Can Michigan Courts Apply Discounts When Determining the "Fair Value" of Minority Shares in a Share Buyback Remedy Under Michigan's Shareholder Oppression Statutes?

By Matthew P. Allen

Introduction

This Article discusses whether Michigan courts can apply valuation discounts when ordering the purchase of closely held minority shares "at fair value" as a remedy for shareholder oppression under Michigan's Business Corporation Act ("Corporation Act"), MCL 450.1489(1)(e), and Limited Liability Company Act ("LLC Act"), MCL 450.4515(1)(d). Because the Corporation and LLC Acts contain the same substantive definition of oppression and the same fair value purchase remedy, both are collectively referred to in this Article as "Michigan's oppression statutes." Courts that have applied discounts to determine "fair value" of minority shares have discounted those shares by over 50 percent. So whether a court can or should apply discounts is a significant issue.

Michigan's oppression statutes do not define "fair value." Which means they do not say whether the "fair value" of an oppressed shareholder's shares should be reduced by various potentially applicable discounts, the two most common of which are discounts based on the lack of a public market on which to sell the shares ("marketability discount"), and discounts based on the lack of control the shares command within the organization(s) ("control discount"). The Corporation Act contains a separate statute that permits a shareholder dissenting from a corporate transaction to obtain "'fair value' with respect to a dissenter's shares … ." MCL 450.1761(d). This section defines when "fair value" of the shares is determined under this "dissenter's rights" statute, but is silent about whether discounts should be applied. This is markedly different from the Model Business Corporation Act ("Model Act"), wherein "fair value" is defined in the dissenter's rights chapter as excluding marketability and control discounts, while the "fair value" remedy for oppression in the Model Act does not exclude discounts.

Michigan appellate courts have upheld trial court decisions that have both applied, and declined to apply, discounts to shares subject to a court's fair value sale remedy for oppression. *See, e.g., Schimke v Liquid Dustlayer, Inc*, 2009 WL 3049723 at *6-7 (Mich Ct App Sept 24, 2009) (unpublished) ("Michigan has not adopted the requirement that fair value be ascertained without a discount for lack of marketability or minority status. Conversely, the definition contained in § 761 [the dissenter's rights statute] does not *require* a court to discount the value of minority shares."); *Lardner v Port Huron Golf Club*, Nos 138038, 139092 (Mich App Aug 4, 1994) (applying a 50% reduction in value of the plaintiff's stock to reflect both a minority control and marketability discount). In late 2019, the Michigan Court of Appeals attempted to more directly grapple with the question of whether discounts could be used to determine "fair value" in Michigan's oppression statutes, but arguably left some gaps to fill in its analysis and the application of its holding. *See Franks v Franks,* 330 Mich App 69, 944 NW2d 388 (2019).

The short answer is that Michigan trial courts likely have broad discretion to decide whether to apply discounts when determining fair value of minority shares in a specific case. Indeed, whether discounts apply in a given case is partly a fact specific analysis since oppression claims in Michigan are equitable. *See Madugula v Taub*, 496 Mich 685,

720, 853 NW2d 75 (2014). But lawyers should understand the nuances of the reasoning behind the application (or not) of these discounts in order to best position their clients on whatever side of the argument they are on. To that end, this Article raises and discusses issues and arguments to consider when litigating whether discounts apply when valuing the shares of a minority shareholder under Michigan's oppression statutes.

The Attributes of Discounts for Lack of Control and Lack of Marketability

Michigan's oppression statutes do not define "fair value."

Lack of Marketability Attributes

A shareholder in a closely-held, non-publicly traded company is generally not able to liquidate her shares as quickly as she would if those shares were trading (and thus salable) on a public stock exchange. Therefore, anyone who purchases these shares will be locked into an illiquid and long-term investment. As a result, a purchaser of private company shares will seek price concessions for buying shares that are not readily liquid. The diminution in value associated with this factor is referred to as a discount for lack of marketability.[1]

Lack of Control Attributes

An owner of a non-controlling interest in a private company (a minority shareholder) cannot exert control over operations and governance of the company compared to a controlling shareholder. A controlling shareholder, on the other hand, can influence key decisions and operations of the company, including but not limited to daily operations, investment decisions, management compensation, disposition of assets, and declaration and payment of distributions. Because these factors of control impact the value of the company (and therefore its stock), a non-controlling, minority share is worth less than a controlling share.[2]

* * * *

The methodologies employed to determine these valuation discounts, the studies used to support them, and the dates on which the shares are valued are outside the scope of this Article, which is focused on the legal question of whether discounts can or should be employed when determining fair value in oppression cases. But the methodologies, studies, and valuation dates underlying a valuation and any discounts applied are important to supporting, or undercutting, a valuation expert's qualifications and opinions.[3]

Should Fair Value in the Oppression Statutes Mean the Same Thing as Fair Value in the Dissenter's Rights Statute?

If a company undertakes a dramatic change in its business that results in changes to the nature of the shareholder's interests, a shareholder has a right to dissent to the corporate action and demand that her shares be appraised for purchase by the company at "fair value."[4] Classically, the corporate action is a merger or acquisition. These "dissenter's rights" protect a shareholder from being unwillingly forced into an investment that is substantially different from the one she originally made. The dissenter must formally object and observe certain statutory requirements before she can file suit.[5]

Dissenter's rights actions need not implicate oppression at all. Typically, the company's controlling shareholders did nothing wrong; the dissenter simply does not wish to participate in the changed company. In other words, the dissenter's right cause of action did not originate to penalize a corporate actor or controlling shareholder, but rather as a way to compensate a shareholder for giving up their veto right with respect to major corporate actions.[6] Moreover, in typical dissenter's rights cases the corporate transaction at issue affects all shareholders, not just minority shareholders. This is contrary to the typical oppression case, where the fair value sale remedy affects only the minority shareholder's interests.

Section 761 of the Corporation Act provides a definition of "fair value" that is limited to appraising dissenter's shares, though that definition only addresses the timing of the share valuation and does not mention discounts.[7] Because this fair value definition is expressly limited to the dissenter's rights statute, a textual interpretation precludes application of section 761's definition of "fair value" in the oppression context. However, many courts analyzing the application of discounts in a fair value determination in the oppression context refer without explanation—and many times by mistake—to fair value determinations in dissenter's rights cases. The Michigan Court of Appeals in the *Franks* decision cited mostly cases analyzing fair value under dissenter's rights statutes

from other states while writing that the interpretations occurred under "shareholder oppression statutes."[8] But does it really matter? Another Michigan Court of Appeals panel a decade earlier openly used the dissenter's right statute as a basis to analyze discounts in an oppression case.[9]

A review of the Model Business Corporation Act ("Model Act"), upon which Michigan and other state's corporation acts are based, reveals an argument about why this may be an issue. As in Michigan, the Model Act has separate sections for oppression remedies (Chapter 14(C)) and dissenter's rights remedies (Chapter 13). And as in Michigan, both the oppression and dissenter's rights sections provide for the remedial purchase of the aggrieved shareholder's shares at "fair value." However, unlike in Michigan, the Model Act includes a definition of "fair value" in the dissenter's rights Chapter that expressly excludes the application of marketability and control discounts: '"Fair value' means the value of the corporation's shares determined … without discounting for lack of marketability or minority status … ."[10] Interestingly, the Model Act does not define "fair value" when discussing the option of a company or shareholder to purchase the shares of an oppressed shareholder at "fair value."[11] In other words, the Model Act does not import the discount exclusion of its dissenter's rights definition of "fair value" into its use of "fair value" as a remedy for oppression.

It is interesting that the Michigan Legislature choose not to expressly exclude application of discounts in its dissenter's rights statute. A party looking to apply discounts could argue that the Legislature's failure to exclude discounts like the Model Act does reflects an intent by the Legislature to apply discounts in dissenter's rights cases.[12] The Model Act's Official Comment to its definition of Fair Value provides the policy rationale for prohibiting discounts:

> Valuation discounts for lack of marketability or minority status are inappropriate in most appraisal actions, both because most transactions that trigger appraisal rights affect the corporation as a whole and because such discounts may give the majority the opportunity to take advantage of the minority shareholders who have been forced against their will to accept the appraisal triggering transaction. [T]he definition of "fair value" adopts the view that appraisal should generally award a shareholder his or her proportional [pro rata] interest in the corporation after valuing the corporation as a whole, rather than the value of the shareholder's shares when valued alone.[13]

Courts following the policy rationale of the Model Act essentially presume dissolution or a complete reorganization will occur, and thus find that a minority should not receive less than they would in a complete liquidation of the company's assets. In a full liquidation, all members would receive a pro rata share, and so the court will not discount the minority's share to less than its pro rata value.[14]

However, this policy rationale for excluding discounts does not typically apply in oppression cases because the acts of oppression usually do not "affect the corporation as a whole" as does an appraisal-triggering corporate transaction. Moreover, the oppression at issue in most cases does not affect the value of the company as a whole, and thus the fair value purchase remedy is focused on valuing the minority shareholder's shares alone rather than the corporation as a whole. This argument is supported by the fact that the Model Act does not import the discount prohibition in its dissenter's rights chapter into the chapter containing the fair value purchase remedy for oppression.

Given these observations, a party could argue that applying dissenter's rights statutes and interpretative caselaw in oppression cases is inapposite, especially if those authorities stand for the proposition that discounts are inapplicable when determining "fair value." This is in addition to the textual argument in Michigan and other states that do not expressly exclude discounts from the definition of "fair value" in their dissenter's rights statutes, as does the Model Act.

However, there are other policy and equitable arguments a party can use in arguing against application of discounts in a fair value calculation under the oppression statutes. For example, because oppression cases are equitable, the court could find that imposing a financial burden on the majority by purchasing majority shares above market value (i.e. with no discounts) is warranted based on the court's view of the acts of oppression by the majority.[15] Conversely, if the court orders the oppressed shareholder to purchase

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the interest of oppressive shareholder, the court may nonetheless apply marketability discounts to the oppressed shareholder's fair value price.[16]

Franks v Franks:[17] Michigan's Most Recent Statement on Applications of Discounts in Oppression Cases

In *Franks*, the majority owners in a family business controlled all the voting shares of the company, had an active role in management, and controlled stock distributions to shareholders. The minority shareholders owned non-voting shares and had no role in management of the company.[18] The majority shareholders stopped paying dividends and proposed to buy the minority shares for $62 a share, though this number was not based on any valuation. The court ultimately valued the shares at $712 per share. The minority shareholders deemed this conduct oppressive and sued for oppression under section 1489 of the Corporation Act.[19] The trial court found oppression and ordered as a remedy that the majority purchase the minority shares at fair value as set forth in section 1489(1)(e) of the Corporation Act. At a hearing on valuation, the trial court selected the valuation of the minority shareholder's expert valuing their shares at $712 a share, and held that the court was prevented from applying "a discount to lower the fair value of the shares."[20] One of the questions on appeal was whether the trial court erred in determining it was prevented from applying discounts in determining fair value when ordering a stock buy-back remedy under the Michigan's oppression statute.

The Michigan Court of Appeals ultimately determined that courts in Michigan have discretion to apply discounts when determining the fair value of oppressed shares under Michigan's oppression statute.

The Michigan Court of Appeals ultimately determined that courts in Michigan have discretion to apply discounts when determining the fair value of oppressed shares under Michigan's oppression statute. But first, the court conducted an analysis of what it said were foreign court interpretations of "their respective shareholder-oppression statutes" to conclude that "fair market value" has a "technical meaning" that is different than "fair value."[21] On this point, the court concluded that "fair market value" inherently includes discounting while "fair value" inherently does not: "A fair market value would, therefore, take into consideration the fact that a ready, willing, and able buyer might discount the value of the shares on the basis of limitations in the shares."[22] Based on its analysis of non-Michigan legal authority, the *Franks* panel set forth its "opinion" that the Michigan Legislature "used the term 'fair value' to distinguish the remedy from purchase at 'fair market value.'"[23] So in its opinion, the *Franks* court concludes that the Michigan Legislature intended to use the term "fair value" as opposed to "fair market value" in Michigan's oppression statute, which based on the court's reasoning connotes a legislative intent that determining "fair value" under Michigan's oppression statute does not include discounts.

But as discussed above, most of the case law the *Franks* court relied on to reach this conclusion analyzed fair value under the dissenter's rights statutes in other states, not shareholder oppression statutes. And as previously discussed, there are arguments going both ways about whether a fair value analysis under a dissenter's rights statute can or should be the same under a shareholder oppression statute, especially where Michigan's dissenter's rights statute declines to adopt language excluding discounts like the Model Act and other states do.[24]

Despite its opinion that the Legislature used fair value to distinguish that term from fair market value because the latter term included discounts, the *Franks* court "[n] everhteless" found that "nothing within the statute precludes a trial court from considering fair market value when determining fair value."[25] In other words, the court held that trial courts can consider discounts even though it thought the Legislature intended to use a term that precluded the use of discounts. In support of this latter holding, the *Franks* court relied on a Michigan Court of Appeals decision valuing stock under Michigan's dissenter's rights statute using various valuation methodologies, though the case did not discuss fair value or the use of discounts.[26]

As further support for its holding that trial courts can use discounts when determining fair value, the *Franks* court said the "statutory scheme as a whole" in section 1489 "does not preclude a trial court from applying discounts when crafting a remedy."[27] The court's reasoning is anchored in the broad, permissive discretion afforded the courts by the Legislature to fashion remedies for oppression under section 1489:

> In providing for relief under MCL 450.1489(1), the Legislature stated that a trial court could "order or grant relief

> as it considers appropriate[.]" The Legislature further provided that the relief "may" include "without limitation" the "purchase at fair value of the shares of a shareholder[.]" MCL 450.1489(1)(e). The Legislature did not define "fair value." However, by stating that the trial court "may" order the purchase of the shares at issue at "fair value" "without limitation," the Legislature indicated that trial courts were not required to order such relief, but may do so if appropriate. Stated differently, the Legislature gave the trial court broad authority to fashion its remedy to suit the equities of the case—that is, to fashion a remedy that was "appropriate" under the circumstances. MCL 450.1489(1). Therefore, while the trial court has the authority under MCL 450.1489(1)(e) to order that defendants purchase plaintiff's respective shares at "fair value," nothing within the statutory scheme requires the trial court to value the shares in any particular way. Given the Legislature's broad grant of authority to craft a remedy for shareholder oppression under MCL 450.1489(1), we conclude that a trial court is required to order an "appropriate" remedy, which may include an order to purchase shares at "fair value" or at any other value that the court concludes is appropriate under the totality of the circumstances. In this case, the trial court had the authority to value the shares without discounts under MCL 450.1489(1)(e) but was not required to do so. Because the trial court had authority to value the shares in any way that was equitable under the totality of the circumstances, the trial court erred to the extent that it felt compelled to value the shares without any discounts.[28]

This same rationale was used by another Michigan Court of Appeals panel a decade earlier when finding that trial courts had discretion to apply discounts when determining fair value when ordering a share redemption under section 1489.[29] In *Schimke*, the court affirmed the trial court's refusal to apply discounts in its fair value analysis because the ownership interests of the oppressed and non-oppressed shareholders "were so close together."[30] To protect the trial court's discretion, the *Schimke* court cited the same broad, permissive language in section 1489 that the *Franks* court cited, though *Schimke* was not cited or discussed in *Franks*. The *Schimke* court openly analyzed the definition of fair value in Michigan's dissenter's rights statute to conclude in that oppression case that the trial court was not required to apply discounts: "Michigan has not adopted the requirement that fair value be ascertained without a discount for lack of marketability or minority status. Conversely, the definition in § 761 [the dissenter's right statute] does not *require* a court to discount the value of minority shares. The trial court correctly recognized this principle."[31]

The Model Act is not cited by *Schimke*, but, as discussed *supra*, the Model Act's dissenter's rights provision requires that discounts *not* be applied. Michigan has not adopted this discount prohibition in its dissenter's rights statute. So *Schimke* may lend support to an argument that discounts are appropriate in oppression and dissenter's rights cases because Michigan rejected the Model Act's express prohibition of discounts in its dissenter's rights statute.

In 1994, the Michigan Court of Appeals in *Lardner v Port Huron Golf Club* affirmed the trial court's 50 percent marketability and control discounts when determining the fair value of minority shares in a court-ordered buy back under the oppression statute.[32] In support of its holding the court cited the same Michigan dissenter's right case as the *Franks* panel, though it did not provide any further substantive analysis.[33] The *Franks* panel did not cite or discuss the *Lardner* case.

What if the Company's Governing Documents Provide Buyout Valuation Terms Requiring Discounts?

Michigan courts have not addressed the application of discounts in an oppression case where the entity's governing documents address application of discounts in calculating buyout prices for shares. What if a company's governing documents require the application of discounts when calculating the buyout price for the company's shares?

Michigan courts uphold corporate bylaws as contracts "between a corporation and its shareholders."[34] And so an operating agreement is also a "written contract between the members of a limited liability company …."[35] According to the Corporation Act, bylaw contracts "may contain any provisions for the

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regulation and management of the affairs of the corporation not inconsistent with law or the articles of incorporation."[36] Likewise, the LLC Act permits LLC operating agreements wide latitude in determining when and how LLC members can be removed: "An operating agreement may provide for the expulsion of a member or for other events the occurrence of which will result in a person ceasing to be a member of the limited liability company."[37] Furthermore, if conduct is approved by the operating agreement of an LLC, courts will not find that conduct oppressive.[38] And if the operating agreement sets forth the methodology to calculate the share price of a withdrawing member, that calculation governs.[39] Commentators on the LLC Act recognize that shareholders should use methods to liquidate membership interests that "may allow a shareholder to use a minority discount in valuing the LLC membership interest" in order to reduce tax liabilities in connection with the liquidation.[40] Given these corporate principles, one commentator suggested courts "first consider" a company's governing documents when determining whether to apply discounts.[41]

Given the deference Michigan legislation and courts give to corporate governing documents, there is support for courts deferring to an oppressed minority shareholder's freely contracted methodology of using discounts if the company's governing documents require them. However, given the flexibility Michigan courts have in fashioning remedies under Michigan's oppression statutes, a court could find support for ignoring the contract between a company and its minority shareholder requiring discounts in valuing minority shares if the court determines the oppressive shareholder's conduct was fraudulent, in bad faith, or other special circumstances applied. But if the court fails to apply discounts to punish an oppressive shareholder, an argument could be made that these are punitive damages that a court in equity has no authority to award.[42] Another consideration is whether the oppressed shareholder claims she was fraudulently induced to agree to governing documents containing mandatory discounts in pricing shares.

Conclusion

While legal practitioners and commentators may be able to quibble with technical interpretations about whether discounts are permitted under Michigan's oppression statutes, it may be that the discretion afforded trial courts by the *Franks* opinion lands in the right spot since the Michigan Supreme Court in *Madugula* confirmed that oppression is an equitable claim and remedy. Indeed, because the facts and circumstances of an oppression claim will be unique in every case, it may make sense for a trial court to have maximum flexibility in determining whether to apply discounts when ordering the sale of shares as a remedy for oppression. But the trade-off for flexibility is a lack of certainty as to how a particular court in a particular case will decide the "discount issue." Until the Michigan Legislature decides to opt for legislative certainty, parties will need to be guided by the principles in this Article in crafting their positions on the application of discounts in oppression buyback cases.

NOTES

1. *See generally* Research Institute of Am., Tax Advisors Plan. Sys. 9:8.01 – 05, *Valuation of a Closely Held Business: Discounts and Premiums, RIATAPS* s 9:8.01-05 (Thomson Reuters 2020); Matt C. Courtnage, *Valuation Discounts in Dissenting Shareholder Appraisal Rights and Shareholder Oppression Claims*, Insights, Willamette Management Associates, Issue 120 (Spring 2019); *Cox Enters, Inc. v News-Journal Corp*, 510 F.3d 1350, 1354-57 (11th Cir. 2007); Sandra K. Miller, *Discounts and Buyouts in Minority Investor LLC Valuation Disputes Involving Oppression or Divorce*, 13 U. PA. J. BUS. L. 607, 612-16 (2011); Douglas K. Moll, *Shareholder Oppression and "Fair Value": Of Discounts, Dates, and Dastardly Deeds in the Close Corporation*, 54 DUKE L.J. 293, 315-18 (2004).

2. *See id.*

3. *See, e.g.*, Moll, supra note 1 at 298 ("Given how quickly a company's fortunes can change, the question of when to measure fair value is a critical inquiry in and of itself, as the choice of date can have a significant impact on the ultimate fair value conclusion.").

4. *See* Corporation Act, Chapter 7, MCL 450.1761(d); 1762; 1772(1).

5. *See generally* MCL 450.1754-74.

6. *See, e.g., HMO-W Inc v SSM Health Sys*, 228 Wis 2d 815, 827 (1999); *Pueblo Bancorporation v Lindoe, Inc*, 63 P3d 353 (Colo 2003).

7. *See* MCL 450.1761(d) ("'Fair value,' *with respect to dissenter's shares*, means the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporation action unless exclusion would be inequitable" (emphasis added)).

8. *See Franks v Franks*, 330 Mich App 69, 99, 944 NW2d 388 (2019) (four of the six cases cited for interpretations of their state's "shareholder oppression statutes" were actually cases interpreting a dissenter's rights statute, including the one Michigan case cited, *Morley Bros v Clark*, 139 Mich App 193 (1984)).

9. *See Schimke v Liquid Dustlayer, Inc*, No 282421 (Mich Ct App Sept 24, 2009) (unpublished).

10. Model Act, Chapter 13.01, "Fair Value." The definition provides a narrow exception to the discount prohibition in circumstances where a company amends

its articles of incorporation to reduce a shareholder's shares for a fraction of a share and then give the company a right to repurchase the fractional shares created. And even in this circumstance the exception to the Model Act's discount prohibition is only applicable "if appropriate." The American Law Institute defines "fair value" in the dissenter's rights context to exclude control discounts, but permits marketability discounts only in "extraordinary circumstances." American Law Institute, *Principles of Corporate Governance*, § 7.22. The Revised Uniform Partnership Act avoids using "fair value" but talks instead about a "buyout price," which it says should exclude control discounts but that marketability discounts "may be appropriate." Revised Unif. P'ship Act § 701 (cmt 3).

11. *See* Model Act, Chapter 14, section 14.34.

12. *But see Pueblo Bancorp v Lindoe, Inc*, 63 P3d 353, 368 (Colo 2003) (rejecting this argument for Colorado's dissenter's rights statute, which was identical to Michigan's until July 1, 2020, and adopting instead the policy rationale of the Model Act in excluding discounts when determining fair value under Colorado's dissenter's rights statute: "Because the legislature has consistently relied on the [Model Act] when fashioning the corporate laws of this state we find the views of the [Model Act] on this issue to be persuasive."). However, in 2019 the Colorado Legislature amended its dissenter's right statute and adopted verbatim the Model's Act's definition of "fair value" that expressly excludes discounts. *See* 2019 Colo. Legis. Serv. Ch. 166 (S.B. 19-086), CRSA 7-113-101(3) (eff. July 1, 2020). *See also Schimke v Liquid Dustlayer, Inc*, No 282421 (Mich Ct App Sept 24, 2009) (unpublished) (finding that trial court had discretion not to apply discounts in an oppression fair value determination because Michigan's dissenter's right statute does not expressly require discounts).

13. Model Act, Official Comment 2(B) to section 13.01.

14. *See, e.g., Brown v Allied Corrugated Box Co*, 91 Cal App 3d 477, 486 (1979).

15. *But see Ferolito v Arizona Beverages USA, LLC*, 2014 WL 5834862, *21 (NY Sup 2014) (applying 25% marketability discount to dissenter's shares because New York statute did not exclude discounts, and doing so despite alleged "bad acts" because "there was no credible evidence that these acts caused any damage to … the company.").

16. *See, e.g., Parker v Parker*, 2016 WL 7484852 (NJ Super Dec 22, 2016), *aff'd* 2019 WL 1253348 (NJ App Mar 18 2019).

17. 330 Mich App 69, 944 NW2d 388 (2019).

18. *See id.* at 76.

19. MCL 450.1489.

20. *Franks, supra* at 84.

21. *See id.* at 110.

22. *Id.*

23. *Id.* at 111.

24. *See* discussion *supra*.

25. *Franks*, 330 Mich App at 111-112.

26. *See id.* (citing *Morley Bros v Clark*, 139 Mich App 193, 197-98 (1984)).

27. *Id.* at 112.

28. *Id.* at 112-113.

29. *Schimke v Liquid Dustlayer, Inc*, No 282421 (Mich Ct App Sept 24, 2009) (unpublished).

30. *Id.* at *6.

31. *Id.*

32. *Lardner v Port Huron Golf Club et al*, Nos 138038, 139092 (Mich Ct App Aug 4, 1994) (unpublished).

33. *See id.* at *6 (citing *Morley Bros v Clark*, 139 Mich App 193 (1984)).

34. *Ward v Idsinga*, No 302731 at *3 (Mich Ct App Aug 15, 2013) (unpublished) (citing *Cole v Southern Michigan Fruit Ass'n*, 260 Mich 617, 621-22 (1932)).

35. *S-S, LLC v Merten Bldg Ltd P'shp*, No 292943 at *2 (Mich Ct App Nov 18, 2010) (unpublished).

36. MCL 450.1231.

37. MCL 450.4509(2).

38. *See S-S, LLC, v Merten Bldg Ltd P'shp*, No 292943 at *6 (Mich Ct App Nov 18, 2010) (unpublished).

39. *See, e.g., Bellwether Cmty Credit Union v CUSO Dev Co, LLC*, 566 F App'x 398 (6th Cir 2014); *Kyle v Apollomax, LLC*, 987 F Supp 2d 519, 528 (D Del 2013) (rejecting claim that company owed fair market value of shares because operating agreement provided for a different share valuation).

40. *See* Cambridge, *Michigan Limited Liability Companies*, §8.36 (ICLE 2020).

41. *See, e.g.,* Miller, *supra* note 1 at 648.

42. A penalty is punitive, meant to punish. It is not equitable. *See Tull v United States*, 481 US 412, 422 (1987) (noting that a "punitive damages remedy is legal, not equitable, relief." (citing *Ross v Bernhard*, 396 US 531, 536 (1970))). "A 'penalty' is a 'punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offense against its laws.'" *Kokesh v SEC*, 137 S Ct 1635, 1642 (2017). Before the State can impose a penalty it must afford a defendant the right to a jury trial, is bound by shorter limitations periods in which to seek the penalty, among other constitutional protections. *See Tull*, 481 US at 525; *Gabelli v SEC*, 568 US 442 (2013); *Kokesh v SEC*, 137 S Ct 1635 (2017). More to the point, courts cannot impose a penalty without express statutory authority to do so. *See Decorative Stone Co v Building Trades Council*, 23 F2d 426, 427-28 (2d Cir 1928) ("Courts of equity do not award as incidental relief damages penal in character without express statutory authority."). In *Madugula v Taub*, 496 Mich 685, 853 NW2d 75 (2014), the Michigan Supreme Court held that the option of awarding damages (a traditional legal remedy) in the Michigan oppression statutes was not sufficient to overcome the holding that an oppression claim sounds in equity with no entitlement to a jury. *See id.* at 703-04, 714. *Madugula* did not address whether declining to apply discounts in order to punish an oppressive shareholder was possible or lawful.

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