
Insider Liability for Attorney Fees and Other Damages

By Maury Klein, Esq.

Note: The following law and argument would or could come into play should you discover that a business partner or LLC member having sensitive information decides to clandestinely supply support and information to aid the other side in a lawsuit and that cooperation comes to light.

The principle that a third party whose misconduct causes your client to suffer suit and damages can be held liable for attorney fees can be used whether or not the third party is an “insider.”

Background

[Factual basis for the underlying lawsuit and your “insider’s” involvement in supplying information to the party or parties suing your business client.]

Statement of Facts

The evidence has proven that [Defendant herein] knew the terms of the operating agreement, knew of the managerial authority vested in [Manager], and knew of a dispute with the [underlying lawsuit opponents]. Despite this, [Defendant] injected himself into the dispute and provided “opinions,” inside information, and offers of testimony that could only be detrimental to the interests of [Company]. These actions took place both before the actual litigation and after its inception. [Defendant] was at all times an eager volunteer of this assistance. His [facts comprising assistance] provided a factual grounding of the claims against [Company.] [Defendant] was not simply a member/partner who might have been contacted along with other members to give his opinion and then gave what he could argue was simply his two cents. Rather, [Defendant] initiated contact on these sensitive issues as shown by the [business records of underlying party opponent] and kept going. At various times he provided information that could be used by the other side whether for delay or otherwise. By the testimony of underlying attorney/party, the information was of probative value in the [underlying suit] because of Defendant’s status as a partner/LLC member. It was as an insider that [Defendant] violated the best interests of Company at every turn and opportunity.

LLC Statutory References

We respectfully cite the court’s attention to the following references in Michigan’s LLC statutes in support of their contention that a right of action exists against members

for circumstances such as the one at issue (i.e., defendant acting in a managerial role against the actual will of the actual manager).

MCL 450.4211(b) notes rights and limitations “... in an action or right of the company to procure a judgment against an incumbent...member...of the company *for loss or damage due to his or her unauthorized act.*” (Emphasis added)

MCL 450.4404 requires that (in this case the person usurping the role of management) “A manager shall discharge his duties...in a manner he reasonably believes to be in the best interests of the LLC.” We respectfully cite to the court’s attention that the complaint includes a breach of fiduciary duty count among others.

MCL 450.4302 (3) states, “Rights of the LLC are in addition to rights under the operating agreement or applicable law.”

[Defendant’s] actions as an insider bring him within the purview of these statutory provisions.

The cardinal rule of statutory construction is to identify and to give effect to the intent of the legislature. *Mull v Equitable Life*, 444 Mich 508, 514, n 7; 510 NW2d 184 (1994); *Coleman v Gurwin*, 443 Mich 59, 65; 503 NW2d 435 (1993). The first step in ascertaining such intent is to focus on the language in the statute itself. *Thorton v Allstate Ins Co*, 425 Mich 643, 648; 391 NW2d 320 (1986). If the statutory language is certain and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written. *Mull and Coleman, supra*.

“It is well recognized that statutes and court rules in derogation of the common law must be strictly construed.” *Clute v General Accident Assurance Co of Canada*, 177 Mich App 411, 417 (1989). Should [Defendant] urge a claim that the existence of the LLC statutes act as such a limitation on the common law right to sue, his argument must fail in light of such case law limitation.

Prior Attorney Fees are Cognizable as Damages in this Action

The case of *State Farm v Allen*, 212 NW2d 821, 50 Mich App 71, 212 NW 2d 821 (1973) and *Fleischer v Buccilli*, 13 Mich App 135 163 NW 2d 637 (1968) are the earliest cases dealing with a narrow exception to the bar on recovery of attorney fees in the absence of statute or court rule. Quoting from *State Farm v Allen* at page 78 of the Mich App cite:

Finally, reasonable attorneys' fees incurred in prior litigation with a "third party—not with the defendant" may be recoverable.

The rationale went on to rely on a citation from *McCormick*, Damages, Sec. 66, p 246:

For the expense incurred in the present litigation, we have found that our law generally gives the successful party no recompense beyond the taxable costs... On the other hand, where the present defendant has by his wrongful conduct, be it tort or breach of contract, caused the present plaintiff to defend or prosecute previous legal proceedings, the law reverses its restrictive attitude and allows the plaintiff to recover all the expenses, including counsel fees, reasonably incurred by him in the prior litigation."

There is no requirement of being the sole cause.

Application of Law to Facts

[Defendant's] unwarranted interference constituted an exercise of managerial discretion obligating [Defendant] to act in the best interests of the company and rendering him liable for both his failures to act properly and breaches of obligation. The secrecy of his contacts belies any claim

that he acted in good faith. [In the event the co-operation was coupled with an attempt to force a buy-out at the same time.] Opening a "second front" in bringing his original action in this forum should be seen for what it was: a callous effort to make his buy-out more attractive. Unfortunately for Rhine, his efforts to perpetrate a silent fraud were exposed. The LLC statute does not excuse or shield his actions. To the contrary, it shines a light on his wrongdoing. The case law in Michigan makes it clear that [Defendant] can be held accountable for his wrongful conduct in the form of reasonable attorney fees. For the record, the attorney fees charged were [\$] per hour, and I have been in practice since [].

Damages

[Specific listing of attorney fees and any judgment resulting.]

Plaintiff has been damaged by the judgment entered, and at the same time, plaintiff was free of any personal fault. Accordingly, judgment damages are at issue under both theories of common-law indemnity (*Langley v Harris Corp*, 413 Mich 592, 321 NW2d 662 (1982)) and implied contractual indemnity (*Isabella County v Michigan*, 181 Mich App 99, 449 NW2d 111 (1989)).