New Limitations Period for Claims Against Corporate and LLC Fiduciaries

By Paul P. Asker and Stacy L. Jitianu

In January 2014, the Sixth Circuit issued an opinion that significantly affects the limitations periods applicable to claims against corporate fiduciaries.[1]

Michigan's Limited Liability Company Act (LLC Act)[2] provides truncated statutes of limitations for actions against managers and members arising under the act. The general limitations period is three years, but causes of action that are "discovered or should reasonably have been discovered" by a plaintiff are limited to two years after the actual or constructive discovery.[3] These pro-manager provisions protect managers from stale claims relating to an LLC's affairs. Michigan's Business Corporations Act has nearly identical provisions.[4]

Techner v Greenberg[5] involved fiduciary duty claims against a manager of an LLC. The member plaintiff asserted that the manager defendant breached her statutory fiduciary duties by allowing the defendant's co-manager to make distributions in violation of the company's operating agreement. As a result of this failure, the plaintiff was deprived of hundreds of thousands of dollars in distributions over the course of several years.

Through no imprudence of her own, the plaintiff did not find out about the improper distributions until long after they were made. Had the LLC Act's limitations provisions applied, she would have been foreclosed from collecting most of her damages. At issue was whether her claim could be tolled by Michigan's Fraudulent Concealment Statute, MCL 600.5855.

Embedded within this issue were two key questions: (1) whether the LLC Act's statutes of limitations could be tolled by section 5855 (or any other tolling doctrine) and (2) whether tolling under section 5855 required proof that

the named defendant had taken affirmative action to conceal the plaintiff's causes of action.

At the time *Techner* was decided, there was substantial confusion as to whether the LLC Act's three-year limitations periods—and their Business Corporations Act counterparts—constituted statutes of limitations (which can be tolled) or statutes of repose (which cannot).

Statutes of limitations prescribe the time limits in which a party can bring a cause of action that has *accrued*, which generally happens "at the time the wrong upon which the claim is based was done regardless of the time when damage results."[6] Section 5827's "time of the wrong" is currently interpreted quite broadly and perhaps at odds with the language of the statute itself. As stated by the Sixth Circuit:

> Nevertheless, the Michigan Supreme Court has stated that the phrase "time of the wrong" contained in the statute "specified the date on which the defendant's breach harmed the plaintiff, as opposed to the date on which the defendant breached his duty." *Moll v. Abbott Lab.*, 506 N.W.2d 816, 822 (1993). Thus, Michigan's highest court has explained that, in general, claims accrue in Michigan not when a defendant perpetrates a wrong, not when a plaintiff learns or should have learned of the harm done, but rather only when the plaintiff actually suffered damages as a result of the defendant's actions, even if the plaintiff was not yet aware of the harm.[7]

Because a cause of action accrues as soon as a harm occurs, the Michigan legislature has adopted various statutes that toll limitations periods to prevent results it has deemed to be unfair. The fraudulent concealment statute is one example.[8] It provides that a plaintiff who can establish that "a person who is or may be liable for any claim fraudulently conceal[ed] the existence of the claim or the identity of any person who is liable for the claim" is entitled to an additional two years to file suit to recover damages, even if the claim would otherwise be barred by a statute of limitations.[9]

Whereas statutes of limitations focus on time measured from an injury, statutes of repose focus on the time from some initiating event unrelated to an injury. They prevent a cause of action from *ever* accruing on injuries sustained outside of a designated statutory period and reflect a legislative intent to impose an absolute time limit within which an action can be brought. Thus, if a defendant breaches a duty that doesn't harm the plaintiff until a time outside of the period of repose, a cause of action for that breach will never accrue. Tolling doctrines cannot salvage claims brought outside of periods of repose.

Sections 4404 and 4515 both provide that an action must begin "within 3 years after the cause of action has *accrued*...." For this reason, the plaintiff argued, both sections were necessarily statutes of limitation. By their express language, they could not cut off the accrual of a claim like a statute of repose. Instead, they provided a time limit that began to run once a claim accrued. Because these were statutes of limitations, they could be tolled under section 5855. The Sixth Circuit agreed.

The second question involved whether an "affirmative act" was generally required for section 5855 to apply. Under this rule, section 5855 is only enforced against those who take affirmative action or make a misrepresentation to conceal a cause of action.[10] It provides that "mere silence" is insufficient to invoke the statute.[11]

As argued by the plaintiff and held by the Sixth Circuit, as a result of fiduciaries' affirmative disclosure duties, there is an exception to the rule if the defendant is a fiduciary. The court held that "unlike the requirement for the general application of Michigan's fraudulent-concealment statute, the statute's relevance in breach-of-fiduciary-duty cases is not constrained by the necessity of establishing an affirmative act by the defendant...."[12]

The Sixth Circuit thus reached two decisions that will substantially impact the risk to corporate fiduciaries of lawsuits that would otherwise be barred as falling outside the truncated limitations periods of the LLC and Business Corporations acts. First, these limitations periods are statutes of limitations, which can be tolled by section 5855 and other tolling doctrines. Second, for actions against fiduciaries—a category that subsumes all managers, majority members, officers, and directors—no affirmative act

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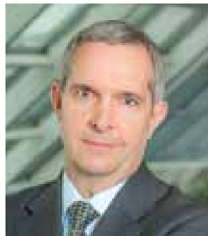
by the fiduciary is necessary for a plaintiff to invoke the fraudulent concealment statute.

What does this mean for corporate fiduciaries in Michigan? It means they are at risk for lawsuits and damages dating back to what can be unlimited periods. A plaintiff who is able to establish that his or her cause of action was fraudulently concealed by a named defendant or any other corporate fiduciary will be able to collect all damages relating to the named defendant's breach, no matter how far back in time those damages go.

There are, however, a few things that can be done to maintain the truncated limitations periods of the LLC and Business Corporations acts. First of all, disclosure is key. The more information disclosed to members and shareholders, the more likely that corporate fiduciaries will be able to avail themselves of the two-year "knew or should have known" limitations periods. Generally, LLCs and their managers do not provide members with information pertaining to other members' distributions. The LLC Act does not impose any such obligation, only requiring the provision of partnership tax forms on an annual basis. Companies should go beyond these requirements and provide quarterly statements outlining distributions, the actions of the company, and any potentially self-interested transactions by managers and majority members.

Second, managers, officers, and directors should take steps to either apprise themselves of the affairs of co-managers, officers, and directors or clearly delineate in operating agreements and corporate bylaws which fiduciaries are responsible for which functions. If a manager wants to rely on a co-manager to supervise distributions, he or she should make sure that reliance is specifically authorized by the operating agreement. For example, in *Techner*, the operating agreement merely specified that the LLC's "managers" were to cause proportionate distributions. The defendant had relied on her co-manager to fulfill that obligation, but because she was also responsible for the distributions, she was equally liable for the ensuing damages. ■



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ENDNOTES

1. See *Techner v Greenberg*, 553 F Appx 495 (CA 6, 2014).
2. MCL 450.4101 *et seq.*
3. MCL 450.4404(6) and MCL 450.4515(1)(e).
4. MCL 450.1541a(4).
5. *Techner*, 553 F Appx 495.
6. MCL 600.5827.
7. *Techner*, 553 F Appx at 505.
8. MCL 600.5855. Another example is MCL 600.5851, providing for tolling of an action based on minority age or insanity.
9. MCL 600.5855. This is a codification of the common-law "discovery rule." In 2007, the Michigan Supreme Court held that limitations periods can only be tolled if expressly provided by statute. *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378; 738 NW2d 664 (2007). Thus, Michigan no longer recognizes any common-law tolling doctrines.
10. *Techner*, 553 F Appx at 506.
11. *Id.*
12. *Id.* at 507.