Top 10 Business Cases, 2010–2019

By Dan Sharkey and Alexandra Stan

Here we endeavor to briefly discuss what we believe are the 10 most notable decisions of Michigan law affecting the business community during the past decade. We evaluated several factors: the number of times a case was cited, our perception of the relative importance of the legal issue decided, and, most importantly, whether we believe it was likely to affect the day-to-day practice of business lawyers here in our pleasant peninsula. We welcome your reaction to our list.

1. The "separate and distinct" requirement does not mean that contracts extinguish common-law or statutory duties of reasonable care owed to noncontracting third parties.

Loweke v Ann Arbor Ceiling & Partition Co, LLC, 489 Mich 157; 809 NW2d 553 (2011)

This case led the proverbial pack with 220 citations by state and federal courts.

An electrician who was employed by an electrical subcontractor sued a drywall subcontractor after drywall boards fell on him. At issue: when does a legal duty of care arise between a contracting party (the drywall subcontractor) and a noncontracting third party (the plaintiff)?

The Court of Appeals followed the familiar "separate and distinct" analysis.[1] It observed that it must look at the "terms of the contract" between the drywall contractor and the general contractor to determine if the defendant's actions were required under the contract. Because the placement of the boards was part of the drywall subcontractor's duty under its contract with the general contractor, the Court concluded there was no "separate and distinct" duty owed to the plaintiff, so his tort claim was dismissed.

The Supreme Court of Michigan reversed, abrogating previous appellate decisions that it criticized as misapplying the "separate and distinct" requirement. The Court explained that instead of focusing on the terms of the contract and determining if the plaintiff's injury was contemplated under

it, the focus should be on whether the defendant had *any* legal obligation, independent from the contract, to act for the plaintiff's benefit. The drywall subcontractor, in performing an act under the contract, was not relieved of its preexisting common-law duty to use ordinary care to avoid foreseeable harm in the execution of its undertakings because that duty (imposed by law) was separate and distinct from the subcontractor's contractual obligations with the general contractor.

2. Breach of an indemnity provision gives rise to a separate and later-accruing claim.

Miller-Davis Co v Ahrens Const, Inc, 495 Mich 161; 848 NW2d 95 (2014)

This case had 154 citations by federal and state courts, plus 33 citations by business courts.

The Michigan Supreme Court held that a roofing subcontractor breached its contract with a general contractor at two distinct times: first, when it failed to properly install the roof, and second, when it failed to indemnify the general contractor for the corrective work required to remedy the nonconformities, in violation of an indemnity clause.

Under MCL 600.5807(8), the six-year statute of limitations period for breach of contract accrues when the promisor fails to perform under the contract. The breach-of-contract claim, for failing to properly install the roof, accrued on the date the general contractor made its last payment to the subcontractor under the subcontract. The claim for breach of the indemnity provision, however, accrued when the general contractor conducted a partial tear-off of the roof and discovered the nonconforming work. The first breach, which occurred more than six years before the plaintiff filed suit, was barred by the statute of limitations, but the second breach of the indemnity provision was within the statutory period, and therefore was not barred.

3. Because shareholder oppression claims are equitable, there is no right to trial by jury, and breaches of a shareholder agreement can be evidence of oppression.

Madugula v Taub, 496 Mich 685; 853 NW2d 75 (2014)

The shareholder oppression statute, MCL 450.1489, allows a shareholder to sue directors or those in control of the corporation for fraudulent, willfully unfair, or oppressive conduct. The minority shareholder obtained a jury verdict and the majority shareholder appealed, claiming the minority shareholder did not have a right to a jury trial.[2]

The Supreme Court agreed. It held that Section 489 shareholder oppression claims must be tried before a judge in a court of equity; there is no statutory or constitutional right to a jury trial for these claims. A court of equity, however, may use an advisory jury under MCR 2.509(D) to decide issues of fact in a shareholder oppression claim provided the court states its own findings of the facts and conclusions of law. Because shareholder oppression actions are equitable, judges may fashion remedies on a case-by-case basis for a variety of inequitable conduct. Although the Court refrained from providing an exhaustive list of all the interests or rights that shareholders have, it found that violations of a shareholder agreement and other corporate documents can be used to support a claim for shareholder oppression.[3]

4. Unlike the standard used in employer-employee noncompetes, the antitrust "rule of reason" applies to business-to-business noncompetes.

Innovation Ventures v Liquid Mfg, 499 Mich 491; 885 NW2d 861 (2016)

The Michigan Supreme Court drew a double-yellow line between noncompete agreements between employers and employees and those between businesses. It held that the Court of Appeals[4] improperly applied the "reasonableness" standard of the Michigan Antitrust Reform Act (at MCL 445.774a) regarding employer-employee noncompetes to a noncompete between businesses, and that caselaw regarding the former was not instructive as to the latter.

In the business context, commercial noncompetes will be deemed invalid only if they fail the antitrust "rule of reason" under MCL 445.772 instructing courts to defer to federal interpretation of antitrust statutes. Simply showing an unreasonable impact on the other party will not invalidate a business noncompete under the antitrust rule of reason; instead, an affirmative showing of adverse anticompetition in the relevant product and geographic markets is necessary to invalidate it. The focus becomes not on injury to that party itself, but rather on whether the business noncompete "may suppress or even destroy competition" broadly across the market. Under this more exacting standard, in contrast to the "reasonableness" standard of Section 445.774a regarding employment noncompetes, commercial noncompetes are more likely to be held enforceable.[5]

5. An oppression claim accrues when the plaintiff incurs "actionable harm," not necessarily when it incurs "calculable financial injury."

Frank v Linkner, 500 Mich 133; 894 NW2d 574 (2017)

At issue was whether the three-year period in MCL 450.4515 (1)(e), the statute concerning LLC member oppression, was a statute of limitations or repose and when the claim accrued. A statute of limitations can be tolled under the fraudulent concealment statute, but a statute of response cannot be. A statute of limitations bars claims after a specified period based on the date the claim accrued, while a statute of repose bars

claims after some other particular event or time after the defendant acted.

The Michigan Supreme Court found that MCL 450.4515(1)(e) was a statute of limitations. It agreed with the Court of Appeals that it contains two alternative statutory periods of limitations: one based on the claim's accrual and the other based on the claim's discovery. While the two-year period does not begin until the plaintiff discovered or reasonably should have discovered the claim, the three-year period can only be tolled if the plaintiff did not discover and reasonably would not have discovered the claim and the plaintiff can prove the defendant committed affirmative acts or misrepresentations designed to prevent discovery pursuant to the fraudulent concealment statute.

The Court of Appeals held that the claim accrued in 2012 when the LLC sold substantially all its assets,[6] but the Michigan Supreme Court reversed, holding that it accrued when the LLC amended its operating agreement (in 2009) to subordinate the plaintiffs' common shares. It explained that an action under MCL 450.4515(1) does not necessarily accrue when the plaintiff incurs a calculable financial injury. Instead, it accrues when the plaintiff incurs actionable harm, i.e., when the defendant's actions interfere with the plaintiff's interest as a member. Because the plaintiff's actions accrued in 2009, unless they could toll their claims by showing that the defendant fraudulently concealed the claim or anyone liable for it, the claims for monetary damages were barred.

6. The "single-document rule" does not bar arbitration of warranty claims if the arbitration clause is in a separate document.

Galea v FCA US LLC, 323 Mich App 360; 917 NW2d 694 (2018)

The Michigan Court of Appeals overturned this long-debated rule. The defendants argued that the lawsuit was barred by an agreement to submit warranty disputes to arbitration. The plaintiff claimed that because the arbitration agreement was not part of the warranty document, Federal Trade Commission (FTC) regulations prohibited enforcement of the arbitration agreement under the rule.

The Magnuson-Moss Warranty Act (MMWA) does not address binding arbitration or allow the FTC to decide if arbitration is permitted. Instead, it allows warrantors to require consumers to use informal dispute settlement procedures *before* filing suit and allows the FTC to establish rules about these procedures.

The Court observed that binding arbitration is not an informal dispute settlement procedure or mechanism within the meaning of the act. Instead, it is a formal, final adjudication that serves as a substitute for a judicial forum, not merely a prerequisite to it. Therefore, the Court concluded that arbitration agreements are outside of the FTC's rule-making authority under the MMWA and the single-document rule does not apply. On that basis, the arbitration agreement was enforceable although it was not part of a single document.

7. To pierce the corporate veil, "mere instrumentality" is insufficient: fraud, abuse of corporate form, or other wrongful acts are required.

Dutton Partners, LLC v CMS Energy Corp, 290 Mich App 635; 802 NW2d 717 (2010)

A property developer filed suit for damages caused by a pipeline rupture. The defendant, CMS Energy, claimed the developer should have sued its subsidiary that operated the pipeline, Consumers Energy. The developer responded that the two were alter egos and therefore should be considered the same entity.

To pierce the corporate veil and hold a parent company liable for the acts of its subsidiary, a plaintiff must demonstrate that the subsidiary is a mere instrumentality of the parent; the subsidiary was used to commit a fraud or wrong; and, as a result, the plaintiff suffered unjust injury or loss.

The Court of Appeals found facts raising questions about whether Consumers was a mere instrumentality of CMS Energy: the entities shared addresses, policies, counsel, SEC filings, and assets. It nevertheless affirmed summary disposition for CMS Energy because the developer failed to show any evidence of fraud, wrongdoing, or misuse of Consumers' corporate form.

8. Thirty days means 30 days: lack of prejudice does not affect enforcement of an unambiguous notice provision.

DeFrain v State Farm Mut Auto Ins Co, 491 Mich 359; 817 NW2d 504 (2012)

An insurance policy required the insured to give the insurer notice of any claim for benefits within 30 days of an accident. After the insured waited to notify the insurer until 90 days after the accident, the insurer denied the claim due to lack of timely notice. The insured argued lack of prejudice. The Michigan Supreme Court found that the unambiguous notice-of-claim provision in the policy was enforceable without an additional need to show prejudice to the insurer. Reading prejudice into a notice provision where no such requirement exists would contravene the parties' right to contract freely and the judicial requirement to enforce unambiguous contractual provisions as written. The Court was careful to distinguish this provision from those requiring notice "immediately" or within a "reasonable" time, in which case the insurer would still need to show prejudice.

9. Regardless of the underlying transaction giving rise to the debt, open account and account stated claims are independent causes of action subject to the six-year statute of limitations period governing general breach of contract claims.

Fisher Sand and Gravel Co v Neal A. Sweebe, Inc, 494 Mich 543; 837 NW2d 244 (2013)

More than four years after a buyer failed to pay its open account balance for supplies, the seller sued for breach of contract, account stated, and open account. At issue was which statute of limitations applied: the six-year period governing general breach of contract actions under MCL 600.5807(8) or the four-year period in Article 2 of Michigan's Uniform Commercial Code?

The Michigan Supreme Court held that the six-year statute of limitations applies to both claims for account stated and open account because they are each distinct from the underlying transactions giving rise to the antecedent debt, so it is immaterial whether the underlying transactions involved the sale of goods. Therefore, alleging facts that the parties agreed to the balance (account stated) or open line of credit (open account) can allow a plaintiff to pursue a remedy that may otherwise be time barred under the UCC's shorter four-year statutory period.

10. Governmental actions are not "force majeures" that excuse performance of a contract, even if it's no longer profitable.

Hemlock Semiconductor Operations, LLC v SolarWorld Industries Sachsen GmbH, 867 F3d 692 (CA 6, 2017)

Seller Hemlock entered into long-term "take or pay" agreements that required buyer Sachsen to either order from Hemlock polysilicon at fixed prices or pay Hemlock. After the Chinese government began subsidizing national polysilicon production, which caused market prices to plummet below the contract prices, Sachsen refused to pay Hemlock, claiming frustration of purpose and performance under the contracts was impracticable.

The Sixth Circuit affirmed the district court's decision[7] that Sachsen's breach for failing to pay was not excused, confirming an award of $800 million in damages and interest. The court explained that these commercial impracticability defenses apply only if the unanticipated circumstance made performance of the promise vitally different from what should have reasonably been contemplated by the parties when they entered into the contract. Although the parties may not have foreseen the Chinese government's illegal actions, the possibility that market prices would plummet was well within contemplation. Holding otherwise would go against the general rule that a contract's unprofitability doesn't warrant application of the impracticability defenses.

To read additional court decisions from the past decade that may be of interest to Michigan business lawyers, consider:

- Michigan state and federal court opinions, including archived cases, in the State Bar of Michigan's daily e-Journal at https://www.michbar.org/e-journal/archive
- ICLE Business Law Institute's annual written Business Case Law Summaries, available on-demand at www.icle.org ■

Dan Sharkey is a cofounder of Brooks Wilkins Sharkey & Turco PLLC. He is a past chair of the Commercial Litigation Committee of the SBM Business Law Section and has significant experience in commercial disputes with an emphasis in automotive supply-chain and UCC issues. He was previously a captain and trial counsel in the U.S. Army Judge Advocate General's Corps and special assistant U.S. attorney.

Alexandra Stan is an associate attorney at Brooks Wilkins Sharkey & Turco PLLC. She graduated from Loyola University Chicago School of Law in 2014 and holds a master's degree in public policy with merit from University College London. She is a director of the Oakland County Bar Association New Lawyers Committee, an executive board member of the Oakland County Bar Association Inns of Court, and a board member of Global Ties Detroit.

ENDNOTES

1. *Loweke v Ann Arbor Ceiling & Partition Co*, unpublished per curiam opinion of the Court of Appeals, issued April 22, 2010 (Docket No. 289451).
2. *Madugula v Taub*, unpublished per curiam opinion of the Court of Appeals, issued October 25, 2012 (Docket No. 298425).
3. For a detailed analysis, see Mantese and Toering, *The Michigan Supreme Court Speaks:* Madugula v Taub *and Shareholder Oppression*, 93 Mich B J 11 (November 2014) <https://www.michbar.org/file/journal/pdf/pdf4article2493.pdf> (accessed November 17, 2019).
4. *Innovation Ventures, LLC, v Liquid Manufacturing, LLC*, unpublished per curiam opinion of the Court of Appeals, issued October 23, 2014 (Docket No. 315519).
5. For a detailed analysis, see Iwrey, Johnson & Rockey, Innovation Ventures *Paves the Way for Stronger Commercial Noncompete Agreements*, 96 Mich B J 5 (May 2017) <http://www.michbar.org/file/barjournal/article/documents/pdf4article3116.pdf> (accessed November 17, 2019).
6. *Frank v Linkner*, 310 Mich App 169; 871 NW2d 363 (2015).
7. *Hemlock Semiconductor Corp v Deutsche Solar GMBH*, 116 F Supp 3d 818 (ED Mich, 2015).