BUSINESS ASSOCIATIONS

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I. INTRODUCTION

During the *Survey* period, which ran from June 1, 2007 to May 31, 2008, Michigan state courts reported only two[1] decisions concerning business law.[2] On the statutory front, there were no notable amendments

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1. This low output is typical of recent *Survey* periods. *See, e.g.*, Michael K. Molitor, *Business Associations, 2007 Ann. Survey of Mich. Law*, 54 WAYNE L. REV. 27 (2008) (discussing two reported decisions and one unreported decision issued during the June 1, 2006 to May 31, 2007 *Survey* Period) [hereinafter *Molitor 2008*]; Michael K. Molitor, *Business Associations, 2006 Ann. Survey of Mich. Law*, 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 2005 Ann. Survey of Mich. Law*, 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, 2004 Ann. Survey of Mich. Law*, 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, 2003 Ann. Survey of Mich. Law*, 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, 2002 Ann. Survey of Mich. Law*, 49 WAYNE L. REV. 247, 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"); and David G. Chardavoyne, *Business Associations, 2001 Ann. Survey of Mich. Law*, 48 WAYNE L. REV. 405 (2002) (discussing one case decided during the June 1, 2000 to May 31, 2001 *Survey* Period).

2. In addition, one unreported decision is worth mentioning, at least in a footnote. In *Mazur v. Kammer*, No. 275298, 2008 WL 1989659 (Mich. Ct. App., May 8, 2008), a corporation, KTK Inc., was owned by five shareholders, each of whom owned twenty percent of the outstanding stock. Due to a series of disagreements, one shareholder sued the corporation and two of the other shareholders (who collectively owned forty percent of the corporation's stock) for, among other things, oppression under Section 489 of the Michigan Business Corporation Act. *Id.* at *1; *see* MICH. COMP. LAWS ANN. § 450.1489 (West 2008). Section 489 provides 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."

to the Michigan Business Corporation Act (BCA),[3] the Michigan Uniform Partnership Act,[4] the Michigan Limited Liability Company Act,[5] or the Michigan Revised Uniform Limited Partnership Act[6] during the *Survey* period, although a few minor technical changes were made.[7]

II. WHAT IS A "PROFESSIONAL CORPORATION"?

Clearly the most important business law decision during the *Survey* period was *Miller v. Allstate Insurance Co.*, in which the Michigan Supreme Court held that an insurance company lacked standing to challenge whether the provider of physical therapy services to its insured was properly incorporated under the BCA.[8] Before turning to the Supreme Court's final decision in the case, it may be helpful to summarize the prior proceedings, which are somewhat complicated.

The plaintiff in *Miller*, PT Works, Inc., provided more than $29,000 of physical therapy services to William Miller in 2003 after he was involved in automobile accidents in 2002.[9] Allstate Insurance Company, Mr. Miller's insurer, refused to pay these charges because it believed that PT Works, as a provider of "professional services,"[10] was required to be

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MICH. COMP. LAWS ANN. § 450.1489(1) (emphasis added). The court upheld the trial court's dismissal of the plaintiff's oppression cause of action because, "although [the plaintiff] claims that defendants control the corporation, he does not explain how [the two shareholder-defendants] have control over the corporation when they collectively own only [forty] percent of the shares." *Mazur*, 2008 WL 1989659 at *6. This was despite the fact that another shareholder had given his proxy to the two shareholder-defendants; although these three shareholders, collectively owning sixty percent of the shares, would be in "control" of the corporation, only two of these three shareholders were actually named as defendants. Under the Michigan Court Rules, an "unpublished opinion is not precedentially binding under the rule of stare decisis." MICH. CT. R. 7.215(C). Subsection (B) of the same rule lists the situations in which an opinion must be published. MICH. CT. R. 7.215(B).

3. MICH. COMP. LAWS ANN. §§ 450.1101-.2099 (West 2008).

4. MICH. COMP. LAWS ANN. §§ 449.1-.48 (West 2008).

5. MICH. COMP. LAWS ANN. §§ 450.4101-.5200 (West 2008).

6. MICH. COMP. LAWS ANN. §§ 449.1101-.2108 (West 2008).

7. *See* MICH. COMP. LAWS ANN. § 450.1911(1)(e) (West 2008); MICH. COMP. LAWS ANN. § 450.5101(1)(g) (West 2008).

8. 481 Mich. 601, 751 N.W.2d 463 (2008).

9. *Id.* at 604, 751 N.W.2d at 465-66.

10. 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." MICH. COMP. LAWS ANN. § 450.1251(1) (West 2006). In other words, if a corporation *can* be incorporated under a different statute, such as the Michigan Professional Services Corporation Act (PSCA), then the corporation cannot be incorporated under the BCA *unless* that other statute allows the corporation to be

incorporated under the Michigan Professional Services Corporation Act (PSCA)[11] instead of the BCA.[12] According to Allstate, it did not matter that properly licensed *employees* of PT Works performed the physical therapy services; what mattered to Allstate was that PT Works was providing "professional services" while being incorporated under the BCA instead of the PSCA.[13] Allstate argued that because PT Works was not incorporated under the correct statute—and could not be, because some of its shareholders were not licensed as physical therapists—it was not "lawfully" rendering treatment for which it could claim payment.[14]

This was a novel argument in a somewhat murky area of law. Although far from entirely clear, the longstanding practice in Michigan had been that only persons engaged in the "learned professions" of medicine, law, and the clergy (as well as those providing the other "professional services" specifically listed in Section 2(b) of the PSCA[15] such as accountants, dentists, and veterinarians) must incorporate under the PSCA instead of the BCA. For corporations providing other professional services, incorporation under the PSCA was considered

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incorporated under the BCA. 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 . . . ." MICH. COMP. LAWS ANN. § 450.224(1) (West 2008). A "professional corporation" is defined as "a corporation that is organized under the [PSCA] for the sole and specific purpose of rendering [one] or more professional services and has as its shareholders only licensed persons . . . ." MICH. COMP. LAWS ANN. § 450.222(b) (West 2008). 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, architects, professional engineers, land surveyors, and attorneys at law.

MICH. COMP. LAWS ANN. § 450.222(c) (West 2008). Thus, 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. 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 2008).

11. MICH. COMP. LAWS ANN. §§ 450.221-.235 (West 2006).

12. *Miller*, 481 Mich. at 605, 751 N.W.2d at 466.

13. *See id.* Note that providing physical therapy services requires a professional license in Michigan. *See* MICH. COMP. LAWS ANN. § 333.17820 (West 2008).

14. *Miller*, 481 Mich. at 605, 751 N.W.2d at 466. The Michigan no-fault act provides that an institution "lawfully rendering treatment" to an injury victim may charge a reasonable amount for its services. MICH. COMP. LAWS ANN. § 500.3157 (West 2008).

15. MICH. COMP. LAWS ANN. § 450.222(c) (West 2008).

optional, not required.[16] Because the PSCA (but not the BCA) requires that all shareholders of the corporation be licensed in the applicable profession[17] and has other disadvantages compared to the BCA,[18] most corporations would choose the BCA over the PSCA if they could. Thus, it should not be surprising to find many corporations that render "professional services" incorporated under the BCA instead of the PSCA.

The circuit court "denied Allstate's motion [for summary disposition,] concluding that physical therapy did not constitute 'professional services' under the PSCA, and hence PT Works could incorporate under the BCA."[19] In a 2006 decision, the court of appeals affirmed, but avoided directly addressing this issue, holding instead that, even if PT Works were incorporated under the wrong statute, "the no-fault act . . . does not bar recovery of benefits for services rendered where the *treatment itself* was lawfully rendered by licensed physical therapists."[20] Further, a "clinic or institution is lawfully rendering treatment when [properly] licensed employees are caring for, and providing services and treatment to, patients despite the possible existence of corporate defects irrelevant to treatment."[21]

In March 2007, 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' . . . ."[22] On remand, in a decision that was released in September 2007, the court of appeals concluded that PT Works *was* improperly organized, but was nonetheless entitled to payment from Allstate for the services that it "lawfully" rendered.[23] In other words, the court of appeals came to the same conclusion—even a corporation that is improperly organized under the BCA may still "lawfully" render services for purposes of the no-fault act. However, the

16. *See Molitor 2008*, *supra* note 1, at 28-30.

17. MICH. COMP. LAWS ANN. § 450.224 (West 2006).

18. *See, e.g.*, MICH. COMP. LAWS ANN. § 450.226 (West 2008) (concerning liability issues).

19. *Miller*, 481 Mich. at 605, 751 N.W.2d at 466.

20. Miller v. Allstate Ins. Co., 272 Mich. App. 284, 286, 726 N.W.2d 54, 56 (2006) (emphasis added), *vacated*, 477 Mich. 1062, 728 N.W.2d 458 (2007), *aff'd on other grounds*, 481 Mich. 601, 751 N.W.2d 463 (2008).

21. *Id.* at 287, 726 N.W.2d at 57.

22. *Miller*, 477 Mich. at 1062, 728 N.W.2d at 458.

23. *Miller*, 275 Mich. App. 649, 739 N.W.2d 675 (2007), *aff'd on other grounds*, *Miller*, 481 Mich. 601, 751 N.W.2d 463 (2008).

court of appeals was forced first to decide whether PT Works was improperly organized under the BCA. On this issue, the court found that PT Works, by providing physical therapy services, was rendering "professional services" to the public and thus could not be incorporated under the BCA.[24]

PT Works appealed the holding that it was unlawfully incorporated. Separately, Allstate appealed the determination that the physical therapy services were lawfully rendered. The Michigan Supreme Court granted leave to appeal on both issues in November 2007.[25] Meanwhile, confusion reigned at the Michigan Legislature, as it considered the implications of the court of appeals decision in *Miller* for the thousands of Michigan corporations formed under the BCA but rendering services that require a professional license. In October 2007, two bills that were designed to address the consequences of the *Miller* decision were introduced in the Michigan House of Representatives.[26]

Before the legislature acted, however, the Michigan Supreme Court handed down its decision.[27] Instead of addressing whether PT Works was properly incorporated under the BCA, the Michigan Supreme Court held that Allstate lacked standing to raise that issue under Section 221 of the BCA.[28] Section 221 provides that:

> The corporate existence shall begin on the effective date of the articles of incorporation as provided in section 131 [of the BCA]. Filing is conclusive evidence that all conditions precedent required to be performed under this act have been fulfilled and that the corporation has been formed under this act, except in an action or special proceeding by the attorney general.[29]

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24. *Id.* at 653, 739 N.W.2d at 678. Interestingly, because none of its shareholders was a licensed physical therapist, PT Works could not be incorporated under the PSCA either. *Id.* at 654, 739 N.W.2d at 679. 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.

25. 480 Mich. 938, 741 N.W.2d 19 (2007).

26. *See Molitor 2008*, *supra* note 1, at 34-36; *see also infra* note 37.

27. *Miller*, 481 Mich. 601, 751 N.W.2d 463. Justice Markman was the author of the opinion, which was joined by Chief Justice Taylor and Justices Corrigan and Young. *Id.* at 603-16, 751 N.W.2d at 465-72. Justice Cavanagh concurred in the result only, without opinion. *Id.* at 616, 751 N.W.2d at 472. In a separate opinion (which was joined by Justice Kelly), Justice Weaver concurred in the result only. *Id.* at 616-17, 751 N.W.2d at 472.

28. *Id.* at 604, 751 N.W.2d at 465.

29. MICH. COMP. LAWS ANN. § 450.1221 (West 2008).

The Supreme Court interpreted this section to mean that the filing of a corporation's articles of incorporation is "'conclusive evidence' that: (1) all the requirements for complying with the BCA have been fulfilled and (2) the corporation has actually been formed in compliance with the BCA."[30] As such, once a corporation's articles have been filed, "the statute generally creates an irrebuttable presumption of proper incorporation"[31] which may only be challenged by the Attorney General.[32]

The court held that "[b]ecause the Legislature has expressly forbidden Allstate from raising the affirmative defense [to payment] asserted in this litigation, Allstate lacks statutory standing to challenge the corporate status of PT Works."[33] Thus, the lower courts should not have considered Allstate's argument,[34] and the Supreme Court vacated the Court of Appeals decision that PT Works had been improperly incorporated under the BCA.[35] The Supreme Court further observed that "if the legality of every Michigan corporation were subject to continual assault by any person, it would be difficult to see how a stable economic climate could ever exist."[36]

Thus, the Supreme Court calmed the chaos that had started with its decision to remand the case to the court of appeals in March 2007 and returned things, more or less, to the way they had been before. As such, it was no longer necessary for the legislature to "fix" the consequences of the court of appeals decision in *Miller*. Indeed, as of February 5, 2009, it appears that the legislation that was introduced in October 2007 has stalled.[37]

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30. *Miller*, 481 Mich. at 611, 751 N.W.2d at 469.

31. *Id.*

32. *Id.* ("[O]nly the Attorney General is not affected by the irrebuttable presumption in favor of legality.").

33. *Id.* at 612, 751 N.W.2d at 469.

34. *Id.* at 612, 751 N.W.2d at 470.

35. The court also rejected Allstate's argument that the no-fault act should be read as a "specific" exception to the "general" rule of Section 221 of the BCA. *Id.* at 613, 751 N.W.2d at 470. Indeed, the court found that the BCA is a more specific provision than the no-fault act and therefore prevails. *See Miller*, 481 Mich. at 613-14, 751 N.W.2d at 470.

36. *Id.* at 616, 751 N.W.2d. at 471.

37. *See* H.B. 5356, 94th Leg., Reg. Sess. (Mich. 2007); H.B. 5357, 94th Leg., Reg. Sess. (Mich. 2007). House Bill No. 5356 would have, among other things, added the following to Section 123 of the BCA:

> (3) . . . A corporation that provides 1 or more services in a learned profession may not incorporate under this act.
>
> (4) A corporation that engages in providing professional services 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 because it was organized under this act.

III. SUCCESSOR LIABILITY IN MERGERS

Although there were many issues in *Dept. of Environmental Quality v. Waterous Co.*,[38] the only issue that is relevant to this article is that of successor liability in mergers.[39] It is of course a basic principle of corporate law that the surviving corporation in a merger not only assumes all of the assets of the merged corporation (also known as the target corporation or the disappearing corporation), but also assumes all of the merged corporation's liabilities.[40] For example, Section 724(1)(d) of the BCA provides that, when a merger takes effect, the "surviving corporation has all liabilities of each corporation party to the merger."[41]

In *Waterous*, Traverse City Iron Works (TCIW) used a site in, of all places, Traverse City for foundry operations until 1974.[42] TCIW merged into Waterous Co. in 1978.[43] Although Waterous itself never conducted any operations on the Traverse City site, it became the owner of the site

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H.B. 5356, 94th Leg., Reg. Sess. Bill No. 5356 would also have defined "services in a learned profession" as "services rendered by a dentist, an osteopathic physician, a physician, a surgeon, a chiropractor, a physical therapist, an optometrist, a doctor of divinity or other clergy, or an attorney-at-law." *Id.* Moreover, House Bill No. 5356 would have defined "professional service" as "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.* Likewise, House Bill No. 5357 would have made complementary changes to the PSCA, including adding a provision to Section 4 of the PSCA that would have specifically stated that a "corporation that provides [one] or more professional services may elect to incorporate under the [PSCA] or the [BCA] if it does not provide any professional services that are services in a learned profession." *See* H.B. 5357, 94th Leg., Reg. Sess.; *see also* H.B. 5358, 94th Leg., Reg. Sess. (Mich. 2007) (relating to professional limited liability companies). The primary result of these changes for newly formed corporations would have been to require corporations engaged in the "learned professions" to incorporate under the PSCA, but to permit corporations engaged in *other* professional services to choose either the BCA or the PSCA. Although House Bill No. 5356 was enacted into law in early 2009, the final version of the legislation does not contain any of the proposed changes discussed above in this footnote. *See* Mich. Pub. Act. No. 402, 94th Leg., Reg. Sess (effective Jan. 6, 2009). Meanwhile, legislation has been introduced in the Michigan Senate that may affect the method by which certain physicians and physician's assistants form professional service corporations or professional limited liability companies. *See* S.B. 26, S.B. 27, and S.B. 28, 95th Leg., Reg. Sess. (Mich. 2009).

38. 279 Mich. App. 346, 760 N.W. 2d 856 (2008).

39. *Id.*

40. *Id.*

41. MICH. COMP. LAWS ANN. § 450.1724(1)(d) (West 2008).

42. *Waterous*, 279 Mich. App. at 349, 760 N.W.2d at 859.

43. *Id.*

as a result of the merger.[44] As it turned out, the site was contaminated and the Michigan Department of Environmental Quality (MDEQ) eventually sought to recover from Waterous the amounts that the MDEQ had spent remediating the site and to require Waterous to undertake certain additional response actions.[45]

One argument (among many) that Waterous made to avoid liability was that, pursuant to the terms of its 1978 merger agreement with TCIW, it never agreed to assume the environmental liabilities at issue in the case. Specifically, the merger agreement contained a provision whereby TCIW represented and warranted to Waterous that "[t]here are no liabilities of [TCIW] of any kind whatsoever, whether or not accrued and whether or not determined or determinable, in respect of which [Waterous] . . . may become liable on or after consummation of the merger," other than those that were disclosed on certain of TCIW's financial statements or that were later incurred in the ordinary course of business and were not "materially adverse" to TCIW.[46] Because the environmental liabilities were not disclosed in TCIW's financial statements or thereafter incurred in the ordinary course of business, Waterous argued that it had not assumed the liabilities.[47] In other words, Waterous's position was that it only assumed liabilities that had been disclosed pursuant to the merger agreement.

Given that the BCA provides for a different result—not to mention the fact that the parties' merger agreement contained a clause that incorporated the provisions of the BCA[48]—the court correctly concluded that Waterous was liable for all of TCIW's liabilities, whether or not they

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44. MICH. COMP. LAWS ANN. § 450.1724(b) (West 2008) ("[T]itle to all real estate . . . owned by each corporation party to the merger [is] vested in the surviving corporation . . . .").

45. *Waterous*, 279 Mich. App. at 349-51, 760 N.W.2d at 859-60.

46. *Id.* at 378-79, 760 N.W.2d at 874.

47. *Id.* at 377- 80, 760 N.W.2d at 873-74.

48. The relevant portion of the merger agreement provided that:

> On the Effective Date of the Merger, [TCIW] shall be merged into WATEROUS which shall be the Surviving Corporation and WATEROUS on such date shall merge [TCIW] into itself. The corporate existence of WATEROUS with all its purposes, powers and objects, shall continue unaffected and unimpaired by the merger, and as the Surviving Corporation it shall be governed by the laws of the State of Minnesota and *shall succeed to all rights, assets, liabilities and obligations of [TCIW] in accordance with the Michigan Business Corporation Act.* The separate existence of and corporate organization of [TCIW] shall cease upon the Effective Date of the Merger and thereupon [TCIW] and WATEROUS shall be a single corporation, to wit, WATEROUS.

Id. at 377-78, 760 N.W.2d at 873 (emphasis added).

had been disclosed before the merger.[49] The fact of the matter is that the BCA provides that *all* of the merged corporation's liabilities become the liabilities of the surviving corporation when the merger becomes effective.[50] Even though Waterous did not know about the environmental liabilities before the merger, this would not allow Waterous to avoid liability to the MDEQ.[51]

49. *Id.* at 379-80, 760 N.W.2d 874.

50. MICH. COMP. LAWS. ANN. § 450.1724(1)(d) (West 2008).

51. For the leading Michigan case concerning successor liability in asset-purchase transactions (as opposed to mergers), *see Turner v. Bituminous Casualty Co.*, 397 Mich. 406, 244 N.W.2d 873 (1976). *See also* Foster v. Cone-Blanchard Machine Co., 460 Mich. 696, 597 N.W.2d 506 (1999).