

MICHIGAN CORPORATIONS FACE SIGNIFICANT COURT RULING

BY VINCENT PECORA AND IRIS LINDER

In the recent case of *Miller v Allstate Ins Co*, {__ Mich App __, Docket No 259992, May 31, 2007} the Michigan Court of Appeals held that if a corporation is eligible for incorporation under the Professional Service Corporation Act (the “PSCA”), it may not be incorporated under the Michigan Business Corporation Act (the “MBCA”).

Under the reasoning of this decision, some Michigan corporations formed as business corporations under the MBCA, and whose shareholders, officers, employees, or agents are required to be licensed in order to perform the services they provide, may have been improperly incorporated.

With respect to existing businesses, the decision in *Miller* only affects business corporations that have not been incorporated as a professional corporation. Based on current authority, it *does not* affect limited liability companies, partnerships and other types of business organizations.

The *Miller* case is significant because it represents a departure from the well-settled legal principles governing the formation of Michigan professional corporations. Historically, only the “learned professions,” namely, law, theology, and medicine, were required to incorporate as professional corporations under the PSCA.

More recently, certified public accountants, dentists, and psychologists were added to the list of professionals that could incorporate only under the PSCA. All other licensed occupations were given the

option of incorporating either under the PSCA or the MBCA. Breaking from existing practice, the court in *Miller* held that incorporation under the PSCA is mandatory for *all* licensed occupations performing “personal services” to the public.

On July 23, 2007, the Corporation Division of the Michigan Bureau of Commercial Services, Department of Labor and Economic Growth (the “Bureau”) issued a release in response to the Court of Appeals’ decision in *Miller*. The Bureau’s release sets forth a list of service providers that must incorporate as professional corporations under the PSCA, as well as a list of service providers that may still organize as business corporations under the MBCA.

The Bureau characterized the following services as “professional services” that under the reasoning of *Miller* must be organized as a professional corporation:

- Athletic Trainers
- Audiologists
- Counselors
- Dental Assistants
- Dental Hygienists
- Dieticians
- Marriage Counselors
- Nurses
- Nursing Home Administrators
- Nutritionists
- Pharmacists

“Under the reasoning of this decision, some Michigan corporations formed as business corporations under the MBCA...may have been improperly incorporated.”

continued page 2...

MICHIGAN COURT OF APPEALS RULING *CONTINUED...*

- Physician's Assistants
- Physical Therapists
- Psychologists
- Respiratory Therapists
- Social Workers
- Substance Abuse Counselors
- Veterinary Technicians
- Acupuncturists
- Midwives
- Solicitors
- Funeral Directors
- Morticians
- Real Estate Appraisers
- Real Estate Brokers and Salespersons

Although the Bureau has stated that business corporations existing at the time this release was issued do not need to take any remedial action, we are currently evaluating the implications of *Miller* for your business. We consider a Michigan professional corporation to be an undesirable organizational structure for four reasons:

1. It is subject to a 35% flat corporate tax rate, as opposed to the graduated tax brackets available to business corporations (unless the corporation qualifies as an S Corporation)
2. Section 4 of the PSCA allows only persons licensed to perform the specific professional services of the professional corporation to become a shareholder.
3. Section 2(b) of the PSCA limits the scope of activities and services that a professional corporation can perform, and provides that professional corporations must be formed for the sole and narrow purpose of performing specific professional services.
4. Section 6 of the PSCA provides that professional corporations are unable to limit the personal liability of their officers, shareholders, agents, and employees for acts of professional negligence.

The *Miller* case is currently on appeal, so we are not recommending that affected business owners make any immediate changes to their organizational structure. If you are forming a new entity, you may find the limited liability company to be a better choice if you are engaged in one of the licensed occupations listed above.

“Breaking from existing practice, the court in Miller held that incorporation under the PSCA is mandatory for ALL licensed occupations performing ‘personal services’ to the public.”

Until the *Miller* case is definitively settled by the courts or the Michigan Legislature acts to provide a legislative correction, there will be considerable uncertainty in this area of the law.

In the meantime, you should consider doing one or all of the following: (a) check with your liability insurance carrier to make sure that your coverage is not affected by this recent development in the law; (b) consult with your legal counsel; (c) look into joining an industry association to participate in a legislative lobbying effort or the filing of an amicus brief with the Michigan Supreme Court in the *Miller* case appeal.

7



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FTD&D PREVAILS IN ESTATE SUIT

Michael Donnelly recently prevailed in a two week jury trial in the Jackson County Probate Court, defending the estates and trusts of two successful Michigan restaurateurs.

William and Violet Sigmund opened the first McDonald's restaurant in Jackson, Michigan in 1959 and went on to open eight more on their way to becoming multimillionaires. They shared their good fortune with the Jackson community by establishing the Bill and Vi Sigmund Foundation, which awards at least \$600,000 in grants and scholarships annually. This year alone, the foundation has awarded 70 scholarships to college-bound students in Jackson and Lenawee counties.

During their lives, the couple gave over \$3 million to relatives and funded the college education of every niece and nephew; but they wanted to ensure that their money would continue to help the community after they were gone. In 2002, with only one close blood relative remaining, they changed their wills, leaving \$700,000 to their family, while leaving approximately \$10 million to their foundation.

Four relatives brought suit to challenge the estate, claiming that Violet Sigmund was incompetent and both Sigmunds were unduly influenced by three of their advisors. Mr. Donnelly and his team demonstrated that although the Sigmunds were in their eighties when they changed their wills, they were competent and were not unduly influenced. The jury agreed, returning a unanimous verdict in favor of the estate in less than three hours.

The case had been pending for more than two years. Because of Mr. Donnelly and his Fraser team, the last wishes of Bill and Violet Sigmund have been upheld - to the benefit of the Jackson community and the future of scores of college-bound children.

7

FTD&D FINDS SOLUTIONS FOR ENERGY CLIENTS

Representing the Empire and Tilden Iron Mines, the Energy & Utility Law Practice group successfully pursued claims against Wisconsin Electric Power Company (WEPCO) involving the use of a complex computer energy algorithm used by WEPCO to

determine electric service costs to the Mines. After nearly two years of aggressive discovery and months of forensic computer work, the parties reached a settlement. The new pricing terms ensure that the Mines will continue to operate as vital contributors to the economic well-being of Michigan's Upper Peninsula through the remaining term of the contracts.

The group also engaged in a series of cases before the Michigan Public Service Commission to create a smooth path for the Mines' eventual transition from contract rates to tariff rates. The Fraser team advocated for Michigan's first-ever special electric rate for mining companies. The Commission approved a settlement agreement, adopting a special rate for the Mines that enables them to continue operations in a fiercely competitive global iron ore marketplace.

Members of the Fraser team included Dave Marvin, Tom Waters, Mike Ashton, Thad Morgan, Bob Nelson, Jennifer Heston, and Nicki Proulx.

7

ATTORNEY ACTIVITIES OF NOTE

■ Peter L. Dunlap was elected President of the Michigan Defense Trial Counsel for 2007-2008. A board member and officer of the MDTC for nine years, Dunlap adds his tenure to a distinguished roster of past presidents. Mr. Dunlap's practice is devoted to alternative dispute resolution, client representation in appellate law, arbitration, legal malpractice defense, and mediation.

■ Anita G. Fox was appointed by Governor Jennifer M. Granholm as General Counsel to the Host Committee for the 2007 meeting of the National Governors Association held in Traverse City from July 20-23, 2007. Fox's legal team created a Section 501(c)(3) entity to raise private funds to underwrite the costs of this year's NGA meeting, held on Michigan's scenic Mackinac Island. Over 1,200 people, including more than three dozen governors and their staffs, attended the four day conference.

■ Robert Nelson addressed the annual Regulatory Studies Program of the Institute of Public Utilities at

(continued on page 4)

LAW *and* BUSINESS

REPORT

"No law or ordinance is mightier than understanding."
Plato

(continued from page 3)

Michigan State University on Aug. 15 on the topic of "Local, State, and Regional Telecom Issues."

Mr. Nelson is also a writer and was awarded third place in the 2007 State Bar of Michigan's annual Short Story Competition for his original piece, *A Little Collateral Damage*.



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INSIDE
*Unexpected Court Rulings May Have
Wide Impact on Michigan Corporations*

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