State Bar of Michigan
BLS
Business Law Section

The Michigan Business Law JOURNAL

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Issue 2
Summer 2025

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SBM
State Bar of Michigan
Published by THE BUSINESS LAW SECTION, State Bar of Michigan

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 Tala Dahbour, ICLE, 1020 Greene Street, Ann Arbor, Michigan, 48109-1444, tdahbour@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 2026	November 30, 2025
Summer 2026	March 31, 2026
Fall 2026	July 31, 2026
Spring 2027	November 30, 2026

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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.

The *Michigan Business Law Journal* (ISSN 0899-9651), is published three times per year by the Business Law Section, State Bar of Michigan, 306 Townsend St., Lansing, Michigan.

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 Ian Williamson

As I write this final column as chairperson of the Business Law Section, I find myself in the midst of a multi-week jury trial. Most Michigan business litigators will understand that this means I've spent more time inside a courtroom over the past month than I have during the preceding five years combined. For many of us, that's a disheartening reality. I count myself among those who miss the rhythm of in-person motion calls, the energy of a full courtroom, the excitement of presenting arguments before a live audience of peers, the joy of seeing friends and colleagues unexpectedly, and the invaluable practice insights gleaned from observing what does and doesn't work before different judges.

While the efficiency of remote hearings has yielded clear economic benefits for clients, five years of predominantly virtual practice in Michigan's business courts have fundamentally changed the experience of business litigation. This transformation happened swiftly—just 13 years ago, business courts were still in the pilot stage, and the Section had formed an ad hoc committee to explore what would eventually become Michigan's business court legislation.[1] The statewide implementation of business courts and the pandemic-driven shift to virtual hearings brought about marked changes sometimes even within a single case. For example, my partner Gerard Mantese and I first tried *Franks v. Franks* in person before a general jurisdiction circuit judge as the case pre-dated Michigan's business court legislation. After remand by the Court of Appeals, we re-tried the matter entirely via Zoom before a judge dedicated to the business court docket.[2]

Today, business law and litigation are undergoing another seismic shift—this time driven by the rapid development and adoption of AI-powered tools. Although stories still surface about lawyers being reprimanded for submitting briefs filled with imaginary citations generated by general-purpose AI tools like ChatGPT, the broader trend is clear: legal professionals are increasingly embracing AI-enhanced software for practice management, research, document review, and document editing.[3] It seems inevitable in the light of these technological advances that the pace of change in our profession will only accelerate over the next five years.

In this context, standing in an actual courtroom before a jury and examining witnesses in person can feel almost quaint, despite our ability to display documents onscreen in real time, highlight key excerpts instantly, and play audio or video clips at a moment's notice. And the foundational rules of persuasion remain unchanged: the side that most effectively evokes a sense of injustice in the jury is more likely to prevail. But everything leading up to that moment—from research and document review to jury selection strategy—is increasingly accomplished with the aid of AI-enhanced tools.

As these technological and cultural shifts reshape our profession, the Business Law Section remains a vital resource and community for Michigan attorneys. The Section continues to fulfill its mission by: (1) expanding resources for business lawyers through educational, networking, and mentoring opportunities; (2) reviewing and promoting improvements to Michigan's business laws and regulations; and (3) fostering service, professionalism, and collegiality within the practice. Our programming is timely, substantive, and rich in both variety and networking opportunities. Committees like the Corporate Laws Committee routinely examine and propose legislative reforms affecting Michigan businesses, and all are open to participation by interested members. As I and many past chairs have said, the Section is a community that welcomes initiative—contacting a committee chair and proposing ideas for programming is a great way to get involved quickly.

Serving on the Section's council and executive committee has given me the chance to collaborate with a wide range of intelligent, creative, and committed attorneys. It has been an honor to help guide the Section—if only briefly—as it continues to thrive through the dedication of so many who contribute their time and talents. I'll close with a quote shared a decade ago by James Carey, our current Nominating Director, a past chair, and this year's well-deserving recipient of the Steven H. Schulman Award: "Every new beginning comes from some other beginning's end."[4] My time on council may be coming to an end, but I am looking forward to a "new beginning" of continued involvement in the Section as a chairperson *ex officio*.

As a final note, I would like to acknowledge the remarkable contributions of the late Cyril Moscow—longtime Honigman partner, co-author of *Michigan Corporation Law and Practice*, past chairperson of the Business Law Section, and one of the first recipients of the Schulman Award. Cy's recognitions and accolades as a lawyer and a person are too numerous to list; his lengthy and generous participation in the Business Law Section is just one aspect of his extraordinary legacy and impact on Michigan business law.[5]

NOTES

1. Edwin Lukas, *From the Desk of the Chairperson*, 32 MI Bus LJ 1 (Spring 2012).
2. *Franks v Franks*, 330 Mich App 69, 944 NW2d 388 (2019).
3. In keeping with these trends, I ran the initial draft of this column through ChatGPT 4o to edit for brevity as it was getting too long. ChatGPT managed to cut out 100 words without changing the

tone too much, which I promptly added back in when I made my own final edits, including these endnotes.

4. James L. Carey, *From the Desk of the Chairperson*, 35 MI Bus LJ 1 (Summer 2015). In his article, Jim attributes this quote to both the hit song "Closing Time" by the band Semisonic and to the ancient Roman philosopher Seneca the Elder (or his son, Seneca the Younger).

5. See Cyril Moscow's Obituary, available at: https://obits.mlive.com/us/obituaries/annarbor/name/cyril-moscow-obituary?id=58104280.

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 By Alexis Lupo

Corporations Division Launches MiBusiness Registry Portal

The Michigan Corporations Division launched the MiBusiness Registry Portal on June 23, 2025.

Designed to modernize interactions between businesses and the state, this system represents a leap forward in how entities are formed and maintained in Michigan.

Legal professionals who regularly interact with Michigan's business registry are encouraged to begin preparing for this transition. The new portal will serve as the central hub for filings, records, and certificates, completely replacing the system currently in use.

The MiBusiness Registry Portal is the resource for:

- entity formation
- annual report and statement submissions
- document filing throughout the life of an entity
- certificate and document copy orders
- entity searches and record access

The portal is the outcome of a collaborative project with a vendor that has successfully implemented similar systems in California, Pennsylvania, New Mexico, and other states. It is a modern system intended to deliver a more efficient and user-friendly experience.

MiLogin for Business

Access to the new system to submit documents or place orders will require a MiLogin for Business account, which is the State of Michigan's secure identity and access management platform. This is separate from a personal MiLogin account, and it is required for anyone submitting filings or requesting certificates or copies. A MiLogin for Business account is not required to perform searches.

Each user must create their own account. Shared login credentials are not permitted, and doing so could result in payment processing errors, such as duplicative charges.

If you already have a MiLogin for Business account, then after June 23, to access the portal, you must use the "Find Services" feature to locate the Department of Licensing and Regulatory Affairs and then select the MiBusiness Registry Portal.

Fortunately, if you currently use an Account on File for payment, those credentials will continue to function. Also, the system will include a shopping cart feature, allowing payments for multiple filings or order items rather than requiring payment for each transaction individually.

Changes to Filing Procedures

Elimination of CID and PIN

The current method of accessing records using a CID and PIN will be eliminated. All access and filings will now go through authenticated MiLogin for Business accounts.

Mandatory Online Submission of Annual Reports and Statements

Paper filings for annual reports and annual statements will no longer be accepted. All annual report/statement filings must be submitted online through the new portal. Entities that have not opted into email notifications will receive postcard reminders in place of mailed forms.

This change also applies to renewals of assumed names, limited liability partnerships (LLPs), trademarks, service marks, and name registrations.

Certificates and Copy Orders

All certificate and copy orders must be submitted online through the new portal. Telephone requests will no longer be accepted. The appearance of certificates and filed documents will change, so you can expect visual differences.

System Downtime During Transition

To implement the new system, there will be a scheduled service outage from: 4:00 p.m. Eastern Time on Wednesday, June 18 through 6:00 a.m. Eastern Time on Monday, June 23.

During this transition period, online submissions, searches, and certificate orders will not be available.

The email submission process through LARA-CSCL-CorpsEFile@michigan.gov will be discontinued after June 18 at 4:00 p.m. ET as all forms can be submitted online in the portal.

Expedited services will be available until June 18 at 4:00 p.m. and will resume after the new system is launched.

Legal professionals should prioritize resolving any pending rejections before June 18, as rejected filings will not carry over into the new system and will require resubmission with new fees.

Requesting Access to Existing Entities

To file documents for an existing entity, users must first request access to the entity's record. Multiple users can have access to an entity.

Steps to request access:

1) Log-in through MiLogin for Business.
2) Search for the business entity in the portal.
3) Click the entity name to open the slide-out detail view.
4) Select "Request Access" and enter the entity's ID number and the initial filing date in Michigan.
5) After access is granted, refresh the screen.
6) Filing buttons such as "File Subsequent Document" or "File Annual Report" will then appear.

Looking Ahead

The launch of the MiBusiness Registry Portal is a significant and necessary modernization. While the new system introduces several changes to filing procedures and user access, the benefits in usability and efficiency will be substantial.

For updates and additional information, visit www.michigan.gov/corporations. The MiBusiness Registry Portal will be available beginning June 23 at www.michigan.gov/corpfileonline.

Alexis Lupo, Corporations Division Director; Michigan Department of Licensing & Regulatory Affairs; Corporations, Securities & Commercial Licensing Bureau. As Corporations Division Director with the State of Michigan, Ms. Lupo oversees the review and filing of business entity documents for the formation, continuation, and growth of corporations, limited liability companies, limited partnerships, limited liability partnerships, and trademarks. She is a member of the State Bar of Michigan and serves on the Business Law Council as well as the Corporate Laws and LLC & Partnerships Committees of the Business Law Section. Ms. Lupo is a graduate of Purdue University and Western Michigan University Cooley Law School. Ms. Lupo also serves as Immediate Past President for the International Association of Commercial Administrators, which is comprised of government officials responsible for business registries and secured transaction systems around the world.

 By Eric M. Nemeth

Federal Tax Law Uncertainty – Enforcement, Legislation, and Procedure Welcome to 2025 and Beyond

IRS Staffing

At the time of the drafting of this column, about the only thing that was certain about IRS staffing was that it continues to decrease. As of March 2025, according to a Treasury Inspector General Report, the IRS had already had a reduction of over 11,000 employees. Perhaps most startling, an estimated 3623 revenue agents were included in that figure. Revenue agents are the backbone of the examination function and support IRS litigation and criminal investigations. Since the IRS hired many employees in the last two years that were experienced accountants or revenue agents from state agencies, the loss or "brain drain" is likely to be severe. Since that date, more revenue agents have left as have a thousand revenue officers and technical support employees. There are estimates that the IRS could loose over 30% of its workforce in the coming months. There are credible reports that some employees who applied for the Deferred Resignation Program "DRP" were denied because they were deemed to be mission critical. Nevertheless, at least some of those employees are expected to resign and pursue other career opportunities. At the same time, the hiring freeze remains at the IRS.

At a recent hearing before the House Appropriations Committee, Treasury Secretary Scott Bessent was questioned about IRS staffing, budgeting, and priorities. Note, the Administration's fiscal 2026 discretionary budget request for the IRS is a $2.5 billion cut. Apparently, $2 billion has been cut from the IRS information technology budget. At the same hearing, Secretary Besset signaled that the IRS would meet revenue goals via "smarter IT" and the "AI boom." In other words, bots over bodies.

For taxpayers and their representatives, regardless of political persuasion, the staffing cuts present practical challenges. First, many files will be orphaned. If a taxpayer needs an affirmative action from the IRS, such as, to process payoffs to clear title, release liens or levies or perhaps notify the State Department to unfreeze a passport, the delays could be legion. Taxpayer Services has experienced a staffing reduction. The scheduling of administrative appellate conference with the Office of IRS Appeals will be delayed. That office is expected to have approximately a 30% reduction in staffing. Future hearings should be expected to be briefer and closed quicker to move the proverbial inventory.

As for the "AI boom" and "smarter IT" to be deployed by the IRS, what will that look like? I have some insights. I have already seen an uptick in desk examinations of large dollar items on a tax return. The examinations are stylistic in nature. What I mean is that the underlying tax return may have an error such as the item is on the wrong line or perhaps the wrong form. A letter is generated to the taxpayer, and the taxpayer responds. Regardless of the response, the IRS issues a Notice of Deficiency or 90 Day Letter. This action requires the taxpayer to petition the United States Tax Court for relief. IRS Chief Counsel has also experienced a number of departures from leadership and the field. However, the proverbial can has been kicked down the road. Perhaps the IRS Chief Counsel lawyer can muster an agent to assist in actually examining the issue short of trial. Sometimes a human being has to look at a stylistic error caused by another human being. With over 150 million tax returns to be processed yearly, mistakes are going to happen.

Closing of DOJ (Tax Division)

The Department of Justice has finalized a reorganization plan that would separate the criminal tax and civil tax divisions and reassign those units to the department's main branches. This proposal is the latest plan to close the tax division as a separate division of the department. Since January, there has been a significant decrease in tax lawyers through retirements and resignations. It is believed that about 400 full-time lawyers will be reassigned. The practical impact is difficult to assess at this time as many prosecution functions may be handled by the respective U.S. Attorney offices around the country. However, certain technical review and other authorization functions are likely to be impacted. How, time will tell.

Internal Revenue Code Civil Fraud Penalty-Jury Trial

In *SEC v Jarkesy*, 603 US 109 (2024) the Supreme Court held that a civil fraud penalty that the SEC sought implicates the Seventh Amendment's right to a jury trial. A reasonable interpretation of that ruling draws parallels to IRC 6663. Section 6663 is a civil fraud penalty that imposes a 75% penalty of the tax underpayment due to fraud. IRC 6662, the accuracy-related or negligence penalty is 20%. In addition, if civil fraud is found, there is no civil statute of limitations. Therefore, the civil fraud penalty has profound repercussions. Taxpayers litigating tax years only held open by the civil fraud penalty could prevail based upon the statute of limitations. Certainly, an understaffed IRS will have limited ability to develop civil fraud cases wherein the IRS carries the burden of proof by clear and convincing evidence. A significantly higher burden than a preponderance of evidence.

However, there are various challenges winding their way through the courts as to whether the IRS can assert the civil fraud penalty. The United States Tax Court is an Article I Court. Thus, a jury trial is not available. The practical impact of this situation is uncertain, at best. Taxpayers often choose to Petition the United States Tax Court because litigation is cheaper and often faster than litigation in the United States District Court. In addition, taxpayers do not have to pay the tax and penalties and sue for a refund before litigating their dispute. This matter impacts other IRS penalty sections and other agencies have similar penalty regimes. We can expect further litigation before the United States Supreme Court.

New Tax Legislation

It is impossible to predict where the federal budget and tax legislation will finally settle. I have written in previous columns about the dynamics of the reconciliation process and perhaps more importantly, the dynamics at work within the Republican caucus in the House of Representatives and the Republican caucus in the United States Senate. The fissures have begun to publically emerge with key elected officials writing op-eds about their opposition to various proposed spending cuts such as Medicaid or their protests that there are not enough spending cuts. What we do know is that the current tax legislation has many items, such as the SALT cap, and various other tax rates expire at the end of the calendar year unless new legislation is passed.

It is reasonable to expect that the legistative manuevers and arm twisting will be legion. It seems that one gambit to score the tax legislation is that certain provsions will be for a four-year term while others may be permanent. Individual income tax rates, corporate rates, estate tax exemption and even the nontaxability of certain forms of income all remain in flux. Undoubtedly, clients will ask more questions as the summer turns to the fall. I believe that the most sound counsel at this point is to not panic or trade on rumor, especially political rumors, and to pay attention to developments.

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 By Kristina Pedersen

Top Technology Threats for Businesses in 2025

As potentially vulnerable legal practitioners representing potentially vulnerable companies in an era of cyber attacks, it's imperative that we all keep abreast of the trends in cybersecurity. Over the years, we've heard about phishing and whaling. We've been warned about monitoring departing employees and to watch our onboarding of vendors. But what are the trends in 2025 showing? Vishing and Cyber-espionage are two of the most prevalent major threats for companies to defend against in 2025. Both are on the rise, and, with the increasing sophistication of artificial Intelligence (AI), threat actors are becoming harder and harder to detect.

Cyber-Espionage

The first area of concern is "cyber-espionage." Business leaders and lawyers need to be on the lookout for nation-state led cyber-espionage particularly from China. Since June 2024, there has been an increased level of attacks from China-linked threat actors, particularly APT15, UNC5174, and APT41. To date, there are at least 75 organizations that have been significantly compromised. But there are potentially more organizations that have been compromised and are yet unaware, as many of these organizations were only discovered when SentinelLABS infrastructure was targeted. After analyzing the failed breach, SentinelLABS began searching for other victims, assessed who the attackers were, and when the attacks occurred.

But who is most susceptible to this type of attack? Cyber-espionage attacks target many different industries to include manufacturing, government, legal, finance, telecommunications, and research sectors (unsurprisingly, all are critical infrastructure organizations). What was a surprise to researchers was that cybersecurity companies themselves have become a large focus of attack. According to SentinelLABS, cybersecurity companies have become a valuable target because of their "protective roles, deep visibility into client environments, and ability to disrupt adversary operations." One needs only to review the massive outage and all the ripple effects caused worldwide to multiple industries by a faulty software update from CrowdStrike in July 2019 to realize why cybersecurity companies are so valuable to threat actors. For example, Crowdstrike observed a 150% increase in China-nexus activity across all sectors of industry from 2023 to 2024.

But why is China on the radar? According to a report by the Office of the Director of National Intelligence, "China remains the most active and persistent cyber threat to the U.S. Government, private sector, and critical infrastructure networks." Chinese threat actors have long targeted critical infrastructure and now seem to be targeting the networks of small- to medium-sized businesses. Sometimes, these businesses are part of the critical infrastructure of the United States. In other situations, they only provide support services or are vendors to critical infrastructure but still a critical part of the supply chain. The threat actors infiltrate the business networks and then lie in wait for the opportune moment to cause disruptions and degrade service.

Vishing

What is a "vishing" attack? Vishing, which is short for voice phishing, is another threat that is growing in popularity among threat actors. A vishing attack is a social engineering form that entices the victim to divulge sensitive information. This enticement has grown with our reliance on digital platforms for communication, specifically with the increase in businesses relying on voice communication platforms such as Microsoft Teams or Zoom. It's these tools that vishing threat actors have been able to exploit with ease.

Vishing threat actors typically use communication platforms that people trust by mimicking trusted colleagues, sending fraudulent meeting invites and embedding malicious links disguised as legitimate files. The use of AI has made vishing much more successful because the recordings closely mimic the person's known contacts or company leaders and are extremely difficult to detect. CrowdStrike in its 2025 Threat Report has observed a 442% increase in vishing between the first and second half of 2024.

On the legal front, the Cyber Division of the FBI has recently observed that the "Silent Ransom Group" has been targeting law firms and the healthcare industry using a vishing scheme where they pose as a member of the firms IT department. The threat actor then tells the employee there is an IT issue that needs to be fixed and they need to be granted access to the computer. Because of the method the threat actors are using to access the employee's computer and then the company's network, normally, this method does not flag the firm's IT security.

Stay Alert

Our firms, businesses and clients alike, need to recognize these emerging threats and be prepared for tactics as they evolve. Critical to threat avoidance in both cyberespionage and vishing is raising awareness among all employees that these threats exist and what they look like. Companies should assess existing policies that address how IT contacts employees and ensure that all employees understand the policy to avoid being fooled by outside threat actors. As cyberespionage threat actors become more sophisticated and more patient, it is critical that companies have strong access controls ensuring that only people with a "need to know" have access to certain information. It is also critical to continuously monitor networks and search for unauthorized access, realizing the threat actors may have accessed the network but are simply observing and waiting before causing problems.

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 By Douglas L. Toering, Gerard V. Mantese and Patrick L. Klida

Succession Planning and Shareholder Litigation Program; Recent Developments Nationally and in Delaware and New York

For this issue, we take a break from interviewing business court judges. Instead, we summarize a program sponsored the Business Law Section on business succession planning, shareholder litigation, judicial and mediation perspectives, estate planning, drafting, and valuation and tax; provide a brief summary of recent changes in Delaware corporate law; and give an update on recent developments in the New York Commercial Division.

Shareholder Litigation and Succession Planning

The Importance of Succession Planning Generally

On April 10, 2025, the Business Law Section's LLC & Partnerships Committee, the Corporate Laws Committee, and the Commercial Litigation Committee co-sponsored a program on succession planning, shareholder/LLC member litigation, estate planning, drafting, valuation, and tax. The program also included helpful insight from eight business court judges and five distinguished mediators.[1] In the past year or so, we have heard much about succession planning. Indeed, the largest transfer of wealth in history will occur in the upcoming decades. Estimates range from $80 trillion to $120 trillion. Thus, succession planning is an important issue for any business.

This brief column is not intended to provide any kind of in-depth treatment of the many complex and interrelated issues involved in succession planning. Rather, this is intended to raise the issue for lawyers and their clients (and for law firms, too).

Issues in Succession Planning, Drafting, and Estate Planning

Succession planning requires the that the owners and management look to the future, with all its uncertainties. "What happens when one of us retires, wants to do something else, or passes away?" This, in turn, involves issues of ownership (Who? family; others); management; control; voting classes and preferences; possible securities issues; employment; strategies to retain key employees (equity; phantom equity; employee stock ownership); exit strategy; mandatory or optional triggers (death, disability, divorce, termination of employment); right to profit distributions (and, if so, when and how calculated); debt; capital calls and dilution of shares; whether the owners may own competing businesses and the corporate opportunity doctrine; business valuation and buyout provisions (date of valuation; how the purchase price is calculated (formula; stipulated value), how much down, how much paid in installments, interest rates, security); tax; corporate organization (C-corporation, S-corporation, LLC); estate planning; and tax. In fact, tax issues—both gift and estate tax as well as income tax issues—can have a major effect on succession planning. Involving key advisors—the company's accountant, corporate counsel, bankers and financial planners, the owners' personal advisors, among others—is important. As is sometimes said, "Failing to plan, is planning to fail." And, the earlier the owners plan, the better.

Speaking of planning, a critical component is documenting the agreements in writing, whether in a shareholder agreement or buy-sell agreement, phantom stock agreement, operating agreement, and so forth. Board or manager resolutions will likely be needed. According to statistics presented at this program, about 50% of businesses will survive five years or more; only about 1/3 will survive ten years or more. Indeed, about 30% of family businesses survive the second generation.

Part of succession planning often involves family issues. Are family members capable of continuing the business? What if they are not interested? How can family members be treated fairly (although not necessarily equally) by their parent(s)? These raise complex issues involving family dynamics, corporate/LLC law, drafting, estate planning, tax, valuation, asset protection, and the potential use of life insurance for taxable estates.[2]

Litigation Issues

But even with proper planning, the transfer of ownership and control does not always go smoothly. This can lead to disputes and may result in litigation. Gerard V. Mantese was the lead-off speaker presenting on litigation and strategic considerations.[3]

In addition, eight business court judges shared some of their experience and wisdom. The judges included: Judge Annette J. Berry (Wayne), Judge Chris Christenson (Genesee), Judge Edward Ewell, Jr. (Wayne), Judge Brian S. Pickell (Genesee), Judge Brian R. Sullivan (Wayne), Judge Victoria A. Valentine (Oakland), Judge Kathryn A. Viviano (Macomb), and Judge Michael Warren (Oakland). Some of the main issues in shareholder litigation include: identifying the real issues ("What's really going on?"); how to manage the high emotional component; how counsel can rise above the fray (and avoid escalating the dispute), while still zealously representing their clients; effective communication with opposing counsel; how and when to involve the judge in resolving the litigation; and the importance of drafting agreements that will be clear years later if a dispute arises.

One trial issue is how a shareholder or an LLC oppression case[4] will be tried if legal claims will also be tried. The oppression claims are equitable,[5] so they are tried to a judge. But legal claims are tried to a jury.

Mediation Issues

Mediation is, of course, a key part of resolving business litigation, particularly business divorces. For that issue, a distinguished panel of mediators provided their advice.[6] Some of the key issues include: understanding the interpersonal dynamics; addressing the emotional issues; getting to the heart of the dispute (again, "What's really going on here?"); allowing the parties the ability to be heard and proactive listening (mediation can be your client's "day in court"); recognizing that the parties cannot change the past, but they can move on to a better future by resolving the dispute; how the mediator can develop trust with the parties; the importance of preparation for mediation (by both the clients and their counsel—this includes the clients reading the other party's mediation brief); pre-mediation sessions with the mediator, counsel, and the parties; the use (or not) of joint sessions; how to resolve differences among the experts (commonly called "hot tubbing"); how attorneys can be zealous advocates without raising the emotions the parties already have; and generally, how mediation can be more client-centric.[7] An excellent resource on dispute resolution issues generally is the Office of Dispute Resolution, which coordinates the dispute resolution services of the Michigan State Court Administrative Office.[8]

Nationally: American College of Business Court Judges Meets in Michigan

The 19th meeting of the American College of Business Court Judges occurred in Traverse City from April 30–May 2, 2025. Judge Christopher Yates presided as President and Judge Michael Warren was elected a Director. Congratulations to both!

Amendments to the Delaware General Corporation Law

Delaware's Senate Bill 21, signed on March 25, 2025, delivers the most sweeping overhaul of the DGCL in a generation.[9] It codifies bright-line safe harbors that bar equitable relief or damages when a conflicted transaction is either approved by a disinterested board or ratified by an informed, uncoerced vote of disinterested stockholders.[10] The statute introduces Delaware's first statutory definition of "controlling stockholder": one who (i) holds a majority of the voting power, (ii) enjoys contractual or other rights to elect a majority of directors, or (iii) owns at least one-third of the voting power while exercising managerial authority over the corporation.[11]

Amended § 220 confines routine inspection to nine specified records—including charter, bylaws, board materials, and three-year stockholder documents—and requires a clear-and-convincing, compelling-need showing for any extras such as e-mails.[12] Senate Bill 21 also grants controlling stockholders the same duty-of-care exculpation that directors receive under § 102(b)(7).[13] The General Assembly fast-tracked these changes after warnings that marquee corporations might reincorporate elsewhere and that § 220 demands had purportedly swelled into pre-complaint discovery battles. This, supporters claimed, threatened both Delaware's franchise tax revenues and overall transactional certainty.[14]

A single, easily-overlooked clause makes the overhaul even more consequential: all amendments apply retroactively unless a lawsuit was already pending or a § 220 demand was served before February 17, 2025. That one sentence shutters untapped entire-fairness claims, curtails books-and-records that are claimed to be fishing expeditions, and immediately changes settlement calculus for deals closed before that date (and that were not in suit or the subject of a § 220 demand as of February 17, 2025). Senate Bill 21's exculpation of controlling stockholders further narrows the field of claims, converting many potential fiduciary-duty disputes into purely disclosure-based skirmishes. Expect insurers of D&O (directors and officers) policies to reassess pricing and policy carve-outs as the statute's shields gain traction.

For Delaware corporations, boards should inventory past transactions to see which now fall within the § 144 safe harbors, update committee charters and director-independence questionnaires, and retrain finance and legal teams on the amended § 220 books-and-records response protocol. Family businesses in the midst of succession planning should reevaluate buy-sell formulas, trustee duties, and related-party arrangements in light of the statute's bright-line control threshold and retroactive reach. Counsel should also flag open questions: the undefined contours of "managerial authority," the interaction between § 144(5) exculpation and existing charter provisions, and the possibility of future Delaware tweaks on fee-shifting. Acting now secures the benefits of SB 21; waiting risks litigating under an outdated playbook while opponents leverage the new one.

New York Commercial Division

The New York County Lawyers Association honored the New York Commercial Division on its 30th Anniversary at NYCLA's 2025 Annual Gala on March 4, 2025. As part of the event, the Commercial Division presented a film explaining the effectiveness of the Commercial Division.[15]

On the rulemaking side, the Commercial Division has recently implemented a number of a procedural changes. Administrative Order, signed on May 13, 2025 by the Chief Administrative Judge of the Courts, adds a new Rule 23 to the Rules of the Commercial Division to provide for the filing of amicus briefs.[16] Also, pursuant Administrative Order dated May 6, 2025 (effective July 7, 2025), all parties with cases pending in the Commercial Division must make initial disclosures.[17] The initial disclosure scheme is similar to what has been commonplace in federal courts for some time, but it differs in several significant respects.

Administrative Order, signed on May 20, 2025, adds a model pre-trial order as a new Appendix E to Section 202.70 of the Uniform Rules of the Supreme and County Courts (Rules of the Commercial Division of the

Supreme Court) and amends the preamble to Commercial Division Rules 25-33 relating to trial preparation and procedure.[18]

NOTES

1. The program was titled, “War and Peace: Shareholder Litigation, Business Succession Planning, and the Largest Transfer of Wealth in History.” It was held at the San Marino Club in Troy with approximately 165 people in attendance. Plans are already being discussed for a similar presentation in western Michigan in 2026. The program was planned and moderated by Gerard V. Mantese and Douglas L. Toering. The Chairperson of the Business Law Section, Ian Williamson, introduced the program.

2. Julius H. Giarmarco presented on estate planning, and James J. Vlasic presented on drafting issues. Thomas A. Frazee presented on valuation and tax.

3. Mr. Mantese also presented on litigation and drafting considerations in succession planning for the New York County Lawyers Association at a continuing education program on February 6, 2025.

4. MCL 450.1489 and 450.4515, respectively.

5. *Madugula v Taub*, 496 Mich 685, 853 NW2d 75 (2014).

6. The mediators were Jennifer M. Grieco, William Horton, Thomas G. McNeill, Paul Monicatti, and I.W. Winsten.

7. *See* McNeill, *Proposed Advancements in Mediation Practices: Placing Clients at the Center of Mediation*, 103 Mich B J 16 (June 2024),< https://www.michbar.org/journal/Details/Proposed-advancements-in-mediation-practices-Placing-clients-at-the-center-of-mediation?ArticleID=4895>; Toering & Rose, *Touring the Business Courts: Mediation Strategies Discussed at Statewide Business Courts Program; National Business Court Developments*, 44 MI Bus LJ 13 (Fall 2024),< https://higherlogicdownload.s3.amazonaws.com/MICHBAR/ebd9d274-5344-4c99-8e26-d13f998c7236/UploadedImages/pdfs/journal/Fall2024.pdf#page=15>.

8. Michigan Courts, Office of Dispute Resolution, <https://www.courts.michigan.gov/administration/offices/office-of-dispute-resolution/> (accessed June 9, 2025).

9. *See* Ann Lipton, Business Law Prof Blog, *Delaware Decides Delaware Law Has No Value*, <https://www.businesslawprofessors.com/2025/02/delaware-decides-delaware-law-has-no-value/ > (posted February 17, 2025) (accessed June 9, 2025).

10. 8 Del Code Ann § 144(a).

11. *Id.* § 144(e)(2).

12. *Id.* § 220(a)(1)(a)–(i), (g)(1)–(3).

13. *Id.* § 144(d)(5).

14. *See* Katie Tabeling, *Meyer Signs Corporate Law Bill After 'Dexit' Debate in the House*, Del Bus Times (March 26, 2025), <https://delawarebusinesstimes.com/news/meyer-signs-corporate-law-bill-after-dexit-debate-in-the-house/> (accessed June 9, 2025).

15. *A Court That Means Business* (video), <https://vimeo.com/1060574090/e2635bcfaf> (accessed June 9, 2025).

16. Administrative Order of the Chief Administrative Judge of the NY Courts, AO/105/25 (May 13, 2025).

17. Administrative Order of the Chief Administrative Judge of the NY Courts, AO/104/25 (May 6, 2025). See also newly promulgated Rule 11-h of the Statewide Rules of the Commercial Division.

18. Administrative Order of the Chief Administrative Judge of the NY Courts, AO/111/25 (May 13, 2025).

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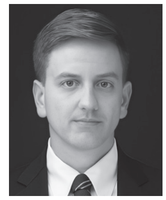
Gerard V. Mantese has a national practice in shareholder, member, and partnership disputes, and other complex business litigation. He is the CEO at Mantese Honigman, P.C. He is co-chair of the State Bar of Michigan (SBM) Business Law Section's LLC and Partnerships Committee, and he is on the Board of Commissioners of the SBM. Mr. Mantese is also chair of the New York County Lawyers Association (NYCLA) Committee on Corporations, LLCs, and Partnerships. The SBM has conferred both the Champion of Justice Award, as well as the SBM's highest award, the Roberts P. Hudson Award, on Mr. Mantese for his advocacy for vulnerable citizens and for his outstanding service to the profession.



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Don't Water Down the Drinks: Anti-Dilution in Limited Liability Companies

By Jordan B. Segal, Gerard V. Mantese, and Patrick L. Klida

Anyone who has seen *The Social Network* and knows the history of Facebook knows that equity dilution can lead to serious disputes between equity holders. An investor, having provided start-up capital, in exchange for a stake in the business, will want the benefit of the bargain and will not want to see successive equity raises reduce (or dilute) his ownership stake. On the other hand, a business seeking outside investment may need to take on additional investors at the cost of diluting its existing equity holders. As a result of this tension, early investors may well negotiate for limitations on the company's ability to dilute its equity—usually in the form of an anti-dilution provision.

Anti-dilution provisions in corporations (especially Delaware or Model Business Corporation Act jurisdictions) typically follow standardized statutory frameworks (e.g., convertible preferred stock, preemptive rights). Limited liability companies, on the other hand, are creatures of contract—LLC partners have more flexibility to customize protections based on the LLC's unique structure (capital accounts, tax allocations, profit interests, etc.). But this flexibility also means greater risk of ambiguity or unintended consequences if anti-dilution provisions are not carefully considered and drafted. In short, while corporate anti-dilution provisions are more standardized and easier to plug-and-play, LLC anti-dilution provisions require careful drafting to mesh with the unique features of LLC economics, governance, and tax treatment.

Approaches to Antidilution

Conceptually, the simplest form of antidilution is "Percentage-based" protections, which directly preserve the protected member's ownership percentage, regardless of the price of the new units.[1] In other words, if a member owned 20% of the LLC before a new issuance, percentage-based protection ensures that they maintain 20% ownership after the new units are issued, even if that requires adjusting other members' percentages or issuing "bonus units" to the protected member. This ensures that the protected member's percentage of total ownership remains unchanged or is adjusted based on a negotiated formula. While this form of protection is easier to understand and administer, it can create issues with capital account balances and tax allocations in an LLC (especially if units also carry economic rights like profit distributions).

For these reasons, "Price-based antidilution" is a more common form of protection, in which a new issuance causes a price-per-unit adjustment, generally in one of two different forms.

"Full ratchet" protection adjusts the member's ownership as if they had originally invested at the new, lower price per unit, regardless of how many new units were issued.[2] For example, if a member bought units at $10 each and the LLC later issues units at $5, full ratchet would retroactively treat the original investment as if it had been made at $5, effectively doubling the number of units to which the protected member is entitled. This heavily favors the protected member.

A "Weighted Average" protection is more moderate. It adjusts the original member's ownership based on a formula that considers both the price and the number of units issued in the dilutive round. The adjustment reflects the "blended" impact of the new issuance, softening the dilution without fully shifting all the economic benefit to the protected member. This is often seen as a more balanced approach between investor protection and company flexibility. The exact weighted average formula can vary from case to case.[3] These formulas can be described either as "broad-based" weighted-average formulas that include all forms of outstanding equity—common units, preferred units, options, warrants, etc. Alternatively, a "narrow-based" weighted-average formula would adjust the price per unit according to a formula that only considers the price of common (or, perhaps common and preferred units). The precise formula used in any given case is usually heavily negotiated between the parties.

Tax Implications

A crucial distinction between dilution protective strategies lies in the tax treatment of LLCs as partnerships under Subchapter K of the Internal Revenue Code. Any reallocation of equity in an LLC—such as the issuance of new units to a protected member—must be accompanied by corresponding adjustments to capital accounts and allocations of income and loss. Failure to maintain these balances can cause allocations to lack "substantial economic effect," triggering IRS scrutiny and potentially invalidating the intended economic sharing among members.

For allocations to have substantial economic effect under IRC 704(b), they must track the underlying economics of the LLC. Anti-dilution adjustments that allocate additional units to certain members without adjusting their capital accounts can result in allocations that do not reflect real economic arrangements. Further, adjustments that involve exchanges of units or money can trigger the disguised sale rules of IRC 707(a)(2)(B), resulting in unintended taxable events. Finally, reallocation of equity that masks debt can be recharacterized as a loan, impacting basis, interest deductibility, and profit allocations.

[W]hile corporate anti-dilution provisions are more standardized and easier to plug-and-play, LLC anti-dilution provisions require careful drafting to mesh with the unique features of LLC economics, governance, and tax treatment.

Compatibility with Capital Call Provisions

Anti-dilution adjustments can conflict with capital call mechanics, especially if new issuances arise from member contributions under a capital call. Without clear coordination, this can result in overlapping protections or unintended dilution. Careful drafting should clarify the priority of capital calls versus anti-dilution adjustments. Indeed, dilution is a common action taken against members who fail to make a required capital call.[4] Without the ability to dilute a defaulting member, the other members may well be without an effective remedy if a partner cannot or will not provide funds under a capital call. Thus, the protected members' partners will frequently insist on an express carve-out of the anti-dilution provision (however structured) for defaulted capital calls.

Soft Alternatives

Anti-dilution clauses often overlap with preemptive rights, creating potential conflicts over who is entitled to new units and how governance rights shift as a result. Operating agreements should specify how these rights interrelate and ensure consistent outcomes. Anti-dilution adjustments can also impact voting rights, altering control dynamics and potentially leading to governance disputes if not clearly addressed. It is for this reason that fledgling limited liability companies might opt for alternatives that (while not prohibiting dilution outright) make dilution considerably more difficult, or require consent from the protected member. For example, the operating agreement might well require a supermajority of members to consent to the issuance of additional equity or admission of additional members. While this does not preclude dilution, it ensures that a protected member can only be diluted when he consents or at least a supermajority consents, and can require other concessions (such as greater management rights or other negotiated items) in exchange for his reduction in membership percentage.

Remedies for Breach

One breaches an anti-dilution clause or effectuates a dilution without contractual consent at one's own peril because dilution of membership interests is often the subject of a claim for oppression, breach of fiduciary duty, breach of contract, or all three. In Michigan, a breach of an anti-dilution provision in an LLC's operating agreement is, above all, a matter of contract.[5] When the agreement guarantees a member the right to maintain a specified ownership percentage—whether through preemptive rights, mandatory consent for new issuances, price-based adjustments, or a percentage-based true-up—a unilateral dilution constitutes a contractual violation.[6] The primary remedy for such a breach is compensatory damages, designed to restore the aggrieved member's "but-for" economic position. In a closely held company without a public market, however, damages often remain speculative until a defining event—such as a sale or recapitalization—crystallizes the member's loss.[7] The Michigan Supreme Court's decision in *Frank v Linkner* illustrates this principle—in that case, new "Series C" units were issued in breach of an unwritten anti-dilution promise, only for common-unit holders to receive nothing when the company later sold. The court held that the cause of action accrued at the moment of dilution rather than at the day of the sale proceeds, and that claims filed more than three years after the dilutive act fell outside the statutory window. The court also held, however, that fraudulent concealment may toll this statute of limitation.[8] This teaches that members must vigilantly monitor cap-table changes and invoke their rights promptly, for the mere passage of time can extinguish contractual relief.

Yet because each LLC unit embodies a unique bundle of economic and governance rights, Michigan courts have long recognized that damages alone may not make a minority member whole.[9] Specific performance and rescission therefore serve as indispensable equitable supplements to contractual relief.[10] Where an operating agreement requires unanimous member approval for equity issuances—or prescribes a particular formula for price-based anti-dilution protection—a court may void an unauthorized issuance outright, treating it as though it never happened.[11] When dilution cannot simply be unwound by striking new units from the books, courts may compel "make-up" issuances, ordering the breaching party to allocate additional units to restore the minority's percentage interest. And when a dilutive transaction is already consummated, rescission remains available to unwind the entire contract and reinstate the pre-breach membership structure.[12] Although illustrative authority derives from other jurisdictions—*Lengyel-Fushimi v Bellis*, for example, where a New York court enjoined a majority's unilateral recapitalization in the face of a unanimous-consent requirement—the underlying principle holds true in Michigan that the operating agreement is the first law of the LLC, enforceable as written, and cannot easily be displaced by informal "past practice" or arguments of business necessity.[13]

Preventive relief in the form of preliminary injunctions and declaratory judgments further protects a minority member from irreversible harm.[14] When a member demonstrates a clear violation of a consent or preemptive-rights clause coupled with an imminent threat of dilution that would inflict irreparable injury—whether by depriving the member of voting power, eroding economic value, or undermining future appreciation—Michigan courts possess the authority to freeze the cap table pending final adjudication.[15] This status-quo relief forestalls the practical impossibility of unwinding complicated equity transactions after the fact. In *Kassab v Kasab*, a New York court intervened midstream to halt a family-business freeze-out, recognizing that once new shares are issued and votes reallocated, monetary relief alone cannot repair the harm.[16] Michigan courts, exercising their equitable powers,[17] have the power to step in to preserve a member's equity under the statutory oppression remedy when dilution looms on the horizon.[18] Moreover, a declaratory judgment may clarify the parties' obligations under the anti-dilution clause, removing uncertainty that can chill future capital raises or force costly pre-issuance litigation.[19]

Michigan's statutory oppression remedy under MCL 450.4515 empowers a court to grant relief when those in control engage in "illegal or fraudulent or … willfully unfair and oppressive conduct" that substantially interferes with a member's interests.[20] Conduct expressly authorized by the operating agreement is exempt, meaning that a harsh but bargained-for dilution cannot be recast as statutory oppression, unless the dilution was a matter of discretion exercised in bad faith or a self-interested motive.[21]

Once oppression is established, Michigan courts enjoy broad equitable discretion "to issue an order or grant relief as [they] consider appropriate."[22] The statute explicitly contemplates remedies including voiding unlawful issuances, canceling or reforming provisions in the operating agreement or articles of organization, injunctive relief, and purchase of the oppressed member's interest at fair value—payable by either the LLC or the wrongdoers.[23] Damages may also be awarded, subject to the statutory limitations period.[24] Federal courts have adopted the same remedial breadth; in *Eichenblatt v Kugel*, for example, the Eastern District of New York allowed parallel breach-of-fiduciary-duty and aiding-and-abetting claims to proceed alongside an oppression-style theory, recognizing that dilution tactics can trigger overlapping equitable and legal remedies.[25]

Timing remains a critical feature of statutory oppression claims. Michigan law imposes a three-year limitation from accrual or two years from discovery, whichever occurs first.[26] In *Frank v Linkner*, the Michigan Supreme Court confirmed that accrual occurs at the moment of dilution but also held that equitable tolling may apply in cases of fraud-

Anti-dilution adjustments can conflict with capital call mechanics, especially if new issuances arise from member contributions under a capital call.

ulent concealment, courts construe such tolling narrowly.[27] Thus, the prudent minority member should pursue injunctive relief and file both contract and oppression claims at the earliest indication of unauthorized or bad faith dilution.

Beyond explicit contractual obligations and statutory protections, LLC managers and controlling members must also contend with fiduciary duties. Michigan law explicitly requires managers to act "in good faith" and in the LLC's best interests.[28] Thus, even when the letter of the operating agreement authorizes capital calls or dilutive fees, self-interested conduct can cross the line into fiduciary breach triggering claims for disgorgement of ill-gotten gains or equitable reallocation of distributions.[29]

Thoughtful drafting, vigilant oversight, and swift legal action remain the best defenses against unwelcome dilution.

The Michigan Court of Appeals discussed the boundary between permissible contract-authorized dilution and fiduciary breach in C*astle v Shoham,* where the trial court found no breach or oppression, reasoning that the majority's fee hikes and capital calls fit within the broad contractual language in the operating agreement. But the court of appeals saw it differently. It reversed in part, holding that self-dealing by the majority could still support a claim for oppression, even if facially permitted by contract.[30] Although the claims ultimately failed on the facts, the decision underscores that fiduciary theories may supplement contract and statutory claims to capture the full spectrum of wrongful dilution.

Dissolution and liquidation of the LLC remain available but serve as remedies of last resort. MCL 450.4515 expressly allows a court to dissolve the company, but Michigan judges invariably explore narrower alternatives—specific performance, rescission, injunction, reallocation of equity, damages, or compulsory buy-out—before dismantling a viable enterprise.[31] Dissolution may be warranted only where co-ownership has become irretrievably toxic or the majority has looted assets so thoroughly that liquidation is the sole practical path to recover value.[32] Even then, courts may tailor dissolution to preserve certain operations or facilitate the minority's continuation in a new entity, consistent with equitable principles.[33] In practice, the very specter of dissolution frequently serves as leverage to induce buy-outs or compliance, rendering actual liquidation rare.

A well-drafted operating agreement should specify notice and consent procedures, coordinate anti-dilution mechanics with capital-call rights, and articulate deadlines for pursuing remedies. By embedding precise formulas and drafting safeguards, members can reduce ambiguity, making breaches easier to detect and remedies simpler to administer. Vigilant record-keeping of cap-table changes and contemporaneous documentation of management decisions further clarifies the parties' respective rights, providing clear evidence of breach or oppressive conduct when this occurs.[34]

Michigan's layered framework for addressing rights and remedies for dilution begin with contract enforcement, extending through equitable intervention, statutory oppression claims, and fiduciary-duty theories. Thoughtful drafting, vigilant oversight, and swift legal action remain the best defenses against unwelcome dilution. If those fail, Michigan's jurisprudence offers a comprehensive arsenal of remedies to restore the minority's bargained-for stake and preserve the integrity of the LLC form.

NOTES

1. Joseph L. Lemon, Jr., *Don't Let Me Down (Round): Avoiding Illusory Terms in Venture Capital Financing in the Post-Internet Bubble Era*, Tex J Bus L, Spring 2003, at 1, 32.

2. Manuel A. Utset, *Reciprocal Fairness, Strategic Behavior & Venture Survival: A Theory of Venture Capital-Financed Firms*, 2002 Wis L Rev 45, 67 (2002).

3. *Diamond v ShiftPixy, Inc*, No 20-CV-7305 (LJL), 2021 WL 3085405 at *2 (SDNY July 19, 2021)(citations omitted) (comparing Full Ratchet with Weighted Average provisions in the corporate context).

4. For example, the LLC's operating agreement in *Canyon Creek Dev, LLC v Fox*, 46 Kan App 2d 370, 263 P3d 799 (2011), provided that if a member defaulted on a contribution obligation, the other members had the right, but not the obligation, to cover the defaulted amount. The agreement further provided that in the event that a member covered a defaulting member's default amount, the percentage interests of the members would be adjusted to reflect each member's contribution as a percentage of total contributions.

5. *See Frank v Linkner*, 500 Mich 133, 140, 894 NW2d 574 (2017) (noting that dilution claims may arise from breach of contractual promises). Gerard Mantese argued this case for the Plaintiffs.

6. *Id.* at 140–41 (describing issuance of Series C units that diluted common holdings).

7. *Id.*

8. *Id.* at 143–47.

9. *Franks v Franks*, 330 Mich App 69, 82–85, 944 NW2d 388 (2019) (discussing inadequacy of monetary relief alone).

10. *Id.*

11. *Lengyel-Fushimi v Bellis*, 2021 NY Slip Op 32498(U), at *2–3 (Sup Ct Kings Cty Aug 25, 2021)

(granting preliminary injunction barring dilution absent unanimous consent).

12. *Cortes v 3A N Park Ave Rest Corp*, 46 Misc 3d 670, 695, 998 NYS2d 797 (Sup Ct Kings Cty 2014) (ordering rescission-or-buy-out after diversion of profits).

13. *Lengyel-Fushimi*, 2021 NY Slip Op 32498(U), at *2–3.

14. *Franks,* 330 Mich App at 101–03 (noting power to enjoin oppressive acts).

15. *Id.*

16. *Kassab v Kasab*, 56 Misc 3d 1213(A), 2017 NY Slip Op 50986(U), at *5–6 (Sup Ct Queens Cty 2017).

17. *Madagula v Taub*, 496 Mich 685, 853 NW2d 75 (2014), argued by Gerard Mantese, held that shareholder oppression is an equitable claim.

18. *Franks*, 330 Mich App at 101–03.

19. *Id.*

20. MCL 450.4515(2).

21. MCL 450.4515(2) (excluding conduct permitted by operating agreement). *See also Berger v Katz*, Nos 291663, 293880 (Mich Ct App July 28 2011) (unpublished), holding that a general grant of authority cannot be exercised in bad faith.

22. MCL 450.4515(2).

23. MCL 450.4515(1)(a)–(e).

24. MCL 450.4515(1)(e).

25. *Eichenblatt v Kugel*, No 17-CV-559 (DLI)(LB), 2018 WL 3202079 at *9–10 (EDNY May 15, 2018).

26. MCL 450.4515(1)(e).

27. *Frank*, 500 Mich at 150–51 (discussing fraudulent-concealment tolling).

28. MCL 450.4404(1).

29. *Franks*, 330 Mich App at 76–79 (discussing self-dealing and duty of loyalty and holding that oppressive conduct necessarily nullifies reliance on the business judgment rule). Gerard Mantese argued *Franks* for the plaintiffs in the court of appeals and tried that case with Ian Williamson to a successful finding of shareholder oppression.

30. *Castle v Shoham*, No 337969, 2018 WL 3746550 at *2–4 (Mich Ct App Aug 7, 2018) (unpublished).

31. MCL 450.4515(1)(a).

32. *Franks*, 330 Mich App at 82–85.

33. *Id.*

34. *Frank*, 500 Mich at 150 (prompt action essential).

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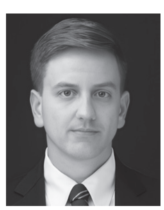

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Appointing a Partnership Representative: Key Considerations for Smooth Sailing (and Avoiding Rough Waters)

By John A. Sellers

A domestic limited liability company (LLC) with at least two members is classified as a partnership for federal income tax purposes unless it files Form 8832 with the Internal Revenue Service (IRS) and affirmatively elects to be treated as a corporation.[1] For such LLCs, an understanding of the manner in which tax deficiencies are assessed and the identity of the person having authority to make binding decisions is critical.

The Centralized Audit Regime

The Bipartisan Budget Act of 2015 (BBA) introduced significant changes to the manner in which partnerships are audited and tax deficiencies are assessed. A key feature was the introduction of the concept of the "partnership representative," which supplanted the former "tax matters partner" role. The partnership representative holds considerably more power and responsibility than the "tax matters partner" under prior law, making selection of a partnership representative an essential decision for any LLC taxed as a partnership. This change, effective for tax years beginning in 2018, centralized audit authority at the LLC level, creating far-reaching implications for all members in the appointment of the partnership representative.

Under the BBA, by default, the IRS conducts examinations at the LLC level to determine the accuracy of the company's tax return (unless an opt-out election is made).[2] If the examination concludes that there was an underpayment of tax, the LLC itself must pay the underpayment on behalf of its members. Internal Revenue Code (IRC) section 6221(a) provides: "Any adjustment to a partnership-related item shall be determined, and any tax attributable thereto shall be assessed and collected, and the applicability of any penalty, addition to tax, or additional amount which relates to an adjustment to any such item shall be determined, at the partnership level, except to the extent otherwise provided in this subchapter." Under this default method, the IRS assesses and collects tax adjustments at the LLC level in the year the audit is completed, thereby placing the economic burden of the additional tax liability on the current members of the LLC instead of on those who were members for the year under audit.[3]

Opting Out of the Centralized Audit Regime

Eligible LLCs may opt out of this centralized audit regime by making an election on an annual basis. This election shifts any tax liability to those who were members during the tax year to which the adjustment applies, and the LLC must issue adjusted Schedules K-1 to those members within 45 days after the IRS issues a notice of final judgment. As a practical matter, given the liability at the LLC level under the default method in IRC 6221(a), a secured lender of the LLC might require the LLC to opt out each year so that any liability would be imposed on the members rather than the LLC. Making this election, though, will result in a higher interest rate on any underpayment compared to the normal deficiency interest rate.[4]

To opt out, "Yes" must be selected on Line 33 of Schedule B on Form 1065, and Schedule B2 must be completed. Only entities meeting certain eligibility criteria, however, are permitted to opt out. To be eligible, the LLC must have no more than 100 members, and each member must be an individual, a C corporation, a foreign entity that would be treated as a C corporation if it was a domestic entity,[5] an S corporation, or an estate of a deceased partner.[6] Eligible members, however, do not include partnerships, trusts, disregarded entities, nominees or other similar persons holding a membership interest on behalf of another person, nonqualifying foreign entities, and estates of individuals other than deceased partners.[7]

Prudent estate planning is often a consideration in the issuance or transfer of membership interests. It is common for membership interests to be held by a grantor trust or by a testamentary trust following death. In such instances, the LLC would not be eligible to opt out of the centralized audit regime.

Also, if any member is an S corporation, the number of shareholders of the S corporation must be included in the calculation of the 100 member limit.[8] For example, if an S corporation with two shareholders is a member, then this two-shareholder S corporation would account for 3 toward the 100 member limit (the S corporation itself and each of its two shareholders). An S corporation will be an eligible member even if one or more of its shareholders would be ineligible to directly hold an interest in the LLC.[9]

Given these eligibility requirements, if the members prefer to opt out every year, the LLC's operating agreement should include express requirements for eligibility to hold equity in the LLC that are consistent with the eligibility requirements in IRC 6221(b)(1). It should also include transfer restrictions preventing assignment or other transfer of membership interests to anyone not meeting those requirements.

The Role of the Partnership Representative

Every LLC taxed as a partnership must either designate a partnership representative in each taxable year or qualify as an eligible small partnership and elect to opt out. Absent an opt out election, a partnership representative must be designated each year on Schedule B on the LLC's IRS Form 1065 partnership tax return.[10] The designation becomes effective when the return is filed with the IRS. Importantly, the designation is only effective for the tax year for which it is made. Consider the example of an LLC that designates a person as partnership representative for the 2025 tax year. A breakdown in the relationship with that person subsequently occurs, and the LLC designates a different person as partnership representative in 2026. If the IRS examines the 2025 return, the person designated in 2025 will be the partnership representative for the examination despite the relationship breakdown and the designation of a different person in the subsequent year.

If the IRS determines that a partnership representative designation is not in effect for the applicable tax year, it will provide written notice to the LLC and have a period of 30 days in which to submit a designation. If the LLC fails to timely do so, the IRS will designate someone to serve as the partnership representative for the LLC.[11]

The partnership representative designation requirement is intended to ensure that the LLC has an available individual to discuss examination-related issues with the IRS who possesses the necessary authority to bind the LLC and that the IRS does not waste time looking for an appropriate contact person. The partnership representative can be any person (individual or entity) with a substantial presence in the United States and does not have to be a member of the LLC. If the LLC designates an entity as the partnership representative, it must also identify a "designated individual" to act on its behalf.[12]

A person designated as partnership representative is deemed to be eligible to serve as the partnership representative unless and until the IRS determines that the person is ineligible.[13] Each LLC and its members should carefully consider who should serve as the partnership representative or "designated individual" acting for a partnership representative that is an entity and to what extent this individual has access to the LLC's books and records or other relevant financial data. This is especially relevant given the nature of the partnership representative's role.

The partnership representative has exclusive authority to act on behalf of the LLC in any IRS examination or judicial proceeding.[14] The authority of the partnership representative includes binding the LLC, and the actions taken and decisions made by the partnership representative, including agreements to adjustments, settlement offers, and litigation strategies, are binding on all of the members (including former members), even if they disagree with, or are not aware of, the partnership representative's actions.[15] As a result, the partnership representative is the ultimate decision-maker for the LLC with the IRS and not simply a conduit for conveying information to the IRS.

In designating a partnership representative, if one of the members is selected for the role, attention should be given to the varying and potentially conflicting interests of the members, particularly in deciding whether to exercise the opt-out election. The amount of a member's investment in the LLC relative to the amounts invested by other members,

The Bipartisan Budget Act of 2015 (BBA) introduced significant changes to the manner in which partnerships are audited and tax deficiencies are assessed.

for example, may affect that member's willingness to pay under the default method of IRC 6225 or to make an opt-out election under IRC 6226. Notably, the interests of newer members who did not hold equity in the LLC during the tax year under review may be materially different than those of the members who did. Moreover, a person who is a member of the LLC when designated to serve as the partnership representative will have an inherent conflict of interest if he or she then ceases to hold equity.

Operating Agreement Provisions and State Law Limitations

Following the BBA's 2018 effective date, LLC operating agreements often include provisions addressing the partnership representative's duties and obligations and express limits of authority. They might include, for example, such provisions as a requirement that the partnership representative give notice to the members of the pendency of any examination, that member or manager consent is required to enter into a closing agreement with the IRS or to agree to extend any statute of limitations, or that the opt-out election must be made each year. Additionally, the partnership representative may owe state common law fiduciary duties to the LLC and/or each of its members, including duties of care and loyalty. The Treasury Regulations, however, clearly provide that the actions of the partnership representative are binding and "[n]o state law, partnership agreement, or other document or agreement may limit the authority of the partnership representative or the designated individual as described in section 6223 and this section."[16]

Every LLC taxed as a partnership must either designate a partnership representative in each taxable year or qualify as an eligible small partnership and elect to opt out.

As a result, while a carefully drafted operating agreement might include specific requirements and obligations limiting authority or discretion, the partnership representative nevertheless has broad discretionary authority to bind the LLC and its members. In dealing with the partnership representative, the IRS is simply not bound by any such contractual or state law limitations, even if it is aware of them. The IRS's position is that "[t]he partnership and the partnership representative are free to enter into contractual agreements to define the scope and limits of their relationship. However, because the IRS is not a party to these agreements, it is not bound by them."[17] Also, given the expansive statutory and regulatory authority granted to the partnership representative, traditional state law agency and apparent authority principles do not apply. In adopting the final regulations, the IRS specifically rejected a proposal that principles of agency law should apply to the partnership representative and that the partnership representative should be operating as the agent on behalf of the partnership subject to the same control by the partnership as any principal would have over an agent. As the IRS explained, "Section 301.6223–2(d) is not intended to prevent partnerships from taking advantage of state law remedies for partnerships who wish to restrict a partnership representative's authority under state law. Rather, the regulations leave the enforcement of such restrictions to the relevant parties, which simplifies the administrative proceeding consistent with the design of the centralized partnership audit regime."[18]

Consequently, if a partnership representative were to exercise authority and take actions binding on the LLC contrary to the LLC's operating agreement, the LLC's and the members' sole recourse may be to seek recovery of damages based on claims of breach of contract and/or breach of fiduciary duty by the partnership representative.[19]

The designation of a partnership representative remains effective until it is terminated by a revocation of the designation, a valid resignation, or an IRS determination that the designation is not in effect. If there is a change to the partnership representative or "designated individual," any actions taken by the partnership representative or designated individual prior to the resignation or revocation remain valid.[20]

Resignation

A partnership representative may resign from serving in such role for any reason by providing written notice to the IRS.[21] The resigning partnership representative would submit an IRS Form 8879 (Partnership Representative Revocation, Designation and Resignation), to the attention of the current IRS employee point of contact (for example, revenue agent, appeals officer, counsel). It may only be submitted "after the IRS issues a notice of administrative proceeding (NAP) under Section 6231(a)(1) for the partnership taxable year for which the partnership representative designation is in effect or at such other time as prescribed by the IRS in forms, instructions or other guidance"[22] Accordingly, it would be filed after the issuance of either Letter 2205-D (Notice of Selection for Examination), Letter 5893 (Notice of Administrative Proceeding-Partnership), or Letter 5893-A (Notice of Administrative Proceeding—Partnership Representative). If the IRS withdraws the notice of administrative proceeding, any valid resignation submitted prior to such withdrawal would remain in effect.[23] Additionally, Form 8879 may be filed in connection with the filing of an administrative adjustment request (AAR) prior to the issuance of Letter 2205-D, Letter 5893, or Letter 5893-A. The resignation is immediately effective upon the IRS's receipt of the Form 8879.[24]

Within 30 days after receiving notice of such a resignation, the IRS will send written confirmation of receipt of that notice to the LLC.[25] The LLC must then designate a successor partnership representative within that 30-day period by filing a new Form 8879. If it fails to do so, the IRS will designate a person to serve as the partnership representative. A resigning partnership representative lacks the authority to designate a successor partnership representative.[26] This is particularly important in situations in which the partnership representative resigns due to an adverse relationship with the LLC or its members, which could otherwise result in appointment of a successor who does not have the confidence or approval of the LLC or the other members.

Removal

Of course, circumstances may arise in which the LLC desires to remove the designated partnership representative.[27] Such situations might include, for example, (a) an adverse change in the relationship between the member designated as the partnership representative and the LLC or the other members, including litigation, breach of the operating agreement or termination of his or her employment with the LLC; (b) a determination that the interests of the partnership representative in the outcome of the examination are materially different than those of the LLC or the other members; (c) a member designated as partnership representative subsequently divests his or her membership interests in the LLC and is no longer a member; or (d) the occurrence of events in the partnership representative's life which may adversely affect his or her judgment or ability to be effective in the role, such as a disability, a death in the family, divorce, insolvency, or pending criminal charges.

The Treasury Regulations allow the LLC to revoke a partnership-representative designation and appoint a new partnership representative. This is typically accomplished by filing an amended partnership return[28] or by filing a Form 8979. The regulations allow any member who held a membership interest during the taxable year to which the revocation relates to sign the revocation.[29] A revocation after the partnership return has been filed may only occur when the IRS issues either a notice of selection for examination as part of an administrative proceeding or a notice of administrative proceeding (NAP) under IRC 6231(a)(1) for the taxable year for which the partnership representative designation is in effect.[30] In general, the IRS will issue a notice of selection for examination to the LLC (and not to the partnership representative) prior to mailing the NAP to inform the LLC that it is being selected for examination. This provides the LLC an opportunity to change its partnership representative before the formal administrative proceeding commences, thereby allowing the LLC to be represented by a partnership representative of its choice throughout the administrative proceeding. The LLC, however, may not revoke the designation of a partnership representative who was designated by the IRS without the IRS's permission.[31]

Conclusion

The BBA and its centralized audit regime fundamentally reshaped how LLCs taxed as partnerships are audited, placing significant emphasis on the pivotal role of the partnership representative. This individual or entity wields immense authority, capable of binding the LLC and all its members to decisions made during an IRS examination or judicial proceeding, regardless of individual member agreement or knowledge or any contractual or state law limitations or controls.

Given such expansive power, the selection of a partnership representative is a critical decision for any LLC taxed as a partnership. Members must carefully consider not only the individual's qualifications and trustworthiness but also potential conflicts of interest that may arise, especially concerning the annual opt-out election. While operating agreements can establish limitations, attempt to define the scope of the partnership representative's authority, and impose notice and

Given such expansive power, the selection of a partnership representative is a critical decision for any LLC taxed as a partnership.

consent requirements, it is crucial to remember that the IRS is not bound by these internal agreements. Consequently, if a partnership representative acts outside the bounds of the operating agreement, the LLC and its members may be limited to seeking recourse through state law claims such as breach of contract or fiduciary duty.

Strategically, LLCs and their members must consider whether to remain in the centralized audit regime or to opt out annually (if eligible). Opting out may be preferrable for closely held LLCs with stable and eligible membership when fairness dictates that tax liabilities should follow the members who benefitted during the audit year. This approach, though, requires careful structuring of membership eligibility and ongoing administrative due diligence, including annual elections and prompt issuance of revised Schedules K-1.

Remaining in the centralized regime may appeal to LLCs with more complex ownership structures, ineligible members, or a preference for administrative simplicity. Entity-level resolution of tax matters can streamline audit procedures and eliminate the need to trace liabilities through past member records. The trade-off, though, is exposing current members to liabilities to which they may not have contributed and reliance on the sole authority of the partnership representative.

Understanding the default centralized audit regime, the criteria for opting out, and the far-reaching implications of the partnership representative's authority are paramount. Proactive planning, including thoughtful selection of the partnership representative and careful drafting of operating agreement provisions, can help mitigate potential risks and ensure a smoother process in the event of an IRS audit.

NOTES

1. *See* 26 CFR 301.7701-3.
2. 26 USC 6221(a).
3. Under IRC 6221, "the applicability of any penalty, addition to tax, or additional amount which relates to an adjustment to a partnership item must be determined at the partnership level … Therefore, the fraud penalty under IRC 6663(a), as it relates to fraud on the partnership return, must be determined at the partnership level, even if there are partner-level determinations that may need to subsequently be made. *Omega Forex Grp, LC v United States*, 906 F3d 1196, 1211-12 (10th Cir 2018); *see also United States v Woods*, 571 US 31, 39-41 (2013). "If fraud is established at the partnership level, then all partners will be liable for the fraud penalty on any underpayments of tax resulting from the adjustments to partnership items that are attributable to fraud." IRS Office of Chief Counsel Memorandum No 202044010 (Oct 30, 2020).
4. *See* 26 CFR 301.6226-3(c).
5. *See e.g.*, 26 CFR 301.7701-2(b)(8).
6. *See* 26 USC 6221(b)(1).
7. *See* 26 CFR 301.6221(b)-1(b)(3)(ii).
8. *See* 26 CFR 301.6221(b)-1(b)(2)(ii).
9. *See* 26 CFR 301.6221(b)-1(b)(3).
10. *See* 26 CFR 301.6223-1(c)(2).
11. *See* 26 CFR 301.6223-1(f).
12. 26 CFR 301.6223-1(b)(3).
13. *See* 26 CFR 301.6223-1(b). Such a determination might occur, for example, upon the death or incapacity of the person, or if the person no longer has a substantial presence in the United States.
14. *See* 26 CFR 301.6223-2(d)(1).
15. *See* 26 CFR 301.6223-2(a).
16. 26 CFR 301.6223-2(c)(1).
17. Internal Revenue Bulletin 2018-35 (Aug 27, 2018).
18. *Id.*
19. A person evaluating whether to accept a designation to serve as would be wise to seek an indemnification and hold harmless agreement against liability for actions taken in good faith.
20. *See* 26 CFR 301.6223-2(b).
21. *See* 26 CFR 301.6223-1(d).
22. 26 CFR 301.6223-1(d)(2).
23. *Id.*
24. 26 CFR 301.6223-1(d)(3).
25. 26 CFR 301.6223-1(d)(1).
26. *Id.*
27. Additionally, after commencement of a partnership action, the U.S. Tax Court is authorized to remove a partnership representative in the partnership action for cause, after giving notice and an opportunity to be heard. *See* Rule 255.6(b) of the Rules of Practice and Procedure of the United States Tax Court.
28. *See* 26 CFR 301.6223-1(c)(2).
29. *See* 26 CFR 301.6223-1(e)(4).
30. *See* 26 CFR 301.6223-1(e)(2).
31. *See* 26 CFR 301.6223-1(e)(6).

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Admission as an LLC Member in the Absence of an Operating Agreement

By Ian Williamson

Most business lawyers have experienced the following scenario at least once, if not many times: a dispute has arisen among supposed owners of a limited liability company; the client looks confused when asked if an operating agreement exists; and there appear to be minimal or no records relating to the entity whatsoever except for the initial articles of organization, perhaps filed by a long-retired CPA or by the client themselves. Where the dispute involves questions as to whether parties have legitimate claims to membership in the LLC, the initial investigation becomes particularly important, and the lawyer's first task is to evaluate the putative members' claims as to how and when they were admitted as a member of the company.

LLC membership interests are personal property[1] that may be assigned, converted, held in common by multiple persons,[2] and used as security for financial obligations,[3] but the Michigan Court of Appeals has had limited opportunities to analyze or apply the Michigan Limited Liability Company Act's guidelines for admission as a member of an LLC. Until this year, nearly every opinion addressing those guidelines has been unpublished, leaving some uncertainty in Michigan law regarding when a person might have become an LLC member in the absence of an operating agreement. Given the informality with which many LLCs are operated, and given that many LLCs lack operating agreements, this can lead to instances where one party may reasonably believe they are a member based on the conduct of the parties, but it is not clear whether statutory guidelines for admission have been satisfied.

Recently, the Michigan Court of Appeals approved for publication its opinion in *Branch v Rudolph*, No 368071, ___ Mich App ___, ___ NW3d ___ (May 1, 2025). The *Branch* case involved claims that an individual defendant (Kevin Rudolph) was a member of an LLC defendant. *Id.* at *1. Rudolph denied this and ultimately moved for summary disposition arguing, *inter alia*, that he was not a member of the LLC, which the trial court granted. *Id.* at *2. Branch appealed the trial court's order. After reviewing the arguments and evidence that were raised in the trial court and analyzing whether they met the guidelines set forth in MCL 450.4501, the court of appeals held that Branch's proffered evidence below was not sufficient to create a genuine issue of material fact as to whether Rudolph was admitted as a member to the company in question. *Id.* at *5.

MCL 450.4501(1) and (2), which set forth the statutory guidelines by which a person may be admitted as a member of a limited liability company, were adopted effective December 16, 2010, through Public Act 290. *Branch v Rudolph* will be the first published Michigan Court of Appeals opinion interpreting and applying those guidelines.

The Statutory Bases for Admission

The process by which someone may be admitted as a member of an LLC depends first on timing. *Bartosiewicz v A2Q, LLC*, Nos 345942, 345944, 2020 WL 1286227 at *4 (Mich Ct App Mar 17, 2020) (unpublished). MCL 450.4501 addresses two different scenarios: (1) admission as a member in connection with the *formation* of a limited liability company, and (2) admission as a member *after* the formation of the company. Depending on the circumstances, the statutorily recognized methods of admission differ. The current statutory language of MCL 450.4501(1) and (2) is as follows:

> 450.4501 Members; admission; liability for acts, debts, or obligations.
>
> Sec. 501.
>
> (1) A person may be admitted as a member of a limited liability company in connection with the formation of the limited liability company in any of the following ways:
>
> (a) If an operating agreement includes requirements for admission, by complying with those requirements.

(b) If an operating agreement does not include requirements for admission, if either of the following are met:

(i) The person signs the initial operating agreement.

(ii) The person's status as a member is reflected in the records, tax filings, or other written statements of the limited liability company.

(c) In any manner established in a written agreement of the members.

(2) A person may be admitted as a member of a limited liability company after the formation of the limited liability company in any of the following ways:

(a) If the person is acquiring a membership interest directly from the limited liability company, by complying with the provisions of an operating agreement prescribing the requirements for admission or, in the absence of provisions prescribing the requirements for admission in an operating agreement, upon the unanimous vote of the members entitled to vote.

(b) If the person is an assignee of a membership interest, as provided in section 506.

(c) If the person is becoming a member of a surviving limited liability company as the result of a merger or conversion approved under this act, as provided in the plan of merger or plan of conversion.

For companies that have been informally operated and perhaps organized without the assistance of a business law attorney, these relatively narrow guidelines for admission as a member of a limited liability company can result in substantial uncertainty, particularly if relationships among putative owners become strained. If the company has never had an operating agreement or other written agreement of the members, a person seeking to establish admission as a member in connection with the *formation* of the company under MCL 450.4501 faces substantial hurdles if the company has not filed tax returns and is generally lacking documentation. The statutory guidelines for admission *after* the formation of the company are different. If the company lacks an operating agreement and the membership interest is not transferred or created through a plan of merger or conversion, a person's routes to establish admission as a member are limited to either (1) unanimous vote of members entitled to vote, or (2) assignment of the membership interest.

Permissive or Mandatory?

In addition to the recent *Branch v Rudolph* opinion, the court of appeals has analyzed and applied the current version of MCL 450.4501(1) and (2) in various unpublished cases since its adoption. None of these cases address the question of whether the legislature's choice to use the word "may" in these sections means that the statute is permissive rather than mandatory. Under Michigan law, courts must give the ordinary and accepted meaning to the permissive word "may" and the mandatory words "shall" or "must" unless doing so "would frustrate the legislative intent as evidenced by other statutory language or by reading the statute as a whole." *Atchison v Atchison*, 256 Mich App 531, 535, 664 NW2d 249 (2003). If the use of "may" in MCL 450.4501(1) and (2) is permissive, then the statutory guidelines set forth therein should be construed as methods by which a person can establish admission as a member of an LLC *with certainty*, while leaving open the possibility that other arguments for admission may be viable, if not definitive.

> The process by which someone may be admitted as a member of an LLC depends first on timing.

However, Michigan law further requires that courts construing statutory language determine the intent of the legislature by "examining the specific language of the statute" and reading it "in the context with the entire statute to produce a harmonious whole." *Yopek v Brighton Airport Ass'n, Inc*, 343 Mich App 415, 424, 997 NW2d 481 (2022). In *Branch*, the only published opinion applying the statute, the court of appeals does not directly address whether MCL 450.4501(1) and (2) are permissive but does refer to the definition of a "member" as set forth in MCL 450.4102(2)(p). *Branch v Rudolph*, *supra*, 2025 WL 868739 at *3. That definition states as follows:

450.4102 Definitions

Sec. 102

(1) Unless the context requires otherwise, the definitions in this section control the interpretation of this act.

(2) As used in this act:

* * *

(p) "Member" means a person that has been admitted to a limited liability company as provided in section 501, or, in the case of a foreign limited liability company, a person that is a member of the foreign limited liability company in accordance with the laws under which the foreign limited liability company is organized.

The definition of a "member" for domestic LLCs is limited to persons who have been admitted "as provided in section 501." The *Branch* court appears to be relying on this definition to interpret the guidelines from MCL 450.4501(1) and (2) as mandatory rather than permissive, which is consistent with the general trend seen in unpublished Michigan cases analyzing and applying those guidelines. *See, e.g., Fowler v Keiper*, No 360216, 2023 WL 4140323 (Mich App Jun 22, 2023) (unpublished) (no genuine issue of material fact as to whether the plaintiff was admitted as a member in connection with the formation of LLC because documentary evidence suggested another person was the sole member, though the parties' communication history along with affidavits of third parties arguably suggested otherwise).[4]

A company's operating agreement is the primary source for determining whether a person has been admitted as a member of a limited liability company.

Establishing Membership in Connection with Formation

A limited liability company is formed and comes into existence on the effective date of the articles of organization. MCL 450.4202(2).[5] MCL 450.4501(1) clarifies that compliance with or execution of an operating agreement are the primary routes for admission as a member at or around the time an LLC is formed. However, the statute also identifies several alternative methods for admission as a member where companies do not have operating agreements.

Operating Agreement

A company's operating agreement is the primary source for determining whether a person has been admitted as a member of a limited liability company. In fact, prior to the December 2010 amendment to MCL 450.4501, a person could *only* be admitted as a member of a limited liability company in connection with the formation of the entity by signing the initial operating agreement.[6] *See, e.g., Cooper v Dean*, No 283244, 2010 WL 1223160 at *2 (Mich Ct App Mar 30, 2010) (unpublished). Though this article's focus is admission as an LLC member in the absence of an operating agreement, it should be noted that whether an operating agreement exists may not be entirely clear.

As defined in MCL 450.4102(r), an "operating agreement" generally means "a written agreement by the member of a limited liability company that has 1 member, or between all of the members of a limited liability company that has more than 1 member, pertaining to the affairs of the limited liability company and the conduct of its business." In *Cooper*, the court of appeals confirmed that execution of the articles of organization of a limited liability company does not establish membership and noted that MCL 450.4202 allows "[o]ne or more persons, who *may* become members" to file articles of organization and create a limited liability company. MCL 450.4202(1). Although Dean had signed the articles of organization of the entity in question, he never signed the operating agreement and therefore did not become a member in connection with the formation of the company. *Id.*

However, this does not mean that articles of organization are necessarily irrelevant to membership. The Limited Liability Company Act's definition of "operating agreement" clarifies that the term "includes any provision in the articles of organization pertaining to the affairs of the limited liability company and the conduct of its business." MCL 450.4102(r). While the articles of organization in *Cooper* apparently did not qualify as an operating agreement, articles of organization should always be reviewed to determine whether they include provisions that arguably *would* qualify under the Act.

Records, Tax Filings, and Other Written Statements

Michigan jurisprudence provides little detail as to which "records, tax filings, and other written statements" may be sufficient to establish admission as a member in connection with the formation of a limited liability company. In *Bartosiewicz*, the LLC in question had no operating agreement but the court of appeals noted that one member's "status as a member [was] reflected in the… tax filings" of the LLC at issue but the court does not identify the tax filings. *Bartosiewicz*, *supra*, 2020 WL 1286227 at *4. An argument that membership could *not* be based on tax filings was apparently raised unsuccessfully in *Allen & Allen Props, LLC v Smith*, No 365970, 2024 WL 3906640 (Mich Ct App Aug 22, 2024) (unpublished). The Court of Appeals did not identify the tax documents at issue in that case and found that the trial court had not relied on tax documents as a separate basis for determining membership, but rather as evidence of the parties' intent as to the meaning of operating agreement language. *Id.* at *7.

Conversely, in *Branch*, which also involved an LLC without an operating agreement, the court of appeals held that a bank signature card document that listed Kevin Rudolph as a "member" was *not* sufficient to establish Rudolph's admission as a member because it was a record or other written document of the bank and not the limited liability company. *Branch v Rudolph*, *supra*, 2025 WL 868739 at *4. While the bank signature card document contained information suggesting that Rudolph was a member, it did not meet the statutory requirement that the information be on records or in statements of the LLC itself.[7] *Id.*

The *Branch* court read MCL 450.4501(1)(b)(ii) narrowly to include only records or written documents prepared and maintained by the company and held that the presumptive intent of the statutory language "was to allow LLCs to identify their own members in records or written statements produced by the LLC." *Id.* In other words, if a company without an operating agreement nevertheless maintained a "member directory" or similar document, such a document would presumably satisfy the statute. But documents are created by persons, and the *Branch* holding provides no guidance or instruction on determining whether a document is a "record or written statement produced by the LLC" if there is a dispute as to whether the document's creator is a member or agent of the LLC. Practically speaking, the *Branch* opinion may do little to clarify membership for LLCs without operating agreements where membership in the company is contested and the parties cannot agree on whether an individual creating a record or written statement is authorized to act on behalf of the company.

Written Agreement of the Members

MCL 450.4501(1)(c) also permits admission in connection with the formation of a limited liability company "in any manner established in a written agreement of the members." The Limited Liability Company Act does not include a definition for "agreement" outside of the definition for "operating agreement," but the language of the Act generally strongly suggests that the legislature would have simply used the term "operating agreement" if that was the intended meaning of "agreement" as used in MCL 450.4501(1)(c).[8] Accordingly, this subsection is apparently meant to be more inclusive than MCL 450.4501(1)(a), which is limited to operating agreements.

Michigan jurisprudence does not provide specific guidance as to what may constitute a "written agreement of the members" in connection with the formation of an LLC. MCL 450.4501(1)(c) does not appear to have been analyzed by the court of appeals in any published or unpublished opinion at this point. Presumably, any writing enforceable as a contract under Michigan law would qualify under this subsection—and any writing that adequately expresses the members' intent without ambiguity could arguably satisfy the statutory language even if *not* enforceable as a contract.

Michigan jurisprudence provides little detail as to which "records, tax filings, and other written statements" may be sufficient to establish admission as a member in connection with the formation of a limited liability company.

Establishing Membership After Formation

For persons asserting admission as a member of an LLC at some point after formation, compliance with an operating agreement remains paramount if the person is acquiring a membership interest directly from the company. If no operating agreement exists or if the operating agreement is silent as to admission, a person acquiring a membership interest from the company may be admitted via unanimous vote of the existing members. For persons acquiring a membership interest *other than* directly from the company or through a plan of merger or conversion, the only other means of admission identified in the statute is as an assignee of a membership interest as provided in MCL 450.4506.

Vote of Members

MCL 450.4102(v) defines a vote as "an affirmative vote, approval, or consent." Michigan law has recognized that "affirmative" can be defined as "that which declares positively; that which avers a fact to be true; that which establishes …." *People v Lukity*, 460 Mich 484, 505 n 1, 596 NW2d 607 (1999), citing to Black's Law Dictionary (6th Ed.) at 59. In order to demonstrate that a unanimous vote, approval, or consent was "affirmative," then, a member should be prepared to show at least some evidence that the alleged vote, approval, or consent was declared positively or averred to be true by all other members.

A person's simple participation in an LLC's operations or management without protest from established members does not, by itself, meet this standard. The U.S. District Court for the Eastern District of Michigan has held that an informal involvement of persons in the operation or management of an LLC, even to the extent of providing them with K-1s and allowing them to review confidential and sensitive information, is not sufficient to constitute a unanimous vote of members pursuant to MCL 450.4501(2)(a). *Patel v Bhakta*, No 13-cv-14099, 2014 WL 5023460 at *4-5 (ED Mich Oct 8, 2014).

In *Bartosiewicz*, the Michigan Court of Appeals similarly ruled that MCL 450.4102(v) "does not permit passive approval or consent to admit a new member to an LLC…" *Bartosiewicz*, *supra*, 2020 WL 1286227 at *5. As in *Patel*, the putative member in *Bartosiewicz* participated in the company's operations and management and even controlled the company's finances with the approval of the company's actual members. *Id.* Nonetheless, the *Bartosiewicz* court held that without some evidence of an actual affirmative vote for her admission, there was no genuine issue of material fact as to whether the plaintiff had been admitted as a member.[9] *Id.* The putative member had received payments that appeared to be for a salary as opposed to distributions. *Id.* at *2. In addition, though the LLC in question had no operating agreement and was therefore member-managed per MCL 450.4401(1), the court also noted that "nonmember managers may fill important roles in an LLC," citing to MCL 450.4402. *Id.* at *5.

While assignment is a valid means of admission as an LLC member after formation of the company, an assignee may still face hurdles to obtaining membership status depending on the circumstances of the company.

Membership via Assignment

A membership interest in an LLC is assignable in whole or in part unless the company's operating agreement provides otherwise. MCL 450.4504(1). The Act does not define "assignment" and does not limit or restrict LLC members to any specific method of assignment of membership interests. However, a member seeking to establish admission after the formation of a company via assignment under Section 501 should also be prepared to demonstrate that the assignment satisfies the requirements of Section 506. MCL 450.4501(2)(b).

Under Section 506, an assignee of a membership interest in a limited liability company that has more than one member may become a member only upon the unanimous vote of the members entitled to vote. MCL 450.4506(1). If the LLC only has one member, the assignee "may become a member in accordance with the terms of the agreement between the member and the assignee." *Id*. Michigan law provides that no particular form of words is required for an assignment, but the assignor must manifest an intent to transfer and must not retain any control or any power of revocation. *Burkhardt v Bailey*, 260 Mich App 636, 655, 680 NW2d 453 (2004). LLC membership interests are personal property and assignments of personal property may be oral as well as written, which suggests that an LLC membership interest may be assigned orally. *See, e.g., Case v Ranney*, 174 Mich 673, 683-684, 140 NW 943 (1913). However, an assignor may only validly assign an interest that the assignor possesses. *See First of America Bank v Thompson*, 217 Mich App 581, 587, 552 NW2d 516 (1996). Accordingly, a putative assignee of a membership interest should ensure that the assignor can support their own prior claim to the assigned membership interest.

While assignment is a valid means of admission as an LLC member after formation of the company, an assignee may still face hurdles to obtaining membership status depending on the circumstances of the company. As noted, if the company has more than one member, the assignee cannot become a member without the unanimous vote of all other members unless an operating agreement exists and provides otherwise. MCL 450.4506(1). An assignee who is not admitted via unanimous vote or in accordance with the terms of an agreement with an assignor may receive distributions that would otherwise flow to the assigned interest but may not be entitled to participate in the LLC's management or affairs. MCL 450.4505(2).

Conclusion

When dealing with LLCs that lack operating agreements, clearly identifying who has been admitted as a member can be complicated. The guidance available in Michigan's jurisprudence is limited, and the caselaw that does exist is largely unpublished. While the recent publication of *Branch v Rudolph* is helpful, the statutory guidelines for establishing admission as a member leave open questions that will continue to fuel litigation into the future. With LLCs far outstripping corporations and partnerships as the entities of choice for conducting business in Michigan, the court of appeals should consider publication of additional opinions that analyze and apply MCL 450.4501(1) and (2) as they come before the court.[10]

NOTES

1. MCL 450.4504(1).
2. MCL 450.4503(1)(b).
3. MCL 450.4508.
4. The factual record also included sworn testimony that the parties had agreed in writing to co-ownership, and that a Michigan State Trooper was a witness to that document, but the plaintiff had lost the agreement in one of several different moves.
5. While a company does not come into existence until the articles of organization have been filed, limited liability companies are subject to the "de facto corporation" doctrine and may be bound by contracts executed prior to the point at which they are formed. *Duray Dev, LLC v Perrin*, 288 Mich App 143, 792 NW2d 749 (2010), *lv denied,* 488 Mich 994.
6. The current version of MCL 450.4501 was adopted through Public Act 290 of 2010, which became effective as of December 16, 2010. The previous version stated in subsection (1)(a) that a person could be admitted as a member "in connection with the formation of a limited liability company, by signing the initial operating agreement." The statute did not provide for any other means to be admitted as a member in connection with the formation of the company.
7. The *Branch* court did not evaluate whether the bank signature card document could serve as evidence of an assignment of membership interest to Rudolph as no party alleged or argued that any such assignment had been made.
8. In practice, it seems likely that most such agreements would qualify as an "operating agreement" anyway under the broad definition set forth in MCL 450.4102(r).
9. The *Bartosiewicz* plaintiff appears not to have argued that any membership interest was assigned to her, as the court of appeals does not discuss or analyze this possibility.
10. This article was researched, drafted, revised, and completed without the use of any generative AI, large language models, or other artificial intelligence tools or software.

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Case Digests

*Prepared by *Tala Dahbour*

***FCA US LLC v Kamax Inc*, No 371234, ___ Mich App ___, ___ NW3d ___ (May 14, 2025)**

Fastener manufacturer Kamax supplied approximately 180 different parts to vehicle manufacturer FCA. The agreement between the parties included terms and conditions incorporated into each purchase order, stating, "This order is for approximately 65%-100% of our requirements." Upon raising their prices, Kamax notified FCA that it would no longer deliver parts based on their previous agreement. FCA then brought an action for breach of contract against Kamax, and Kamax counterclaimed unjust enrichment, common-law conversion, and statutory conversion.

The trial court granted a preliminary injunction, requiring Kamax to continue delivering supplies according to the parties' agreement. Kamax moved for summary disposition under MCR 2.116(C)(10) and for dissolution of the injunction. Kamax argued that the trial court incorrectly relied on *Cadillac Rubber & Plastics, Inc v Tubular Metal Sys, LLC*, 331 Mich App 416, 952 NW2d 576 (2020), which had been implicitly overruled by *MSSC, Inc v Airboss Flexible Prods Co*, 511 Mich 176, 180, 999 NW2d 335 (2023). The trial court denied Kamax's motions, finding that the contract between the parties constituted a valid requirements contract.

On appeal to the Michigan Court of Appeals, the court distinguished *Cadillac* from *Airboss*, finding no conflict between them and refusing to infer that *Airboss* had implicitly overruled *Cadillac*. The contract at issue in *Airboss* did not contain a quantity term, whereas the requirements contract in *Cadillac* stated a quantity term "between one part and 100% of our requirements." The court found that the parties' contract constituted a requirements contract under *Cadillac*. Therefore, the decision of the trial court was affirmed.

***Branch v Rudolph*, No 368071, ___ Mich App ___, ___ NW3d ___ (Mar 19, 2025)**

Lee and James were partners in the transportation company STL. After James passed away, his brother Kevin, who had access to the company's bank accounts, withdrew money per Lee's instructions, who claimed these transactions were in the normal course of business. Lee later established a new business, ST4L, which he asserted was never active. The personal representative of James's estate sought a financial accounting from STL but received no response, prompting her to file a lawsuit against Kevin, STL, and ST4L. The complaint included allegations of violating the Michigan Limited Liability Companies Act, fraud, breach of contract, unjust enrichment, breach of fiduciary duties, and conversion, among others.

After two years of legal discovery, Kevin and ST4L requested a summary disposition, contending there were no factual disputes since Kevin was not an STL member and funds were used appropriately. The trial court agreed, ruling there was no genuine issue of material fact and granting summary disposition. The plaintiff later sought reconsideration of the claims specifically against STL. The trial court reviewed the motion without a hearing and denied it, extending its original decision to dismiss the claims against all defendants, not just Kevin and ST4L.

The estate appealed the trial court's decision, arguing that Kevin was a member of STL and requesting to pierce the corporate veil, and contended that the trial court had improperly dismissed their claims. In support of this, the estate submitted documents from Chase Bank indicating that Kevin was listed as a "member" on the company's bank account. However, the court of appeals dismissed this claim, referencing MCL 450.4501(1)(b)(ii), which requires that evidence of membership come from the company's records or statements.

Plaintiff also argued that the trial court erred in dismissing claims against STL, which had not moved for summary disposition and had not filed an answer. When the issue was raised, plaintiff filed a motion for reconsideration and requested a trial date for the unresolved claims. Instead, the trial court concluded that the reasoning supporting the dismissal of Kevin and ST4L also applied to STL. In denying reconsideration, the trial court confirmed dismissal of all claims against all defendants. The court of appeals disagreed and found that the dismissal violated plaintiff's due-process rights, as plaintiff was not given notice or an opportunity to be heard on whether STL was entitled to summary disposition under MCR 2.116(C)(10). The trial court's dismissal of claims against Kevin and ST4L is affirmed. However, because the claims against STL were dismissed without due process, that portion of the judgment is vacated, and the matter is remanded for further proceedings. Affirmed in part, vacated in part, and remanded.

***Kircher v Boyne USA, Inc*, No 166459, ___ Mich ___, ___ NW3d ___ (Mar 27, 2025)**

In *Kircher v Boyne USA, Inc*, 513 Mich 1054, 4 NW3d 351 (2024), the trial court initially determined that the plaintiff had a valid breach of contract claim based on the implied duty of good faith and fair dealing, thus denying the defendants' motion for summary disposition. The dispute centered around settlement agreements that included a formula for calculating the annual redemption price of the plaintiff's shares, with language allowing for changes only if "otherwise agreed." After a 2018 real estate transaction significantly increased the defendants' debt, the formula yielded a negative value for 2019, and the defendants refused to renegotiate the formula, leading the plaintiff to file a breach of contract suit. The trial court found questions of fact as to whether defendants breached the implied covenant of good faith and fair dealing. The Michigan Court of Appeals affirmed.

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On appeal, the Michigan Supreme Court held that the court of appeals erred by holding that defendants were contractually obligated to use a different formula under the implied covenant of good faith and fair dealing. The court ruled that this implied covenant cannot establish new contract obligations where none exist, though it applies to how a party exercises discretion in fulfilling existing obligations. The phrase "unless otherwise agreed" did not grant unilateral discretion but indicated that the parties could mutually modify their agreement. Consequently, the court of appeals incorrectly upheld a breach of contract claim based solely on the implied covenant without an associated contractual duty. Reversed in part, denied leave to appeal in part, and remanded the case to the trial court for further proceedings.

McPherson v Suburban Ann Arbor, LLC, 135 F4th 419 (6th Cir 2025)

The plaintiff went car shopping at the defendant's dealership, where she filled out a credit application and, later that day, was informed of an approved financing plan requiring a $2,000 down payment and various fees. After completing the payment and signing, she received the car's title and drove it home. Weeks later, the dealership notified her that the financing had fallen through, giving her the options to return the car or accept worse terms. When the plaintiff refused to sign the new agreement, the dealership repossessed the car.

The plaintiff filed a lawsuit in federal court, alleging statutory conversion and violations of the Michigan Regulation of Collection Practices Act, among other state and federal claims. The jury awarded her $15,000 in actual damages, $23,000 for the value of the converted property, and $350,000 in punitive damages. The plaintiff sought prejudgment interest, treble damages on state claims, $555,039.50 in attorney's fees, and $20,684.61 in costs. The district court denied treble damages but granted her $418,995 in attorney's fees, $11,212.61 in costs, and $6,433.65 in prejudgment interest, totaling $824,641.26.

On appeal, the plaintiff argued for treble damages and additional attorney's fees; the defendant cross-appealed, deeming the awards excessive. Although both Michigan statutes under which the plaintiff prevailed allow for treble damages, they are discretionary, not mandatory. The district court found them unnecessary, considering the $350,000 in punitive damages already awarded. The district court also expressed due process concerns because the plaintiff's total award resulted in a 9.2-to-1 ratio of punitive to actual damages. Therefore, there was no abuse of discretion in the district court's decision not to grant treble damages.

Regarding attorney's fees, the district court applied a well-reasoned approach. It reviewed market rates in Michigan, past case rates, and justified the hours required given the case's complexity. It found the requested $600 per hour rate for lead attorneys excessive compared to the market's 95th percentile, settling at a $450 rate within the 75th percentile. After similar scrutiny regarding the associate's rate, the court's award decision was considered reasonable without abuse of discretion. Affirmed.

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BUSINESS LAW SECTION
State Bar of Michigan
306 Townsend Street
Lansing, Michigan 48933-2012

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Published in cooperation with
INSTITUTE OF CONTINUING
LEGAL EDUCATION
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Copy and Production Editor

SECTION CALENDAR

Council Meetings

DATE	TIME	LOCATION
September 12, 2025*	12:00 p.m.	JW Marriott Hotel, Grand Rapids
September 13, 2025	9:00 a.m.	JW Marriott Hotel, Grand Rapids
December 4, 2025	11:00 a.m.	Zoom

*Annual Meeting followed by Council Meeting the next day