Business Law Update

Drake University Law School General Practice CLE

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Contents

Iowa Legislative & Rulemaking Developments

1. ***Uniform Protected Series LLC Legislation,* SF 569.** ***Enacted by the 2019 General Assembly and codified as part of the Iowa Revised Uniform Limited Liability Company Act (Iowa Code Ch. 489) as new §§ 489.14101 et seq. Effective July 1, 2020.***

Background: Iowa Code Ch. 489 is patterned on the Uniform Law Commission (ULC)'s Revised Uniform Limited Liability Company Act (RULLCA), which did not include "Series LLCs" when originally drafted. Thus, Iowa Code Ch. 489 included a non-uniform Article 12 (Iowa Code §§ 489.1201 et seq.) that maintained the series LLC rules from the original Iowa LLC Act (Iowa Code Ch. 490A—now repealed).

After Iowa enacted Ch. 489, the RULLCA drafters from the ULC developed a "Uniform Protected Series Act" (UPSA) covering series limited liability companies. See 6C ULA (Pocket Part 2018). The UPSA is designed to function as an additional, optional "Article" that states may adopt as part of RULLCA.

UPSA Enactment and Effective Date: The Iowa Legislature enacted the UPSA (S.F. 569) in the 2019 legislative session, and its provisions are to be codified as Article 14 of Iowa Code Ch. 489. New Article 14 takes effect July 1, 2020 for any Iowa series limited liability company formed after that date, as well as for existing Iowa series limited liability companies that elect to be governed by the UPSA.

Transition Provisions: Iowa's current series LLC rules (Article 12 of current Iowa Code Ch. 489) governs any Iowa series LLC formed before July 1, 2020, unless the LLC elects to be governed by the new UPSA thereafter. From and after July 1, 2021, the UPSA will govern *all* Iowa series limited liability companies regardless of when formed, and the original Iowa series LLC rules (Article 12 of current Iowa Code Ch. 489) will be repealed.

UPSA Summary: The relevant provisions of the UPSA are summarized briefly below based on the "Summary of Legislation" provided on the Iowa General Assembly's website. Generally, the UPSA provides that each "protected series" of a "series limited liability company" may function in a manner analogous to a separate legal entity. Thus, a protected series may have different ownership, management structures, assets, and liabilities. The debts and obligations of one protected series are not the debts or obligations of another protected series, or of the series limited liability company.

The UPSA is divided into eight subparts, lettered A through H.

> Subpart A (Iowa Code Sections 489.14101-.14108) includes definitions, a description of the nature of a series limited liability company and a protected series, including the power, purpose, and duration of a protected series. The subpart also provides that a protected series is governed by the series limited liability company's operating agreement, as well as rules for applying certain provisions of an existing series limited liability company to a protected series.

Subpart B (Iowa Code Sections 489.14201-.14206) governs how a protected series is established. Requirements include an affirmative vote of the series limited liability company's membership.

Subpart C (Iowa Code Sections 489.14301-.14305) provides for the assets, membership, management, and information of a series limited liability company and any protected series. An asset is only associated with a series limited liability company or its protected series if there are adequate records describing the asset.

Subpart D (Iowa Code Sections 489.14401-.14404) provides for limitations on liabilities and claims asserted against a series limited liability company or its protected series. Subpart D creates a "horizontal" shield that protects each protected series and its assets from automatic, vicarious liability for the debts of the series limited liability company and the debts of any other protected series of the series limited liability company, as well as a "vertical" shield that protects the series limited liability company and its assets from the creditors of any of its protected series.

Subpart E (Iowa Code Sections 489.14501-.14503) provides for the dissolution and winding up of a protected series. Subpart E also provides for the effect of a protected series when a series limited liability company is reinstated or rescinds a voluntary dissolution.

Subpart F (Iowa Code Sections 489.14601-.14608) provides for organic transactions, including restrictions on mergers involving a series limited liability company or its protected series.

Subpart G (Iowa Code Sections 489.14701-.14704) governs choice of law matters. The subpart provides that the law where a foreign (out-of-state) series limited liability company is created generally governs its protected series.

Subpart H (Iowa Code Sections 489.14803-.14804) provides for transitional provisions.

2. Expanded Iowa Business Specialty Court Jurisdiction

On December 21, 2012, the Iowa Supreme Court launched a three-year Iowa Business Specialty Court Pilot Project that has since been continued and expanded.[1] Under the new rules, a number of district court judges across the state (currently Judges Sarah Crane, Michael Huppert, Larry McLellan, Sean McPartland, Kurt Stoebe, and John Telleen) are designated as members of a new Business Specialty Court, which can accept by transfer from other district courts a broad range of complex commercial or business entity cases with $200,000 or more in dispute. If accepted for transfer to the Business Specialty Court, the case is still heard in the county in which it was initially properly filed, but advancements in electronic communication are expected to permit faster, more efficient processes for the resolution of complex business cases.

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1 https://www.iowacourts.gov/static/media/cms/011419_Business_Ct_Memo_5A469FC10871C.pdf.

Initially, all parties had to agree to transfer a qualified case to the Business Specialty Court's docket. However, in January 2019, in order to facilitate transfer of cases to the new court, the Iowa Supreme Court added an additional process whereby *any party* may move to transfer a qualified case to the Business Specialty Court.[2] Such a motion may be filed with the original petition. If any party is unsatisfied with the Business Specialty Court, a procedure is available that allows that party to move to transfer the case back to the normal case docket.

The Iowa Judicial Branch has been making available selected rulings from the Business Specialty Court at: https://www.iowacourts.gov/iowa-courts/district-court/iowa-business-specialty-court/rulings-and-orders/.

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[2] To be eligible, a case must allege compensatory damages totaling $200,000 or more or claims seeking primarily injunctive or declaratory relief. In addition, the case must satisfy one or more of the following criteria:

(1) Arise from technology licensing agreements, including software and biotechnology licensing agreements, or any agreement involving the licensing of any intellectual property right, including patent rights.

(2) Relate to the internal affairs of businesses (i.e., corporations, limited liability companies, general partnerships, limited liability partnerships, sole proprietorships, professional associations, real estate investment trusts, and joint ventures), including the rights or obligations between or among business participants, or the liability or indemnity of business participants, officers, directors, managers, trustees, or partners, among themselves or to the business.

(3) Involve claims of breach of contract, fraud, misrepresentation, or statutory violations between businesses arising out of business transactions or relationships.

(4) Be a shareholder derivative action or commercial class action.

(5) Arise from commercial bank transactions.

(6) Relate to trade secrets, noncompete, nonsolicitation, or confidentiality agreements.

(7) Involve commercial real property disputes other than residential landlord tenant disputes and foreclosures.

(8) Be a trade secrets, antitrust, or securities-related action.

(9) Involve business tort claims between or among two or more business entities or individuals as to their business or investment activities relating to contracts, transactions, or relationships between or among them.

See https://www.iowacourts.gov/static/media/cms/011419_Business_Ct_Memo_5A469FC10871C.pdf.

3. ISBA's Proposed Amendments to Iowa Code Ch. 490 (Iowa Business Corporation Act)

For the past two years, the *Corporate Laws* Committee of the ISBA's Business Law Section has been reviewing the latest edition of the Model Business Corporation Act to identify any recent changes that should be added to the Iowa Business Corporation Act (Iowa Code Ch. 490), which is patterned on the Model Act.

The Committee, chaired by former Drake Law Dean David Walker, completed its work earlier this fall, and the ISBA Board of Governors approved the Committee's proposed legislation as part of the ISBA's legislative agenda for 2020. A draft bill based on the proposed legislation is now being prepared by the General Assembly's Legislative Service Bureau. If this legislation is enacted as proposed in the Spring 2020 session, the changes to the IBCA will take effect July 1, 2021.

With Dean Walker's permission, reproduced on pages 7-12 is Dean Walker's "Executive Summary" of the ISBA's proposed legislation amending the IBCA. As Dean Walker explains, this summary identifies the most important, but not all, of the proposed IBCA changes. A longer, more comprehensive, summary of the bill will be available through the ISBA.

EXECUTIVE SUMMARY
Report on the ISBA Review of IC Chapter 490 and the MBCA 4th Edition & Recommendation of Amendments to IC Chapter 490

Introduction. Along with thirty-three other States and the District of Columbia, Iowa has generally followed the Model Business Corporation Act in enacting the law governing business corporations. It is substantively sound and well drafted, and it offers benefits to Iowa courts, practitioners, and businesses on account of its widespread adoption, court interpretations (although non-binding), and useful Official Comments. In December 2016 the ABA Corporate Laws Committee published a 4th Edition of the MBCA. The 4th Edition amends the MBCA in various substantive ways. It also represents in part a restatement of the MBCA to include amendments approved since publication of the 3rd Edition; and in recognition of continuing developments in the law, the 4th Edition integrates the MBCA with the law governing unincorporated business associations such as LLCS. Finally, some changes were made simply to improve clarity.

[SSB/HSB] was developed over the course of two years and more than 28 meetings by the Corporate Laws Committee of the Iowa State Bar Association's ["ISBA"] Business Law Section. As the Iowa Bar has always done, while generally following the MBCA, the Bar in some places has intentionally modified some sections of the MBCA and added others to reflect the experience and practical preferences of Iowa lawyers, business, or state government administration, especially the Secretary of State's Office; and Iowa has enacted non-uniform sections—for example, IC § 490.1108A [Board Consideration of Community Interests When Considering Tender Offer or Proposed Business Combination]—which the Committee determined should be and which have been retained in this bill. This Summary notes only the more significant changes [SSB/HSB] makes to Chapter 490. A full Report on this bill identifying all of the major areas in which the bill makes changes to Chapter 490 is available from the Iowa Bar.

1. Article 1—General Provisions. Article 1 contains provisions pertaining to the filing of documents, the powers of the Secretary of State, and definitions used in the Act. There are no changes in the powers of the Secretary of State and, in general, none with respect to filing. There are two major changes. First, because the MBCA was revised to include the possibility of inter-entity transactions such as a merger with or conversion into an unincorporated entity like an LLC, new definitions drawn generally from unincorporated business organization law are included in Section 49.140 of Article 1. Examples include "Eligible Entity," "Governor," "Interest," and "Interest Holder Liability." Second, Subchapter E (§§ 490.145-490.152) has been added, entitled "Ratification of Defective Corporate Actions." It sometimes happens that a corporate action taken by or on behalf of the corporation, within the power of the corporation to take, is "defective" because the manner in which it was authorized, approved, or otherwise effectuated did not comply with the MBCA, the corporation's articles or bylaws, a resolution of the board of the directors, or an agreement to which the corporation was party. As a result, the transaction may be void or voidable, and the consequence is uncertainty, delay, possible claims, litigation, and expense, all of which could have been avoided. New Subchapter E provides a statutory ratification procedure, supplementing the common law, enabling the corporation—with proper authorization, notice, disclosure, meetings, quorum, and/or votes—to correct the defect and validate the transaction. Judicial proceedings are authorized to determine the validity of the ratification of a defective corporate action.

2. Article 2—Incorporation: Articles and Bylaws. Article 2 of the MBCA covers the articles of incorporation and the process of incorporating and organizing a corporation; liability for pre-incorporation transactions; and the adoption and content of bylaws. The following four changes may be highlighted:

- *Authorization through the Articles to Limit or Eliminate Duty to Offer Business Opportunity to the Corporation [Section 490.202(b)(6)].* In closely held businesses, especially real estate transactions, it is often the intention of investors going into the deal to limit the relationship, for example, to the acquisition, development, improvement, operation and possible sale of one specific commercial property, and not any other, whether located in the same area or related in kind, or not. The new provision allows them to do so.
- *Shareholder Access to Corporate Proxy Statement [Section 490.206(c)(1)].* The 4th Edition provides that the bylaws may contain "a requirement that if the corporation solicits proxies or consents with respect to the election of directors, the corporation must include in its proxy statement and any form of its proxy or consent" one or more individuals nominated by a shareholder. Controversial at one time, "proxy access" as it is now called, with various stated conditions, is fairly widespread among public companies and an option even for ones that are not. Under the bill, the board of directors possesses, and shareholders may not limit, "the authority . . . to amend or repeal any condition or procedure set forth in or to add any procedure or condition to such a bylaw to provide for a reasonable, practical, and orderly process," such as requirements of ownership of shares, duration of ownership, and the number of directors to be nominated.
- *Reimbursement by the Corporation of Expenses Incurred by a Shareholder in Soliciting Proxies in an Election of Directors [Section 490.206(c)(2)].* If the board of directors or the shareholders approve, the bylaws may contain "a requirement that the corporation reimburse the expenses incurred by a shareholder in soliciting proxies or consents in connection with an election of directors, to the extent and subject to such procedures and conditions as are provided in the bylaws, provided that no bylaw so adopted shall apply to elections for which any record date precedes its adoption." The board of directors possesses and retains authority to amend or repeal or add any condition or procedure in order "to provide for a reasonable, practical, and orderly process."
- *Forum Selection Provision [Section 490.208].* Under this new provision the articles or bylaws may contain a provision requiring "that any or all internal corporate claims shall be brought exclusively in any specified court or courts of this state and, if so specified, in any additional courts in this state or in any other jurisdictions with which the corporation has a reasonable relationship." The term "internal corporate claim" is defined [Section 490.208(d)] and includes (1) any claim based upon a violation of duty by a current or former director, officer, or shareholder in such capacity, (2) any derivative action brought on behalf of the corporation, (3) a claim arising under this chapter or under the corporation's articles or bylaws, and (4) in general any claim governed by the internal affairs doctrine not included in the above three. Such clauses are common in contracts and agreements and increasingly so in corporate statutes with respect to internal corporate claims. It will give Iowa corporations the authority to choose an Iowa court as the forum for adjudication of corporate claims and interpretation of Iowa law. Almost inevitably key evidence—documents, parties, and witnesses' testimony—is located in Iowa.

3. Article 5—Office and Agent. Article 5 covers the registered office and registered agent required by law for both an Iowa corporation and a foreign corporation transacting business in Iowa. There is one significant change applicable to both domestic and foreign corporations. That change concerns the effective date of a registered agent's resignation. Under current law the resignation takes effect immediately, upon the agent's filing a statement of resignation with the Secretary of State. Under this bill, Section 490.503 will provide that the resignation takes effect upon the earlier of 12:01 a.m. on the 31st day *after* the day on which the statement is filed or the designation of a new registered agent by the corporation, whichever is earlier. The change is calculated to prevent possible surprise to the corporation and also prevent possible prejudice to third parties with claims against the corporation.

4. Article 6—Shares and Distributions. Under IC Section 490.622 a purchaser of shares from a corporation of the corporation's own shares is not liable to the corporation's creditors "except to pay

the consideration for which the shares were authorized to be issued." This section has been amended to state explicitly what is presently the law but not stated in the MBCA, namely, "that a shareholder may become personally liable by reason of the shareholder's own acts or conduct." Two sections of Chapter 490 have been deleted as unnecessary because of other sections of Chapter 490: (1) Section 490.624A, authorizing the board to adopt a so-called "poison pill" as a defense to a hostile takeover attempt, and Section 490.628, authorizing the corporation to pay the expenses of issuing shares out of the consideration received for the shares. Finally, an amendment to Section 490.623 explicitly authorizes the board to set a record date for a distribution or share dividend, but the record date may not be retroactive.

5. Article 7—Shareholders. Four changes may be highlighted. First, the MBCA 4th Edition expands the previously approved authorization, § 490.709, with appropriate safeguards, for the board to allow shareholders to participate in the meetings remotely or online. Such "virtual meetings" have gained in popularity, and this bill adopts the 4th Edition's authorization for the board to hold annual [Section 490.701] or special meetings [Section 490.702] totally virtually, *i.e.*, without any specific "place." Second, conflict of interest provisions concerning the voting of the corporation's shares which the corporation controls or owns directly or indirectly have been strengthened. Section 490.721 has disallowed a corporation from voting such shares "absent special circumstances." That language has replaced and the section amended to clarify the intended disenfranchisement. Third, Section 490.725 continues to allow the corporation to alter the general rule that a majority of the votes entitled to be cast constitutes a quorum for purposes of action by that voting group. Thus, it may provide that less than a majority constitutes a quorum. However, other sections of Chapter 490, like those governing a merger, specify that a quorum of the voting group "consisting of a majority of the voters entitled to be cast" is required. An amendment to Section 490.725(a) made by [SSB/HSB] eliminates the conflict and provides, "Whenever this Act requires a particular quorum for a specified action, the articles of incorporation or the bylaws may not provide for a lower quorum." Fourth, this bill adds a new section, Section 490.749—Judicial Determination of Corporate Offices and Review of Elections and Shareholder Votes. Questions can arise in the course of corporate process, for example, about (1) the results or validity of an election, appointment, removal or resignation of a director or officer, (2) the right of an individual to serve as a director or officer, or (3) the result or validity of any shareholder vote. This bill includes a new Section approved in the MBCA 4th Edition, Section 7.49, authorizing judicial determination of these issues and addressing required or authorized procedure.

6. Article 8—Directors and Officers. Among the changes in Article 8, two are of especial note. First, Section 490.802 has been amended to give explicit attention to qualifications of board nominees and elected directors. Directors cannot be inhibited or encumbered from the full discharge of their fiduciary duties to the corporation and its shareholders. To this end Section 490.802(b) has been added. It provides, "A requirement that is based on a past, prospective, or current action, or expression of opinion, by a nominee or director that could limit the ability of the nominee or director to discharge his or her duties as a director is not a permissible qualification under this section." However, "qualifications may include not being or having been subject to specified criminal, civil, or regulatory sanctions or not having been removed as a director by judicial action for cause." In addition, Section 8.02 has been amended to make clear that a qualification for nomination applies at the time of nomination but that a qualification prescribed *after* a person has been nominated does not apply to that person. Likewise, a qualification for director prescribed before a person has been elected or appointed applies at the time the person becomes a director and during the director's term on the board; but a qualification prescribed *after* a director has been elected or appointed does not apply to that director before the end of his or her term. Second, the bill adds a judicial remedy to deal with directors who act wrongfully. Under current Section 490.802 a court is authorized to remove a director of the corporation from office if it finds that the director "engaged in fraudulent conduct with respect to the corporation or its shareholders, grossly abused the position of director, or intentionally inflicted harm on the corporation, if considering the director's course of conduct removal would be in the

best interest of the corporation." Section 8.02 has been amended to authorize a court not only to remove the director but also to bar the director from reelection for a period prescribed by the court.

7. Article 9—Domestication and Conversion. Domestication is a procedure by which (1) an entity organized under Iowa law may change from being an Iowa entity into a like foreign entity, *or* (2) a foreign entity may become a like Iowa entity, provided that the statutes of each jurisdiction authorize domestication and provided further that required procedures are observed. Domestication is a transaction Iowa law *has* authorized for LLCs since 2008 (IC §§ 489.1110-489.1113), but it has not been a part of Iowa's corporate law, though recognized by many other states and notwithstanding inclusion in the earlier edition of the MBCA. The 4th Edition amplifies and clarifies the law regarding domestication. As with other changes regarded as fundamental, board approval and shareholder approval following full disclosure are required. The procedure is not available for mutual companies. Further, if a corporation would be required to obtain the approval of the Insurance Commissioner, the Public Utility Board, or the Banking Superintendent for a merger, the same approval is required for a domestication; and if a domesticating corporation had in effect a "protected agreement" clause applicable in the event of a merger but not mentioning domestication, the protections contained in the protected agreement clause apply "as if the domestication were a merger until such time as the provision [in the protected agreement] is first amended after the enactment date." Conversion is a procedure by which a domestic corporation may become another type of authorized business entity, for example, an LLC, or by which a foreign business entity other than a corporation may become domestic, or Iowa, corporation, provided the statutes under which each is organized authorize the conversion, and provided that required procedures are observed. Iowa corporate law has authorized a conversion since 2008. IC §§ 490.1110—490.1114. These provisions have been updated and relocated to Article 9.

8. Article 10—Amendment of Articles and Bylaws. Changes to Article 10 include one relating to an articles amendment resulting in new interest holder liability and another dealing with board elections where a candidate receives more votes against than in favor. The first requires shareholder approval of an amendment in a unique circumstance. Amendments to the articles of incorporation generally require the approval of both the board and the shareholders. New Section 490.1003(f) recognizes that an amendment of the articles may result in one or more shareholders becoming subject to new interest holder liability—personal liability—for debts, obligations, or other liabilities of the corporation. In that event the new section requires that each such shareholder who would have new interest holder liability must give separate written consent to the amendment that would have that result, unless the new interest holder liability is substantially identical to existing interest holder liability (or would reduce or eliminate it). In addition, under § 490.1009(c) the new interest holder liability to which the shareholder may become subject applies only to liabilities incurred after the amendment becomes effective. The second applies to board elections where the number of candidates for election is the same as the number of directors to be elected, and a candidate "receives more votes against than for election." Ordinarily directors are elected by a plurality of the votes cast, IC § 490.728, not a majority, because there may be more candidates for the board than directors to be elected. When the number of candidates is the same as the number of directors to be elected, however, and there are more votes against a candidate than for his or her election, it is clear that a majority of the votes have disapproved and rejected the candidate's election. [SSB/HSB] adds § 490.1022 providing that in that case, the corporation may adopt a bylaw providing that the board member's term ends no later than 90 days after the voting results, and providing further that the board may fill the vacancy thus created.

9. Article 11—Mergers and Share Exchanges. Article 11 deals with fundamental changes. Required procedures and language have been harmonized to achieve consistency and improve clarity; In addition, a new procedure for merger or share exchange is authorized. Except for "short-form mergers" where the acquiring corporation owns 90% or more of the shares of the corporation to be acquired, Article 11 requires both board approval and shareholder approval by each corporation for approval of the

transaction. [SSB/HSB] authorizes a merger without a shareholder vote in additional, narrow circumstances. New Section 490.1104(j) authorizes a merger without a shareholder vote following a tender offer even when the tender offer does *not* result in the offeror acquiring 90% or more of the target company's shares, if several conditions are met. These conditions include (1) that the articles of incorporation must not provide otherwise; (2) the plan of merger or share exchange and the offer must expressly permit or require the transaction to be effected under § 490.1104(j); and (3) the shares or votes acquired in the offer, coupled with those already owned, exceed the minimum number of votes that, absent this subsection, would be required for approval of the merger or share exchange. Essentially, with full disclosure, shares offered and acquired pursuant to the tender offer are viewed as being cast in favor of the merger. If those, together with shares already owned or subject to the offeror's control, are greater than the number required, the merger or share exchange is approved.

10. Article 13—Appraisal Rights. Article 13 provides that in certain listed situations, a shareholder may dissent from a proposed transaction and demand payment of the fair value for shares held by the shareholder rather than having to go along with the transaction. Section 490.1302 lists the situations when a shareholder is entitled to appraisal remedy. To these have been added, in subsections 490.1302(a)(6) and 490.1302(a)(7), (1) a domestication and (2) a conversion of the corporation to a nonprofit corporation.

11. Article 14—Dissolution. Chapter 490 has not explicitly dealt with corporate distributions following dissolution, *i.e.,* in the course of liquidation. The definition of "distribution" in Section 490.140 has been amended explicitly to include "a distribution in liquidation;" Section 490.1405 has been amended to authorize the board to "fix a record date for a determining shareholders entitled to a distribution, which date may not be retroactive;" and Section 490.1409, dealing with directors' duties upon dissolution, has been amended to cover distributions in liquidation following payment or provision for claims. Current Section 490.1422, dealing with reinstatement following administrative dissolution, has been retained.

12. Article 15—Foreign Corporations. Following the MBCA 4th Edition, [SSB/HSB] makes stylistic changes to current law's treatment of foreign corporations, and it makes some changes in organization, *e.g.*, moving treatment of registered agents for foreign corporations to Article 5 from current IC 490.1508. Such changes are clarifying and simplifying and do not represent any significant change in substance. One language change in particular may be noted. Chapter 490 and corporate law for years has referred to a foreign corporation "apply[ing] for a certificate of authority to transact business in this state by delivering an application to the secretary of state for filing." The MBCA 4th Edition and modern law for unincorporated organizations refer instead to a foreign corporation or entity "registering" to do business in this state. This bill adopts that language. The content of the "registration statement" the foreign corporation must file with the secretary of state, including the requirement of attachment of a certificate of existence, remain substantially the same.

13. Article 16—Records and Reports. Article 16 of Chapter 490 states what records a corporation must maintain, when a shareholder has a right to inspect corporate documents, what financial statements a shareholder may request and when a corporation must fulfill the request, and when a biennial report must be filed and what it must contain.

- *Corporate Records.* [SSB/HSB] moves from § 490.1602 to § 490.1601 certain required records, like accounting records and a record of shareholders, improving organization; and it better focuses on the shareholder's inspection right. For example, it provides that the list of shareholders must be maintained "in alphabetical order" and explicitly states, "A corporation shall maintain the records specified in this section in a manner so that they may be made available for inspection within a reasonable time." [SSB/HSB] also states that nothing in the bill "shall require the corporation to include in such record the electronic mail address or other electronic contact information of a shareholder."

- *Inspection Right of Shareholders.* The MBCA 4th Edition and this bill add a valuable proviso or qualification to a shareholder's inspection right but maintain key distinctions in current law insofar as a shareholder's right of inspection is concerned. A shareholder may inspect some corporate records as of right, while for others a shareholder's inspection demand must be "made in good faith and for a proper purpose," must describe "with reasonable particularity the shareholder's purpose and the records" requested, and must show that the records requested are "directly connected with the shareholder's purpose." The added proviso is, "The corporation may impose reasonable restrictions on the confidentiality, use or distribution of records described" I the shareholder's demand; and the corporation and shareholder cannot agree on that, the bill provides for judicial determination, with the court authorized to "impose reasonable restrictions on their confidentiality, use or distribution by the demanding shareholder."

- *Financial Statements for Shareholders.* IC § 490.1620 requires a corporation to prepare and deliver or make available to shareholders annual financial statements, but it makes an exception for corporations with "fewer than one hundred shareholders as of the end of the corporation's fiscal year" and for ones that operate "on a cooperative basis." For these entities the shareholder may make a request, which if the shareholder fulfills the requirements for inspection, the corporation must fill at the corporation's expense. Under the MBCA 4th Edition, that exception is made the general rule. That was the law before 2014. This bill returns the law to the way it worked before 2014.

- *Biennial Reports.* No substantial change is made in the law regarding biennial reports.

14. Article 17—Benefit Corporations. Article 17 authorizes incorporators to organize, or an existing corporation by amendment of its articles to become, a "benefit corporation." More than two thirds of the states have adopted benefit corporation legislation; and reportedly more than 7,000 have been formed. A benefit corporation is defined as one whose articles include a provision stating, "the corporation shall pursue one or more identified public benefits." That, in turn, is defined as "a positive effect, or reduction of negative effects, on one or more communities or categories of persons or entities (other than shareholders solely in their capacity as shareholders) or on the environment, including effects of an artistic, charitable, economic, educational, cultural, literary, medical, religious, social, ecological or scientific nature." Benefit corporation directors are required to act in a reasonable and sustainable manner and in a manner that pursues the public benefit(s) identified in its articles. Directors are also required to consider not just the interest of shareholders but the interests of stakeholders "known to be affected by the business of the corporation;" but the bill states that that does not mean directors owe any duty to a person other than the benefit corporation." The bill provides that a benefit corporation is required annually to prepare and make available a benefit report addressing its efforts to operate in a reasonable and sustainable manner, to pursue intended public benefit(s), and to consider the interests of stakeholders other than shareholders; standards adopted for assessment; and its evaluation of its progress or success. A benefit corporation will be subject to Chapter 490 in all respects except when Article 17 imposes additional or different requirements. The fact that the MBCA and Chapter 490 address benefit corporations in a separate chapter "does not imply that a contrary or different rule of law applies to a corporation that is not a benefit corporation."

15. Article 18—Transition Provisions. The bill provides for an effective date of July 1, 2021. It will apply to all domestic corporations in existence and all foreign corporations registered in Iowa on that date. As under current law stated in IC § 490.1701(2), [SSB/HSB] will not apply to an entity formed under other sections of the Iowa Code unless such entities elect or have elected to be governed by Chapter 490. § 490.1702(3) authorizes them to do so.

Iowa Case Law Developments—Federal

***In re Western Slopes Farms Partnership*, 2018 WL 4348048 (Bank. N. D. Iowa 2018)**. Held: Transfer of property that is fully encumbered by a security interest does not transfer an "asset" for purposes of Iowa Code Ch. 684, the Iowa Uniform Voidable Transactions Act (IUVTA)—formerly the Iowa Uniform Fraudulent Transfer Act.

This case involved the definition of "Asset" under the IUVTA. BJM, Inc. had pledged farm equipment to Roger Rand as collateral for a loan. When the loan was in default and amounts owed on the loan exceeded the value of the equipment, BJM transferred the equipment to Western Slopes Farm Partnership for no consideration. The Partnership filed bankruptcy that same day.

The transfer of the equipment did not cut off Rand's security interest, and there was no dispute that the Partnership held the equipment in the bankruptcy case subject to that security interest. Nonetheless, Security National Bank of Sioux City, representing Rand's estate, asked the Bankruptcy Court to void the transfer under the IUVTA.

The Court noted that the IUVTA voids transactions transferring property in two situations: first, where a transfer is "made … with the actual intent to hinder, delay or defraud a creditor (Iowa Code § 684.4); and second, if an insolvent debtor makes a transfer "without receiving a reasonably equivalent value in exchange" (Iowa Code § 684.5). Whatever the parties' intent in this case, the transfer of the farm equipment was made for no consideration, and thus not for "reasonably equivalent value."

The Bank's case failed, however, because the IUVTA defines "transfer" in terms of disposition of "an asset or an interest in an asset." See Iowa Code § 684.1(16). And under the IUVTA, an "asset" does not include property of the debtor to the extent the property "is encumbered by a valid lien." Iowa Code § 684.1(2). Because the equipment was fully encumbered by Rand's security interest, it did not qualify as an "asset" of BJM. Thus BJM's transfer to the Partnership of the fully encumbered farm equipment did not constitute a "transfer" under the IUVTA.

Iowa Case Law Developments—Iowa Supreme Court

1. ***Morris v. Steffes Group, Inc.*, 924 N.W.2d 491 (Iowa 2019).** Held: Under the Iowa Door-to-Door Sales Act (DDSA), Iowa Code Ch. 555A, the term "consumer goods or services" is defined with reference to the intended use of the goods or services by the buyer, and not the seller.

Todd Morris, a farmer, attended an agricultural trade show and spoke to Norton, a Steffes representative, about the possibility of allowing Steffes to auction off some extra farm equipment that Morris used around his home. With Morris' permission, Norton went to the Morris home and obtained a signed contract for auction services from Morris' wife (on Morris' behalf) covering a tractor and certain other equipment. The contract provided that the equipment to be auctioned would be sold to the highest bidder, and that the equipment could be withdrawn from the auction

only with both parties' consent. However, Norton provided oral assurances that Morris' tractor would not be sold for less than $20,000 if Morris established such a "reserve" price, and Norton and Morris orally agreed on the $20,000 reserve.

Despite Norton's oral assurances about the reserve, Steffes auctioned the tractor for $14,000, Morris then sued Steffes for its failure to provide notice and cancellation rights with respect to the auction contract as required by the DDSA, as well as for fraudulent inducement.

Steffes defended the DDSA count on the ground that its auction services in connection with the sale of Morris' tractor were not "consumer goods or services," so that the DDSA was inapplicable. The district court entered summary judgment in Steffes' favor on that ground. The Iowa Court of Appeals affirmed, but the Iowa Supreme Court reversed after further review.

The Court reasoned that Steffe's auction services for the sale of Morris' tractor could qualify as "consumer goods and services" because the DDSA defines such goods and services as those "*purchased, leased, or rented primarily for personal, family or household purposes*." That statutory reference, the Court explained, requires application of the buyer's, rather than the seller's perspective. Although Steffe was generally engaged in the business of auctioning farm equipment, Morris used his tractor for household chores and recreation rather than in his farming operation. Thus, Steffe's auction services for the sale of that tractor were "consumer services" under the DDSA.

2. ***Wells Fargo Equipment Finance, Inc. v. Retterath*, 928 N.W.2d 1 (Iowa 2019).**
   Held: for choice of law purposes, a member's transferable interest in an Iowa limited liability company is located in Iowa, so that Iowa law governs any applicable exemptions and similar rules that apply to the interest, even if the member resides in another jurisdiction.

Wells Fargo Equipment Finance had Florida judgments against Retterath, a Florida resident, and sought enforcement of those judgments under Iowa's Uniform Enforcement of Foreign Judgments Act (the IUEFJA), Iowa Code Ch. 626A. After registering the Florida judgments in Iowa district court (Chickasaw County) under the IUEFJA, Wells Fargo sought a charging order under Iowa Code § 489.503 against Retterath's transferable interests in Homestead Energy Solutions, LLC, an Iowa limited liability company. The district court granted the charging order, which directed Homestead to pay to Wells Fargo any LLC distributions that were payable Retterath, up to the amount of the judgments.

Retterath and his wife, also a Florida resident, filed a petition to vacate the Iowa district court's charging order on the ground that Retterath held his membership interest in Homestead in tenancy by the entirety with his wife. Although Iowa law does not recognize the tenancy by the entirety concept, Florida would not enforce a judgment against tenancy by the entirety property unless both husband and wife were liable on the judgment.

The issue whether Retterath's transferable interest in Homestead was exempt from the charging order turned on whether Iowa law or Florida law controlled. The Court concluded that Iowa law

controlled because Retterath's interest in Homestead was located in Iowa—where Homestead was formed. Because Iowa does not recognize the tenancy by the entirety concept, the Court held, the Retteraths could not prevent enforcement of the charging order.

The question presented in *Retterath* was an issue of first impression in Iowa, and only a few courts in other states have addressed it. See, e.g., *J.P. Morgan Chase Bank, N.A. v. McClure*, 393 P.3d 955 (Colo. 2017) (holding that because an LLC was organized as a Colorado LLC, Colorado law controlled a priority dispute pertaining competing charging order liens against the transferable interest of a member of that LLC).

The Iowa Supreme Court reasoned that a different rule—that a member's transferable interest in an LLC is located where the member resides—might subject an Iowa LLC "to various and competing charging orders from differing foreign jurisdictions." *Retterath*, 928 N.W.2d 1, 8. Thus, it appears that creditors of nonresident members of an Iowa LLC must pursue their charging orders in Iowa courts, either directly or through the UEFJA.

3. ***Kunde v. Estate of Bowman*, 920 N.W.2d 803 (Iowa 2019)**. Held: (1) Recovery on a promissory estoppel theory is not precluded by the existence of an express contract on related subject matter; and (2) recovery of reliance damages based on promissory estoppel requires proof of a "clear and definite promise" rather than proof of a "clear and definite oral agreement."

Kunde leased farm acreage from Bowman under terms of a written lease and made improvements to the leased property in reliance on an oral understanding with Bowman that Kunde had an option to buy the property. The written lease included clear terms providing that Kunde bore the cost of these improvements and that the improvements belonged to Bowman. After making the improvements, Kunde was prevented from exercising the option to purchase Bowman's land due to a right of first refusal held by another party.

Kunde sued Bowman to recover his property improvement expenses based on theories that included quantum meruit, unjust enrichment and promissory estoppel. The district court concluded that the express provisions of the lease precluded recovery on these theories.

On appeal, the Iowa Supreme Court agreed with the district court (and with the Iowa Court of Appeals, which had also considered the case) that both Kunde's quantum meruit and unjust enrichment claims to recover his property improvement costs were based in theories of "implied contract." These claims, the Court held, could not survive in the face of an express lease contract on the same subject matter that allocated those costs to Kunde.

The Supreme Court distinguished Kunde's promissory estoppel claims based on Bowman's separate oral promise of *a land purchase option*—something the terms of the lease did not cover. The Court also rejected Bowman's argument that under Iowa promissory estoppel precedent, Kunde had to to prove a "clear and definite agreement" with Bowman concerning the option's terms. The Court explained that although there are Iowa cases stating that a "clear and definite agreement" is an element of promissory estoppel, the key to the promissory estoppel recovery theory is reliance on a promise, rather than a "clear and definite agreement." Thus the Court held

that Kunde was required to prove only a "clear and definite promise" of a land option by Bowman and his (Kunde's) reliance on that promise. There was a triable claim on this issue, the Court concluded, and it therefore remanded the case on that basis.

Iowa Case Law Developments—Iowa Court of Appeals

1. ***Felt v. Felt,* 928 N.W.2d 882 (Iowa Ct. App. 2019)(table).** Held: LLC dissolved for failure to have any members for 90 days after the sole member died. Although the member had three heirs, each of whom became transferees of the member's membership interest in equal shares upon his death, the heirs did not execute "joinder agreements" as required by the LLC's Operating Agreement. This failure, the Court of Appeals held, prevented the heirs from becoming members.

The attorney who organized the LLC did not have experience forming LLCs. The *Felt* case teaches several lessons about LLCs and the Iowa LLC Act that this attorney will likely remember in the future.

First, unlike corporate shares, an LLC member's status as a member is generally nontransferable. The Iowa LLC Act provides that a person may become a member of an LLC only as provided in the company's Operating Agreement or with the consent of all members. See Iowa Code § 489.401(4). A related default rule is that an LLC member *can* freely transfer his/her "transferable membership interest." See Iowa Code § 489.501. However, the latter is defined as the member's right to financial distributions from the LLC—not the member's status as a member. See Iowa Code § 489.102(24). This distinction was critical in *Felt*, because provisions of the sole member's will made his children transferees of his transferable membership interest (his financial rights in the LLC) in equal shares upon his death. But the children did not automatically succeed to their father's status as an LLC member.

Second, Operating Agreements can and generally do specify requirements for persons, including transferees of transferable interests, to become members of an LLC. As an example, the Operating Agreement before the Court in *Felt* expressly required that transferees of members execute a written "joinder agreeement" as a condition to becoming members of the comany. Had there been no such requirement, the Court might have concluded that various acts by the Felt heirs indicating all believed themselves to be members in the company *might* have been sufficient proof of membership.

Third, unlike a corporation, an LLC's existence does not always extend beyond the life of its members. One of the few default rules for automatic dissolution of an LLC is Iowa Code Section 489.701(c), providing that a company dissolves if it has no members for 90 days. The LLC members can change this rule in the Operating Agreement, but the Felt Operating Agreement did not do so. Thus, the Court concluded that the company dissolved 90 days following the sole member's death.

2. ***Lucy v. Platinum Services, Inc.*, 928 N.W.2d 882 (Iowa Ct. App. 2019)(table).** Held: Majority shareholder who purchased a minority shareholder's shares could not enforce non-compete provisions in stock redemption agreement to which the majority shareholder was not a party.

Briggs was the majority shareholder of Platinum Services, Inc., which issued shares to Lucy when he became a salesman for the company. When Lucy bought his shares he signed a Redemption Agreement with the company that provided for redemption of Lucy's shares on certain conditions and that also included non-compete provisions. Many years later, when Lucy left Platinum, Briggs purchased Lucy's shares pursuant to a separate Stock Purchase Agreement. When Lucy later began competing with Platinum, Briggs sought to enforce the non-compete provisions of the Redemption Agreement.

The Iowa Court of Appeals, reviewing a declaratory judgment action, agreed with Lucy that his Stock Purchase Agreement with Briggs was separate and distinct from Lucy's Redemption Agreement with Platinum, so that the non-competition provisions in the latter agreement were inapplicable. While the Redemption Agreement contained non-compete provisions that tied Lucy's eligibility to receive payment on continued non-competition, the Stock Purchase Agreement that Lucy and Briggs entered contained no such provisions, and their were no provisions in the agreements incorporating those provisions by reference.

3. ***Heartland Co-op v. Nelson*, 2019 WL 3317858 (Iowa Ct. App. 2019) (table).** Held: Former shareholder held liable as "mere continuation" of defunct farming corporation.

Nelson was sole shareholder of Broken Wing Farms, Inc. a farming corporation that owed Heartland over $800,000 as a result of an arbitration proceeding. Broken Wing never paid the award and ceased operations. At the same time, Nelson formed Nelron, a new limited liability company that took over many of Broken Wing's assets. Nelron also launched a farming partnership with companies owned by Nelson's son and wife, and the new operation used Broken Wing's farmland and suppliers. Nelron took over Broken Wing's bank account, depositing Broken Wing's checks and paid its loan obligations. Based on these facts, the jury concluded that Nelson was personally liable for the arbitration award as a successor/mere continuation of Broken Wing.

Affirming the verdict, the Iowa Court of Appeals noted that the jury appropriately considered the following factors in finding Nelson to be Broken Wing's successor and mere continuation:

1. Whether the predecessor simply changed its form of business organization but continued to conduct business in the same manner that it had before the change in form.
2. Whether the overall operations remain essentially the same with only a change in name or technical legal entity.
3. Whether there is continuity of management with the predecessor.
4. Whether there is continuity of ownership with the predecessor.

Iowa Case Law Developments—Iowa Business Specialty Court

> ***Calkins v. Brandt*, No. EQCE081752, 2019 WL 1222916 (Iowa Dist. Ct. Jan. 26, 2019).** Held: Majority shareholder defeated minority shareholder's reasonable expectations (and thereby oppressed the minority shareholder) by: (i) terminating the minority shareholder's employment without justification, (ii) unilaterally ceasing negotiation for purchase of the minority shareholder's shares, and (iii) attempting to use the termination to force the minority shareholder to sell his shares at less than fair value.

Following the Iowa Supreme Court's decision in *Baur v. Baur Farms, Inc.*, 832 N.W.2d 663 (Iowa 2013), which defined minority shareholder oppression under the "reasonable expectations" standard, there were no reported Iowa cases where oppression plaintiffs prevailed. See *Knobloch v. Home Warranty, I*nc., 2016 WL 6662709 (N.D. Iowa 2016), *Van Horn v. R.H. Van Horn Farms, Inc*., 2018 WL 3060240 (Iowa Ct. App. 2018) (table), *Morse v. Rosendahl*, 885 N.W.2d 220 (Iowa Ct. App. 2016) (table), and *Ahrens v. Ahrens Agr. Indus. Co*., 867 N.W.2d 195 (Iowa Ct. App. 2015) (table). For a complete discussion of all of these decisions, see Matthew G. Doré, 6 IOWA PRACTICE—BUSINESS ORGANIZATIONS § 31:11 (Thomson Reuters 2019-2020 ed.). The plaintiff minority shareholder in *Calkins v. Brandt*, a 2019 Iowa Business Specialty Court case that is not being appealed, broke this trend was able to establish oppression.

Calkins was a minority (43%) shareholder who had invested in and worked for his corporate employer (an insurance-related administration and audit business) for nearly 30 years. As he neared retirement, Calkins negotiated with Brandt, the majority shareholder, for a buy-out, but negotiations foundered when the parties could not agree on a price. Brandt then terminated Calkins employment, telling others that Calkins had retired. Brandt privately told Calkins his termination was necessary as a cost-cutting measure because the firm had lost clients. Brandt then made successively lower-priced offers to purchase Calkins' stock, which Calkins declined to accept.

The Iowa Business Specialty Court sided with Calkins in his ensuing oppression suit against Brandt, finding that Calkins had originally invested in the company with the expectation of getting his returns through employment, and that Brandt and Calkins had always taken out comparable salaries from the company in lieu of dividends. The court further found that Brandt provided no credible business justification for Calkins' termination. Rather, the court noted, Brandt raised his adult son's compensation from the company despite questions about the son's qualifications to service its clients, and that Brandt gave these raises during the same time period that he terminated Calkins on the pretext of cutting costs. The Court concluded that Brandt's actions oppressed Calkins under the "reasonable expectations" oppression standard, citing (i) Brandt's termination of Calkin's employment without justification, (ii) Brandt's decision to unilaterally cease negotiations for the buyout of Calkin's shares, and (iii) Brandt's attempt to use the termination to force Calkins to sell his shares at less than fair value. Rather than order dissolution of the company the Court ordered Brandt to purchase Calkins stock for approximately $1.9 million.

For more details about this decision and oppression in the context of employment decisions, see Matthew C. McDermott and Christopher J. Jessen, *At-Will or Something More?: Reasonable Expectations of Continued Employment by Minority Shareholders Post-Baur v. Baur Farms, Inc.*, 67 DRAKE LAW REVIEW 713 (2019).

Other: New resource on Iowa veil piercing case law

Matthew G. Doré, *Lifting the Veil on Iowa Piercing Jurisprudence and Suggestions for Reform*, 67 DRAKE LAW REVIEW 619 (2019).

Also available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3471943

Article Abstract:

Like courts in other states, Iowa courts employ a multi-factor test for veil piercing that evaluates business owners and their entities based on undercapitalization, commingling of finances, failure to observe formalities, and the like. Yet Iowa precedent assigns no weight to any of the factors, offers few insights concerning their meaning, and even less guidance on the factors' relationship to the justifications for piercing.

This Article outlines a path for bringing greater order and predictability to Iowa piercing jurisprudence, starting with a taxonomy based on legal scholars' consensus that courts are justified in piercing when those controlling the entity do one or more of the following: (1) use the corporate privilege to evade obligations imposed by other legal schemes; (2) engage in fraud, misrepresentation or similar deceptive behavior to obtain corporate credit; or (3) engage in abusive self-dealing that improperly subordinates creditor claims to corporate assets. If one first identifies the asserted policy justification for piercing in a particular case, the Article explains, it becomes easier to assess whether traditional piercing "factors" like undercapitalization, commingling of finances, or failure to follow formalities warrant application of the remedy, and why. Accordingly, the Article recommends that Iowa courts require piercing plaintiffs to identify one or more of the foregoing policy justifications for the piercing remedy before determining whether any traditional piercing factors support granting that relief.

The Article also challenges Iowa's tradition of leaving piercing decisions to juries. Piercing is an equitable remedy that judges should administer without juries, the Article argues, but even if piercing is a legal claim, a decision to grant or withhold the piercing remedy is a law- and policy-making exercise, and thus a legal question for the court. Accordingly, the Article recommends that regardless of whether judge or jury makes the underlying factual findings in piercing cases, Iowa judges, rather than juries, should decide whether to grant and how to shape the piercing remedy.