michigan, and the Business Law and Health Care Law Sections of the State Bar of Michigan to file *amicus curiae* briefs.[46]

A few weeks later, on December 6, 2007, Bills 5356, 5357, and 5358 passed the Michigan House of Representatives. As of late February 2008, these bills were pending in the Michigan Senate, having been referred to the Committee on Economic Development and Regulatory Reform. The hearings on these bills apparently have become contentious. As such, as of the date that this Article was finalized, it was difficult to predict what the outcome of these legislative developments will be.[47] It is also unclear whether the legislature will act before the Michigan Supreme Court issues its final decision in *Miller*, which is anticipated in July 2008. Stay tuned for more details.

III. WHEN IS A PARTNERSHIP FORMED?

Unlike corporations,[48] partnerships,[49] limited liability companies,[50] and certain other business organizations, there is no Michigan *statute* that

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44. *Id.*

45. Miller v. Allstate Ins. Co., 480 Mich. 938, 741 N.W.2d 19 (2007).

46. *Id.* at 938, 741 N.W.2d at 19.

47. An additional complicating factor is that several other Michigan statutes permit the ownership by non-licensed individuals of corporations (and other business entities) that engage in professional services. These statutes are now likely in conflict with the PSCA as interpreted by the *Miller* court. *See, e.g.*, MICH. COMP. LAWS ANN. § 338.481(1) (West 2004) (providing in part that "a partnership or corporation shall not own a drugstore, pharmacy, or apothecary shop unless at least 25% of the interest in the partnership or the stock of the corporation is held by pharmacists"); MICH. COMP. LAWS ANN. § 339.728(1)(a) (West 2004) (stating that as to firms engaged in the practice of public accounting, "a simple majority of the equity and voting rights of the firm [must be] held directly or beneficially by individuals who are licensed in good standing as certified public accountants of this or another state or the equivalent in another licensing jurisdiction acceptable to the board [of accountancy]"); MICH. COMP. LAWS ANN. § 339.2010(1) (West 2004) (providing that a "firm may engage in the practice of architecture, professional engineering, or professional surveying in this state, if not less than 2/3 of the principals of the firm are licensees). Any proper legislative remedy to the *Miller* decision will need to address these—and many other—Michigan statutes.

48. MICH. COMP. LAWS ANN. §§ 450.1101-.2099 (West 2002 & Supp. 2007).

49. MICH. COMP. LAWS ANN. §§ 449.1-.48 (West 2002).

50. MICH. COMP. LAWS ANN. §§ 450.4101-.5200 (West 2002 & Supp. 2007).

directly governs the formation and operation of joint ventures.[51] Instead, the joint venture is a creature of case law,[52] and apparently is alive and well in Michigan (unlike many other states).[53]

In *Kay Investment Co., LLC v. Brody Realty No. 1, LLC*,[54] the issue was whether the original parties to a shopping center deal in 1969 had formed a partnership or, instead, a joint venture. If the parties had formed a joint venture, then the shopping center property would be considered to be owned by the parties' respective successors as tenants in common, necessitating the unanimous approval of all of the owners to sell the property, unless it were partitioned. On the other hand, if the original parties had formed a partnership and the partnership owned the property, then the property could be sold by a majority vote of the partners.[55]

In 1969, the original four parties—Robert Brody, George Brody, Joseph Kaufman, and Harold Kaufman—entered into a contract that was

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51. There are many Michigan statutes, however, that define the term "person" to include joint ventures, among many other types of entities. *See, e.g.*, MICH. COMP. LAWS ANN. § 125.2004(g) (West 2006).

52. *See* Hathaway v. Porter Royalty Pool, Inc., 296 Mich. 90, 101, 295 N.W. 571, 575, *amended*, 296 Mich. 733, 299 N.W.2d 451 (1941) ("The now widely recognized legal concept of joint venture is of modern origin. It has been said to be purely the creature of the American courts.").

53. The status of joint ventures appears unclear in other states. For example, comment 2 to section 202 of the 1997 version of the Uniform Partnership Act ("RUPA") states in part that: "Relationships that are called 'joint ventures' are partnerships if they otherwise fit the definition of a partnership. An association is not classified as a partnership, however, simply because it is called a 'joint venture.'" UNIF. P'SHIP ACT § 202 cmt. 2 (1997). As commentators have observed:

> An earlier draft of [RUPA] stated that joint ventures are partnerships. The rule was deleted in response to the assertion that not everything that is called a "joint venture" should be classified as a partnership. For example, it was felt that certain borrower-lender relationships should not be classified as partnerships simply because they are described as "joint ventures." This is consistent with the general rule that the label put on a relationship is not determinative. In all cases, the question is whether the relationship falls within the definition of a partnership.
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> Nevertheless, as a practical matter, it should be assumed that relationships that are classified as "joint ventures" will be treated as partnerships unless there is a reason why they should be classified as something else. In general, the term "joint venture" is used to describe what is, in essence, a partnership for a limited time or purpose. Although there is case law that continues to distinguish joint ventures from partnerships, most of it appears to say that partnership law applies in any event, either directly or by analogy.

ROBERT W. HILLMAN ET AL., THE REVISED UNIFORM PARTNERSHIP ACT § 202 (2007) (footnotes omitted); *see also* WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP § 266, at 445 (3d ed. 2001) ("The joint venture . . . is difficult to describe adequately, differing from a general partnership perhaps more by definition than in fact.").

54. 273 Mich. App. 432, 731 N.W.2d 777 (2006).

55. *See id.* at 440-41, 731 N.W.2d at 782-83 (citations omitted) (explaining that partnerships may own property, or the partners may hold the property as tenants in partnership, but that parties to a joint venture hold property as tenants in common).

entitled "joint venture agreement," the purpose of which was to build and operate a shopping mall in Southgate, Michigan.[56] After financing was obtained for the project, the shopping center property "was transferred back to the [four] individuals as tenants in common."[57] Over time, the parties to the agreement changed: Robert Brody's interest was transferred to a trust and then to Brody Realty No. 1, LLC ("Brody Realty"); the interest of George Brody (who had died) was transferred to a trust; and the interests of the two Kaufmans were transferred to Kay Investment Company, a partnership consisting of Harold Kaufman and the successors of Joseph Kaufman (who had died).[58] In 2004, Harold Kaufman received two offers to purchase the property.[59] Although the George Brody trust and Kay Investment Company wanted to sell the property, Brody Realty refused.[60] Kay Investment Company then sought a declaratory judgment that the 1969 "joint venture agreement" had actually formed a partnership and that the partnership owned the property (as opposed to it being owned by the partners as tenants in partnership).[61] The trial court granted Kay's motion for summary disposition.[62] As a result, Brody Realty would not be able to "veto" a sale of the property by the partnership.

The court of appeals reversed, finding that the 1969 agreement had formed a joint venture for the "sole purpose of developing and renting out a retail shopping center in Southgate."[63] The court drew a distinction between a partnership, which is an "association of persons to carry on as co-owners a business for profit,"[64] and a joint venture, which is "an association to carry out a single business enterprise for profit . . . ."[65] Although these two definitions seem to differ materially only in the inclusion of the word "single" in the definition of a joint venture, the court further pointed out that prior case law in Michigan had established six elements for joint ventures:

> (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

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56. *Id.* at 434, 731 N.W.2d at 779.
57. *Id.*
58. *Id.*
59. *Id.* at 434, 731 N.W.2d at 779-80.
60. *Kay Inv. Co.*, 273 Mich. App. at 435, 731 N.W.2d at 780.
61. *Id.*
62. *Id.* at 435-36, 731 N.W.2d at 780.
63. *Id.* at 436, 731 N.W.2d at 780.
64. *Id.* at 437, 731 N.W.2d at 781; *see also* MICH. COMP. LAWS ANN. § 449.6(1) (West 2002 & Supp. 2007) (defining a partnership as "an association of 2 or more persons, which may consist of husband and wife, to carry on as co-owners a business for profit. . . .").
65. *Kay Inv. Co.*, 273 Mich. App. at 437, 731 N.W.2d at 781 (quoting Berger v. Mead, 127 Mich. App. 209, 214, 338 N.W.2d 919, 922 (1983)).

> or property by the parties; [and] (f) community interest and control over the subject matter of the enterprise."[66]

This latter definition is somewhat more helpful in distinguishing joint ventures from partnerships because it indicates that the parties' intention is important in forming a joint venture (which is not the case with respect to partnership formation[67]) and further clarifies that, unlike partnerships, joint ventures are limited to a "single" project or business.[68] Nonetheless, these do not seem like very significant distinctions. Further, some of the factors for finding a joint venture, such as a sharing of profits, are also applicable to finding a partnership.[69] However, the court of appeals recognized that joint ventures are a distinct type of entity from partnerships, despite sharing several characteristics with them. As the court stated, "because published opinions from our Supreme Court hold that the two business relationships are different and carry distinct legal consequences, we are not at liberty to treat the two business relationships as identical."[70]

Turning to the facts, the court found that several factors supported the conclusion that the 1969 agreement had formed a joint venture and not a partnership (although a few factors, such as profit-sharing, could also indicate a partnership). First, the parties had actually entitled the agreement "joint venture agreement."[71] Given that the parties' intent is important in determining whether a joint venture is formed, this seemingly minor detail mattered. Also, the agreement covered a single endeavor: the construction and operation of a shopping mall. "In other words, the agreement was not to form a general business, but was limited in scope to the undertaking of a specific project."[72]

Moreover, the parties had titled the property as a tenancy in common, which is typical in joint ventures, and the parties' agreement indicated that "each party would hold an undivided one-fourth interest in the land, which clearly reflects an intent to hold the property as tenants in common."[73] Finally, the Michigan partnership statute indicates that, upon the death of a partner, his or her interest in partnership property (as opposed to his or her interest in the partnership itself or its profits) passes

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66. *Id.* (quoting *Berger*, 127 Mich. App. at 214-15, 338 N.W.2d at 922 (1983)).

67. *See id.* at 437 n.5, 731 N.W.2d at 781 n.5 (citing Byker v. Mannes, 465 Mich. 637, 641 N.W.2d 210 (2002)).

68. *Id.*

69. *See* MICH. COMP. LAWS ANN. § 449.7(4) (West 2002 & Supp. 2007) ("The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business . . . .").

70. *Kay Inv. Co.*, 273 Mich. App. at 440, 731 N.W.2d at 782.

71. *Id.* at 442, 731 N.W.2d at 783.

72. *Id.*

73. *Id.* at 443, 731 N.W.2d at 784. In addition, the parties had had their wives join in the agreement to bind their dower rights, which would not have been necessary if a partnership had owned the property. *Id.*

to the remaining partners instead of the deceased partner's estate.[74] However, in the present case, the parties conducted themselves as if the two deceased parties' interests in the property had passed to their respective estates.[75] Also, when the other parties transferred their interest in the venture to trusts, they transferred not only their interest in the *business* (whatever it may have been), but also their interest in the property. In other words, they acted as if *they*, not a partnership, were the owners of the property.[76] As such, the parties' current successors owned the land as tenants in common, which meant that it could not be sold without the consent of all tenants unless it were partitioned.[77]

In an unrelated unpublished opinion concerning partnership law, *Gunnett v. Brooks*,[78] the Michigan Court of Appeals considered whether a father and his daughter had formed a partnership when they entered into an "umbrella partnership" agreement relating to their respective Amway/Quixtar distributorships.[79] In this case, the plaintiff-father, Clare Gunnett, formed an Amway distributorship in 1963 (referred to in the opinion as "IB-287").[80] The defendant-daughter, Holly Brooks, also owned an Amway distributorship ("IB-4054"), which apparently was much less successful than IB-287.[81]

In 1998, according to the court:

> Plaintiff and defendant signed a document purporting to form what Amway referred to as an "umbrella partnership." Although Amway discouraged the formation of formal partnerships, it permitted distributorships that personally sponsor each other to

74. *Id.* at 444, 731 N.W.2d at 784 (citing MICH. COMP. LAWS ANN. § 449.25(2)(d) (West 2002)).

75. *Kay Inv. Co.*, 273 Mich. App. at 444, 731 N.W.2d at 784.

76. *Id.* In addition, under the Michigan partnership statute (see MICH. COMP. LAWS ANN. §449.31(4) (West 2002)), the death of a partner would cause a dissolution of a partnership, unless the partnership agreement provided otherwise. Here, however, "no dissolution or windup occurred" when either George Brody or Joseph Kaufman died. *Id.* at 444, 731 N.W.2d at 785.

77. Judge Schuette dissented, writing that "Michigan case law reveals a fine line and a thin distinction between what constitutes a partnership or a joint venture." *Id.* at 445, 731 N.W.2d 785 (Schuette, J., dissenting). In his view, based on the parties' objective actions (not their subjective intent), they had formed a partnership.

78. No. 263838, 2007 Mich. App. LEXIS 86 (Mich. Ct. App. Jan. 18, 2007).

79. *Id.* at *3.

80. *Id.* at *1. IB-287 was started in 1963 by Mr. Gunnett and his wife. The opinion does not mention whether Mr. Gunnett and his wife operated IB-287 as partners or had incorporated it; all that is known is that the designation "IB" means "independent business" in Amway's lexicon. In 1983, Mr. Gunnett's wife passed away, at which point he became the sole owner of the distributorship. *Id.*

81. The daughter's distributorship was in the father's "line of sponsorship," which meant that the father's bonuses were based, in part, on the daughter's sales volume. However, beginning in 1979 and continuing for more than 20 years, the father regularly transferred "points" to the daughter's distributorship so that she could maintain her status as a qualified distributor. *Gunnett*, 2007 Mich. App. LEXIS 86 at *2.

> form a partnership "jointly under an umbrella, by adding the proposed partner's name to each IB." According to Amway, "the resulting umbrella partnership is still considered as two distinct independent businesses, for purposes of all bonus and award calculations." Plaintiff signed the agreement because defendant told him that it was like a will and that it would provide for the equal distribution of his business among his children upon his death. According to plaintiff, "when plaintiff and defendant signed the agreement, they did not discuss forming a partnership or changing the operation of IB-287 or IB-4054."[82]

Afterward, the two parties essentially continued operating their IB's as separate entities; neither party received any profits from the other party's IB nor did either try to make any business decisions with respect to, or otherwise operate, the other party's IB.[83]

In 2002, the father became concerned that the daughter would "take his business and 'run' with the money" when he died, leaving nothing for his other children.[84] As such, he contacted Amway to remove the daughter's name from IB-287, only to be told that he could not do so unilaterally without a court order (or his daughter's consent) because the daughter had, according to Amway, an "ownership interest" in IB-287.[85] The father later filed suit, seeking a declaratory judgment that he was the sole owner of IB-287 and an order removing the daughter's name from IB-287.[86] In response, the daughter claimed that a partnership existed between her and her father.[87] The trial court rejected this argument, finding that the father was the sole owner of IB-287.[88]

On appeal, the court of appeals affirmed that no partnership existed.[89] Citing *Lobato v. Paulino*[90] for the propositions that the parties' intent is of "prime importance" in determining whether a partnership exists and that "[s]tricter proof is required to establish a partnership between members of the same family," the court found that the parties had not intended to form a partnership.[91] Instead, they had signed the umbrella distribution agreement for what were essentially estate-planning purposes.[92] The court also noted that, under the Michigan

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82. *Id.* at *3.
83. *See id.* at *3-4.
84. *Id.* at *4.
85. *Id.*
86. *Id.* at *5.
87. *Gunnett*, 2007 Mich. App. LEXIS at *5.
88. *Id.*
89. *Id.* at *11.
90. 304 Mich. 668, 8 N.W.2d 873 (1943).
91. *Gunnett*, 2007 Mich. App. LEXIS at *7.
92. According to the court, the father had signed the agreement to "provide for the distribution of his business to his children upon his death," and the defendant signed it "to receive IB-287 when plaintiff passed away." *Id.* at *8. In other words, the parties did not

Uniform Partnership Act, the "proper focus is on whether the parties intended to, and in fact did, 'carry on as co-owners a business for profit' and not on whether the parties subjectively intended to form a partnership."[93] In other words, intent is important only insofar as it concerns whether the parties intended to be co-owners of a business, not whether they intended to be "partners" in the legal sense or even whether they realized they were "partners."

Several factors led the court to conclude that the parties had not intended to be co-owners of IB-287. For example, the parties had not filed a certificate of partnership under section 449.101 of the Michigan Compiled Laws,[94] they did not have a written partnership agreement,[95] they had not filed partnership income tax informational returns,[96] and the

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appear to have intended the defendant to have any *present* ownership interest in the business.

93. *Id.* at *8 (citing Byker v. Mannes, 465 Mich. 637, 653, 641 N.W.2d 210, 218 (2002) and MICH. COMP. LAWS ANN. § 449.6(1) (West 2002)).

94. *Id.* at *9. This section provides in part:

> No 2 or more persons shall hereafter be engaged in carrying on any business as copartners unless such persons shall first make and file with the county clerk of the county in which such copartnership business is or shall be located, a certificate in writing, to be signed by each, and verified by the affidavit of 1 of the members of said copartnership, setting forth the full name of each and every person composing the said copartnership, and the residence of each, the name and style of the firm, and the length of time for which it is to continue, if limited by the partnership contract, and also the locality of their place of business; which certificate shall be kept in the office of the said county clerk, as a public document, and open to the inspection of any person . . . .

MICH. COMP. LAWS ANN. § 449.101 (West 2002 & Supp. 2007). At first glance, this section might lead one to conclude that partnerships may not be *formed* without making a filing with the appropriate county. However, this is not true. For one thing, this statute is not part of the Michigan Uniform Partnership Act, which appears in MICH. COMP. LAWS ANN. §§ 449.1-.48. That statute contemplates that partnerships may be formed without a state filing and without a partnership agreement. Thus, instead of being a *requirement* for formation, MCL section 449.101 is a *penalty* provision. There is a penalty for not making the filing, but the failure to make the filing does not affect the actual existence of the partnership. MCL section 449.106 states in part that:

> [T]he fact that a penalty is provided herein for non-compliance with the provisions of this act shall not be construed to avoid contracts, but any copartnership failing to file the certificate or renewal certificate required by this act shall be prohibited from bringing any suit, action or proceeding in any of the courts of this state until after full compliance with the provisions of this act.

MICH. COMP. LAWS ANN. § 449.106 (West 2002). If section 449.101 meant that one can't actually form a "copartnership" without filing the certificate, then the last clause of section 449.106 would be nonsensical. Instead, statutes like section 449.101 are intended to give third parties some method of determining who the partners of a business are, since "[t]here is no registration requirement for general partnerships [,which means] that a third party has no means of determining the identity of the partners." GREGORY, *supra* note 53, § 180, at 276.

95. *Gunnett*, 2007 Mich. App. LEXIS at *9. As with the filing of a certificate of partnership, a written partnership is not a *requirement* for partnership status, but is good *evidence* of the existence of a partnership.

96. *Id.*

defendant had not contributed any capital to the alleged partnership.[97] Moreover, the parties did not "act" like partners; the daughter was not involved in the management of IB-287 and did not share in any of its profits.[98] Tellingly, testimony indicated that she "repeatedly referred to IB-287 as 'dad's business.'"[99] In the end, the "lack of evidence that the parties carried on the business as co-owners for profit [was] fatal to defendant's claim of partnership."[100]

IV. SHAREHOLDER OPPRESSION[101]

Section 489 of the Michigan Business Corporation Act provides in part that a "shareholder may bring an action . . . 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."[102] The statute defines the term "willfully unfair and oppressive conduct" as

> [A] continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder. The term 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.[103]

The second-to-last sentence in the above-quoted portion of section 489 was added after the Michigan Court of Appeals' 2004 decision in

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97. *Id.*

98. *Id.* at *10.

99. *Id.*

100. *Id.* at *11.

101. *See* Zahn v. Eng'g Solid Solutions, No. 266196, 2007 Mich. App. LEXIS 764 (Mich. Ct. App. Mar. 20, 2007) (holding that the holder of an option to purchase shares—as opposed to an actual shareholder—did not have standing to sue for oppression under section 489 of the Michigan Business Corporation Act).

102. MICH. COMP. LAWS ANN. § 450.1489(1) (West 2002 & Supp. 2007).

103. MICH. COMP. LAWS ANN. § 450.1489(3) (West 2002 & Supp. 2007). A similar cause of action for LLC members is provided in the Michigan Limited Liability Company Act. MICH. COMP. LAWS ANN. § 450.4515(1) (West 2002 & Supp. 2007). This statute provides that a "member of a limited liability company may bring an action . . . to establish that acts of the managers or members in control of the limited liability company are illegal or fraudulent or constitute willfully unfair and oppressive conduct toward the limited liability company or the member." *Id. See generally* James R. Cambridge, *Minority Member Oppression*, XXVI MICH. BUS. L.J. 11 (Spring 2007).

Franchino v. Franchino.[104] In that case, the court of appeals held that a shareholder's loss of employment and removal from the board of directors could not result in a finding of oppression under section 489.[105] The court reasoned that the plaintiff could not show that his interests "as a shareholder" had been harmed because employment and board membership are not generally considered *shareholder* rights.[106] As the court wrote:

> It is generally acknowledged that, in close corporations, shareholders often work for the corporation, and corporate dividends are often paid in the form of a salary. Likewise, shareholders in close corporations are often members of the corporation's management. However, employment and board membership are not generally listed among rights that automatically accrue to shareholders. Shareholder's [sic] rights are typically considered to include voting at shareholder's [sic] meetings, electing directors, adopting bylaws, amending charters, examining the corporate books, and receiving corporate dividends.[107]

As such, the *Franchino* court found that the plaintiff could not show that his firing and removal had oppressed him "as a shareholder." According to the court, to ignore that phrase would be to render it "nugatory, which is contrary to a fundamental rule of statutory construction."[108]

The amendment to section 489, which added the sentence "[w]illfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder,"[109] impliedly recognizes the reality of many closely held businesses. This is because it is very common that shareholders in closely held corporations are employed by the corporation, and receive most of their return on investment in the form of salaries. By contrast, shareholders of publicly traded corporations realized most of the returns on their investments through the receipt of dividends and their ability to sell the stock, hopefully at a higher price on the stock market. Thus, the termination of a shareholder's employment in a closely held corporation, particularly if

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104. 263 Mich. App. 172, 687 N.W.2d 620 (2004).

105. *Id.* at 173-74, 687 N.W.2d at 623.

106. *Id.* at 182-83, 687 N.W.2d at 627.

107. *Id.* at 184, 687 N.W.2d at 628 (citations omitted).

108. *Id.* at 186, 687 N.W.2d at 629 (citation omitted). The court also rejected the use of the "reasonable expectations" test as being inconsistent with the Michigan statute. *See id.* at 186-89, 687 N.W.2d at 629-30.

109. MICH. COMP. LAWS ANN. § 450.1489(3) (West 2002 & Supp. 2007).

coupled with the termination of dividends (and often a concurrent increase in the salaries paid to other shareholder-employees) would very likely make that shareholder's stock in the company virtually worthless; he would receive no return on his investment and likely would find it difficult, if not impossible, to resell this closely held stock for anything close to its intrinsic value. In this context, one could see how these events would interfere with one's interests "as a shareholder" of a closely held corporation, in a way that they would not for the shareholder of a widely held, or publicly traded, corporation. The amendment to section 489, while not artfully worded, at least recognizes that "shareholder" interests in a closely held corporation can include more than the paltry list of shareholder rights listed in old corporate law hornbooks or the *Franchino* case. It also set the stage to see how Michigan courts would interpret this new language.

In *Wojcik v. McNish*,[110] an unreported decision, the plaintiff[111] was a minority shareholder in a two-shareholder corporation. The defendants were the majority shareholder and the corporation.[112] Although the business apparently went well for several years after its formation in 1982, the parties' relationship "soured"[113] when the majority shareholder "insisted that his son-in-law . . . participate in the business."[114] Eventually, the plaintiff resigned voluntarily, whereupon the defendants refused to repurchase his stock, allegedly in violation of a stock purchase agreement.[115] The plaintiff sued under a number of theories, including oppression under section 489 of the Michigan Business Corporation Act and breach of contract (both an employment contract and a stock purchase agreement).[116] The trial court granted the defendants' motion for summary disposition on all claims, and the plaintiff appealed.[117]

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110. No. 267005, 2006 Mich. App. LEXIS 2386 (Mich. Ct. App. July 25, 2006).

111. Technically, Mr. Wojcik's wife was also a plaintiff, but her claims were properly dismissed. *See id.* at *1 n.1.

112. *Id.* at *1.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Wojcik*, 2006 Mich. App. LEXIS 2386 at *2. The plaintiff's argument with respect to the fiduciary-duty claim appears to have been that the defendant, in his capacity as a director and/or officer of the corporation, breached his fiduciary duty to the corporation by appointing his son-in-law to a management position. The plaintiff claimed that the son-in-law's "promotion would ultimately lead to the financial ruin of the company . . . ." *Id.* at *6-7. Such a claim, which is based on perceived harm to the corporation, rather than directly to one or more of the shareholders, would need to be brought as a derivative action on behalf of the corporation. *See* MICH. COMP. LAWS ANN. § 450.1491a(a) (West 2002 & Supp. 2007). Oddly, the plaintiff had included in his complaint a derivative claim, but it is unclear what the *substantive* argument was in that claim. A derivative action is a procedural device. In other words, one cannot simply file a "generic" derivative claim—there has to be a recognized cause of action (e.g., breach of the directors' duty of care or duty of loyalty) that provides a basis for arguing that the corporation suffered harm and that the defendants are legally responsible for that harm. In

With respect to the oppression claim, the plaintiff appears to have argued that three things were oppressive to him: the hiring of the son-in-law, the plaintiff's "constructive" discharge (i.e., his resignation from employment), and the defendants' breach of the stock purchase agreement. Citing *Franchino* for the proposition that "employment and board membership are not generally listed among rights that automatically accrue to shareholders,"[118] the court of appeals upheld the dismissal of the oppression claim, at least insofar as it concerned plaintiff's employment and the stock purchase agreement. The court went so far as to say that "[p]laintiff's claims regarding breach of an employment contract and breach of a stock purchase agreement are not interests of plaintiff as a shareholder, and therefore, are not protected by [section] 489."[119]

There are two troubling aspects to this analysis. First, insofar as it relates to employment decisions, it seems to ignore the new language of section 489, which states that employment-based claims *may* give rise to

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any event, the court of appeals affirmed the dismissal of the plaintiff's derivative claim, noting that "trial court properly dismissed this claim because plaintiffs do not seek damages on behalf of the company but rather sought damages from the company for themselves as individuals and a shareholder." *Wojcik*, 2006 Mich. App. LEXIS 2386 at *34.

The court of appeals affirmed the dismissal of the fiduciary-duty claim for several reasons. First, the plaintiff cited no authority for the proposition that a poor hiring decision could support a claim that a director breached his fiduciary duty of care to the corporation (although such authority likely could easily be found). Second, the alleged harm, i.e., that the corporation would perform poorly in the *future* as a result of the son-in-law's incompetence, was too speculative. Finally, given that hiring decisions are made the by directors, those decisions are normally shielded by the business judgment rule. While a discussion of the business judgment is outside the scope of this Article it essentially is a judicial "hands off" philosophy; courts will not interfere with decisions made by a board of directors unless the person challenging the action can find a way to overcome the business judgment rule, such as by showing that the decision was tainted by fraud, illegality, or a conflict or interest, or that the directors were not reasonably informed when they reached their decision. *See, e.g.*, Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (stating that the business judgment rule is a presumption that the directors made a decision "on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company"). The Michigan Supreme Court has held that the "discretion of the directors will not be interfered with by the courts, unless there has been bad faith, wilful [sic] neglect, or abuse of discretion." Dodge v. Ford Motor Co, 204 Mich. 459, 500, 170 N.W. 668, 682 (1919) (quotation omitted). Because he could not make that showing, the plaintiff lost on his fiduciary-duty claim.

The plaintiff also claimed, among other things, breach of employment agreement, breach of stock purchase agreement, and age discrimination. As briefly discussed in the text above, he lost the employment agreement claim, but the court of appeals reversed the dismissal of his claim relating to the defendants' breach of the stock purchase agreement. That was the plaintiff's lone success at the court of appeals. *Wojcik*, 2006 Mich. App. LEXIS 2386 at *38.

117. *Id.* at *3-4.

118. *Id.* at *13 (citing *Franchino*, 263 Mich. App. at 184, 687 N.W.2d at 628).

119. *Id.* at *14.

oppression in one's "shareholder" capacity.[120] Instead, the court implied that employment matters simply are not shareholder interests. For example, the court stated that "[u]nder the [Michigan Business Corporation Act], the principal rights of shareholders in an ordinary business corporation 'are to have a certificate of stock in proper form, to attend and vote at corporate meetings, and to take part in the election of directors.'"[121] Also, it stated that the plaintiff had not offered evidence that the defendants' actions interfered "with him as a shareholder to participate at shareholder meetings, or to access corporate books and records."[122] Statements like these could be interpreted as meaning that the court of appeals will continue to take a very restrictive approach to defining "shareholder" interests, absent a more explicit direction from the legislature. A separate difficulty with the court's analysis is that it's difficult to see how a corporation's breach of a stock purchase agreement does not affect one in one's "shareholder" capacity; after all, such an agreement concerns *stock.*

To be fair, the plaintiff did set forth in his complaint separate causes of action for breaches of an alleged employment agreement and the stock purchase agreement;[123] perhaps the court thought that the disposition of those claims would be better analyzed under normal breach-of-contract principles than under the murky shareholder oppression doctrine. Moreover, the plaintiff's claim with respect to the breach of employment contract was extremely weak, which led the court to uphold its dismissal; it would seem somewhat incongruous to allow a plaintiff to claim that his firing was oppressive when he could not show that he had an employment agreement for a definite term or that was terminable only for cause (although that should not necessarily be dispositive).[124] Further, the court *did* reverse the dismissal of the plaintiff's claim for breach of the stock purchase agreement,[125] thus paving the way to allow the plaintiff to enforce the defendants' obligation to repurchase his shares. The repurchase of a plaintiff's stock for fair value is a typical result in shareholder oppression cases, so perhaps "all's well that ends well" for the plaintiff.[126]

As noted above, the plaintiff apparently also claimed that the appointment of the majority shareholder's son-in-law constituted

120. MICH. COMP. LAWS ANN. § 450.1489(3) (West 2002 & Supp. 2007).

121. *Wojcik*, 2006 Mich. App. LEXIS 2386 at *13 (citation omitted).

122. *Id.* at *14.

123. *Id.* at *2.

124. *See id.* at *16-23.

125. *Id.* at *23.

126. Douglas K. Moll, *Shareholder Oppression and "Fair Value": Of Discounts, Dates, and Dastardly Deeds in the Close Corporation*, 54 DUKE L.J. 293, 308-09 (2004) (stating that "[t]he most common remedy for oppression . . . is a buy-out of the oppressed investor's stockholdings.") (citation omitted).

oppression.[127] The court disagreed. First, unless the plaintiff could show some fraud or unlawful conduct that interfered with plaintiff's right to vote (which he would be unable to do because directors, not shareholders, generally appoint officers), the court held that he had no cause of action under section 489 to contest the selection of company personnel.[128] Second, even if he had a general "shareholder interest" in seeing the corporation be profitable, any claim that this interest was oppressed as a result of the hiring of an incompetent employee was "inherently speculative."[129]

Wojcik v. McNish gives few clues as to the future of shareholder oppression cases in Michigan after *Franchino* and the amendment to section 489 discussed above. On the one hand, the plaintiff's claims—essentially a complaint that an allegedly incompetent employee was hired—presented a much weaker case than the "usual" shareholder oppression case where a minority shareholder's employment is terminated (usually without cause) and the majority faction then freezes dividends, increases its own salaries, and engages in other self-dealing. This is particularly so because the plaintiff in *Wojcik* resigned voluntarily.[130] On the other hand, the court's seemingly continuing belief that "shareholder" interests only include "technical" items, such as voting on directors and inspecting corporate books and records, may portend that additional changes to section 489 are needed if the shareholder oppression doctrine is to have any vitality in Michigan.

127. *Wojcik*, 2006 Mich. App. LEXIS 2386 at *2.

128. *Id.* at *14.

129. *Id.* Further, the court noted that the plaintiff would have had to show that the defendants intended the oppressive action, which in this situation would require plaintiff to show that the defendants had intentionally tried to harm the corporation. *Id.* at *16.

130. *Id.* at *22.