

Current Developments in Michigan Business Law

A number of significant developments in business law are currently taking shape in Michigan. Practitioners should be aware of the following noteworthy items.

Amendments to Michigan's Limited Liability Company Act

For legislative purposes, the proposed amendments to Michigan's Limited Liability Company Act (LLCA) have been split into two parts. The first part represents the main components of the amendments and the second represents what has been termed the "conversion package," consisting of four separate bills that provide for the conversion of corporations and limited partnerships into LLCs (and vice versa). The parts are currently at different points in the legislative pipeline.

The first part has been introduced in the senate as SB 1418 by Senator Bill Bullard. As of this writing, the bill is expected to pass the senate on November 12, 2002, and will then move to the house to undergo committee review and, ultimately, a general vote. If matters proceed as expected, the bill will pass and the governor will sign it during this legislative session. The bill is designed to take immediate effect. If the bill loses priority and is placed on the legislative back burner until this session's end, the process must start anew and the amendments will not become law until at least some time in February.

Senator Bullard introduced the "conversion package" on October 13. It too must now wind its way through the senate and the house before reaching the governor. It will be difficult, but not impossible, to get this component through before this session's end.

Key provisions of the proposed amendments include the following:

- **Organizers.** Nonmember "organizers" would be able to file the articles.
- **Single-Member LLCs and Operating Agreement.** The definition of *operating agreement* would be amended to

allow operating agreements for single-member LLCs.

- **Voting Majority.** The amendments would clarify that the default definition of *majority* with respect to voting is majority in interest, not majority in number.
- **Noneconomic Members.** The proposed amendments make it clear that domestic LLCs may have members who do not contribute anything in exchange for obtaining a membership interest.
- **Joint Ownership Issues.** Spouses would be authorized to hold membership interests as tenants by the entirety. The statute would also address the voting and distribution consequences of all situations in which a membership interest is held by more than one person.
- **Execution of Documents.** Authorized agents would be permitted to execute documents. One who signs a document through an attorney-in-fact would need to state his or her capacity (as member or manager).
- **Good Standing.** Because many LLCs have failed to file annual statements, a new system would be put in place whereby delinquent LLCs would face consequences, including loss of their entitlement to a good standing certificate or perhaps the exclusivity of their entity name.
- **Service of Process.** Section 207(3), making the LLC's resident agent an agent for service of process on members and managers, would be repealed. If service on a domestic LLC cannot be accomplished because the resident agent cannot be found or served, service of process would be made by delivery (or mailing via registered mail) to the administrator.
- **Managers.** The definition of *manager* would be modified to delete a confusing reference to an operating agreement. A reference to management by managers would continue to be required in the articles, although specific managers need not be identified in that document.
- **Limitations on Manager's Apparent**

Authority. Currently, section 406 states that a manager's act binds the LLC unless the manager does not have authority in that area and the third party has "knowledge" of the lack of authority. An amendment would state that the third party would be charged with knowledge of limitations on the manager's authority in either the LLC's articles or the LLCA. Note that this change would effectively destroy the ability of third parties to rely on "apparent" authority of managers. Third parties would need to review LLC documents to avoid problems, and non-manager members would need to consider putting the limits on manager authority into the articles instead of just in the operating agreement.

• **Conversions:**

Partnership to LLC. The proposed amendments would permit both partnerships and limited partnerships to convert to LLCs. The key proposed changes would emphasize that the LLC is a continuation of the former partnership by eliminating the references to the cancellation of the limited partnership certificate and by stating that the conversion is not a dissolution of the partnership. Additional changes would provide for the adoption of the LLC's initial operating agreement by the partners in the same way they approve the conversion (and a statement that the partnership agreement terminates), authorization in sections 707 and 206 of transfers of assumed names (as in the correlative merger provisions), and an addition to section 204 to ensure that the LLC may use the same basic name as the partnership. Amendments to the Limited Partnership Act would include a new conversion provision, tracking section 707 of the LLCA, and assumed name transfer language.

Corporation to LLC/LLC to Corporation. New additions to both the LLCA and the Michigan Business Corporation Act (MBCA) (together with a minor amendment to the Professional Service Corporation Act) would allow the conversion of

a corporation to an LLC or of an LLC to a corporation. The provisions are similar to those for a partnership conversion, except that a corporation converting to an LLC would have to follow essentially the same internal procedures it would have to follow for a merger. The procedure would be more direct than a cross-entity merger into a shell LLC or corporation, and the proposed amendments state that the converted entity is considered the same entity, with all the property, rights, and liabilities of the converted entity. Note that a dissenting member of an LLC converting to a corporation would have withdrawal rights as in a merger, and shareholders who vote against the conversion of a corporation into an LLC may have appraisal rights. As most practitioners are aware, conversions of a corporation into an LLC will have tax consequences that can be significant and adverse to the participants.

- **Dissolution.** Dissolution on the expiration of a fixed term (a term fixed in the articles of organization) or entry of a judicial decree is proposed to be automatic and would not require the filing of a certificate of dissolution.
- **Electronic Transmission.** In provisions patterned after the 2001 amendments to the MBCA, a definition of and various references to electronic transmission of documents—to or from the administrator or to members (financial statements)—would be added to sections 102(2), 104(1) and (5), 105(1), 106(1), 503(1), and 1101(2) [formerly 1101(1)(q)].

Public Acts 579–581

The aim of this legislation is to amend the General Sales Tax Act (SB 593), the Use Tax Act (SB 594), and the Income Tax Act of 1967 (SB 595). Specifically, those provisions that require the Department of Consumer and Industry Services to withhold a certificate of dissolution or withdrawal until a determination is made that a corporation owes no sales, use, or income taxes, are to be eliminated. Instead, corporations will be required to request a certification from the

Department of Treasury showing that they are free of any tax debt.

The acts also require that purchasers of an operating or defunct business escrow sufficient funds to cover any potential outstanding taxes, interest, and penalties until the former owner produces a treasury department receipt indicating that there are no outstanding taxes due.

These acts took effect October 14, 2002.

House Bill 6338—The Uniform Securities Act

Representative Richner has introduced HB 6338, the Uniform Securities Act (2002). The act was referred to the Committee on Insurance and Financial Services on September 18. The aim of this legislation is, as its name implies, to create greater uniformity with respect to securities law. The act will repeal certain prior acts (or portions thereof) in the securities arena.

The act is currently divided into seven articles. Article one contains general provisions. Article two outlines the exemptions under the act. Article three governs the circumstances under which a person may offer or sell a security in the state. Article four regulates individuals acting as broker-dealers, agents, investment advisers, investment adviser representatives, and federal covered investment advisers. Article five addresses fraud and liabilities arising out of the offer, sale, or purchase of securities. Article six covers administration and judicial review. Lastly, article seven deals with the act's transition period, indicating it will take effect 180 days after it is enacted and that it is not to be retroactively applied.

The Michigan Business Court

Many major industrial states have now established and implemented some form of a specialized business court. Proponents of these courts point out a number of benefits, including consistency, predictability and accuracy, judicial efficiency, and attractiveness to businesses.

The Business Court Ad Hoc Committee has examined the possibility of such a court here in Michigan and has concluded that it merits fur-

ther study. Those who would like to become involved or have questions about the business court, should contact committee chairperson Diane L. Akers at Bodman, Longley & Dahling, LLP; 100 Renaissance Center, 34th Floor; Detroit, Michigan 48243; 313-259-7777; dakers@bodmanlongley.com; or committee administrator Thomas P. Bruetsch at Bodman, Longley & Dahling, LLP; 100 Renaissance Center, 34th Floor; Detroit, Michigan 48243; 313-259-7777; tbruetsch@bodmanlongley.com.

The Michigan Cyber Court

Michigan's new cyber court, which is to have concurrent jurisdiction over nonjury high-tech business and commercial cases exceeding \$25,000 in controversy, is not up and running as of the planned October 1, 2002, commencement date. Due to funding problems, the Michigan Supreme Court has not finalized the proposed Cyber Court Rules.



Eric I. Lark is a member of Kerr, Russell and Weber, PLC, Detroit. Mr. Lark specializes in mergers and acquisitions, securities law, business law, and offshore initiatives. He is treasurer of the Business Law Section of the State Bar of Michigan, is the legislative review director for the Section, and is on the Section's Michigan Business Corporation Act Revision Subcommittee. Mr. Lark is licensed to practice law in Michigan, Illinois, and the District of Columbia.

Thomas F. Miller is an associate attorney at Kerr, Russell and Weber, PLC, Detroit. Mr. Miller received a BA (political science and psychology, with distinction) from the University of Michigan and a JD from Wayne State University, where he was note and comment editor of the Wayne Law Review. Mr. Miller specializes in business law and commercial litigation.