



The Michigan Business Law

JOURNAL

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The editorial staff of the *Michigan Business Law Journal* welcomes suggested business law topics of general interest to the Section members, which may be the subject of future articles. Proposed business law topics may be submitted through the Publications Director, Brendan J. Cahill, *The Michigan Business Law Journal*, 39577 Woodward Ave., Ste. 300, Bloomfield Hills, Michigan 48304, (248) 203-0721, bcahill@dykema.com, or through Max H. Matthies, ICLE, 1020 Greene Street, Ann Arbor, Michigan, 48109-1444, matthies@icle.org. General guidelines for the preparation of articles for the Michigan Business Law Journal can be found on the Section's website at <http://connect.michbar.org/businesslaw/newsletter>.

Each issue of the *Michigan Business Law Journal* has a different primary, legal theme focused on articles related to one of the standing committees of the Business Law Section, although we welcome articles concerning any business law related topic for any issue. The deadlines for submitting articles are as follows:

Issue	Article Deadline
Spring 2023	November 30, 2022
Summer 2023	March 31, 2023
Fall 2023	July 31, 2023
Spring 2024	November 30, 2023

ADVERTISING

All advertising is on a pre-paid basis and is subject to editorial approval. The rates for camera-ready digital files are \$400 for full-page, \$200 for half-page, and \$100 for quarter page. Requested positions are dependent upon space availability and cannot be guaranteed. All communications relating to advertising should be directed to Publications Director, Brendan J. Cahill, the *Michigan Business Law Journal*, 39577 Woodward Ave., Ste. 300, Bloomfield Hills, MI 48304, (248) 203-0721.

MISSION STATEMENT

The mission of the Business Law Section is to foster the highest quality of professionalism and practice in business law and enhance the legislative and regulatory environment for conducting business in Michigan.

To fulfill this mission, the Section shall: (1) expand the resources of business lawyers by providing educational, networking, and mentoring opportunities; (2) review and promote improvements to Michigan's business legislation and regulations; and (3) provide a forum to facilitate service and commitment and to promote ethical conduct and collegiality within the practice.

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Volume XXII, Issue 1, and subsequent issues of the *Journal* are also available online by accessing <http://connect.michbar.org/businesslaw/newsletter>

From the Desk of the Chairperson

By John T. Schuring



Your Business Law Section has been very active in the past few months, working to enhance the practice of business law for all Michigan lawyers. I'd like to update you on a few of those activities.

Business Law Institute

The Section is very excited to host the 33rd Annual Business Law Institute, to be held on October 7, 2022, at the JW Marriott in Grand Rapids. This will be the first in-person Institute since 2019.

For years, the Institute has provided Michigan's business lawyers with timely and high-quality legal education. The educational components will offer something for everyone, whether you are new to the practice or you are a seasoned attorney. Here is a list of our scheduled topics, each to be presented by one of our state's preeminent practitioners:

- Business Legislation Update
- Essential Tax Updates for Business Lawyers
- Commercial Contracts in the Age of Pandemics and Other Supply Chain Disruptions
- Recent Trends in Representations and Warranties Insurance
- Corporate Transparency Act
- Business Caselaw Update
- Update from the Business Court Bench, featuring Hon. Terence J. (T.J.) Ackert, Hon. David J. Allen, Hon. Joyce A. Draganchuk, and Hon. Christopher P. Yates

In addition to the substantive programs, BLI provides a fantastic opportunity to renew old friendships, and create new ones. There are multiple networking breaks and receptions, and the Section will host its annual dinner, with gourmet food stations and accompanying wine parings. Given the COVID-mandated, two-year, in-person hiatus, I expect that the reception, dinner, and networking breaks will be more appreciated and enjoyed than ever.

Registration for BLI is currently open on the ICLE Website, at www.icle.org/business.

I look forward to seeing you there!

Section Strategic Plan/Survey

The activities of the Business Law Section and its Council are guided by the Section's strategic plan. The current plan, adopted in March 2017, articulates the mission and goals of the Section. The plan was adopted with the idea of being revisited and refreshed every five years, and this is its five year anniversary. The Section has formed a committee, chaired by Michael Khoury, to take on that task. If you are interested in joining the committee, please let me know.

In addition, the Section will be sending a survey to our members, to help assist and inform the strategic planning process. Please look for the survey in your inboxes, and take the time to respond.

A link to the Strategic Plan is available here: <https://connect.michbar.org/businesslaw/council/council-info>.

Mentorship Program

In its June meeting, the Business Law Section Council approved the implementation of a Section mentorship program, which will connect newer business lawyers with experienced practitioners willing to serve as mentors. Keep an eye out for more details on this exciting program!

Murphy v Inman

On April 5, 2022, the Michigan Supreme Court issued an opinion in *Murphy v Inman*, a case arising out of the merger of Covisint Corporation and OpenText Corporation. The Business Law Section filed an amicus brief in the case, taking the position that (1) with respect to a cash-out merger and generally, corporate directors owe cognizable common law fiduciary duties to the corporation's shareholders independent of any statutory duty; and (2) shareholders who are directly harmed have standing to bring a direct cause of action if a derivative remedy would not benefit them. The Supreme Court's opinion in the case largely adopted the positions advanced in the Section's amicus brief, including the adoption of a simplified direct/derivative analysis as set forth in the Delaware case of *Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031 (Del 2004).

Murphy v Inman has clarified several important issues of Michigan corporate law, and the work of the Business Law Section's amicus committee was instrumental. Special thanks to the Section members who served on the committee and authored the brief: Michael Molitor, Ian Williamson, Justin Klimko, Douglas L. Toering, William Horton, Marguerite Donahue, Jennifer M. Grieco, and Brian P. Markham.

Soaring Pine Capital Amicus Brief

The Michigan Supreme Court invited interested groups to move for permission to file amicus briefs on, among other issues, "whether a usury-savings clause is void as a violation of public policy." *Soaring Pine Capital Real Estate and Debt Fund II, LLC v Park St Grp Realty Servs, LLC*, ___ Mich ___, 970 NW2d 676 (2022). If usury savings provisions—common in many transactional documents—were invalidated by the court, it could have a tremendous impact on business transactions in Michigan. The Section Council has created an amicus committee to spearhead the effort of preparing an amicus brief on behalf of the Section.

We are seeking volunteers to serve on the Committee to draft and file the Brief. If you are interested, please contact co-chairs Judith Greenstone Miller (jmiller@jaffelaw.com) or Judy B. Calton (judy.b.calton@gmail.com). Thank you to Judy and Judy for taking on this important task.

Schulman Award

Congratulations to Mark R. High, a member at Dickinson Wright PLLC, who will be recognized at our Section's Annual Meeting as the recipient of the 16th Annual Stephen H. Schulman Outstanding Business Lawyer Award. Mark is a former Chair of the Business Law Section, long-time member of various committees, and a dedicated and frequent speaker at Business Law Section events. Congratulations Mark! Information on the Schulman award is available here: <https://connect.michbar.org/business-law/schulmanaward>.

This Issue of the Journal

Thank you to the authors and columnists who have submitted thoughtful and well-written content for this summer issue of the Business Law Journal. The Journal remains a great resource for our Section and our state's business lawyers. If you are interested in submitting an article for the Journal, please contact our Section's Publications Chair, Brendan Cahill (bcahill@dykema.com).

Passing The Gavel

The Business Law Section will hold its annual meeting in Grand Rapids in October in conjunction with the Business Law Institute. At that time, I will pass the Chair's gavel to our next Section Chair, Mark Kellogg. I have enjoyed my time as Chair and appreciated the opportunity to interact with many of you over the course of the year. I thank each member of the Section for the opportunity to lead the Council this year, and I look forward to the great things to come from our Section. In the meantime, please contact me at jschuring@dickinsonwright.com or by phone (616-336-1023) with any ideas you may have to make the Business Law Section an even more valuable resource for your practice, or to discuss how you might further your involvement with the Section.

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Business Identity Theft

Chances are, not very many Michigan business lawyers have visited the dark web. The dark web is a part of the internet that is not accessible by traditional search engines or web browsers. It is known for being a hotbed of illegal activity, and it is a place that cyberthieves can buy and sell stolen identities anonymously. However, it might surprise many people to learn that criminals do not need to visit the dark web to obtain information to commit business identity theft. Many of the elements that comprise the identity of a business are publicly available.¹

While personal or individual identity theft has been known to be a concern for quite some time, business identity theft has greatly increased in recent years. In June 2020, only a few months into the COVID-19 pandemic, business credit reporting company Dun & Bradstreet reported a 258 percent increase in business identity theft since the beginning of 2020.² In those early days of the pandemic, bad actors used stolen identities of businesses to illicitly obtain pandemic relief loans, grants, and other funds. Business identity theft continues to occur—the threats and risks are not going away. In fact, some of the increase has been attributed to the shift to more online storefronts for business activity and a remote workforce, both of which increase data vulnerabilities without the proper safeguards and measures in place.³

Understanding business identity theft begins with defining it. Business identity theft is the unauthorized use of a business name or identity for financial gain.⁴ Business identity theft has much greater complexities than personal identity theft.⁵ There are numerous schemes to commit this fraud. Once the stolen identity is obtained, there are generally a few ways that it is used by a bad actor. The bad actor could obtain goods or services in the name of the stolen business identity and have the goods delivered to their address. They could procure funds,

open lines of credit, or obtain credit cards in the name of the stolen business identity.⁶ Bad actors also obtain goods and services or access to funds and credit by fraudulently using a business name that is very similar to a legitimate business with the intent to confuse lenders, creditors, or salespeople into thinking the fraudulent business is the legitimate business.⁷ Another method used by bad actors is redirecting incoming accounts payable funds of the stolen business identity to their bank account.⁸ Also, stolen business identities have been used to file fraudulent tax returns.⁹

According to the Internal Revenue Service (IRS),

[i]dentity theft is a serious threat to business, partnership, estate and trust filers. Thieves may steal sensitive information to file a fraudulent tax return for a refund or to commit other crimes. All taxpayers must be alert and on guard at all times. It is important to take strong security measures to protect your business' and your employees' data.¹⁰

It makes sense that business identity theft is underreported—for starters, companies are embarrassed, and it may cause reputational harm. Also, only a couple states (California and Florida) have statutes that recognize identity theft crimes against business entities, and federal identity theft laws do not include business entities in the statutory language.¹¹ The Federal Trade Commission (FTC) only responds to consumer complaints.¹² In fact, the FTC's Identity Theft Clearinghouse "collects data on consumer identity theft, but does not collect statistics on business identity theft."¹³

In the unfortunate event that a business is victim of identity theft, the following are some steps to *consider* taking as soon as the business is aware of the theft:

- Contact the companies or institutions where the fraud

occurred.

- Notify the business's relevant financial institutions. This could cause the account(s) to be frozen.
- Notify credit reporting agencies: Dun & Bradstreet, Experian, Equifax, and TransUnion. This could cause the account(s) to be flagged to "stop distribution."
- Notify local law enforcement. "Local law enforcement is required to respond to the incident. Call the non-emergency number to report the crime—reporting the crime will be helpful for insurance purposes. Ensure you obtain a copy of the incident report. Unfortunately, the crime may never be solved."¹⁴
- Review the business's record with the Michigan Corporations Division and/or other states where the business is registered. If an update or a correction needs to be filed, the appropriate document will depend on the information that needs to be changed and the circumstances. For example, a Certificate of Correction may be used by corporations or limited liability companies pursuant to MCL 450.1133, 450.2133, or 450.4106, for the purpose of correcting a document filed with the Corporations Division, which at the time of filing was an inaccurate record of the action referred to in the document or was defectively or erroneously executed.

The FTC has a robust and informative website to assist individuals with reporting and recovering from personal identity theft at [IdentityTheft.gov](https://www.identitytheft.gov). While the multitude of recovery steps may not be directly applicable to businesses, it may be worthwhile to review for ideas that could be extrapolated to a business.

Preventative measures and signs of business identity theft will be discussed more thoroughly in a future column. In the meantime, a couple of basic steps include monitoring the business's credit report and the business's public record on file with the Michigan Corporations Division and/or other states where the business is registered.

It is important to recognize the threat of business identity theft and be aware of the actions to take if this were to occur to your business or to one of your clients.

uploads/2018/08/Biz-ID-Victim-Resources-FINAL-8_13_18.pdf.

13. Business Identity Theft, The National Cybersecurity Society, <https://nationalcybersecuritysociety.org/business-identity>.

14. Victim Resources, Business Identity Theft in the U.S. Fact Sheet, The National Cybersecurity Society, https://nationalcybersecuritysociety.org/wp-content/uploads/2018/08/Biz-ID-Victim-Resources-FINAL-8_13_18.pdf.



Alexis Lupo is the Corporations Division Director in the State of Michigan's Corporations, Securities & Commercial Licensing Bureau. She serves as Treasurer for the International Association of Commercial Administrators. Ms. Lupo is a member of the Business Law Section and an appointed member of the State Bar of Michigan's Standing Committee on Character and Fitness.

NOTES

1. Tips to Protect Business Identity, Business Identity Theft in the U.S. Fact Sheet, The National Cybersecurity Society, https://nationalcybersecuritysociety.org/wp-content/uploads/2018/08/FACT-TIPS-TO-PROTECT-BIZ-ID-FINAL-8_13_18.pdf.

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IRS Budget and Staffing Woes Continue – New Warnings to Taxpayers

Recent statistics released by the IRS show a continued decline in the percentages of income tax returns examined by the agency. For example, for the tax year 2010 the percentage of tax returns examined that reported \$10 million or more of income was 21.5% and for the 2017 tax year that figure was 5.8%.

I have written in many past columns about the impact on IRS personnel reductions on enforcement and compliance. Any tax professional trying to resolve issues for clients by telephone knows the frustrations of hours-long wait time, often only to be disconnected.

In addition, the IRS was trusted in distributing some \$814 billion of pandemic economic impact payments and \$93 billion of advanced payments of the child care credit. These programs contributed to a record number of calls to the agency, and there was not staffing at the IRS to address the volume.

The U.S. Government Accountability Office (GTO) also reported that the IRS average rate for all individual tax returns fell from 0.9% to 0.25% from 2010 to 2019. Granted, some of the reduction is attributable to the reduction in the number of taxpayers itemizing, but the figures reflect the cuts in civil enforcement personnel.

FBAR Update

As many professionals know, the IRS tax systems tracks information as much as delivery and collection tax, such as, Report of Foreign Bank and Financial Accounts and Controlled Foreign Corporation. The correct components of non-willful FBAR penalties remain a divided issue amongst the courts. The Ninth Circuit has delineated the penalty to apply per form, while the Fifth Circuit has ruled that the penalty is per account.

The federal government has requested that the United States Supreme Court hear the issue to settle the split amongst the two circuits. A third case is now before the Second

Circuit after a lower court ruled that the penalty is per form not per account. See *United States v Kaufman*, No 22-468 (2nd Cir 2022).

Following the split amongst the two circuits and the necessity to have a unified penalty regime nationally, on June 21, the U.S. Supreme Court decided to hear the dispute and settle the questions concerning the maximum FBAR penalty for undeclared accounts. The Supreme Court has taken up the case of *Bittner v United States*, No 21-1195. The matter will be heard in the fall when the Supreme Court reconvenes from their summer recess. Until that time, taxpayers can expect the IRS to assert the maximum non-willful penalty of \$10,000 per account, rather than \$10,000 per FBAR form at the examination phase.

Speaking of information returns, a recent audit by the Treasury Inspector General for Tax Administration reported the IRS had destroyed an estimated 30 million paper-filed information return documents in March 2021. We don't know exactly what returns were destroyed, or the basis for the destruction. Certainly, the public perception is extremely poor and raises legitimate questions about the need for the data in the first place. The IRS cites lack of personnel to process the 30 million paper filed documents.

IRS Whistleblower Leadership

The IRS Whistleblower Office has a new director. John W. Hinman has taken the leadership post. The office has a substantial backlog with nearly 24,000 cases in inventory; the backlog can be as long as ten years. Since 2007, the IRS reports collecting over \$6 billion based on whistleblower claims.

Hinman comes to the post from leading financial operations for the IRS Large Business and International Division transfer pricing practice. It is too early to tell if that past experience

will translate into a focus within the Whistleblower Office.

Criminal Enforcement

Don't tell the owners of a famous Philly cheesesteak shop that the IRS does not have enough personnel. Tony Luke's cheesesteak father and son owners, Anthony Lucidonio, Sr. and his son Nicholas Lucidonio, recently pled guilty to charges in a 24-count indictment. The pair were charged with underreporting revenues by more than \$8 million, over-reporting expenses, and paying their workers under the table.

IRS Dirty Dozen

The IRS published their 2022 "Dirty Dozen." This annual publication wherein the IRS advises taxpayers of various potential schemes to defraud the IRS or taxpayers impersonating the IRS to steal money from unsuspecting taxpayers. See IR-2022-125.

Some of the continuing scams include people impersonating IRS personnel, demanding money, or seeking personal information so the unsuspecting taxpayer can get "refunds or credits." Other warnings that continue are unreported foreign accounts, conservation easements, and micro-captive insurance arrangements.



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It's All Meta in the Metaverse and the World of NFTs

Technology buzzwords are nothing new. We've become accustomed to "cryptocurrency" and are aware of the risks of "ransomware" and the need to take "cybersecurity" seriously. Yet each of these were new concepts at one time that became common parlance in business. The same is likely to be true of some of technology's biggest 2022 buzzwords—the metaverse and NFTs. Unfortunately, these terms are currently mired in jargon and even describing them can be confusing. So, in this column, we hope to demystify NFTs and the metaverse while giving a hint of their possible long-term impact in the business sector.

What Is "the" Metaverse?

The metaverse is one of the most popular technology buzzwords around. Yet, despite its popularity, very few people can describe what it really is or what it will become. If you are familiar with the book and/or movie *Ready Player One* and its depiction of the OASIS, you may have a good vision of the future. By donning virtual reality goggles or even an entire suit that allows the wearer the ability to "feel" the interactive world, characters in *Ready Player One* were transported out of their postapocalyptic reality and into a complete virtual world. But the term metaverse was actually coined by Neal Stephenson in the 1992 science fiction novel *Snow Crash*, where the virtual world created after a global economic meltdown was designed as a successor to the Internet with individuals represented by avatars.

Outside of the dystopian fantasy novels that launched the term "metaverse," actual functional definitions range from the overly simplistic to exceedingly esoteric. The metaverse is a set of persistent virtual worlds that continue to exist, even when you're not interacting with them. It includes virtual reality and augmented reality. Mathew Ball, venture capitalist and angel investor described it this way:

When these two technologies (internet and computing) first

emerged, all interactions were primarily text-based (emails, messages, usernames, email addresses). Then they slowly became more media-based (photos, videos, livestreams). The next elevation of user interface and user experience is into 3D. Secondly, if we think of [a] mobile [phone] as placing a computer in our pocket and the internet being available at all times, think of the metaverse as always being within a computer and inside the internet.¹

Simply put, it is the digital life being lived in 3D. But it would be inaccurate to say that there is one single metaverse. To have one metaverse, all companies would need to cooperate in the creation and support of one single platform, something that would interfere with potential profit and proliferation of innovation. It's more accurate to say that we live in a world of multiple metaverses.

What Can You Do in an Actual Metaverse?

When you look at what a metaverse can do, the company Meta (formerly known as Facebook) uses several key examples. In a YouTube video, Meta shows a person attending a concert located across the country in a virtual form, almost like a holograph.² You can create virtual landscapes and "hangout" spots to meet your friends or join them in games and other experiences. Users are able to customize their avatars and "be anyone they like," even appearing to be a cartoon like Bugs Bunny as a passing character did in *Ready Player One*. Much of this entertainment comes in the form of user-generated content, but the business opportunities are also equally endless.

The metaverse will also allow for the purchase and monetization of virtual real estate. Many platforms are divided into land blocks called "parcels," which can be purchased with the platform's chosen cryptocurrency.

E-commerce and online shopping are also expected to thrive as the owners of certain brands and intellectual property rush to allow avatars to wear their virtual products or to cloak themselves in the brand. The metaverse is also a perfect place to host virtual art galleries to view NFTs.

What Is an NFT?

An NFT is a non-fungible token. It is non-fungible because it is unique and cannot be replaced with anything else. These tokens can be anything reduced to a digital media including drawings, paintings, music, and videos. NFTs are stored on a blockchain. And if you feel like you're winning "jargon bingo," a blockchain is a distributed ledger where the ownership can be digitally recorded and traced as it is transferred by its owner. This allows for NFTs to be traded or sold.

In a nutshell, NFTs are promised to be the future of investing and collecting. Although not all NFTs hold remarkable value, there are many splashy examples that are more than eye-popping in value:

- An individual paid almost \$390,000 for a 50 second video by Grimes (who is known by some as a musician, record producer, and judge on the avatar based TV game show *Alter Ego* and known by others as Elon Musk's former girlfriend and mother to their son, "X Æ A-Xii.")
- Another purchaser paid \$6.6 million for a video by Bepple, a net artist named Mike Winkelmann, who creates digital art that combines bizarre and disturbing images that are a montage of pop culture, technology, and the dystopian future.
- The largest NFT sale to date occurred on December 2, 2021, when 30,000 collectors pooled their resources to purchase "The Merge," a

piece by the artist Pak, for \$91.8 million.

What Do You Own with an NFT?

Ownership is an interesting concept that is widely misunderstood in NFTs. An NFT can only have one owner (or can be owned by a single group, as shown with Pak's "The Merge") at a time. This is managed through the unique ID and metadata that no other token can replicate. NFTs are minted through smart contracts that assign ownership and manage the transferability of the NFT's. But what does that person or group really own?

They don't own the "asset" exactly. When the Mad Dog Jones NFT called "Replicator" sold for over \$4 million in April 2021, it wasn't the image that the purchaser obtained. The NFT itself is an image of a photocopier in an office overlooking a downtown. The purchaser did not obtain the copyright behind the art or the right to the underlying work. It doesn't convey the right to create derivative works or to reproduce the image. In fact, the rights to an NFT can be fairly limited, depending on what the creator of the NFT allows. As an example, the musical group Kings of Leon required that their NFT music was for personal consumption only. Therefore, the purchaser of the NFT could not broadcast the music. These rights, or lack of rights, will clearly open up future disputes and litigation as purchasers misunderstand their rights or seek to exceed them.

The Metaverse and NFT's in the Legal News

Despite how new these technologies are, legal challenges have already become the norm.

NFTs and Intellectual Property Issues

Most NFT-related litigation has emerged out of trademark law. In February 2022, athletic wear giant Nike filed a lawsuit against an online marketplace reseller. StockX, a reseller for streetwear, created a market-

place for launching NFTs based on Nike shoes. Nike asserts that the NFTs that bear the Nike logo constitute trademark infringement, false designation of origin, and trademark dilution. StockX has countered that it is merely selling an NFT that represents the actual ownership of a physical set of shoes and that the NFTs are "absolutely not 'virtual products' or digital sneakers" because they are tied to that real product. In essence, StockX is arguing that the NFT is more of a digital receipt. This case is being closely watched as it may impact how intellectual property law is applied to NFTs.

Another example of asserted trademark infringement in the NFT space falls with the famed Birken bag. In January 2022, Hermès, the creator of Birkin handbags, sued an NFT company and digital artist Mason Rothschild for infringing on its trademark rights, claiming that the company's NFTs, called MetaBurkins, are "fake Hermès products in the metaverse." This case hinges whether Mr. Rothschild's piece of work should be treated as an expressive work, which is protected under the First Amendment.³

NFTs and Metaverse Digital Asset Theft

Ownership of digital assets adds complexity in the fact that they are at risk of theft by hackers. This year, many users of the OpenSea platform filed suit alleging the company failed to take necessary measures to protect its users from various cyberattacks. One example involved Robert Armijo, an investor in Nevada, who was a victim of a phishing attack. The hacker took several NFTs from his digital wallet. Armijo notified OpenSea within hours of the attack but alleges that the company failed to take action.

Along with stolen NFTs, companies are forced to contend with plagiarized NFTs. In one study, an application used to scan NFTs to detect plagiarism identified more than 290,000 instances on OpenSea and other NFT marketplaces. In response, OpenSea stated that it has upgraded

its program and is taking steps to minimize these occurrences. Despite this, creators and owners find themselves frustrated and allege that almost no accountability is taken by the hosting platforms.

Contractual Questions

Even though most matters sound like intellectual property, we can see from a cheesburger and an aged contract that disputes can arise based on our inability to fully contemplate the future of technology. In what is called by some the "Royale with Cheese" lawsuit filed on November 16, 2021, Miramax sued Quentin Tarantino and his company Visona Romantica, Inc. for breach of contract, unfair competition, and copyright and trademark infringement when Tarantino planned the use of images from the movie *Pulp Fiction* in an NFT release. The breach of contract claim is interesting as, under the original agreement, Tarantino assigned almost all of the intellectual property rights related to *Pulp Fiction*. He only reserved rights to the soundtrack, music publishing, live performance, print publications, interactive media, theatrical and television sequel and remake rights, and television series and spinoff rights. Miramax argues that these grants prevent Tarantino from exploiting *Pulp Fiction* NFTs. The resolution of this dispute will likely depend on the interpretation of the 1993 contract and how NFTs fit into the then-drafted language.

The Metaverse and NFTs in Corporate Transactions

How much will the metaverse and NFTs impact the corporate realm? By 2024, the metaverse alone is projected to be an \$800 billion market led, in part, by tech giants Meta, Microsoft, Apple, and Google. Beyond the platforms hosting the metaverse, content creation will continue to grow and be a source of value for years to come. For example:

- Epic Games has recently acquired a number of companies that allow it to create or distribute digital

assets. Many of these focus around what is called the Unreal Engine 5 platform, advertised as the world's most open and advanced real-time 3D creation tool. The Unreal Engine base platform is frequently used in video games and now in the film industry in programs including *The Mandalorian* and *Ford v Ferrari*. But the application of these virtual reality worlds does not end with the entertainment industry. The Unreal Engine is currently being used in the design of digital cockpits in the automotive industry including uses by BMW, Lexus, and Audi.

- Microsoft spent \$68.7 billion to acquire the game developer Activision Blizzard to increase its access to the interactive entertainment space. This acquisition will bring Microsoft more than just the *Call of Duty*, *Warcraft*, and *Candy Crush* assets; it will position Microsoft to be a major player in developing an immersive metaverse.

With respect to the market for NFTs, which is on the rise, more merger and acquisition activity and consolidation among NFT marketplaces is expected. Companies are now looking into reframing how they position themselves in the digital ecosystem to garner younger consumers. In courting this demographic, NFTs have become a more common marketing tool and have been employed by Coachella, the Super Bowl, Adidas, and many others. As larger companies employ NFT branding strategies, several have decided to partner or even acquire well known NFT marketplace players.

On December 13, 2021, Nike announced its acquisition of RTFKT, a virtual sneaker company that creates NFTs. In the same month, Adidas announced a partnership with GMoney, Bored Ape Yacht Club, and

PUNKS comic. This year, OpenSea acquired Dharma Labs, a protocol for generic tokenized debt agreements. And on March 11, 2022, Yugo Labs announced the acquisition of CryptoPunks and Meebits from Larva Labs. The desire to capitalize on this new revenue will lead to a continuously growing industry and corporate transactions will continue to increase both in the areas of NFTs and the metaverse generally.

Final Thoughts

At the end of the movie, *Ready Player One*, the heroes divide up control of their metaverse. They even shut it down, one day a week, to encourage interaction in the real world. We may not be at a place where we live our lives in a virtual reality or make money from NFTs, but the business opportunities (and subsequent legal challenges) are written on the wall in the real world. Or turning to one of the creators of the OASIS in the movie version of *Ready Player One*:

I created the OASIS because I never felt at home in the real world. I just didn't know how to connect with people there. I was afraid for all my life, right up until the day I knew my life was ending. And that was when I realized that ... as terrifying and painful as reality can be, it's also ... the only place that ... you can get a decent meal. Because reality... is real.



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2. <https://www.youtube.com/watch?v=Uvufun6xer8&t=775s>.

3. See *Rogers v Grimaldi*, 875 F.2d 994 (2d Cir 1989), a trademark and intellectual freedom case, that established the "Rogers test" which protects uses of trademarks that implicate intellectual freedom issues.

In this issue, we interview newly appointed Michigan Court of Appeals Judge Christopher P. Yates. We will look back on his distinguished ten-year career on the Kent County Specialized Business Docket and look forward to his new position on the Court of Appeals. Following that, we summarize the landmark Michigan Supreme Court decision in *Murphy v Inman* and the Business Law Section's involvement in filing an amicus curiae brief in that business court case.

Michigan Court of Appeals and Former Kent County Business Court Judge Christopher P. Yates

Beginning of the Kent County Business Court

The Kent County Business Court (Specialized Business Docket) started March 1, 2012. This was the second business court in Michigan. (The Macomb County Specialized Business Docket, which opened November 1, 2011, was the first.) Judge Yates was the first business court judge on the Kent County Business Court. He served as a business court judge there until April 15, 2022, when Governor Gretchen Whitmer appointed him to the Court of Appeals.

Recalling how the Kent County Business Court started, Judge Yates states that Donald A. Johnston, III, then the Chief Judge for the Kent County Circuit Court, really drove the process. Judge Johnston drafted an administrative order, which was approved by the Michigan Supreme Court. The administrative order included the criteria for business court cases. Unlike the current business court statute, high-asset divorce cases were included in the business court there. Otherwise, the local administrative order was similar to the current business court statute.¹

Approach to Business Court Cases

One goal of the Kent County Business Court was to create a docket dedicated to complex business cases. This was particularly important because such cases tended to clog the general

civil docket due to their more complicated and time-consuming nature. Another goal of moving such cases off the general civil docket onto a specialized docket was to resolve those cases swiftly. So when Judge Yates was appointed to the business court, he sought to be proactive on business cases in order to resolve them quickly. To that end, Judge Yates strived to resolve business cases "on the front end." Failing that, he sought to set up a process to move the cases to conclusion as quickly and inexpensively as possible. Overall, Judge Yates, Judge Johnston, and the Kent County Circuit Court staff "set up a good process."

But there were stumbling blocks to early resolution of cases. It turned out that few business cases in Kent County have a jury demand, so Judge Yates could not always hold early settlement conferences, because he might be the ultimate finder of fact. Indeed, he presided over only a "handful" of jury trials while on the business court bench, but he tried many bench trials. Also, Judge Yates observed, it was often difficult to isolate and decide the controlling issues early in the case. Instead, parties would usually need to get through the discovery phase before a central issue could be resolved. If a critical issue was impeding resolution, Judge Yates encouraged counsel to engage in the limited discovery needed to resolve that particular issue. But parties were often hesitant to do so.

Successes

Looking in the rearview mirror, what were Judge Yates's major accomplishments? Two things immediately came to Judge Yates's mind. First, he endeavored to address emergency matters (for example, preliminary injunction motions) quickly. To that end, he worked to provide opinions within a week. As part of a preliminary injunction motion, the moving party sets forth its view of likelihood of success on the merits. Thus, Judge Yates's opinion on such a motion gave good guidance to the parties on the likely outcome of the case.

His second success was his focus on initial status conferences. (These have become common in business courts throughout the state and have been one of the major reasons for the success of the business courts.) In Judge Yates's view (and undoubtedly in the views of other business court judges), initial status conferences provide a customized plan to "get to the finish line." This includes deciding the amount and timing of discovery. In some cases, however, the lawyers didn't want discovery; they just wanted a trial date. (A firm trial date settles cases, observes Judge Yates.) Thus, Judge Yates would set a quick trial date. Overall, many complex cases were resolved, in part, through the use of the initial status conferences.

Difficulties

But there were also difficulties. Early on, Judge Yates was able to provide written opinions on most everything. But the crush of motion practice (which is a large part of business litigation) made that difficult, so Judge Yates had to decide more motions from the bench. ("It doesn't do lawyers any good to wait four to six months for an opinion," he notes.) As the success of the business courts in resolving cases became more widely known, business courts received more filings. That's fine, of course. But this made it tougher to provide written opinions for every ruling.

Another disappointment was COVID-related. Prior to the pandemic, Judge Yates would meet informally with attorneys and obtain their input on how the business court was operating. (This became difficult during the pandemic.) It helped him when lawyers would "gently tell me what I could do differently." He added, "It is so important for judges to get feedback."

Training New Trial Lawyers

Judge Yates shares a concern that many in Michigan and nationwide have expressed. How can we train trial lawyers, when so few cases are tried? Weighing in, Judge Yates mentions that preliminary injunction

hearings can provide good courtroom experience—the stakes are lower and less scary than being in front of a jury. Also, use the opportunity to try bench cases, when that opportunity presents itself. You can “learn on the fly better” than if there is a jury. Indeed, Judge Yates did not mind going off the record in a bench trial to explain to a new attorney how something should be done. Overall, Judge Yates agrees with the “learning by doing” approach.²

Bench, Bar, and More

Apart from serving on the Court of Appeals, Judge Yates serves as President of the Michigan Judges Association, Vice President of the American College of Business Court Judges, an officer of the Business Law Section, and a council member of the Judicial Section and the Alternative Dispute Resolution Section. He also presides over mock trials for the Michigan Center for Civic Education. Despite the time and effort these require, Judge Yates reflects that, “My career and my ability have been tremendously increased by outside activities.” He seldom turns down a speaking opportunity with lawyers, because “it is helpful for them to hear from the bench.” Indeed, “we never stop learning in this business. What we encounter on a day-by-day basis is what a lot of practitioners would like to know. If you don’t get out, you can’t get the word out.”

Overall

On the business court bench, “I felt like an NBA referee,” says Judge Yates. “Every day I got to watch the best in the business and all I had to do was make the calls.”

Advice

Judge Yates provides a few words of practical advice: (1) Feel free to attach relevant opinions from other business court judges; he found those very instructive. (2) Think hard before filing an early summary disposition motion under MCR 2.116(C) (10), which courts usually don’t grant without discovery. (3) Be flexible in your argument at the hearing. Listen

to where the judge is going and adjust your argument accordingly. (4) Some briefs filed in the business court are so voluminous as to be intimidating. Ask yourself whether you really need all of those exhibits to support your motion. If so, then, yes, attach all of them. But some motions arrive with boxes of exhibits, and it is rarely necessary to include that many exhibits. (5) As to appeals, it can often be more effective to submit a tight, 15-page brief, rather than including everything in 50 pages. A case almost never requires a 50-page brief. Quoting a supervising attorney he had earlier in his career, Judge Yates states, “On appeal, bring a rifle not a shotgun.”

Going Forward

Judge Yates’ investiture will likely occur in July 2022. Until the Michigan Supreme Court appoints a replacement for Judge Yates, Judge Johnston has returned from retirement to assist with Judge Yates’s former docket. Judge Johnston will serve along with Judge Terence J. Ackert on the Kent County Business Court bench.

Murphy v Inman

In early 2021, the Michigan Supreme Court invited input from the Business Law Section (BLS) as *amicus curiae* in a business court case concerning fiduciary duties owed to shareholders. That case, *Murphy v Inman*,³ involved litigation over a “cash-out”⁴ merger between two corporations, Covisint Corporation and OpenText Corporation. After the merger was completed and Covisint’s shareholders were cashed out, the plaintiff brought a putative class action charging Covisint’s former directors with breaching their statutory and common law fiduciary duties by, *inter alia*, accepting a too-low per share price in the merger.⁵

The dispute on appeal dealt with both the fiduciary duties owed to shareholders and the direct/derivative distinction in shareholder actions. The business court granted summary disposition for the defendant directors, holding that the plaintiff lacked standing to bring the suit as a direct shareholder action; instead,

his claim was derivative because the alleged harm affected Covisint and the plaintiff in the same way, and because the plaintiff’s harm was not distinct from Covisint’s shareholders at large. However, the plaintiff could not bring the suit derivatively on behalf of Covisint because he had not met the requirements for bringing a derivative action.⁶ The Court of Appeals affirmed, holding that the plaintiff’s claims were derivative under common law fiduciary duty principles and under the Business Corporation Act’s fiduciary duty provisions in MCL 450.1541a.⁷

Plaintiff filed an application for leave to appeal to the Michigan Supreme Court, on which the Court ordered a mini-oral argument on the application.⁸ The Court requested supplemental briefing from the parties on two issues: “(1) whether, with respect to Covisint Corporation’s cash-out merger with OpenText Corporation, corporate officers and directors owed cognizable common law fiduciary duties to the corporation’s shareholders independent of any statutory duty; and (2) whether the appellant has standing to bring a direct cause of action under either the common law or MCL 450.1541a.”⁹ The Court also invited briefs *amicus curiae* from the BLS and the Litigation Section.

The BLS convened an ad hoc *amicus* committee to consider the questions presented.¹⁰ The committee, comprising eight excellent business litigators of varying backgrounds, reached a consensus and prepared a brief arguing the following positions:

1. The plaintiff had standing to bring a direct action under the common law and MCL 450.1541a;
2. The Court should adopt Delaware’s “*Tooley test*”¹¹ to clarify Michigan’s caselaw on the direct/derivative determination;
3. Directors owe shareholders common law fiduciary duties, which MCL 450.1541a’s statutory duties did not abrogate; and

4. Directors have a specific duty to maximize shareholder value in cash-out mergers.

The BLS's Council approved the brief. After the parties' oral argument on the application, the Court dispensed with full merits briefing and argument and instead made its decision on the mini-oral argument on application. The Court issued an opinion adopting substantially all of the BLS's positions. First, the Court found that under Michigan's "common law, directors owe fiduciary duties first and foremost to the shareholders of the corporation,"¹² and that MCL 450.1541a did not abrogate those duties.¹³ And, "in the context of a cash-out merger transaction, directors of the target corporation must disclose all material facts regarding the merger and must discharge their fiduciary duties to maximize shareholder value by securing the highest value share price reasonably available."¹⁴ The Court also agreed that Michigan's existing direct/derivative tests were problematic, and, as the BLS suggested, adopted Delaware's *Tooley* test to clarify the existing tests and streamline the inquiry to two simple questions: "(1) who suffered the harm, and (2) who will receive the benefit of any remedy."¹⁵

Applying these principals and its newly clarified direct/derivative test, the Michigan Supreme Court found that because shares are personal property, any harm resulting from an inadequate cash-out price would directly injure the plaintiff.¹⁶ Moreover, characterizing plaintiff's claim as derivative "defies logic" — the per-share price received by shareholders does not involve any corporate interest; recovery by the acquiring corporation (here, OpenText), would provide it with a windfall; and the plaintiff would be left "with no avenue for relief."¹⁷ Accordingly, the Court held that the plaintiff had standing to bring his shareholder action directly and remanded the case back to the business court.¹⁸

NOTES

1. MCL 600.8301 *et seq.* The business court statute was signed October 2012 and became effective January 1, 2013. The current local administrative order for the Kent County Business Court may be found at <https://www.accesskent.com/Courts/17thcc/efiling.htm>.

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3. *Murphy v Inman*, No 161454, ___ Mich. ___, ___ NW2d ___ (Apr 5, 2022), 2022 WL 1020127.

4. In a cash-out merger, the target corporation's shareholders are divested of their ownership interests, for which they receive cash as consideration. *See id.* at *5.

5. Michigan's dissenters' rights statute, MCL 450.1754-1774, was not available to the plaintiff by virtue of the Covisint-OpenText merger's cash-out nature. *See* MCL 450.17462(b).

6. Specifically, the plaintiff had not met the "demand requirement" for bringing a derivative suit, which requires that a would-be derivative plaintiff first demand that the corporation take action on his allegations. MCL 450.1493a. Other standing requirements for derivative suits are found in MCL 450.1492a.

7. *Murphy v Inman*, unpublished per curiam opinion of the Court of Appeals, issued April 20, 2020 (Docket No. 345758). All citations to *Murphy* in this article are to the Michigan Supreme Court decision unless expressly noted.

8. Under MCR 7.305(H)(1), the Supreme Court may "direct argument on the application" in lieu of making the ultimate decision whether to grant leave to appeal. Per the Court's Internal Operating Procedures, a mini-oral argument on application "allows the Court to explore the issues in a case without the full briefing and submission that apply to a grant of leave to appeal." IOP 7.305(G)(1).

9. *Murphy*, 2022 WL 1020127 at *5.

10. Full disclosure: Mr. Toering and Mr. Markham served on the BLS's *amicus* committee, and Ms. Bolyea served on the Litigation Section's committee.

11. *Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031 (Del 2004).

12. *Murphy*, 2022 WL 1020127 at *7.

13. *Id.* at *10.

14. *Id.* at *8.

15. *Id.* at *12.

16. *Id.* at *13.

17. *Id.* at *13-14 ("[L]abeling plaintiff's claim as derivative would result in a windfall for OpenText, as it would have paid a reduced price for the Covisint shares and received a damage award payable to itself as a result of defendants' breach.?).

18. *Id.* at *14.



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*The Stark Reality: Stark Law Changes for Physician Group Practice Compensation Arrangements and How These Affect Business Lawyers**

By Theresamarie Mantese, Douglas L. Toering, and M. Jennifer Chaves

Introduction

The reach of health care laws extends far beyond the treatment of patients and proper billing procedures. Health care laws directly and indirectly regulate nearly every aspect of a health care provider's practice. The federal Physician Self-Referral Act, or "Stark Law," governs compensation arrangements and referrals between physicians and health service providers. Stark's broad scope and detail-laden exceptions place complex restrictions on matters otherwise categorized as employment or business law.

This article first highlights why business lawyers should care about health care laws. We provide a brief overview of the federal and Michigan-specific laws that regulate the health care profession.

Our discussion will then review the Stark Law and several of its heavily relied-upon exceptions that are of particular application to business lawyers who serve health care providers. These set out the required elements of various arrangements to avoid being deemed impermissible referrals. In this review, our primary goals are twofold. First, we aim to explain how the recent change to Stark's in-office ancillary services exception affects physician compensation models in group practices. Our second goal is to demonstrate how the Stark Law restricts a health care provider's business transactions.

Changes to Stark's in-office ancillary services (IOAS) exception took effect January 1, 2022.¹ The requirements to qualify as a group practice and utilize this exception are complex. Stark's amended group practice requirements now prohibit distributions of profits from designated health services on a service-by-service basis. Such distribution

arrangements are sometimes called "split-pooling" of profits. Our discussion of the IOAS exception includes an explanation of acceptable profit distribution models under the new law. We briefly conclude with the intersection of business transactions and the Stark Law.

Why Business Lawyers Should Care About Health Care Laws

The health care profession is regulated at both the federal and state level. Every business lawyer who represents health care clients needs a working understanding of health care statutes. This is true even when the attorney limits his or her representation to business matters and carefully avoids giving legal advice on health care topics. While some health care laws apply only to health care providers, many apply more broadly.

There are a few key federal and state laws that commonly restrict business transactions of health care providers. Primarily, these are the Stark Law, the federal Anti-Kickback Statute, and state laws on the corporate practice of medicine and fee-splitting. Examples of business transactions that are commonly impacted by these laws include employment contracts, transfers of business interests, sale of a health care entity, leases of office space or equipment, affiliate marketing agreements, marketing to and solicitation of patients, and vendor service and supply contracts. Although these transactions may appear routine, they should be scrutinized for conformity to applicable health care laws.

Violating health care laws can lead to a provider's Medicare and Medicaid exclusion, licensure issues, hefty civil penalties, and possibly criminal liability. Even where

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Every business lawyer who represents health care clients needs a working understanding of health care statutes.

no violation has occurred, the mere appearance of unlawful conduct can trigger onerous fraud investigations. These investigations are often costly and can continue for years—consequences that most clients are obviously eager to avoid.

Some health care laws extend beyond health care providers to vendors and other economic players on the periphery of the health care profession. Anytime the client's transactions intersect with the health care field, business lawyers should use care. With research and thoughtful planning, most transactions can be structured to mitigate risk to the client.

Overview of Health Care Regulation

As mentioned, federal statutes impose a myriad of complex requirements on health care providers that affect nearly every aspect of their practices. This article is limited to a focus on, and practical implications of, the Stark Law.² However, the wary lawyer should consider the many other federal statutes that govern health care practice. These include the False Claims Act,³ the Anti-Kickback Statute,⁴ the Civil Monetary Penalties Law,⁵ the Health Insurance Portability and Accountability Act (HIPAA),⁶ the Emergency Medical Treatment and Labor Act (EMTALA),⁷ the Health Information Technology for Economic and Clinical Health Act (HITECH Act),⁸ and the Health Care Quality Improvement Act (HCQIA).⁹ Federal administrative agencies further affect the regulatory landscape with interpretive rules, fraud alerts, and advisory opinions. Also, some health care providers must pay special attention to antitrust laws when engaging in business transactions.

Additionally, Michigan has its own laws on physician licensure,¹⁰ fee-splitting and anti-kickback,¹¹ false claims,¹² and the corporate practice of medicine.¹³ Importantly, some of these state laws apply more broadly than their federal counterparts. Michigan's fee-splitting statute, for example, applies to all medical treatments, procedures, and services, not only those billed to a government payor.

What Is the Stark Law?

The Stark Law aims to minimize financial incentives for physicians who recommend unnecessary tests, services, and procedures at the government's expense. To accomplish

this, the statute limits the circumstances under which a physician may refer a patient for certain health services, called "designated health services" (DHS). When a physician has a financial relationship with an entity that provides such services, Stark prohibits the physician from referring patients to the entity for DHS if the DHS are payable by Medicare—unless an exception applies.¹⁴ If such a referral for DHS is made (and no exception applies), the entity may not bill Medicare and must refund any payment received from Medicare.

The Stark Law's prohibitions reach broadly. Many common medical tests, procedures, and services fall under the definition of designated health services. Examples of DHS include laboratory services, physical therapy, occupational therapy, outpatient prescription drugs, home health services, prosthetics, hospital procedures and services, speech-language pathology services, and some equipment and supplies.¹⁵ Every year the Centers for Medicare and Medicaid Services (CMS) publish an updated list of medical billing codes that qualify as designated health services.¹⁶

The term "referral" is similarly broad. It covers not only designated health services requested by the physician, but also DHS requested by another physician if the initial physician referred the patient to the second physician. A referral also includes DHS furnished by another physician within the referring physician's own practice.¹⁷ Additionally, the term "physician" includes doctors of medicine or osteopathy that are legally authorized to practice medicine and surgery by the state and other specialized health care providers, such as dentists, chiropractors, optometrists, and podiatrists.¹⁸

Most notably, the broad definition of "financial relationship" encompasses nearly all economic activities, from ownership or investment interests to direct or indirect compensation arrangements, between a referring physician or his or her immediate family members and a DHS provider. Physician salaries, equipment and office leases by physician-owned entities, and even nonmonetary benefits that physicians receive from hospitals or vendors create a financial relationship between the parties for purposes of the Stark Law. Stark also extends to indirect financial arrangements, such as physician ownership of a legal entity that owns shares in a DHS provider to which the physician makes re-

referrals.¹⁹ Furthermore, the Stark Law defines immediate family members to include many relations that common parlance would instead categorize as extended family members. Brothers-in-law, sisters-in-law, the spouses of grandparents, and the spouses of grandchildren are all deemed immediate family members under Stark.²⁰

However, it is not only Stark's expansive definitions that make it so potent. The Stark Law is what is known as a strict liability statute. That is because physicians can be held liable for violating its prohibitions, even absent an intent to do so. Stark imposes a \$15,000 penalty for each billing and refund violation, and penalties up to \$10,000 per day for certain reporting failures. A \$100,000 penalty applies to indirect referral schemes designed to circumvent the statute.²¹ The U.S. Department of Justice typically enforces the Stark Law through the False Claims Act, which can trigger both civil and criminal liability. Additionally, the Office of the Inspector General has authority to exclude Stark violators from participation in all federal health care programs. Consequently, violators risk significant loss of future revenue from Medicare, Medicaid, and other government-payor health care programs.²²

Stark Law Exceptions

Despite such heavy penalties, there are many examples of routine practices in the health care profession that may appear to violate the Stark Law. These are allowed because Stark provides a multitude of exceptions that permit physicians to make otherwise-prohibited referrals. Nearly all customary referral and compensation arrangements between physicians and DHS providers operate under a Stark Law exception. Several common exceptions are described below.

In-Office Ancillary Services (IOAS)

Exception

Many physicians refer patients for designated health services that are provided within the physician's own practice. In the case of a group practice, these are mostly diagnostic testing, but also include some therapy services. Physicians typically refer these services to internal units in their own practice under the exception for IOAS. The IOAS exception specifies who must provide the DHS, where the DHS must be provided, and who can bill for the service.²³

Stark limits this exception to medical groups that qualify as a group practice and solo practitioners.²⁴ CMS amended the definition of a group practice with its recent changes to the Stark Law. We reserve discussion of those changes for later in this article.

Under the IOAS exception, the DHS may be provided only by the referring physician, another physician in the group practice, an individual who is supervised by the referring physician, or by another physician in the same group practice. The referring physician must be present and order the DHS during a patient visit or must be present while the DHS is furnished. Further, the patient receiving the DHS must usually receive care from the referring physician or a member of the physician's group practice.

The IOAS exception demonstrates Stark's far-reaching effects on business transactions. In addition to other requirements, it requires the DHS to be provided at one of a few specified locations.²⁵ Under the first location option, DHS may be provided in the same building as the physician's or medical group's office, if all the following criteria are met:

- the office is normally open to patients for medical services at least 35 hours per week;
- a physician or another member of the group regularly practices medicine and provides physician services to patients at least 30 hours per week; and
- that physician provides some services to patients that are unrelated to provision of DHS.

Another location option under the IOAS exception speaks of a centralized building. The centralized building may be all or part of a building, including a mobile vehicle or trailer, that is owned or leased on a full-time basis by a group practice (24 hours a day, 7 days per week for no less than six months) and that is used exclusively by the group practice. However, the definition of centralized building excludes space shared with a third party.²⁶ Thus, the Stark IOAS exception affects employment practices such as physician work hours, business hours, and even property leases.

Billing for IOAS must be by (1) the physician performing or supervising the service, (2) the group practice of the performing or supervising physician under the group practice's billing number, (3) an entity that is

The Stark Law aims to minimize financial incentives for physicians who recommend unnecessary tests, services, and procedures at the government's expense.

wholly owned by the performing or supervising physician or that physician's group practice, or (4) a third-party billing company acting as an agent of the physician or group practice, or the wholly owned entity.

Although these are some of the key elements to be aware of for a properly designed IOAS arrangement, additional specific rules apply for certain, durable medical equipment, home care physicians, MRI, CT, and PET scans, Academic Medical Centers, Ambulatory Surgical Centers, and other situations, which extend beyond the scope of this article. However, careful review of the statute and regulations is imperative for application to any proposed IOAS arrangement.

Bona Fide Employment Relationships Exception

Another Stark exception that authorizes familiar health care referral arrangements is the bona fide employment relationships exception.²⁷ A physician who refers patients to his or her employer for DHS typically does so pursuant to this exception. To fall within the exception, the parties must have an employment agreement for specific, identifiable services. The physician's compensation cannot be determined in any way that accounts for the volume or value of physician referrals made to the employer unless the compensation or formula for determining the compensation is set in advance for the duration of the arrangement, and patient choice is maintained. The employer must pay fair market value for the physician's services, and the physician's compensation under the agreement must be commercially reasonable even if the physician makes no referrals to the employer. Other requirements also apply. As with the IOAS exception, here again the Stark Law reaches beyond health care law into employment and transactional matters.

Personal Service Arrangements Exception

Stark also provides an exception for work performed for a DHS provider by a non-employee physician. This exception allows a DHS provider to compensate a referring physician for personal services he or she provides to the DHS provider under contract.²⁸ Although this exception fits many different types of work arrangements, Stark limits its scope to services that are "reasonable and necessary for the legitimate business purposes of the arrangement(s)." The arrangement must be set out in a writing, which includes

the services to be provided by the physician, and the compensation must be consistent with fair market value. Other than for certain qualified types of incentive plans, the compensation in such arrangements must not be based on the volume or value of referrals or other business generated between the parties. The arrangement must be for no less than one year; and if canceled during the initial year, it cannot be renewed on the same or substantially the same terms during the remainder of the one-year term.

Office Space and Equipment Lease Exceptions

Stark offers separate exceptions for leases and rentals of office space and equipment.²⁹ Both exceptions contain similar requirements. Most notably, the rent payments must be set in advance, must not take into account the volume or value of referrals between the parties, must be consistent with fair market value, and cannot exceed what is reasonable and necessary for the legitimate business purpose of the lease. These exceptions also require, among other things, a written lease agreement that specifically describes the leased property for exclusive use by the lessee. Careful analysis by the attorney is imperative to avoid running afoul of these exceptions. Of particular note, care is needed to avoid the lessor or another tenant using the leased property or equipment during periods of exclusive use by the lessee under the lease.

Fair Market Value Compensation Exception

The fair market value compensation exception enables DHS providers and physicians to buy, sell, or lease items, services, and even office space and equipment to each other at fair market value without the requirements of a one-year term or exclusivity of use, if applied appropriately.³⁰ Among other requirements, the parties' agreement must be in writing, signed, and must be commercially reasonable even if no referrals were made between the parties. Moreover, the compensation amount cannot be tied to the volume or value of referrals or other business generated by the parties, with limited exceptions.

Other Exceptions

The Stark Law provides several other exceptions that enable desirable economic relations among physicians and DHS providers. For example, referring physicians may invest

Overall, the Stark Law dictates many aspects of a physician's practice, including compensation arrangements, sales, leases, and financial investments.

in publicly traded securities of large corporations that provide DHS.³¹ They may also invest in a hospital, if they are authorized to perform services there, or in a rural DHS provider.³² The one-time sale of property or a medical practice is permitted.³³ Furthermore, hospitals may provide certain benefits to medical staff, and DHS providers may give low-value, noncash gifts of appreciation to referring physicians.³⁴ As with the other Stark exceptions, the exceptions covering these transactions are subject to very specific requirements.

Overall, the Stark Law dictates many aspects of a physician's practice, including compensation arrangements, sales, leases, and financial investments. The law's detail-laden exceptions and sprawling restrictions create an intricate web of acceptable conduct. Counsel and clients must navigate Stark's prohibitions attentively.

Recent Changes for Group Practices

CMS recently amended and interpreted the Stark Law as it relates to group practices.³⁵ As mentioned earlier, medical groups relying on Stark's in-office ancillary services (IOAS) exception must meet the definition of a group practice. The Stark Law enumerates eight very specific requirements, all of which must be met to qualify as a group practice.³⁶ CMS's new regulations narrow and clarify the seventh requirement of a group practice, as discussed below.

Requirements to Qualify as a Group Practice

Of the eight requirements to qualify as a group practice under the IOAS exception, two relate to the group practice's corporate form and governance. Four requirements relate to the medical group's physician-members or the services they provide, and the final two restrict compensation, profit sharing, and distribution arrangements.

Single Legal Entity

To qualify as a group practice, the medical group must consist of a single legal entity that operates as a physician group. In limited situations, the single legal entity may consist of multiple legal entities in contiguous states.

Unified Business Test

The medical group must also meet the unified business test. That is, it must have con-

solidated billing, accounting, and financial reporting. Additionally, the medical group must have a "body representative" that performs centralized decision-making and maintains effective control over the group's assets and liabilities. The unified business test is intended to prevent loose confederations of physicians from joining together primarily to capture the profits from referrals.³⁷ Business attorneys who assist medical groups with corporate documents must understand these restrictions if the group utilizes the IOAS exception.

Members and Services

A group practice must have at least two physicians who are members. Independent contractors do not count as members, but owners and employees do. Physician-members of the group practice must personally perform at least 75 percent of the group practice's "physician-patient encounters." Also, each physician-member must furnish substantially the full range of patient care services that the referring physician routinely furnishes through the group practice.

Substantially All

In addition, "substantially all" (at least 75 percent) of the physician-members' total patient care services must be furnished through the group and billed under the group practice's billing number. Amounts received for these services must be treated as receipts of the group. Although there is flexibility in determining how to measure patient care services for the purpose of this "substantially all" (75 percent) requirement, records must be kept and made available to the Secretary of the Department of Health and Human Services³⁸ upon request. Stark provides an exception to the "substantially all" requirement for services provided in areas designated by CMS as having a shortage of health care professionals.

Compensation and Profit Sharing

A group practice must determine how it will distribute income and overhead expenses before payments are received. Additionally, physician-members may not be compensated based on the volume or value of their DHS referrals, directly or indirectly. However, special rules permit productivity bonuses and certain DHS profit-sharing arrangements. A physician in the group may be paid a share of "overall profits" from DHS that is not directly related to the volume or value of

Of the eight requirements to qualify as a group practice under the IOAS exception, two relate to the group practice's corporate form and governance.

his or her referrals. Many medical groups utilize these special rules to lawfully engage in various profit-sharing arrangements.

Split-Pooling Under the Special Rules for DHS Profit Sharing

Earlier Definition of “Overall Profits”

CMS amended the definition of “overall profits” related to DHS profit sharing in these special rules for physician compensation. Prior to this change, “overall profits” meant either “the group’s entire profits derived from [DHS]” or “the profits derived from [DHS] of any component of the group practice that consists of at least five physicians.”³⁹

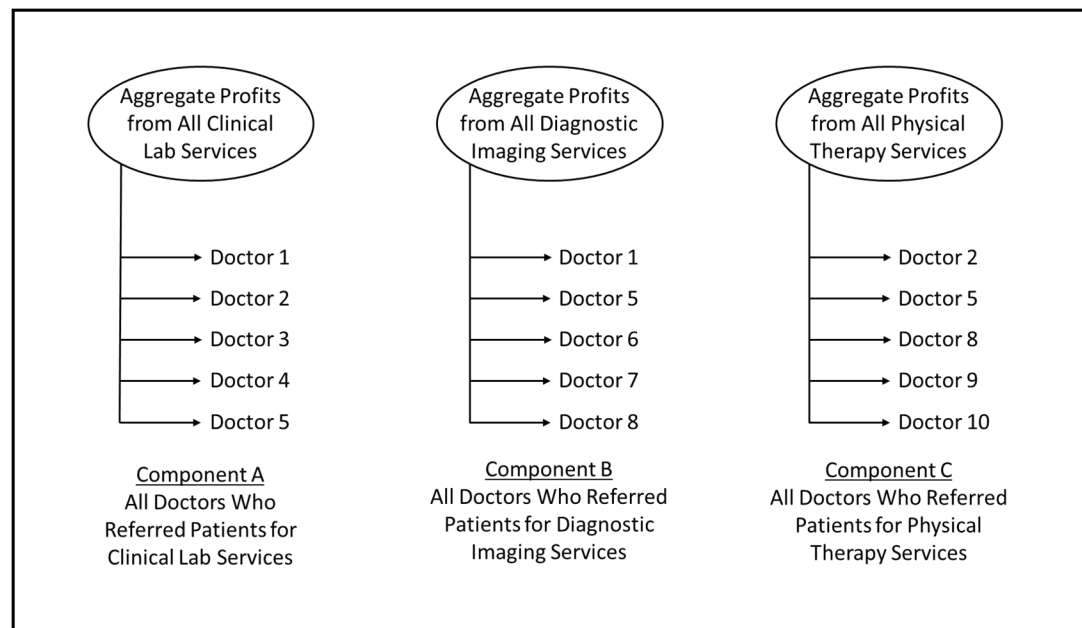
Interpretation of Earlier Definition (Split-Pooling Model)

Some medical groups utilizing the IOAS exception interpreted this earlier definition to allow distributions of DHS profits on a service-by-service basis, sometimes called split-pooling. Under that distribution model, medical groups formed components based on DHS. Typically, a medical group would form components so that each DHS category corresponded to one component, such as one component for clinical laboratory services

and one component for diagnostic imaging services. All profits from each DHS category (which are all profits within that particular component) would be aggregated and then distributed to all physicians in the medical group who, by circumstance, happened to refer patients to receive that corresponding DHS.

Figure 1 illustrates split-pooling using clinical laboratory services, diagnostic imaging services, and physical therapy services, all of which are DHS. For example, in Figure 1, all profits from clinical laboratory services would be aggregated into the corresponding clinical laboratory services component and then distributed to the physicians who referred patients to receive clinical laboratory services (Doctors 1-5). Those referring physicians would then become the physicians in that component and, under a split-pooling model, those physicians would receive profits from the clinical laboratory services component. Thus, using a split-pooling model, the kind of referrals alone caused physicians to be placed into components. The earlier definition of “overall profits” further complicated the split-pooling distribution model by requiring a minimum of five physicians per component.

Figure 1. DHS Profit Aggregation & Distribution by Service (Split-Pooling)



The Stark Law’s detailed provisions require vigilance from counsel when handling business transactions or litigation for health care providers.

When using a split-pooling model, a single physician could have been (and often was) a member of multiple components. In Figure 1, Doctor 5 is a member of all three components, because he or she refers patients for clinical laboratory services, diagnostic imaging services, and physical therapy services. As the name split-pooling implies, the profits from Doctor 5's various DHS referrals are thus split among three different pools (components).

Under a split-pooling model, profits from a specific DHS were distributed to all physicians who referred patients for that particular DHS. However, because of Stark's restrictions, the profits were not distributed according to the volume or value of referrals. For example, the amount of total profits from diagnostic imaging services, after aggregating, could *not* be distributed pro rata according to the value of each physician's diagnostic imaging referrals. Per capita distribution (20 percent for each of five physicians), however, would have been an acceptable distribution method.

Recent Changes to the Special Rules for DHS Profit Sharing

Amended Definition of "Overall Profits"

CMS revised the definition of "overall profits" in the special rules of the IOAS exception's group practice definition. The new definition of "overall profits" adds the words "all the" immediately before "designated health services," among other changes. It now reads:

Overall profits means the profits

derived from *all the* designated health services of any component of the group that consists of at least five physicians, which may include all physicians in the group. If there are fewer than five physicians in the group, overall profits means the profits derived from *all the* designated health services of the group.⁴⁰ (Emphasis added.)

CMS implemented this change to the special rules specifically to prohibit the split-pooling distribution model.⁴¹

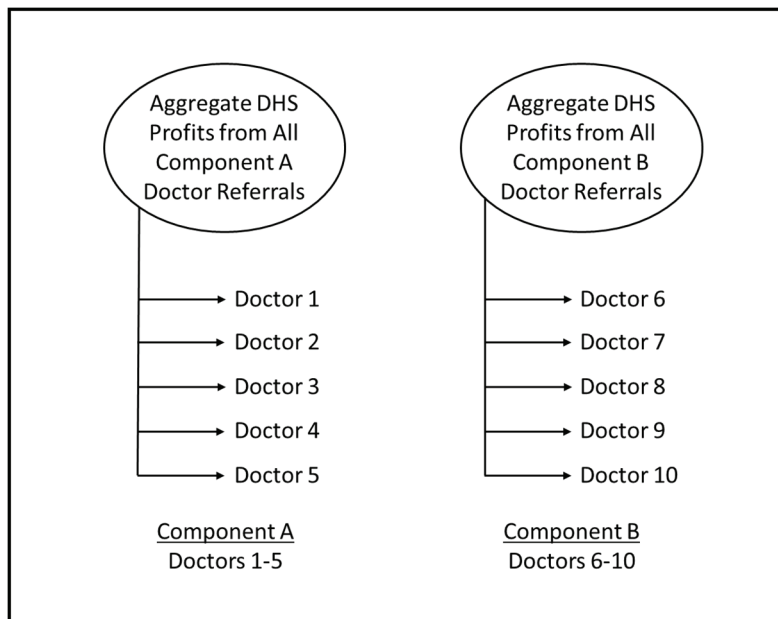
Interpretation of New Definition (Physician Group Model)

The new definition leaves many aspects of acceptable DHS profit-sharing models unchanged. As before, a medical group may still aggregate DHS profits within each component and distribute them to that component's physicians, assuming it has enough physicians to do so. The five-physician minimum per component also remains unchanged.

What has changed is the process of assigning physicians to a component. If a medical group is using components to aggregate and distribute DHS profits, it may no longer form components on a service-by-service basis (split-pooling). Instead, it must intentionally place each physician in a *single component*, thereby creating components that are best described as physician groups. Although no physician may be placed in more than one component, different physicians may be separated into different components, as shown in Figure 2.

When a DHS provider gives anything of value to a referring physician (for any reason), the transaction must comply with one of Stark's exceptions.

Figure 2. DHS Profit Aggregation & Distribution by Physician Group



The restriction that each physician may join only one component results from the new definition. “Overall profits” are “profits derived from *all the* designated health services of any component.” If a single physician were to be placed in two components, then neither of those two components would be able to aggregate profits from *all the* DHS of the physicians in that particular component. Rather, the DHS profits from the physician in two components would have to be split between those two components (split-pooling), which is now prohibited.

Forming Components under the New Physician Group Model

In its commentary on the new definition, CMS explained that physicians may be placed in components based on any criteria that does not directly relate to the volume or value of DHS referrals.⁴² Acceptable criteria for placing physicians in components include similar practice patterns, similar practice locations, similar years of experience, and similar years of tenure with the medical group.

Distributing DHS Profits under the New Physician Group Model

A component’s *aggregate* DHS profits may be distributed to the component’s physicians using any method that does not directly relate to the volume or value of DHS referrals. Different distribution methods may be used for different components. The definition of “overall profits” explicitly permits per capita distributions and distributions based on a physician’s personal productivity.⁴³ Some medical groups choose to distribute profits according to ownership interests.

Furthermore, a medical group may treat different components differently when it comes to the decision to distribute DHS profits.⁴⁴ For example, a medical group may choose to distribute all aggregated DHS profits from Component A to the Component A physicians, but choose not to distribute any Component B DHS profits, or choose to distribute only a portion of the Component B profits to the Component B physicians.

Eligibility to Receive DHS Profits under the New Physician Group Model

Under Stark’s IOAS exception and its special rules on DHS profit sharing, all physicians in a component may receive DHS profits. That is, owners, employees, and independent contractors in a component are all eligible to

receive a share of the aggregated profits from that component.⁴⁵ However, a medical group may establish its own eligibility standards that restrict some physicians from receiving profits, provided, of course, that those standards do not relate to the volume or value of DHS referrals. Eligibility could be premised on considerations such as length of time with the medical group, whether the physician is an owner, employee, or independent contractor, or the number of hours the physician typically works.⁴⁶

Record Keeping

The definition of “overall profits” in the special rules requires careful bookkeeping. Medical groups utilizing the IOAS exception must maintain records of their profit share calculations and supporting documentation.⁴⁷

Stark Affects Business Transactions and Disputes

The Stark Law’s detailed provisions require vigilance from counsel when handling business transactions or litigation for health care providers. In general, a good place to begin is to identify whether the Stark Law applies, and then if so, determine whether a Stark exception, if any, applies.

For medical groups and physicians, employment agreements and contracts for personal services are directly impacted by the Stark Law, although other types of transactions can also be impacted and other health care laws can restrict business transactions. The contents of the employment agreement will vary depending on the needs of the practice and the applicable Stark exception. If the physician’s referrals will fall under the IOAS exception, the agreement should incorporate Stark’s business practice requirements and describe a compliant physician-compensation arrangement.

As for litigation, claims of minority owner oppression⁴⁸ between physicians in a group practice may give rise to scenarios with restricted settlement options. In the event a dispute is settled, counsel must verify that any payment to a health care provider does not run afoul of Stark. Counsel should also consider Stark’s restrictions when developing damages models.

Conclusion

Health care providers do business in a complex regulatory setting. Some health care laws apply even to entities that do not them-

selves provide health care services. Business attorneys who represent these clients should have a general understanding of the statutes that govern the practice of medicine.

The Stark Law is a complex federal statute that significantly limits many aspects of health care practice. When a DHS provider gives anything of value to a referring physician (for any reason), the transaction must comply with one of Stark's exceptions. Health care providers should consider potential Stark restrictions before engaging in business transactions, generally, and physician compensation arrangements, in particular.

CMS recently changed the definition of "overall profits" in Stark's IOAS exception. Medical groups relying on this exception may no longer aggregate profits from a specific DHS category. Overall, the Stark Law affects many aspects of a health care provider's practice. Business attorneys who represent health care providers or those who do business with health care providers should be familiar with how Stark affects their clients.

30. 42 CFR 411.357(l).
31. 42 CFR 411.356(a).
32. 42 CFR 411.356(c).
33. 42 CFR 411.357(f).
34. 42 CFR 411.357(m); 42 CFR 411.357(k).
35. 85 FR 77561.
36. 42 CFR 411.352.
37. 85 FR 77564.
38. 85 FR 77492.
39. 85 FR 77561.
40. 42 CFR 411.352(i)(1)(ii).
41. 85 FR 77561.
42. 85 FR 77565.
43. 42 CFR 411.352.
44. 85 FR 77563; 42 CFR 411.351.
45. 85 FR 77565.
46. 85 FR 77563.
47. 42 CFR 411.352(i)(4).
48. MCL 450.1489; MCL 450.4515.



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NOTES

1. 85 FR 77561.
2. 42 USC 1395nn.
3. 31 USC 3729.
4. 42 USC 1320a-7b.
5. 42 USC 1320a-7a.
6. Pub L No 104-191.
7. 42 USC 1395dd.
8. Pub L No 104-191, Title XIII.
9. Pub L 99-660, Title IV.
10. MCL 333.17011.
11. MCL 750.428; MCL 333.16221(d)(ii); MCL 445.162.
12. MCL 752.1001 *et seq.*; MCL 400.601 *et seq.*
13. MCL 450.1281.
14. 42 USC 1395nn.
15. 42 CFR 411.351.
16. <https://www.cms.gov/Medicare/Fraud-and-Abuse/PhysicianSelfReferral>.
17. 42 USC 1395nn(h)(5)(A).
18. 42 CFR 411.351; 42 USC 1395(x)(r).
19. 42 CFR 411.354.
20. 42 CFR 411.351.
21. 42 USC 1395nn(g)(3)-(4).
22. 42 USC 1395y(o).
23. 42 CFR 411.355(b).
24. 42 CFR 411.355(b).
25. 42 CFR 411.355(b)(2)(i)(A).
26. 42 CFR 411.355(b)(2)(ii)-(iii); 42 CFR 411.351.
27. 42 CFR 411.357(c).
28. 42 CFR 411.357(d).
29. 42 CFR 411.357(a)-(b).



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Case Digests

Prepared by Matthew J. Franson

Murphy v Inman, No 161454, ___ Mich ___, ___ NW2d ___ (Apr 5, 2022)

Plaintiff, a shareholder of Covisint Corporation, sued the Covisint board of directors, alleging they breached their statutory and common-law fiduciary duties when the company entered into a cash-out merger agreement. The Michigan Court of Appeals affirmed the lower court's decision to grant the board of directors' motion for summary disposition, reasoning that plaintiff lacked standing to bring a direct shareholder action. On appeal, the issues before the Michigan Supreme Court were (1) whether corporate directors owe fiduciary duties directly to the shareholders of the corporation under Michigan law, and, if so, what those duties entail with respect to a cash-out merger transaction; and (2) whether a shareholder alleging that corporate directors breached their fiduciary duties in handling a cash-out merger must bring that claim as a direct or derivative shareholder action. The court held that under Michigan common law, directors owe fiduciary duties first and foremost to the corporation's shareholders. In the context of a cash-out merger transaction, "directors of the target corporation must disclose all material facts regarding the merger and must discharge their fiduciary duties to maximize shareholder value by securing the highest value share price reasonably available." *Id.* slip op at *14-15. Furthermore, based on the current language of the Business Corporation Act (BCA), MCL 450.1101 et seq., and its statutory history, the BCA did not abrogate the board of directors' common-law fiduciary duties. Thus, corporate directors owe their shareholders fiduciary duties under Michigan common law independent of the duties prescribed in the BCA. Next, adopting the framework outlined by the Delaware Supreme Court in *Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031, 1033 (Del 2004), the court held that to distinguish between direct and derivative actions in Michigan, "courts must ask (1) who suffered the alleged harm, and (2) who would receive the benefit of any remedy recovered." *Murphy*, slip op at *28. If the answer to both questions is the corporation, then the action is derivative. If the harm is suffered by shareholders independent of the corporation and the shareholders receive the remedy rather than the corporation, it is a direct action. Based on this analysis, the court reversed the lower court and concluded that plaintiff had standing to bring a direct shareholder action.

Hawkins v Cintas Corp, 32 F4th 625 (6th Cir 2022)

Plaintiffs, as former employees of Cintas, brought a punitive class action lawsuit against Cintas under ERISA §502(a)(2), alleging breaches of defendants' fiduciary duties owed to the employer's ERISA plan (the "Plan"). In district court and on appeal, Cintas argued that plaintiffs agreed to arbitrate all "rights and claims" relating to their

employment, including the ERISA claims at issue in the lawsuit. On appeal, the circuit court determined that the "weight of authority and the nature of §502(a)(2) claims suggest that these claims belong to the Plan, not to individual plaintiffs. Therefore, the arbitration provisions in these individual employment agreements—which only establish [plaintiffs'] consent to arbitration, not the plan's—do not mandate that these claims be arbitrated." *Hawkins v Cintas Corp*, 32 F4th 625, 627 (6th Cir 2022). The court, citing precedent outside the Sixth Circuit, further held that despite the §502(a)(2) claims being brought by individual plaintiffs, "it is the plan that takes legal claim to the recovery," and that "the claim really 'belongs' to the Plan" *Id.* at 633. Thus, "because §502(a)(2) claims 'belong' to the Plan, an arbitration agreement that binds only individual participants cannot bring such claims into arbitration." *Id.* Lastly, the court held that even if plaintiffs' claims were covered by the arbitration provision, compelling arbitration would still be improper, absent the Plan's consent to arbitrate, because the "right" to bring a §502(a)(2) claim is not necessarily exclusive, as these claims belong to the Plan as well as to individual plaintiffs. Therefore, the district court's conclusion that the §502(a)(2) claims are not covered by the arbitration agreement signed by plaintiffs, that the Plan's consent is required for arbitration, and that the Plan has not in fact consented to arbitration is affirmed.

City of Taylor Gen Emps Ret Sys v Astec Indus, Inc, 29 F4th 802 (6th Cir 2022)

After years of reports that Astec's wood-pellet business was thriving, more recent reports and the CEO's statements indicated that it was losing money and the plant would ultimately be closed at a significant loss. Shortly thereafter, plaintiff shareholders filed suit against the company, the CEO, and the corporate executives, asserting the company released misleading reports, and the CEO made misleading statements. Plaintiffs brought two claims: (1) violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 against all defendants, and (2) violation of Section 20(a) of the Exchange Act against the CEO and executives. The district court dismissed the complaint, holding that plaintiffs failed to identify with specificity why the statements they quoted in the complaint were in fact misleading. The court noted that plaintiffs' complaint was a "puzzle pleading" because it was "merely a long list of quotes followed by some generalized allegations of fraud." *City of Taylor Gen Emps Ret Sys v Astec Indus, Inc*, 29 F4th 802, 809 (6th Cir 2022). On appeal, the circuit court stated that while "plaintiffs' complaint is not a model of clarity or conciseness, it sufficiently pleads fraudulent statements" holding that it complied with FRCP 9(b) requirements. *Id.* at 810. Furthermore, the court determined that "even if the factual allegations are lengthy, the complaint's theory of liability is clear..." *Id.* at 812. Moving to the individual defendants, the court held that "a holistic review of [the CEO's] statements reveals a theme: relentless, unfounded optimism that was contradicted by the

undisclosed facts.” *Id.* at 813. Thus, given the CEO’s misleading statements and action, the court was “satisfied that plaintiffs have pleaded a strong inference of ‘knowing and deliberate intent to manipulate, deceive, or defraud’ or, at minimum, [act with] recklessness.” *Id.* at 814 (citations omitted). Regarding Astec, the court held that “the § 10(b) claims against the company rise and fall with the claims against the individual defendants.” *Id.* at 816. Because plaintiffs established a claim against the CEO “his state of mind could be imputed to Astec.” *Id.* Finally, the court noted that plaintiffs had abandoned their claims against the corporate executives. Thus, the circuit court affirmed the district court’s judgment against the corporate executives but reversed as to the CEO and Astec.

***Johnson v Michigan Minority Purchasing Council*, No 357979, ___ Mich App ___, ___ NW2d ___ (Mar 3, 2022)**

For many years, plaintiffs were certified as minority business enterprises (MBE) by defendant. After a change of leadership in plaintiffs’ organization, plaintiffs were informed by defendant that, because none of the companies were managed on a day-to-day basis by one or more minority group members, they would no longer be MBE certified. Plaintiff filed suit and sought a preliminary injunction to reinstate MBE certifications, which the circuit court granted. Defendant appealed the granting of the injunction. The Michigan Court of Appeals first considered the likelihood of success on the merits. The court examined a release executed by the parties, wherein plaintiff agreed “to hold [defendant] free and harmless from any and all claims, demands, and damages whatsoever arising out of the presentation” of the MBE applications. *Johnson v Michigan Minority Purchasing Council*, No 357979, ___ Mich App ___, at *1, ___ NW2d ___ (Mar 3, 2022). The court found that this “hold-harmless provision could greatly inhibit plaintiffs’ chances of establishing a substantial likelihood of success on the merits of their claims.” *Id.* at *3. The court also found that plaintiffs’ tortious interference claims were unlikely to succeed, noting that the evidence had not established that defendants acted with the intent to cause a breach or termination of plaintiffs’ business relationships, or that they did anything illegal, unethical, or fraudulent. The court noted that plaintiffs’ have likewise not shown a substantial likelihood of success on the merits for their negligence, defamation, and declaratory relief claims. Finding that plaintiffs were unlikely to succeed on any of their claims, the court next turned to irreparable harm. On this factor, the court determined that plaintiffs established that a loss of MBE certifications could cause a significant loss of goodwill absent an injunction. Ultimately, the court upheld the circuit court’s granting of the injunctive relief, noting “[w]e are not blind to the uniqueness of affirming a preliminary injunction when we have concluded that most of plaintiffs’ claims will not likely succeed on the merits . . .” *Id.* at *9. However, the court held that much deference must be given on appeal to the circuit court’s decision to

grant the injunction. Moreover, “the four factors governing consideration of injunctive relief are meant to ‘simply guide the discretion of the court; they are not meant to be rigid and unbending requirements.’” *Id.* (citations omitted).

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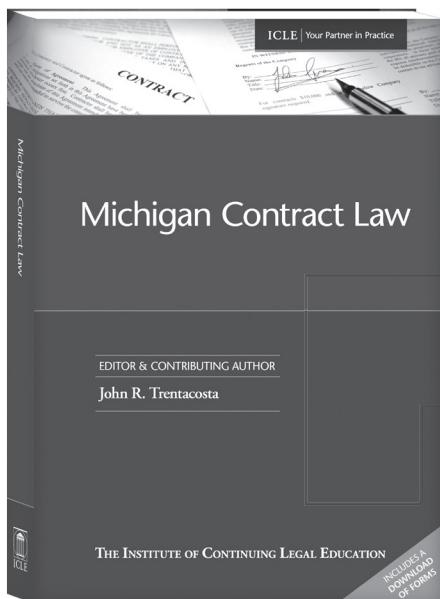
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