

**COMMERCIAL & BUSINESS LITIGATION / APPELLATE**
**MICHIGAN SUPREME COURT CLARIFIES APPLICATION OF THE STATUTE OF LIMITATIONS TO SHAREHOLDER OPPRESSION CLAIMS**

by Daniel D. Quick and Phillip J. DeRosier

In the recent case of *Frank v Linkner*, \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_ (2017), the Michigan Supreme Court clarified that a claim for member oppression under Michigan's Limited Liability Company Act ("LLCA"), MCL 450.4101 *et seq.*, accrues at the time the defendant interferes with the plaintiff's interests as a member, even if the plaintiff has not yet incurred a "calculable financial injury."

**The Facts**

The plaintiffs in *Frank* were former employees of ePrize who held ownership units in the company. The plaintiffs claimed that they were "orally promised that their interests in ePrize would never be diluted or subordinated."

In 2009, ePrize's operating agreement was amended to give distribution priority to newly-created "Series B" and "Series C" units. Then, in 2012, ePrize "sold substantially all of its assets and, pursuant to the Operating Agreement, distributed nearly \$100 million in net proceeds to the holders of Series C and Series B Units." The plaintiffs, meanwhile, "received nothing for their common shares."

In 2013, the plaintiffs brought claims for LLC member oppression. The circuit court dismissed the claims, finding that they were untimely under the applicable three-year statute of limitations. The Court of Appeals reversed, holding that the three-year limitations period did not begin to run until 2012 when ePrize was sold, and that the plaintiffs' claims were therefore timely.

**The Supreme Court's Decision**

In a unanimous opinion, the Supreme Court held that the Court of Appeals erred in determining when the plaintiffs' claims accrued. The Court explained that the plaintiffs' claims accrued when they were first "harmed," and that the relevant harm for purposes of the statute of limitations was when the defendants interfered with the plaintiffs' interests as members of ePrize. The Court concluded that this harm occurred in 2009 when the company's operating agreement was amended to subordinate their shares. Although the plaintiffs may not have incurred "calculable financial injury" until 2012 when ePrize was sold, the Court reasoned that the Court of Appeals' focus on financial injury "conflates monetary damage with 'harm.'" The plaintiffs suffered harm, the Court explained, once their interests in ePrize were interfered with, "regardless of the time when monetary damages result[ed]." The Court concluded that the plaintiffs' claims were therefore barred by the statute of limitations unless they could show that their claims were fraudulently concealed from them. In that case, they would be

entitled to have the statute of limitations tolled under the fraudulent-concealment statute, MCL 600.5855, which provides a plaintiff two years to bring suit after the plaintiff discovered or should have discovered the existence of the claim. The Supreme Court remanded the case to the circuit court for a determination of that issue.

**Implications of the Supreme Court's Decision**

While *Frank* involved a significant event that clearly triggered the accrual of the plaintiffs' member oppression claims, i.e., the amendment of an operating agreement that resulted in the immediate dilution of the plaintiffs' membership interests, that is not always how member oppression occurs. In many cases, it is a pattern of acts that slowly accumulate over time. See, e.g., *Goldberg v First Holding Mgt Co*, No. 325960; 2016 WL 3429851 (Mich App, June 21, 2016) (series of allegedly improper loans). Indeed, the statutory definition of "willfully unfair and oppressive conduct" includes not only a "significant action," but a "series of actions" or a "continuing course of conduct." MCL 450.4515(2). In such cases, it can be difficult to determine the point at which the oppressive acts have resulted in substantial interference with the plaintiff's interests as a member. Regardless, the *Frank* decision serves as a caution that by the time tangible financial damage occurs, it may well be too late to file suit.

*This client alert is published by Dickinson Wright PLLC to inform our clients and friends of important developments in the field of Commercial & Business Litigation / Appellate. The content is informational only and does not constitute legal or professional advice. We encourage you to consult a Dickinson Wright attorney if you have specific questions or concerns relating to any of the topics covered in here.*

**FOR MORE INFORMATION CONTACT:**


**Daniel D. Quick** is a Member and Practice Department Manager in Dickinson Wright's Troy office. He can be reached at 248.433.7242 or [dquick@dickinsonwright.com](mailto:dquick@dickinsonwright.com)



**Phillip J. DeRosier** is a Member in Dickinson Wright's Detroit office. He can be reached at 313.223.3866 or [pderosier@dickinsonwright.com](mailto:pderosier@dickinsonwright.com)