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2021 Legal Update Virtual Seminar

December 9, 2021 | 10:30 a.m. – 5:00 p.m. EDT
LIVE ZOOM WEBINAR

Nothing in this presentation is intended to be legal advice. Please consult with counsel of your choice with regards to any specific questions you may have. ©2021 Katang Muehling & Klekamp, PLLC. All Rights Reserved.



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»» Welcome



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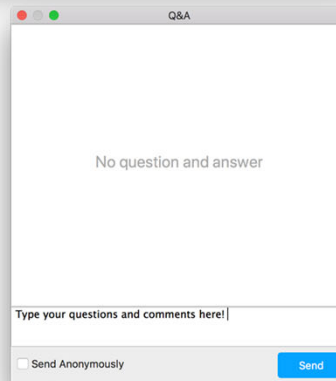
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Q&A

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Seminar Materials

- Agenda
- Copy of Slide Deck
- Presentation Handouts
- CLE Information/Forms

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HOW DO YOU DEFINE SUCCESS?


"I have grown to expect the best from KMK and they always deliver! KMK attorneys are consistent in their approach and bring great value to our company. They are innovative, attentive, and truly care about the success of Cintas which shows in their work and results."
 - Thomas E. Frooman, Former Vice President & Secretary, General Counsel, Cintas Corporation



Upcoming Event
2022 Virtual Law Student Diversity Case Competition



Virtual CLE Seminar
2021 KMK Legal Update



KMK Law D&I Newsletter
Volume 3 | Issue 2

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Webinar / CLE Requirements

While we had hoped to see you in person, due to restrictions on large gatherings and out of an abundance of caution, this program is being held as a live interactive Zoom webinar. For CLE credit, all participants are required to log in individually using the email address provided at registration.

**Attendance will be monitored throughout the program using verification codes which must be correctly reported on the event survey immediately following the presentation.*

For technical questions or assistance, please visit the [Zoom Support Center](#).

Questions & Cancellations

Please contact Katie Lane with any general questions or cancellations at 513.639.3926 or klane@kmlaw.com.

Please contact Sarah Schmidt for questions regarding Continuing Legal Education at 513.562.1438 or sschmidt@kmlaw.com.

Resources:

- [CLE Cheat Sheet](#)
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Continuing Legal Education (CLE)

- For CLE credit, all participants are required to log in individually using the email address provided at registration.
- Attendance will be monitored throughout the program using verification codes which must be correctly reported on the event survey immediately following the presentation.
- Please reference the CLE Handouts for more information, or contact Sarah Schmidt at 513.562.1438 or sschmidt@kmklaw.com.

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Continuing Legal Education (CLE)

- Ohio: 5.75 total CLE hours, including 2.5 hours of professional conduct
- Kentucky: 5.75 total CLE hours, including 1.5 hours of ethics instruction
- Indiana: 5.75 total CLE hours, including 2.5 hours of ethics instruction

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COVID-19 Challenges for Employers: Continuing to Navigate the Ever-Changing Landscape



10:35 a.m. - 11:35 a.m.
CLE 1.0 hour, General



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Meet the Moderators

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Meet the Panelists



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March 2020 → December 9, 2021 → ???



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Wellness Programs & COVID-19



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Vaccine Mandates

- OSHA ETS: Enjoined – nationwide by 5th Circuit
- CMS Rule: Enjoined – nationwide by two Courts (10 states by Missouri district court; remaining states by Louisiana district court)
- Federal Contractor Rule: Enjoined – nationwide by Georgia district court; previously enjoined in Kentucky, Ohio, Tennessee by Kentucky district court

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Vaccine Mandates & Accommodation Requests



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COVID-19 – Expecting the Unexpected



Image Source:
http://1.bp.blogspot.com/_PUjYKjyEP6g/S5wBO8nXZYI/AAAAAAAAAC10/AZWk8i4ed3U/s400/Home-Along.jpg

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Outbreak Period & Deadline Relief



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Questions for the Panel?

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Lawyer Discipline Case Law Update 2021



11:35 a.m. - 12:20 p.m.
CLE 0.75 hours, APC/Ethics

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Justice Patrick F. Fischer
The Supreme Court of Ohio



Meet the Speaker

Objectives

- Examine Ohio Supreme Court cases involving lawyer discipline from the past year
- Discuss recent rule changes
- Review Unauthorized Practice of Law and Character and Fitness decisions

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U.S. Tax Laws: A Review of 2021 and a Look Ahead to 2022



12:35 p.m. - 1:05 p.m.
CLE 0.5 hours, General



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Meet the Moderator

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Meet the Panelists



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Agenda

- Infrastructure Investment & Jobs Act
 - Signed by President Biden November 15, 2021
- Build Back Better Act (Reconciliation Bill)
 - Passed House of Representatives November 19, 2021
- PPP Loans
 - Recent IRS guidance regarding reporting PPP loan forgiveness

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Infrastructure Investment & Jobs Act

- Little impact on income or estate taxes
- Cryptocurrency reporting guidance

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Cryptocurrency Overview

- Cryptocurrencies are taxed like “property.”
- Form 1040: “At any time during 2020, did you receive, sell, send, exchange, or otherwise acquire any financial interest in any virtual currency?”
- IRS FAQ on simply purchasing cryptocurrencies is not reliable authority.

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Updated Tax Reporting

- Effective January 1, 2023, Section 6045 of the tax code will include “any person who (for consideration) is responsible for regularly providing any service effectuating transfers of digital assets on behalf of another person” in the definition of “broker.”
- Brokers must file Form 1099-B (Proceeds from Broker and Barter Exchange Transactions).
- Revisions to Section 6050I will require any returns or filings after December 31, 2023, to treat digital assets as cash.
- A person engaged in a trade or business who receives \$10,000 or more in cash (soon to include digital assets) in one transaction or two or more related transactions in the course of that trade or business must report the name, address, and tax identification number of the person from whom the assets were received; the amount of the assets; and the date and nature of the transaction.
- Reported on Form 8300 (Report of Cash Payments Over \$10,000 Received in a Trade or Business).
- This provision may affect businesses accepting digital assets as a form of payment.

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Build Back Better Act (as passed by House of Representatives on November 19, 2021)

- Status?
- Significant Income Tax Provisions
 - Limitations on use of Section 1202.
 - Imposition of Corporate Minimum Tax.
 - 3% surcharge on high-income individuals.
 - Expanded application of 3.8% net investment income tax.
 - Increase in cap on deductibility of state and local taxes.
 - Limitation on deductions for qualified business income for high-income households.
 - Tax on stock buybacks.
 - Delay in deduction of research and experimentation expenses.

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Build Back Better Act (as passed by House of Representatives on November 19, 2021)

- **Limitation on use of Section 1202**
 - This provision amends Section 1202(a) to provide that the special 75% and 100% exclusion rates for gains realized from certain qualified small business stock will not apply to taxpayers with adjusted gross income equal to or exceeding \$400,000.
 - The gain from the sale of Section 1202 stock is currently included in calculating the \$400,000 AGI threshold.
 - The baseline 50% exclusion in 1202(a)(1) remains available for all taxpayers.

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Build Back Better Act (as passed by House of Representatives on November 19, 2021)

- **Surcharge on High Income Individuals, Trusts, and Estates**
 - This provision adds a tax equal to 5% of a taxpayer's modified adjusted gross income in excess of \$10,000,000 and 3% on adjusted gross income in excess of \$25,000,000.
- **Application of Net Investment Income Tax to Trade or Business Income of Certain High Income Individuals**
 - This amendment expands the net investment income tax (the 3.8% tax) to cover net investment income derived in the ordinary course of a trade or business for taxpayers with greater than \$400,000 in taxable income as well as for trusts and estates.
 - The provision clarifies that this tax is not assessed on wages on which FICA is already imposed.

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Estate Tax Changes: Much ado about nothing (so far!)

reduced estate tax exemption

GRANTOR TRUST CHANGES

elimination of step-up in basis

elimination of valuation discounts

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Estate Tax Exemption

- 2021: \$11.7 million (\$23.4 million per married couple)
- 2022: \$12.06 million (\$24.12 million per married couple)

Pending no further legislation:

- 2026: approximately \$7 million (\$14 million per married couple)

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Annual Exclusion Gifting

<u>2021</u>	<u>2022</u>
\$15,000 per donor per donee	\$16,000 per donor per donee
(\$30,000 per married couple)	(\$32,000 per married couple)

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Estate Planning for 2022 and Beyond

- Provide for family and orderly transfer of assets upon death
- Flexibility is king for estate tax planning
 - Discretionary trusts, trust protectors, disclaimer provisions, QTIP elections
- Reduce estate tax exposure
 - Gift trusts (SLATs), annual exclusion gifting, GRATs

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PPP Loans

- Rev. Proc. 2021-48
- Rev. Proc. 2021-49
- Rev. Proc. 2021-50

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A Practical Application of the Ohio Supreme Court's Lawyer's Creed

1:05 p.m. - 1:50 p.m.
CLE 0.75 hours, APC/Ethics

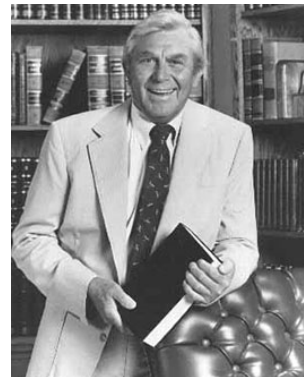
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Justice R. Patrick DeWine
The Supreme Court of Ohio



Meet the Speaker



FROM THE STATEMENT ON PROFESSIONALISM

Issued by the Supreme Court of Ohio,
February 3, 1997

- As professionals we need to strive to meet lofty goals and ideals in order to achieve the highest standards of a learned profession. To this end, the Court issues A Lawyer's Creed and A Lawyer's Aspirational Ideals, which have been adopted and recommended for the Court's issuance by the Supreme Court Commission on Professionalism. In so doing, it is not the Court's intention to regulate or to provide additional bases for discipline, but rather to facilitate the promotion of professionalism among Ohio's lawyers, judges and legal educators. It is the Court's hope that these individuals, their professional associations, law firms and educational institutions will utilize the creed and the aspirational ideals as guidelines for this purpose.

THE LAWYER'S CREED

TO MY CLIENTS

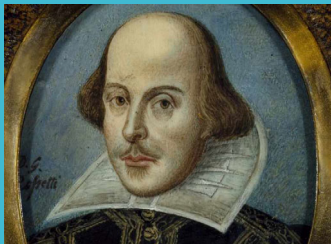
I offer loyalty, confidentiality, competence, diligence and my best judgment. I shall represent you as I should want to be represented and be worthy of your trust. I shall counsel you with respect to alternative methods to resolve disputes. I shall endeavor to achieve your lawful objectives as expeditiously and economically as possible.



AS TO CLIENTS, I SHALL ASPIRE ...to fully informed client decision-making. I should ... communicate promptly and clearly with clients[.]

TO THE OPPOSING PARTIES AND THEIR COUNSEL

I offer fairness, integrity and civility. I shall not knowingly make misleading or untrue statements of fact or law. I shall endeavor to consult with and cooperate with you in scheduling meetings, depositions and hearings. I shall avoid excessive and abusive discovery. I shall attempt to resolve differences and, if we fail, I shall strive to make our dispute a dignified one.



- Do as adversaries do in law, strive mightily, but eat and drink as friends.

-William Shakespeare, The Taming of the Shrew

AS TO OPPOSING PARTIES
AND THEIR COUNSEL, I
SHALL ASPIRE ... [t]o treat
opposing counsel in a manner
consistent with his or her
professional obligations and
consistent with the dignity of
the search for justice. I should ...
[a]void rudeness and other acts
of disrespect in all meetings,
including depositions and
negotiations



TO THE COURTS
AND OTHER
TRIBUNALS,
AND TO THOSE
WHO ASSIST
THEM

I offer respect, candor and courtesy. Where consistent with my client's interests, I shall communicate with opposing counsel in an effort to avoid or resolve litigation. I shall attempt to agree with other counsel on a voluntary exchange of information and on a plan for discovery. I shall do honor to the search for justice.



AS TO THE COURTS AND OTHER TRIBUNALS, AND TO THOSE WHO ASSIST THEM, I SHALL ASPIRE ... [t]o model for others the respect due to our courts. I should ... [a]ct with complete honesty[.]

TO MY
COLLEAGUES in
the practice of
law,

I offer concern for your reputation and well-being. I shall extend to you the same courtesy, respect, candor and dignity that I expect to be extended to me.



AS TO MY COLLEAGUES IN THE PRACTICE OF LAW, I SHALL ASPIRE...[t]o defend you against unjust criticism.

TO THE PROFESSION

I offer assistance in keeping it a calling in the spirit of public service, and in promoting its understanding and an appreciation for it by the public. I recognize that my actions and demeanor reflect upon our system of justice and our profession, and I shall conduct myself accordingly.

AS TO OUR PROFESSION, I SHALL ASPIRE ...[t]o promote the understanding of and an appreciation for our profession by the public. I should ... [c]onduct myself always with an awareness that my actions and demeanor reflect upon our profession.



TO THE PUBLIC
AND OUR
SYSTEM OF
JUSTICE

I offer service. I shall devote some of my time and skills to community, governmental and other activities that promote the common good. I shall strive to improve the law and our legal system and to make the law and our legal system available to all.

AS TO THE PUBLIC AND OUR
SYSTEM OF JUSTICE, I SHALL
ASPIRE ...[t]o improve our laws
and legal system, by for)
example... [s]erving as a public
official[.]



CONTACT
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 [@JusticePatDeWine](https://www.facebook.com/JusticePatDeWine)

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Legal Updates Impacting
Business Entities



1:50 p.m. - 2:35 p.m.
CLE 0.75 hours, General



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Meet the Speakers



INTRODUCTION

Background

- Chapter 1705 was enacted in 1994. Although there have been a number of amendments to the statute over the years, Ohio is one of the few states that has not provided a substantial modernization of its limited liability company law.
- Chapter 1705 predates the Uniform LLC Act (1996), the Revised Uniform LLC Act (2006), and the substantial amendments to the Revised Uniform LLC Act in 2011 and 2013.
- The ABA's Prototype Act was originally published in 1992 and the Revised Prototype LLC Act was published in 2011.

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Effective Date

January 8, 2021

- Governor Mike DeWine signed Senate Bill 276 into law.

April 12, 2021

- Am. Sub. S.B. 276 is officially effective.

January 1, 2022

- Original date by statute.
- When new ORC Ch. 1706 applies to new & old LLCs.
- Governs domestic and foreign LLCs formed before, on and after that date.

February 11, 2022

- Ohio's Sec. of State sought to delay applicability.

See Section 1706.83

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Impact in Numbers

- Nearly 75% of the state's active business entities are now limited liability companies and 88% of all new business entities in Ohio are formed as limited liability companies.
- In 2020 alone, more than 127,605 Ohio limited liability companies were formed.
- As of November 2021, Ohio has 1,164,285 active LLCs.

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A Complete Replacement

- Replaces Chapter 1705 based on the ABA's prototype.
- No useful "redlining" possible.
- **This presentation will highlight some key aspects, but it is not a complete or comprehensive discussion.**
 - **Some aspects are not addressed at all.**
 - **Aspects that are addressed, significant elements may be omitted.**



1705



1706

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Freedom of Contract

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Freedom of Contract

- The Revised Act “shall be construed to give **maximum effect** to the principles of **freedom of contract** and to the enforceability of operating agreements.” Section 1706.05(A).
- LLC’s operating agreement largely controls, but Section 1706.08 list provisions that **cannot be changed**.
- Revised Act eliminates language previously sprinkled throughout Chapter 1705 that provisions of the act could be overridden by the operating agreement.

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Overriding the Default Provisions

- Section 1706.08. Except as otherwise provided in divisions (B) and (C) of this section, both of the following apply:
 - (1) An **operating agreement** governs relations among the members as members and between the members and the limited liability company.
 - (2) **To the extent** that an operating agreement **does not** otherwise provide for a matter described in division (A)(1) of this section, this chapter governs the matter.
- Fiduciary duties, “may be **expanded** or **restricted** or **eliminated** by a written operating agreement.” Section 1706.08(B).
- **Very few** limitations on the ability to modify default rules. Section 1706.08(C).

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Member Rights and Contractual Rights

Contributions may consist of cash, property, services or a binding commitment to contribute any of them.

[1706.28]

Allows a person to become a member without making any contribution *and* without having any economic interest.

[1706.27(C)]

Allows the operating agreement to give enforceable rights to someone who is not a party to the agreement.

[1706.082(B)]

The later two provide flexibility that is particularly useful for forming SPEs for commercial real estate financing.

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Penalties for Breach

- An Operating Agreement may provide penalties and consequences for breach, including:
 - **Reducing** or **eliminating** membership interest
 - **Subordinating** membership interest to non-defaulting members
 - **Forcing a sale** of membership interest
 - **Forfeiture** of membership interest
 - Member **loan** by non-defaulting members
 - **Redemption** based on appraised or formulaic value
 - **“Any other** penalty or consequence.”

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LLC Interest as Collateral

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Restrictions on Assignment

Old act does not expressly address enforceability of restrictions on transfer imposed in an operating agreement.

Binding effect of the operating agreement on members and assignees under Revised Act **supports enforceability** of such restrictions generally. Section 1706.08(A) & (B).

Revised Act's section relating to inapplicability of certain UCC provisions supports that, absent other controlling law, the **restrictions are enforceable**. Section 1706.06(D).

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Prohibitions on Grant of Security Interest

- UCC 9-406 and 9-408 (Section 1309.406 and 1309.408) **override**, at least in part, contractual restrictions (e.g., operating agreement) that would prohibit granting a security interest.
- Overrides in those Ohio sections **do not apply to a membership interest** in an Ohio LLC. Section 1706.06(D).
- Possible that UCC provisions of **another state** applying to a pledge agreement would prevail.
 - Section 1706.06(D) only preempts Ohio law.

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Restrictions on Transfer of a Certificated Security

- Unless an LLC **expressly opts** to have its interest treated as securities under UCC Article 8, they are general intangibles and not securities Section 1308.02(B)
- If an LLC opts into Article 8 securities status, then restrictions on transfer in the operating agreement **may not be enforced against a purchaser without knowledge** unless *either*:

Security is certificated and restriction is noted conspicuously on the security certificate

Security is uncertificated and registered owner has been notified of the restriction

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Perfection of Security Interest Depends on Collateral Category

Not an Article 8 security	Certificated security
<ul style="list-style-type: none"> • Only way to perfect is by filing in the location of the debtor 	<ul style="list-style-type: none"> • Perfected by filing or by control • Control trumps filing, without regard to order in time

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Perfection of Security Interest Depends on Collateral Category

Some Lenders Require LLCs To

- Opt into Article 8 security status
- Certify the interests
- Deliver pledged certificates to the lender or its collateral agent

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Rights of Creditors

- A judgment creditor's **sole and exclusive remedy** is to receive a member's distributions through a charging order. Section 1706.342(F).
- Does not appear to affect rights of a **secured lender** under loan documents and the UCC.
 - In the absence of express operating agreement provisions, the secured lender may have a full range of remedies.

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Fiduciary Duties

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Fiduciary Duties of Members

Section 1706.31. Duties of a Member to a limited liability company and other members.

- Provides for the exclusive **default** fiduciary duties for **members**.
- *Crosby v. Beam* is not applicable to Ohio limited liability companies. Section 1706.08(B)(3).
- Waivers and modifications of fiduciary duties must be in writing. See also Section 1706.08(B).
- If the Company has not designated managers to supervise or manage the activities or affairs of the limited liability company, fiduciary duties are limited to **duty of care** and **duty of loyalty** as defined in Section 1706.31(C) and (D). No default non-competition obligations.
- Implied covenant of good faith and fair dealing always applies.

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Fiduciary Duties of Managers

Section 1706.01. Limited Liability Company Definitions

(O) “**Manager**” means any person designated by the limited liability company or its **members** with the authority to manage all or part of the activities or affairs of the limited liability company on behalf of the limited liability company, which person has agreed to serve in such capacity, **whether such person is designated as a manager, director, officer, or otherwise.**

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Fiduciary Duties of Managers

Section 1706.311. Duties of a manager to a limited liability company and its members.

- Provides for the exclusive **default** fiduciary duties for **managers**.
- Waivers and modifications of fiduciary duties must be in writing. See also Section 1706.08(B).
- **If** the Company has designated **managers** to supervise or manage the activities or affairs of the limited liability company, **Members owe no fiduciary duty.**
- A **manager’s duty of care** to the limited liability company in the conduct and winding up of the limited liability company activities is limited to acting in **good faith**, in a manner the manager reasonably believes to be in or not opposed to the best interests of the limited liability company. Section 1706.311(C).
- Implied covenant of **good faith and fair dealing** always applies.

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Fiduciary Duties of Managers

Section 1706.311. Duties of a manager to a limited liability company and its members.

- (E) A **manager** shall be liable for monetary relief for a violation of the manager's [duty of care] only if it is proved that the manager's **action or failure to act involved an act or omission undertaken with deliberate intent to cause injury to the limited liability company or undertaken with reckless disregard for the best interests of the company.**
- This can be waived by a specific reference in the Articles, Operating Agreement or other agreement between the Company and the manager.

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Indemnification and Advancement

Section 1706.32. Indemnification, advancement, reimbursement, and insurance.

A limited liability company, or a series thereof, may **indemnify** and hold harmless a **member** or **other person**, **pay in advance or reimburse** expenses incurred by a **member** or **other person**, and **purchase and maintain insurance** on behalf of a **member** or **other person**.

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Fiduciary Duties Summary

Case law generally	Recent statutory changes	Revised Act inalterable duties	Revised Act limit on liability
<ul style="list-style-type: none"> • LLC members owe each other fiduciary duties similar to those of partners 	<ul style="list-style-type: none"> • Fiduciary duties of loyalty and due care with minimum levels that could not be eliminated by the operating agreement 	<ul style="list-style-type: none"> • Only inalterable duty of members in an LLC with managers is implied covenant of good faith and fair dealing • 1706.31(A) 	<ul style="list-style-type: none"> • May not limit or eliminate liability for any act or omission that constitutes bad faith violation of implied covenant of good faith and fair dealing • 1706.08(B)

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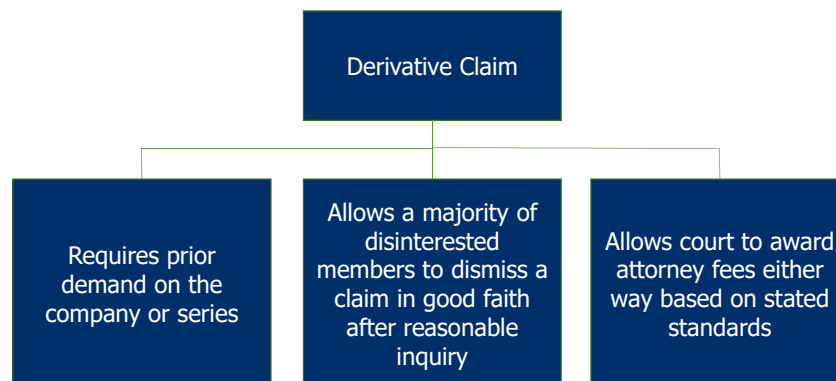
Derivative Claims

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Derivative Actions

- Old Act - Sections 1705.49 through 1705.52 briefly address derivative actions in the limited liability company context.
- Vast majority of operating agreements do not address derivative actions in any meaningful way.
- "A member of a limited liability company in which the management is not reserved to its members may commence an action on behalf of the company to recover a judgment in its favor if the managers of the company with authority to commence the action have refused to do so or if an effort to cause those managers to commence the action is not likely to succeed." Section 1705.49.
- Revised Act - Sections 1706.61 through 1706.617 now generally **allow derivative actions** in both member-managed and manager-managed companies subject to the procedural and substantive requirements laid out in the statute.

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Management Structures

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Management Structures

- Old Act - In Chapter 1705 “member-managed” and “manager-managed” are not used, but contemplates an LLC is one or the other.
- Revised Act is **open-ended** on management structure.
- By default, decisions are made by a **majority** of the **members**, voting **per capita**.
- All Ohio limited liability companies are **presumed** to be **member-managed**, unless operating agreement provides otherwise.

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Management Structures

- Only Sections of Chapter 1706 that use the term “**manager**” are Section 1706.01 (Definitions) and the provisions regarding fiduciary duties (Sections 1706.31 and 1706.311).
- A person’s **actual** or **apparent authority** to bind the limited liability company will be determined with **reference to the operating agreement**, decisions of the **members** in accordance with the operating agreement, a **statement of authority** or other law.
- Approach allows drafters to provide for **managers, officers, boards of directors**, and other forms of governance that were difficult to apply under existing law.

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Management Under the Old Act

Section 1705.25. Authority of members when management reserved to members; authority of managers in other cases.

If the **management** of a limited liability company **is** reserved to its **members**, all of the following apply:

- Every **member** is an **agent** of the Company.
- Action of every **member** for apparently carrying on in the usual way of the business **binds** the Company.
- (c)Unless authorized by the other members** or unless the other members have abandoned the business, **one or more but less than all** of the members of a limited liability company **have not** authority to take certain material actions.

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Management Under the Revised Act

Section 1705.25. Authority of members when management reserved to members; authority of managers in other cases.

If the **management** of a limited liability company is **not** "reserved" to its **members**, all of the following apply:

- (a) Every **manager** is an agent of the Company.
- (b) Action of every **manager** for apparently carrying on **in the usual way** of the business **binds** the Company.
- (c) **Unless authorized by the members** or unless the other members have abandoned the business, **one or more but less than all** of the **members** of a limited liability company **have no** authority to take certain material actions.

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Should the elimination of the manager-managed concept concern me?

- The activities and affairs of the limited liability company shall be under the **direction**, and subject to the **oversight**, of its **members**. Section 1706.30(A)(1).
- Except as provided in division (C) of this section, a matter in the ordinary course of activities of the limited liability company may be decided by a **majority** of the **members**. Section 1706.30(B)(1).
- The consent of all **members** is expressly required for certain actions listed in Section 1706.30(C): (a) **amending** the operating agreement, (b) filing for **bankruptcy** relief and (c) actions **outside the ordinary course** of business (among others).
- **Any matter** requiring the consent of **members** may be decided **without** a meeting, and a member may appoint a proxy or other agent to consent or otherwise act for the member. Section 1706.30(D).

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Statements of Authority

- A limited liability company, on behalf of itself or a series thereof, may deliver to the secretary of state for filing on a form prescribed by the secretary of state a **statement of authority**. Section 1706.19(A).
- A **statement of authority** may state the authority of a **specific person** or, with respect to any position that exists in or with respect to the limited liability company or series thereof, of all persons holding the position, to **enter into transactions** on **behalf** of the limited liability company or series thereof. Section 1706.19(A)(2).
- An effective statement of authority is **conclusive** in favor of a person that gives value in **reliance** on the statement, **except** to the extent that when the person gives value the person has **knowledge to the contrary**. Section 1706.19(C).

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Series LLCs

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Series Limited Liability Companies

- Series limited liability companies are **now permitted** to be formed under Ohio law.
- Ohio becomes the **16th state** to permit series limited liability companies.
- Each series must have either (1) separate rights, powers, or duties with respect to specified property or obligations of the limited liability company or profits and losses associated with specified property or obligations and/or (2) a separate purpose or investment objective. Section 1706.76.
- Series are established through the limited liability company's **operating agreement**, but must be expressly authorized in the Company's articles of organization. Section 1706.761.
- Series LLCs provisions generally track similar provisions in the remaining portion of Chapter 1706.

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LLCs may be formed with separate series within the LLC

Each series can:



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Limitations on Liability in a Series LLC

Debts, liabilities, obligations, and expenses **for a series**

- Enforce against assets of that series only.
- **Not** enforceable against assets of the LLC generally or any other series.

Debts, liabilities, obligations, and expenses **for the company generally**

- Not enforceable against the assets of any series.

99

Establishing and Maintaining a Series

1706.761(B)(3)

- If one or more series, LLC must include in its articles that it may have one or more series of assets subject to the limitations provided in the act.

1706.761(B)(2)

- Operating agreement must state the limitations provided in the act.

1706.761(B)(1)

- Series records must account for the assets of that series separately from other assets of the company or any other series.

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Ways to maintain records so assets of a series may be reasonably identified:

Specific listing	Category	Type
Quantity	Computational formula or procedure (% or share)	Any other method where identity of assets can be objectively determined

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Winding Up

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Barring Claims Upon Winding Up

<div style="border: 1px solid #ccc; border-radius: 15px; background-color: #f0f0f0; padding: 10px; text-align: center;"> <p>Known Creditors 1706.473</p> <div style="background-color: #003366; color: white; padding: 5px; margin: 5px 0; border-radius: 5px;"> <p>Provides detailed procedures for dissolved LLC to give notices to known creditors and claimants at its option</p> </div> <div style="background-color: #003366; color: white; padding: 5px; margin: 5px 0; border-radius: 5px;"> <p>Either bars their claims or requires that they be brought promptly</p> </div> </div>	<div style="border: 1px solid #ccc; border-radius: 15px; background-color: #f0f0f0; padding: 10px; text-align: center;"> <p>Unknown Creditors 1706.474</p> <div style="background-color: #003366; color: white; padding: 5px; margin: 5px 0; border-radius: 5px;"> <p>Provides means for publicizing dissolution and winding up of LLC at the LLC's option</p> </div> <div style="background-color: #003366; color: white; padding: 5px; margin: 5px 0; border-radius: 5px;"> <p>Bars claims not brought within 2 years after publication of notice</p> </div> </div>
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Wrongful Distributions

- Old Act –
 - Section 1705.23. A member who **knowingly** receives any distribution or payment made contrary to the articles of organization or operating agreement of a limited liability company is liable to the company for the **amount received** by him that is **in excess** of the amount that could have been paid or distributed without a violation of the articles or the operating agreement. No action shall be brought by or on behalf of the company upon a cause of action arising under this section at any time **after two years** from the day on which the violation of the articles or operating agreement occurs.
- Revised Act –
 - No similar provision in Chapter 1706.
 - Fraudulent transfer statutes control. *See In re Heritage Org., LLC*, 413 B.R. 438 (Bankr. N.D. Tex. 2009); but see *In re Citibank August 11, 2020 Wire Transfers (S.D.N.Y., Case No. 1:20-CV-06539)*.

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Key Takeaways

1. **Management?** Clear as to **management** and duties? Default rule is **member** managed (**per capita** majority).
2. **Distributions?** Default rule is **equal** sharing among **members**.
3. **Oral Agreements?** Consider **oral** agreements that may modify the Operating Agreement. **Contributions** and waiver of **fiduciary duties** must be in writing.
4. **Fiduciary Duties?** Should we expand, restrict or **eliminate**? Consider the **implied covenant** of good faith and fair dealing.
5. **Series LLCs?** Will they be useful?
6. **Authenticity?** Make certain authority is granted clearly in the Operating Agreement or in a Statement of Authority.

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Health and Well-Being: Navigation During COVID / Post-COVID



2:50 p.m. - 3:50 p.m.
CLE 1.0 hour, APC/Ethics (OH, IN);
CLE 1.0 hour, General (KY)

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Patrick Garry
Associate Director
Ohio Lawyers Assistance Program, Inc.



Meet the Speaker

In other words, "How to Deal Constructively with Reality and Adapt to Change."

- This is my first pandemic.
- I have, though, survived a number of personal challenges/crises.
- Perhaps, I have actually thrived....flourished.
- Unbeknownst to me, I have inadvertently practice/developed **resilience**.
- If Soren Kierkegaard were here now, he might say, "**Life can only be understood backwards, but it must be lived forwards.**"
- But, I digress....

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Why is this so challenging?

- Our world, as we knew it, came to a dramatic halt.
- COVID-19 – and progeny – is not just an epidemiological crisis, but also a psychological one.
- We, as a society, are experiencing a communal grief as we watch our work, healthcare, education, economic systems all destabilize at the same time.
- **Crisis is a perception or experience** of an event or situation as an intolerable difficulty that exceeds the person's current resources or coping mechanisms.
- **Crisis:** an incipient moment; a crucial point **when something begins or changes**.

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Why is this so challenging? (cont.)

- The grief we are experiencing is complex as there are multiple losses/changes at the same time.
- The losses are many:
 - sense of safety
 - social connections
 - personal freedoms
 - job
 - financial security

** things we are unable to predict as this crisis keeps changing and evolving

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Grief

- While grief is difficult, it is a natural experience, and it is useful.
- Grief is about turning inward, recalibrating and processing the new experience we are having.
- It is essential to allow the feelings of loss to be processed, because if we do, the experience allows us to move forward.
- Grief is transient and we should expect it to fluctuate between moments of sadness, mourning, acceptance, and even happiness and joy.
- For most, once the crisis has passed, people will bounce back to their “new normal” / adjusted lives.

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Attachments and Grief

- The nature of our attachments has an impact on our different grief reactions.
- The attachments most impacted during this crisis are, places, projects, possessions, jobs, and other protections.
- Some of us have lost loved ones, and some of us have great compassion for others who have lost loved ones.

This crisis has forced us to confront the frailty of these attachments whether it is our local coffee shop, gym, or any other routine that we have grown accustomed to in our daily lives.

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How to Continue to Cope and Move Forward

- Although we have never experienced anything like this before, we are invited to draw on our past experiences - from other challenges - to get us through this one. If needed, borrow from the experience of others.
- Being able to remember and pull from past ability to recover from a traumatic/challenging experience will guide the path during this pandemic.
- **We must: Stay connected** to our social support networks via phone, texts, video chat, and social media.
- Participation in your "healthy community" is the single best coping strategy to keep connected and to check on others, even after life resumes to the new/adjusted normal.

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Self Care Ideas

- Keep up-to-date on current COVID-reliable news sources* only!
- Control what you can: Your personal routine.
- **Practice:** sleep, nutrition, hydration, exercise, and connecting with others.
- **Help others.**
- **Admit to yourself, “I may need some help here.”**
- Seek professional help from a licensed mental health professional if needed.

*Upon discovery, please let me know of these sources.

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World Health Organization Suggests

- Accept that it is normal to feel sad, scared, or even angry during this time.
- Find ways to talk about how you feel with others, especially if you are isolated.
- Remember to pay special attention to those most at risk, children and those with pre-existing mental health issues.
- Reach out for help from a professional if you are having trouble coping and adjusting.
- Don't use alcohol, drugs, food, shopping or other problematic behaviors to deal/numb your feelings and thoughts.

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World Health Organization (cont.)

- Keep your body/mind as healthy as possible by eating well, getting enough sleep, exercising, and connecting with each other*
- Limit worry/anxiety by limiting media exposure to a few trusted sources and limiting social media/screen time
- Draw on skills you have used in the past that have helped you get through a difficult time or crisis
 - Personally, I highly recommend including some sort of patterned meditation and prayer.

* **“connecting with each other”**, may include sharing your Truth, which may include fears, goals, concerns, and a variety of feelings

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Signs and Symptoms of Concern

- Increased feelings of hopelessness, sadness, anxiety, and worry
- Feelings of suicide or not wanting to be here anymore
- Using alcohol and drugs to numb or cope with feelings
- Isolating and not being able to get work done
- Loss of sleep
- Increased irritability towards friends and loved ones

***** These indicate when you must reach out for professional help!**

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Take Home Message(s) / Reminders:

- We have never had control of others, outcomes, and/or environments. COVID and progeny delivers this Truth to all of us at once. The delusion of control is obliterated, perhaps forever. We don't actually fix problems. We do not control results. **We simply do our best.**
- However, **we do have control over what we do and how we do it.**
- **SELF-CARE.** If I train like a champion, it is far more likely that I'll play like a champion.
- Maintain/rediscover your best, "foundational self": **participate in and nourish healthy relationships.**
- Avoid distraction(s). **"A person who knows who they are lives a simple life by eliminating anything that does not align with her or his overriding purpose and values"**, according to Kilroy J. Oldster.

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More Take Home Message(s) / Reminders:

- Life is all about change, uncertainty, adjustment, growth, loss, love, fear, joy, happiness, suffering*, etc....
- Life is complex, and, in my experience, life is a mystery.
- Life is lived day by day, though. This day, the one we are living, is the most important day of our lives.
- We are in this together. Act accordingly.
- History, including personal history, informs us something constant about life patterns: Order, then chaos, and re-order.

*an informal, personal definition: "I am not – presently – getting my way."

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THMs... Inspired by Jim Kennedy:

- **Humility.** There is no hierarchy of people. I am not better than or worse than any other person. We are the same. Act accordingly.
- Life is clearly complicated. We are easily distracted, especially by stuff. **Focus – and refocus – on your personal relationships.**
- If you disagree with someone – and you should, if you are a principled person, do so respectfully.
- Embrace reality. We are not long for this Earth. Discharge your duties, rights, and responsibilities: **serve others.**

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COVID Navigation Summary

- **The wind has changed. Accept this truth. Adjust your sails.** We are not "off course", rather, we are experiencing life on the open seas.
- If you need help adjusting your sails, ask for it.
- If your sails require rehabilitation/maintenance, take the time and make the effort to renew them. They will not magically fix themselves.
- **Do what needs to be done...** one day at a time. Rest from time to time.
- **We are in this together.** Always. Act accordingly.
- **If you need help, ask.**
- **Express gratitude every day.** Practicing honesty demands it.

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Resources for Help

- The Ohio Lawyers Assistance Program, Inc.
www.ohiolap.org
OLAP's Facebook Page: @ohiolawyersassistanceprogram
- National Suicide Prevention Hotline: (800) 273-8255
- Crisis Text Line- 4HOPE to 714-714
- Call 911
- Go you your closest ER

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Sources

- World Health Organization
- American Psychological Association
- Grief & COVID-19: Mourning our bygone lives by Kristen Weir, April 1, 2020
- Some experience(s) I have had in my life, which are fact.
- Some quotes that have resonated with the presenter.
- Some opinions, that by now, I have undoubtedly expressed despite my intentional efforts to avoid sharing them. **WARNING:** My opinions should be discounted. They are not fact.

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10 Cases Every Attorney Should Know



3:50 p.m. - 4:50 p.m.
CLE 1.00 hour, General



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Meet the Speakers

1. *Krueger v. Experian Info. Sols., Inc.*, 2021 U.S. App. LEXIS 27699 (6th Cir. Sept. 13, 2021).

- Article III standing post-*TransUnion* and post-*Spokeo*.
- *TransUnion v. Ramirez*, 141 S. Ct. 2190 (2021) (KMK's June 28, 2021 Legal Alert).
 - Clarification of *Spokeo, Inc. v. Robins*, 570 U.S. 330 (2016).
 - "No concrete harm – no standing."
 - "An injury in law is not an injury in fact."
 - "Mere presence of an inaccuracy in an internal credit file, if it is not disclosed to a third party, causes no concrete harm."

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1. *Krueger v. Experian Info. Sols., Inc.*, 2021 U.S. App. LEXIS 27699 (6th Cir. Sept. 13, 2021).

- Plaintiff filed for bankruptcy under Chapter 13; made payments and received a discharge.
- After discharge, an online credit-monitoring app said account was still past due; credit score was 515.
- Plaintiff abandoned his plan to buy a new car when he received the credit report and credit score; he disputed the report months later.

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1. *Krueger v. Experian Info. Sols., Inc.*, 2021 U.S. App. LEXIS 27699 (6th Cir. Sept. 13, 2021).

- District court granted summary judgment to Defendant; Sixth Circuit reversed.
- “The harm that resulted from Krueger’s forbearance was not abstract. To the contrary, for about 18 months after Krueger’s debts were discharged, instead of driving a new Ford F-150, he drove a Ford Fusion that was not ‘always in the best of shape.’ And the record here supports a finding that this harm was real, rather than fictive: once the credit-reporting agencies removed the Cenlar account from Krueger’s report, his credit score increased by almost 100 points and he promptly obtained a car loan to buy a new F-150.”

129

1. *Krueger v. Experian Info. Sols., Inc.*, 2021 U.S. App. LEXIS 27699 (6th Cir. Sept. 13, 2021).

- *But see Grauman v. Equifax Info. Servs.*, 2021 U.S. Dist. LEXIS 142845 (E.D.N.Y. July 16, 2021) (lowered credit score, by itself, is not concrete harm under *TransUnion*).
- *But see In re FDCPA Mailing Vendor Cases*, 2021 U.S. Dist. LEXIS 139848 (E.D.N.Y. July 23, 2021) (dismissing six pending FDCPA cases for lack of standing; none of the plaintiffs alleged a concrete and particularized injury-in-fact to satisfy Article III standing).

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1. *Krueger v. Experian Info. Sols., Inc.*, 2021 U.S. App. LEXIS 27699 (6th Cir. Sept. 13, 2021).

- BONUS CASE – *Association of Amer. Physicians & Surgeons v. United States FDA*, 13 F.4th 531 (6th Cir. Sept. 9, 2021) (questioning the associational standing doctrine).
 - *Flast v. Cohen*, 392 U.S. 83 (1968) (plaintiffs generally have standing to sue political branches).
 - *Nat'l Automatic Laundry & Cleaning Counsel v. Shultz*, 443 F.2d 689 (D.D.C. 1971) (association that has suffered no injury can sue on behalf of members who have).
 - “In sum, it is hard to see how the Supreme Court’s more recent case law on standing has not undercut its associational-standing test.”

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2. *Russell v. Educ. Comm'n for Foreign Med. Graduates*, 2021 U.S. App. LEXIS 28960 (3d Cir. Sept. 24, 2021).

- Rule 23(c)(4) issue certification.
- Rule 23(c)(4): “[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues.”
- An “action” must satisfy Rule 23.
- Rule 23(c)(4) requires consideration of a “non-exhaustive list of [9] factors.” *See Gates v. Rohm & Haas Co.*, 655 F.3d 255 (3d Cir. 2011).

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2. *Russell v. Educ. Comm'n for Foreign Med. Graduates*, 2021 U.S. App. LEXIS 28960 (3d Cir. Sept. 24, 2021).

- Rule 23(c)(4) “talks about ‘issues’, not ‘liability’ (or ‘claims’ or ‘causes of action’), so there is no obvious textual basis to limit issue-certification to issues that, upon their resolution, necessarily establish a defendant’s liability as to all claimants.”
- Rejecting Chamber of Commerce amicus (“Even capacious rules for issue-class certification (which we did not purport to advance in this holding) likely will not encourage ‘a flood of abusive class actions’ because few lawyers will have an incentive to file them.”).

133

2. *Russell v. Educ. Comm'n for Foreign Med. Graduates*, 2021 U.S. App. LEXIS 28960 (3d Cir. Sept. 24, 2021).

- *Martin v. Behr Dayton Thermal Products, LLC*, 896 F.3d 406 (6th Cir. 2018) (adopting broad view of Rule 23(c)(4)).
- BONUS CASE – *In re Zetia (Ezetimibe) Antitrust Litig.*, 7 F.4th 227 (4th Cir. Aug. 4, 2021) (reversing district court certification of class of 35 members for failing numerosity requirement).
 - Joinder impracticability, not judicial economy.
 - Concurring opinion offers “some factors that might be considered.”
 - Ironically, Fourth Circuit affirmed decision under Rule 23(a)(4) and Rule 23(b)(3).

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3. *Moser v. Benefytt, Inc.*, 2021 U.S. App. LEXIS 23661 (9th Cir. Aug. 10, 2021).

- Personal jurisdiction in federal class actions.
- Putative nationwide TCPA class action filed in California.
 - Plaintiff is a resident of California.
 - Defendant is incorporated in Delaware; principal place of business is Florida.
- District Court had specific personal jurisdiction over Plaintiff's claims against Defendant, which arise out of or relate to Defendant's contact with California. *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017 (2021).

135

3. *Moser v. Benefytt, Inc.*, 2021 U.S. App. LEXIS 23661 (9th Cir. Aug. 10, 2021).

- District court erred in concluding that Defendant waived its personal jurisdiction objection to class certification by failing to assert the defense at the motion to dismiss stage; district court was required to address Defendant's argument before certifying national class.
- Joins Fifth and DC Circuits. *See Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240 (5th Cir. 2020); *Molock v. Whole Foods Market Group, Inc.*, 952 F.3d 293 (D.C. Cir. 2020).
- Good discussion regarding the scope of Rule 23(f) appeal.

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3. *Moser v. Benefytt, Inc.*, 2021 U.S. App. LEXIS 23661 (9th Cir. Aug. 10, 2021).

- BONUS CASE – *Cooper Tire & Rubber Co. v. McCall*, 863 S.E.2d 81 (Ga. Sept. 21, 2021).
 - Reaffirms prior holding in *Allstate Ins. Co. v. Klein*, 262 Ga. 599 (1992) (Georgia courts may exercise general personal jurisdiction over any out of state corporation that is authorized to do or transact business in this state at the time a claim arises).
 - Recognizes that *Klein* is “in tension” with recent Supreme Court authority, but concludes that *Klein* does not violate federal due process under *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917).
 - Notes that these are cases to the contrary.
 - Concurring opinion invites General Assembly to change the statute.

137

4. *Lyngass v. Curaden Ag*, 2021 U.S. App. LEXIS 8601 (6th Cir. Mar. 24, 2021).

- Class certification – evidentiary standard.
- Rule 23 analysis does not require admissible evidence.
 - “Rigorous analysis”, “probe behind the pleadings” suggest that admissible evidence is not always required.
 - Rule 23 “warrant[s] greater evidentiary freedom at the class certification stage.” (Rule 23 v. Rule 56 v. trial)
 - Reliable evidence might ultimately be deemed inadmissible.
 - Joins Eighth and Ninth Circuits.
 - Note: Fifth Circuit requires admissible evidence; First, Second and Third Circuits suggest the need for admissible evidence.

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4. *Lyngass v. Curaden Ag*, 2021 U.S. App. LEXIS 8601 (6th Cir. Mar. 24, 2021).

- BONUS CASE – *Prantil v. Arkema, Inc.*, 986 F.3d 570 (5th Cir. Jan. 22, 2021) (*Daubert* analysis is required at class certification stage).
 - Joins Third, Seventh and Eleventh Circuits (not all circuits agree).
 - Predominance inquiry lacking.
 - Injunctive relief not specific enough.
- BONUS CASE – *Olean Wholesale Grocery Coop, Inc. v. Bumble Bee Foods, LLC*, 993 F.3d 774 (9th Cir. April 6, 2021), *rehearing en banc* granted and *opinion vacated*, 5 F.4th 950 (Aug. 3, 2021) (*sua sponte*).

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5. *Chamber of Commerce of the United States v. Bonta*, 2021 U.S. App. LEXIS 27659 (9th Cir. Sept. 15, 2021).

- FAA and state law.
- California's AB51/California Labor Code §432.6 imposes criminal and civil penalties on businesses that condition offers of employment on an employee's agreement to arbitrate workplace disputes.
- District court enjoined AB51; preempted by FAA.

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5. *Chamber of Commerce of the United States v. Bonta*, 2021 U.S. App. LEXIS 27659 (9th Cir. Sept. 15, 2021).

- Ninth Circuit reversed in a 2-1 Panel ruling.
 - No inconsistency with FAA because FAA envisions consent.
 - Civil and criminal sanctions are preempted.
 - Dissenting opinion (“Like a classic clown bop bag, no matter how many times California is smacked down for violating the Federal Arbitration Act (FAA), the state bounces back with even more creative methods to sidestep the FAA.”).
- Petition for rehearing *en banc* filed October 20, 2021.

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6. *Morgan v. Sundance Inc.*, Dkt. No. 21-328 (*cert. granted* Nov. 15, 2021)

Can I have my crunchwrap...
... and eat it too?



GIF Source: <https://tenor.com/view/lets-taco-bout-it-tacos-taco-love-you-gif-15288611>

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6. *Morgan v. Sundance Inc.*, Dkt. No. 21-328 (*cert. granted* Nov. 15, 2021)

- *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011): Arbitration agreements are on equal footing with other contracts.
- Waiver or waiver + prejudice?
- Eighth Circuit joined eight other federal courts (plus many state supreme courts) in requiring showing that the waiving party's inconsistent acts caused prejudice.

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6. *Morgan v. Sundance Inc.*, Dkt. No. 21-328 (*cert. granted* Nov. 15, 2021)

- Sixth Circuit requires showing of prejudice. *See O.J. Distrib. Co.*, 340 F.3d 345 (6th Cir. 2003).
- Three circuits (Seventh, Tenth, and D.C.) do not include prejudice as an essential element in proving waiver of the right to arbitrate.
 - *St. Mary's Med. Ctr. Of Evansville, Inc. v. Disco Aluminum Prods. Co.*, 959 F.2d 585 (7th Cir. 1992).
 - Courts should enforce private contracts to arbitrate, not prefer them.
 - Inconsistent conduct is enough to waive right.
- Inconsistent standards in state and federal court.

144

7. *United Food & Commercial Workers Union v. Zuckerberg*, 2021 Del. LEXIS 298 (Del. Sept. 23, 2021)

- New universal test to determine whether pre-suit demand upon a company's board should be excused as futile.
- Modernizes and combines standards from *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984) and *Rales v. Blasband*, 634 A.2d 927 (Del. 1993).
- *Aronson* formulation "narrow and inflexible."
 - Business judgment = personal liability.
 - Section 102(b)(7) was enacted two years after *Aronson*.

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7. *United Food & Commercial Workers Union v. Zuckerberg*, 2021 Del. LEXIS 298 (Del. Sept. 23, 2021)

- Three-part inquiry applied on a director-by-director basis.
- Demand excused as futile if any prong is true for at least half of the members of the "demand board":
 - i. The director received a material personal benefit from the alleged misconduct;
 - ii. The director would face a substantial likelihood of liability on the claims that are the subject of the demand; or
 - iii. The director lacks independence from another who rec'd material personal benefit from alleged misconduct or would face substantial likelihood of liability on the claims that are the subject of the demand.

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8. *DR Distributors, LLC v. 21 Century Smoking, Inc.*, 513 F.Supp. 3d 839 (N.D. Ill. Jan. 19, 2021)

A must-read federal court treatise on e-discovery.

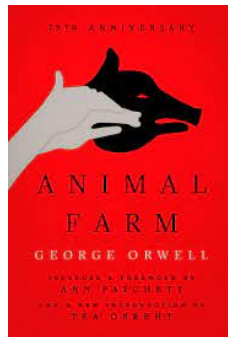


Image source: amazon.com

147

8. *DR Distributors, LLC v. 21 Century Smoking, Inc.*, 513 F.Supp. 3d 839 (N.D. Ill. Jan. 19, 2021)

"Ominous Foreshadowing"

"Snakebit"—That's how a former defense counsel described this case. But "snakebit" connotes the unfortunate circumstances that befall unsuspecting victims. That didn't happen here. Instead, through a series of missteps, misdeeds, and misrepresentations, Defendants and the former defense counsel find themselves looking down the barrel of a sanctions motion Howitzer. If any entity has been snakebit, it's this Court.

This case has taught this Court that—like Boxer the Horse in *Animal Farm*—it cannot solve all problems by just working harder."

148

8. *DR Distributors, LLC v. 21 Century Smoking, Inc.*, 513 F.Supp. 3d 839 (N.D. Ill. Jan. 19, 2021)

E-Discovery Process: Same as it Ever Was:

1. Identification of ESI: The whole process starts here.
2. Preservation of ESI: The litigation hold.
3. Collection of ESI.
4. Review of ESI.
5. Disclosure/Production of ESI.

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8. *DR Distributors, LLC v. 21 Century Smoking, Inc.*, 513 F.Supp. 3d 839 (N.D. Ill. Jan. 19, 2021)

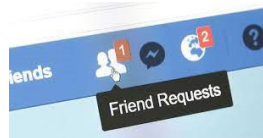
Three Key Assumptions Underlying E-Discovery:

1. Counsel is competent;
2. The client is honest and candid with counsel; and
3. Counsel documents the processes that were used so that they can reasonably defend the process if production is challenged.

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9. *Torgersen v. Siemens Building Technology, Inc.*, 2021 U.S. Dist. LEXIS 98024 (N.D. Ill. May 24, 2021) & friends.

Ensure proper preservation of social media accounts.



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9. *Torgersen v. Siemens Building Technology, Inc.*, 2021 U.S. Dist. LEXIS 98024 (N.D. Ill. May 24, 2021) & friends.

- Instant messaging systems.
 - *Charter Communications Operating, LLC v. Optimize, LLC*, 2021 Del Ch. LEXIS 4 (Del. Ch. Ct. Jan. 4, 2021)
- Fitbit evidence: did you meet your step goal?
 - *State v. Burch*, 2021 Wisc. LEXIS 103 (Wis. June 29, 2021).
- Emojis for the win.
 - *Rosbach v. Montefiore Medical Center*, 2021 U.S. Dist. LEXIS 147031 (S.D.N.Y. Aug. 5, 2021)

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9. *Torgersen v. Siemens Building Technology, Inc.*, 2021 U.S. Dist. LEXIS 98024 (N.D. Ill. May 24, 2021) & friends.

- *Another Facebook account deleted.*
 - *Edwards v. Junior State of America Found.*, 2021 U.S. Dist. LEXIS 78887 (E.D. Tex. Apr. 23, 2021).
- Snapchat “memories” not preserved.
 - *Doe v. Purdue Univ.*, 2021 U.S. Dist. LEXIS 124257 (N.D. Ind. July 2, 2021).
- Text messages.
 - *Measured Wealth Private Client Group, LLC v. Foster*, 2021 U.S. Dist. LEXIS 62143 (S.D. Fla. Mar. 31, 2021).

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Closing Remarks