BUSINESS ASSOCIATIONS

Christopher J. Bonner[†]

CONTENTS

INTRODUCTION

In this *Survey* period, covering July 1, 2015 through June 30, 2017, the New York Legislature extended owner liability for unpaid wages to limited liability companies and to foreign corporations.[1] In decisional law, the Court of Appeals adopted Delaware's *MFW* standard for going-private mergers,[2] and other decisions analyzed intricate questions in the law of partnerships, corporations, and limited liability companies.

I. LEGISLATIVE DEVELOPMENTS

A. Liability of Ten Largest Shareholders

Section 630(a) of the Business Corporation Law (BCL) provides,

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† Special Counsel, Barclay Damon, LLP, Syracuse, New York; J.D., Harvard Law School; B.A., Williams College.

1. Act of Mar. 8, 2016, 2016 McKinney's Sess. Laws of N.Y., ch. 5, at 6 (codified at N.Y. BUS. CORP. LAW § 1319(a)(4) (McKinney Supp. 2018); N.Y. LTD. LIAB. CO. LAW § 609(c), (d) (McKinney 2016).

2. *In re* Kenneth Cole Prods., Inc., S'holder Litig., 27 N.Y.3d 268, 271, 52 N.E.3d 214, 216, 32 N.Y.S.3d 551, 553 (2016) (adopting the standard articulated in *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635, 648–49 (Del. 2014)).

broadly speaking, that the ten largest shareholders of a domestic New York corporation that is not publicly traded will be jointly and severally liable for unpaid debts, wages, or salaries owed by the corporation to its employees.[3] "The ten largest shareholders" are to be "determined by the fair value of their beneficial interest as of the beginning of the period during which the unpaid services referred to in this section are performed[.]"[4] "A shareholder who has paid more than his [or her] pro rata share" may sue the other nine shareholders for contribution.[5] Section 630(a) is available to "laborers, servants or employees" but not to "contractors," to recover "for services performed by them for such corporation."[6] A laborer, servant, or employee (referred to from this point onward simply as an "employee," in accordance with contemporary usage), who is seeking to hold a shareholder liable under § 630(a), must first give notice in writing to such shareholder, within 180 days after the termination of the services.[7] If, within that 180-day period, the employee demands an examination of the corporation's shareholder list under BCL § 624(b), the 180-day period is tolled until sixty days after the employee has the opportunity to examine the shareholder list.[8]

Until 2014, § 630(a) did not apply to New York limited liability companies (LLCs). In 2014, the Legislature added substantially the same language as § 630 to Limited Liability Company Law ("LLC Law") § 609.[9]

Although § 609 of the LLC Law was amended, BCL § 630(a) did not apply to foreign corporations doing business in New York.[10] In this *Survey* period, the Legislature made two amendments to the BCL, in order to apply § 630 to foreign corporations. First, § 630(a) was amended

3. N.Y. BUS. CORP. LAW § 630(a) (McKinney 2003 & Supp. 2018).

4. *Id.*

5. *Id.* § 630(c).

6. *Id.* § 630(a).

7. *Id.*

8. BUS. CORP. § 630(a); N.Y. BUS. CORP. Law § 624(b) (McKinney 2003). Because BCL § 624(b) affords the right to inspect the shareholder list only to shareholders of record, it is not clear from the language of § 630(a) whether this additional sixty-day period is available only to an employee who is also a shareholder, or whether § 624(b) is intended to give the employee a separate right to determine who the ten largest shareholders are. BUS. CORP. § 624(b).

9. Act of Dec. 29, 2014, 2014 McKinney's Sess. Laws of N.Y., ch. 537, at 1393–94 (codified at N.Y. LTD. LIAB. CO. LAW § 609(c), (d) (McKinney 2016)); *see* Sandra S. O'Loughlin & Christopher J. Bonner, *2014–15 Survey of New York Law: Business Associations*, 66 SYRACUSE L. REV. 771, 772 (2016).

10. Stuto v. Kerber, 18 N.Y.3d 909, 910, 963 N.E.2d 1257, 1257, 940 N.YS.2d 556, 556 (2012) (first citing BUS. CORP. § 630; then citing Armstrong v. Dyer, 268 N.Y. 671, 672, 198 N.E. 551, 551–52 (1935); then citing N.Y. BUS. CORP. LAW § 102(a)(4), (7) (McKinney 2003); and then citing N.Y. BUS. CORP. LAW § 1319 (McKinney 2003)).

to specify that foreign corporations are included when services are performed in New York.[11] Second, § 1319(a) of the BCL was amended to add § 630 to the list of BCL provisions that are expressly made applicable to foreign corporations doing business in New York.[12]

B. Amendment to § 630(a)

The first amendment added the language italicized below to BCL § 630(a):

> The ten largest shareholders . . . of every *domestic* corporation . . . *or of any foreign corporation, when the unpaid services were performed in the state*, no shares of which are listed on a national securities exchange or regularly quoted in an over-the-counter market . . . shall jointly and severally be personally liable for all debts, wages or salaries due and owing to any of its laborers, servants or employees other than contractors, for services performed by them for such corporation.[13]

This amendment was enacted as L. 2015, ch. 421, effective January 19, 2016,[14] and is referred to in the discussion which follows as "Chapter 421."

According to the Legislative Memorandum relating to chapter 421, this amendment simply corrected a mistake in the interpretation of the BCL.

> Business Corporation Law § 630 imposes liability for unpaid wages on the [ten] largest shareholders of a closely held corporation after a judgment against the corporation has been returned unsatisfied. This statute was part of an historic 19th century compromise in which New York first gave all citizens the right to form corporations and thereby insulate themselves from personal liability (previously use of the corporate form was permitted only upon an act of the legislature allowing the formation of a corporation to pursue a particular endeavor). When the right to incorporate was established, some objected that the rights of wage earners would be trampled by use of the corporate form, so the exception for wages was created. In the 1930s, there was a split in the [a]ppellate [d]ivisions as to whether the statute applied to foreign corporations or only to domestic corporations. The Court of Appeals ultimately resolved the question by deciding that the Stock Corporation Law of New York did not regulate foreign corporations. In 1962, when the Business Corporation Law was

11. Act of Nov. 20, 2015, 2015 McKinney's Sess. Laws of N.Y., ch. 421, at 1029 (codified at BUS. CORP. § 630(a)).

12. Act of Mar. 8, 2016, 2016 McKinney's Sess. Laws of N.Y., ch. 5, at 5–6 (codified at N.Y. BUS. CORP. LAW §§ 630(a), 1319(a)(4) (McKinney Supp. 2018)).

13. The text added by Chapter 421 is italicized. Act of Nov. 20, 2015, 2015 McKinney's Sess. Laws of N.Y., ch. 421, at 1029 (codified at BUS. CORP. § 630(a)).

14. *Id.*

adopted, it explicitly applied to foreign corporations.[15]

The author notes that the Court of Appeals had addressed precisely this question more than three years earlier in *Stuto v. Kerber* and had concluded that, in 1962, the BCL explicitly did *not* apply to foreign corporations.[16] The Court of Appeals had said: "[T]he plain language and history of [BCL §] 630, as well as other relevant portions of the [BCL], reveal that [§] 630 applies to only domestic corporations, and not to foreign corporations."[17] However, whatever the Legislature's intention may have been in 1962, the Legislature's intention was clear in chapter 421 to apply § 630 to foreign corporations.[18]

The Legislative Memorandum for Chapter 421 describes how, prior to Chapter 421, the existence of § 630 encouraged New York businesses to incorporate under the laws of other states.

> But judicial inertia prevented applying the law to foreign corporations, leading one federal court to describe the rule as an historical anachronism. Under current law, a corporation, though it does all its business in New York, has an incentive to escape liability for wages by incorporating in a foreign state, thus causing NY to lose revenue.[19]

It should be noted, however, that the power of New York to impose liability on shareholders of foreign corporations has not been sufficiently tested, and hence there may remain an incentive to incorporate in a foreign state.

Chapter 421 incidentally shows a grammar point regarding why a pronoun needs to refer to a definite antecedent. Before Chapter 421, § 630(a) by its terms applied to "[t]he ten largest shareholders . . . of every corporation . . . no shares of which are listed on a national securities exchange or regularly quoted in an over-the-counter market . . . ."[20]

The pronoun "which" referred to "corporation," so § 630(a) was clear; § 630(a) did not apply to New York corporations that were listed on a national securities exchange, or regularly quoted in an over-the-

15. Legislative Memorandum of Assemb. Steck, *reprinted in* 2015 McKinney's Sess. Law, ch. 421, at 1722–23.

16. *See* 18 N.Y.3d 909, 910, 963 N.E.2d 1257, 1257, 940 N.YS.2d 556, 556 (2012) (first citing N.Y. BUS. CORP. LAW § 630 (McKinney 2003); then citing Armstrong v. Dyer, 268 N.Y. 671, 672, 198 N.E. 551, 551–52 (1935); then citing N.Y. BUS. CORP. LAW § 102(a)(4),(7) (McKinney 2003); and then citing N.Y. BUS. CORP. LAW § 1319 (McKinney 2003)).

17. *Id.* (internal citations omitted).

18. Legislative Memorandum of Sen. Farley, *reprinted in* 2016 McKinney's Sess. Law, ch. 5, at 1113 ("[F]oreign corporations are subject to Business Corporation Law [§] 630.").

19. Legislative Memorandum of Assemb. Steck, *supra* note 15, at 1723.

20. Act of Nov. 20, 2015, 2015 McKinney's Sess. Laws of N.Y., ch. 421, at 1029 (codified at N.Y. BUS. CORP. LAW § 630(a) (McKinney Supp. 2018).

counter market.[21]

After Chapter 421, § 630(a) by its terms applies to "[t]he ten largest shareholders . . . of every *domestic* corporation, *or of any foreign corporation, when the unpaid services were performed in the state*, no shares of which are listed on a national securities exchange or regularly quoted in an over-the-counter market . . . ."[22]

The phrase "or of any foreign corporation, when the unpaid services were performed in this state," was added before the phrase "no shares of which are listed on a national securities exchange or regularly quoted in an over-the-counter market[.]"[23] Because "which" is an indefinite pronoun, "no shares of which" could, in an abstract, logical sense, refer to either "any foreign corporation," or to both "every domestic corporation" and "any foreign corporation[.]"[24]

A reader who did not know the purpose of Chapter 421 might conclude that "no shares of which" refers to foreign corporations only. The result would be that § 630(a) applies to all New York corporations, whether publicly traded or not, while applying only to foreign corporations that are not publicly traded. The Legislative Memorandum pertaining to Chapter 421, however, clearly states the desire of the Legislature to treat New York and foreign corporations the same.[25]

C. Amendment to § 1319

The Legislature's second amendment was to add § 630 to the list, in BCL § 1319, of BCL sections that expressly apply to foreign corporations.[26] As amended, BCL § 1319 provides in relevant part:

> (a) In addition to articles 1 (Short title; definitions; application; certificates; miscellaneous) and 3 (Corporate name and service of process) and the other sections of article 13 (*foreign corporations*), the following provisions, to the extent provided therein, shall apply to a foreign corporation doing business in this state, its directors, officers and shareholders:
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> * * *

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21. BUS. CORP. § 630.

22. *Id.* The italicized text was added by Chapter 421. Act of Nov. 20, 2015, 2015 McKinney's Sess. Laws of N.Y., ch. 421, at 1029.

23. Act of Nov. 20, 2015, 2015 McKinney's Sess. Laws of N.Y., ch. 421, at 1029 (codified at BUS. CORP. § 630).

24. *Id.*

25. Legislative Memorandum of Assemb. Steck, *supra* note 15, at 1723 ("The bill amends Business Corporation Law 630 to treat New York and foreign corporations alike in terms of liability for unpaid wages of employees.").

26. Act of Mar. 8, 2016, 2016 McKinney's Sess. Laws of N.Y., ch. 5, at 6 (codified at N.Y. BUS. CORP. LAW § 1319(a)(4) (McKinney Supp. 2018)).

(4) Section 630 (Liability of shareholders for wages due to laborers, servants or employees).[27]

The Legislative Memorandum for Chapter 5, referring to the 2015 amendment, stated:

> Chapter 421 of the laws of 2013 amended [§] 630 of the business corporation law to ensure that New York and foreign corporations are treated alike in terms of liability for unpaid wages of employees. Prior to chapter 421, liability was imposed only on New York corporations. The bill makes technical changes to ensure, among other things, that the amendments to [§] 630 are constitutional.[28]

D. Unanswered Questions

The extension of liability, as one of the ten largest owners, for unpaid wages and salaries (which for convenience will be referred to as "§ 630 liability") to domestic LLCs and foreign corporations raises a multitude of questions.

1. Can § 630 liability be avoided by interposing another entity between the ultimate owner and the employee? This has always been a question with § 630 liability, and it will become even more difficult if the intermediate entity is an entity organized in a jurisdiction other than New York.

2. For domestic LLCs and foreign corporations, is § 630 liability retroactive? If an investor purchased an LLC membership interest, or shares in a foreign corporation, before the effective date of the relevant amendment imposing § 630 liability, can that investor be subject to § 630 liability, or does the liability affect only investments made after the effective date of the legislative amendments?

3. Can § 630 liability apply by surprise? An investor who purchases shares in a foreign corporation will not necessarily know (i) whether he or she is purchasing a stake which is possibly one of the ten largest holdings in the corporation, or (ii) whether the corporation will be hiring employees in New York.

4. How are the ten largest holdings to be calculated? For example, in the case of a corporation, how will holdings of preferred stock be compared to holdings of common stock, when a preferred shareholder may have invested more cash or property, but have fewer votes, than a common shareholder? Will their relative market value require an appraisal proceeding?

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27. BUS. CORP. § 1319(a)(4) (emphasis added). The italicized text was added by Chapter 5. Act of Mar. 8, 2016, 2016 McKinney's Sess. Laws of N.Y., ch. 5, at 6.

28. Legislative Memorandum of Sen. Farley, *supra* note 18, at 1113.

II. PARTNERSHIPS

1301 Props. Owner LP v. Abelson arose out of the bankruptcy of the law firm of Dewey & LeBoeuf LLP ("Dewey & LeBoeuf").[29] In 1989, the law firm of Dewey, Ballantine, Bushby, Palmer & Wood, a New York general partnership, a predecessor of Dewey & LeBoeuf,[30] entered a long-term lease tenancy for office space.[31] Under New York partnership law in effect at that time, partners of a law firm were personally liable for their firm's lease obligations.[32] The lease remained in effect until it was terminated by Dewey & LeBoeuf on May 25, 2012,[33] three days before Dewey & LeBoeuf filed for bankruptcy on May 28, 2012.[34]

While the lease was in effect, Dewey, Ballantine, Bushby, Palmer & Wood changed its name to Dewey Ballantine.[35] Then, in 1997, Dewey Ballantine registered as a limited liability partnership (LLP) named Dewey Ballantine LLP.[36] Section 26(b) of the Partnership Law provides, in relevant part:

> (b) Except as provided by subdivisions (c) and (d) of this section [addressing malpractice and majority consent, respectively], no partner of a partnership which is a registered limited liability partnership is liable or accountable, directly or indirectly (including by way of indemnification, contribution or otherwise), for any debts, obligations or liabilities of, or chargeable to, the registered limited liability partnership or each other, whether arising in tort, contract or otherwise, which are incurred, created or assumed by such partnership while such partnership is a registered limited liability partnership, solely by reason of being such a partner . . . .[37]

The Legislature had added subdivisions (b), (c) and (d) to § 26 of the Partnership Law, when the Legislature adopted the LLC law in 1994.[38]

Of significance to this case, subdivision (d) of § 26 of the Partnership Law provides, in relevant part:

> (d) Notwithstanding the provisions of subdivision (b) of this section, all

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29. No. 653342/2013, 2016 N.Y. Slip Op. 50446(U), at 1 (Sup. Ct. New York Cty. Apr. 1, 2016).

30. *Id.* at 2.

31. *Id.* at 1.

32. *See* N.Y. P'SHIP LAW § 26 (McKinney 2015) (Historical and Statutory Notes).

33. *Abelson*, 2016 N.Y. Slip Op. 50446(U), at 2.

34. *Id.* at 1.

35. *Id.* at 2.

36. *Id.*

37. N.Y. P'SHIP LAW § 26(b) (McKinney 2015).

38. *Abelson*, 2016 N.Y. Slip Op. 50446(U), at 7; *see* Act of July 26, 1994, 1994 McKinney's Session Laws of N.Y., ch. 576, at 1347 (codified at N.Y. LTD. LIAB. CO. LAW).

> or specified partners of a partnership which is a registered limited liability partnership may be liable in their capacity as partners for all or specified debts, obligations or liabilities of a registered limited liability partnership to the extent at least a majority of the partners shall have agreed . . . .[39]

Here, there was no agreement by partners to be personally liable for the obligations of the partnership under the lease.[40]

In 2007, Dewey Ballantine LLP merged with the law firm LeBoeuf Lamb LLP to form Dewey & LeBoeuf LLP.[41]

Between commencement in 1989 and termination in 2012, the lease was amended twelve times.[42] At all times, § 29.1(a) of the lease contained a provision stating that the tenant's partners were personally liable "'[I]f Tenant is a partnership . . . ["Partnership Tenant"] or if Tenant's interest in this Lease shall be assigned to a partnership . . . (i) the liability of each of the parties comprising Partnership Tenant shall be joint and several . . . .'"[43]

The landlord argued that the tenant had never altered the original provision holding all the partners personally liable for the partnership's obligation under the lease.[44] The court agreed as well that the original language and intention of the lease was to impose personal liability on all partners of the tenant.[45]

The court, however, held that the adoption of the Legislature of the LLP provisions defeated personal liability of the partners.[46] The court explained the Legislature's purpose as follows:

> The overriding purpose of the Limited Liability Partnership Law is to limit the individual liability of partners in this form of entity. The New York Legislature made clear, in enacting § 26(d), that to impose personal liability on the partners of a limited liability partnership, who would otherwise enjoy the statutory benefit of limited liability, a majority or other agreement between the partners is required. Partnership Law § 26(d) sets forth a statutory procedure for imposing personal liability on partners of an LLP, not merely a default rule that parties may contract around. This statute is designed to safeguard partners and provide them with fair notice of the circumstances under which they will be held personally liable for the partnership's debts,

39. P'SHIP § 26(d).
40. *Abelson*, 2016 N.Y. Slip Op. 50446(U), at 10.
41. *Id.* at 2.
42. *Id.*
43. *Id.* at 3.
44. *Id.* at 9.
45. *Abelson*, 2016 N.Y. Slip Op. 50446(U), at 9.
46. *Id.*

> against their ordinary and reasonable expectation that they are otherwise protected from personal liability as partners of an LLP.*47*

The landlord argued that, since the lease pre-dated the Legislature's adoption of the LLP amendments, it logically followed that the partners' personal obligations on the lease remained.[48] The court, however, observed that the landlord had "ample opportunity"[49] to override the 1994 LLP amendments to Partnership Law § 26, but had not.

> While there may have been a reasonable time period following Dewey Ballantine's conversion to a limited liability partnership during which the parties may have continued to rely on the personal liability provisions in the lease, that time period has long since elapsed. After Dewey Ballantine's conversion to a limited liability partnership in 1997, the contracting parties had ample opportunity to update the lease and comply with Partnership Law § 26 by securing a majority or other agreement among the partners to be held personally liable. The contracting parties, however, failed to do so, even in the fifteen intervening years after the LLP law went into effect. To enforce their agreement now and impose personal liability upon the defendants would be directly contrary to, and defeat the purpose of, Partnership Law § 26(d).
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> Sophisticated parties—such as the contracting parties here—are under a continuing legal obligation to ensure that their contracts comply with New York law. . . .
>
> [P]arties contracting with LLPs must ensure that their contracts seeking to impose personal liability on partners comply with the Partnership Law. The individual partners of an LLP have a legitimate expectation that they are protected from personal liability, unless they agree to the contrary through a majority agreement among the partners. Here, the contracting parties could not have reasonably expected that the lease would continue to impose personal liability on the partners of an LLP, without compliance with the statutory requirements set forth in Partnership Law § 26(d).
>
> Accordingly, I find that the lease is not enforceable to hold the individual partners of Dewey Ballantine LLP and Dewey & LeBoeuf LLP personally liable for the lease due to the contracting parties' failure to comply with Partnership Law § 26(d).[50]

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47. *Id.*

48. *Id.*

49. *Id.*

50. *Abelson*, 2016 N.Y. Slip Op. 50446(U), at 9 n.9, 9–10 ("During the ten years that Dewey Ballentine LLP was tenant, the lease underwent eight separate amendments. Only one of these amendments—the Eighth Amendment dated October 8, 2003—modified Article 29 of the lease containing the partner liability provision. However, the modification did not concern partner liability but instead primarily made changes to the tenant's financial

This decision raises a difficult question for the legal practitioner. At what point did the exemption from personal liability ripen? Was personal liability enforceable up to the time that the landlord and tenant made the first amendment to the lease following the tenant's registration as an LLP, and was the landlord required at that time to insist upon partner liability if the landlord wanted it? What if a long period of time had elapsed after the tenant's registration as an LLP, before an amendment to the lease was required? If the landlord did not have independent grounds for calling a default under the lease, were the partners free to ignore any attempt by the landlord to make them personally liable?

On the other hand, the court's opinion sets forth clearly the equitable reason why imposing personal liability on the partners, fifteen years after the partnership's registration as an LLP, would defeat their legitimate expectation that they were not personally liable on the lease.[51]

Therefore, we are left with the conclusion that, while we do not know how long after the LLP registration the partners' personal liability will last, or through how many contractual amendments, in this case fifteen years and eight amendments were enough to defeat personal liability. LLPs have been commonly used for more than twenty years, so perhaps the question in *1301 Props. Owner* might not recur.

III. CORPORATIONS

A. Venue

The question of what county in New York should be the location where a lawsuit is brought against a business entity might at first seem not particularly important. However, at least one decision during the *Survey* period could lead to the question being litigated in a large proportion of the cases brought against New York business entities.

To determine venue against a domestic corporation, Civil Practice Law and Rules (CPLR) 503(a) provides that "the place of trial shall be in the county in which one of the parties resided when it was commenced" and CPLR 503(c) provides that a domestic corporation "shall be deemed a resident of the county is which its principal office is located . . . ."[52] The rule established in *Western Transportation Co. v. Scheu,* in 1859, was

certification and revenue requirements.").

51. *Id.* at 10.

52. N.Y. C.P.L.R. 503(a), (c) (McKinney 2006). CPLR 304(a) provides that a lawsuit "is commenced by filing a summons and complaint or a summons with notice in accordance with rule [2102]. N.Y. C.P.L.R. 304(a) (McKinney 2010). CPLR 2102(a) provides that papers "shall be filed with the clerk of the court in which the action is triable." N.Y. C.P.L.R. § 2102(a) (McKinney 2012). Thus, the county where the lawsuit should be commenced is the county the trial shall be held.

that the location of the principal office is the location so designated in the certificate of incorporation, even if that location is not the place where the corporation actually does most of its business.[53] The justification for this rule was to fix the location with certainty.[54]

Up until 1992, the official public document of a New York corporation which stated where its office is located was the certificate of incorporation, which requires a statement of "[t]he county within this state in which the office of the corporation is to be located."[55]

In 1992 the Legislature added § 408 to the BCL, which requires each New York corporation, and each foreign corporation authorized to do business in New York, to file a statement with the New York Secretary of State setting forth "the street address of its principal executive office" as well as other information.[56]

If the certificate of incorporation and the biennial statement have different counties for the location of the principal office, where is proper venue for a suit against the corporation?

In *Astarita v. Acme Bus Corp.*, the Supreme Court, Nassau County, decided that the street address of the corporation's principal executive office, set forth in the corporation's most recent biennial statement under BCL § 408, was the proper location of the corporation's principal office for venue purposes.[57]

The plaintiff in that case brought an action for personal injuries against Acme Bus Corp. ("Acme"), "designat[ing] Nassau County as the proper venue" on the grounds that the "principal office [of the defendant was] located in that county.[58] The original certificate of incorporation of Acme, filed in 1960 and never amended, located the office of Acme in Nassau County.[59] Acme asserted, however, that its principal office was located in Suffolk County, as reported in Acme's most recent biennial

53. 19 N.Y. 408, 411 (1859) (corporation could choose which county would be entitled to assess a tax on its corporate capital by stating in its certificate of incorporation where its principal office would be located).

54. *Id.*

55. N.Y. BUS. CORP. LAW § 402(a)(3) (McKinney 2003).

56. N.Y. BUS. CORP. LAW § 408 (McKinney 2003). The statement is to be filed "biennially." *Id.* § 408(a)(3). "Biennially" can mean twice a year, or once every two years, according to writing instructor and software vendor Gary Kinder. Gary Kinder, *Two Furcates and Half a Nary*, WORDRAKE, https://www.wordrake.com/writing-tips/ (last visited May 10, 2018). Meanwhile, the New York Department of State interprets the filing requirement to be once every two years. *See* New York State Dep't of State, Div. of Corps., State Records and UCC, *FAQ-Biennial Statements*, https://www.dos.ny.gov/corps/bus_llc_faq_statements.asp (last visited May 10, 2018).

57. 55 Misc. 3d 767, 774, 52 N.Y.S.3d 616, 621 (Sup. Ct. Nassau Cty. 2017).

58. *Id.* at 768, 52 N.Y.S.3d at 617.

59. *Id.* at 769, 52 N.Y.S.3d at 618.

statement under BCL § 408.[60]

The court stated that "*Western* is still good law and is frequently cited[,]" listing *In re Savage Mills, Inc.*[61] (the "residence" of the debtor corporation, for purposes of recording a conditional sales agreement against it, was New York County, the location fixed in its certificate of incorporation, rather than its only place of business, in Kings County) and *In re General Assignment for Benefit of Creditors of Norma Footwear Corp.*[62] (a chattel mortgage filed against a corporation's assets was invalid because it was filed in the city of Glens Falls where the debtor's plant, machinery, and equipment were located, but the chattel mortgage should instead have been filed in Kings County, which was designated in the certificate of incorporation as the corporation's principal place of business).[63]

However, the *Astarita* court cited the dissenting opinion in a 2007 case in the Appellate Division, First Department for the proposition that the *Western* rule should not necessarily be followed.[64] The 2007 case, *Discolo v. River Gas & Wash Corp.*, involved a slip and fall at the defendant's car wash in the Bronx.[65] The venue choices were Bronx County, the county specified in the defendant's most recent biennial statement under BCL § 408;[66] Kings County, the county specified in the latest certificate of change filed by the defendant to its certificate of incorporation;[67] and Nassau County, the residence of the plaintiff and of a codefendant.[68] While the majority in *Discolo* transferred venue to Kings County,[69] consistent with the *Western* rule, the dissent stated:

> I find it difficult to accept that the law requires an unthinking, automatic application of this rule where a more recent document, which the law requires a corporation to file every two years with the Department of State, lists the corporation's 'principal executive office' at a location

60. *Id.* at 769, 52 N.Y.S.3d at 618–19.

61. 170 F. Supp. 559, 560 (E.D.N.Y. 1959).

62. 2 A.D.2d 24, 25, 153 N.Y.S.2d 80, 81 (1st Dep't 1956).

63. *Astarita*, 55 Misc. 3d at 770, 52 N.Y.S.3d at 618 (first citing Data-Guide Inc. v. Marcus, 16 Misc. 2d 541, 542, 181 N.Y.S.2d 945, 947 (Sup. Ct., N.Y. Cty. 1958); then citing *In re Savage Mills, Inc.*, 170 F. Supp. at 561; then citing *In re* Gen. Assignment of Norma Footwear Corp., 2 A.D.2d 24, 26, 153 N.Y.S.2d 80, 82 (1st Dep't 1956); and then citing WILLIAM M. FLETCHER, 8 FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 4042 (2010)).

64. *Id.* (citing Discolo v. River Gas & Wash Corp., 41 A.D.3d 126, 127–28, 837 N.Y.S.2d 95, 96 (1st Dep't 2007) (Saxe, J., dissenting)).

65. 41 A.D.3d at 127, 837 N.Y.S.2d at 96 (Saxe, J., dissenting).

66. *Id.* at 127, 837 N.Y.S.2d at 97.

67. *Id.* at 126, 837 N.Y.S.2d at 96 (majority opinion).

68. *Id.*

69. *Id.*

> other than the 'principal office' listed in the certificate of incorporation. Under these circumstances, the continued automatic application of the rule that we may look only at the certificate of incorporation, and must ignore documents that as a practical matter serve to update the information in that certificate, seems like willful ignorance. It is particularly offensive to permit a defendant to use this rule as a shield to avoid a lawsuit in the only county where its only business is located, and to both select and forever fix the county of venue where it must be sued merely by virtue of the county named years earlier in its certificate of incorporation.[70]

Astarita followed the dissent in *Discolo*, reasoning that the biennial statement was a better method of stating where the corporate's principal office is located:

> An official database updated every two years provides more accurate information than certificates of incorporation, which are often filed and promptly placed in a file drawer to be ignored. Privately held business entities often fail to amend their certificates of incorporation when relocating. Sometimes those entities no longer have any presence at the address stated in the certificate.
>
> Acme filed its certificate of incorporation in 1960. Its principal office was relocated sometime during the last [fifty-six] years although no amendments to the certificate of incorporation were ever filed. In contrast, the biennial registration statement filed by Acme updated this information and provided the public with easily accessed current information. In addition, corporations are required to file the biennial registration statement, but not ever required to update their certificates of incorporation.
>
> The dissenting opinion by Justice Saxe in *Discolo* should be revisited given the advances in technology and ready internet access that have occurred over the ten years since that opinion was written. As Justice Saxe stated in 2007: 'Under these circumstances, the continued automatic application of the rule that we may look only at the certificate of incorporation, and must ignore documents that as a practical matter serve to update the information in that certificate, seems like willful ignorance.'
>
> In the opinion of the undersigned, based upon the information contained in the official database of the Department of State, Acme's principal place of business is in Suffolk County which is the venue of this action.[71]

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70. *Discolo*, 41 A.D.3d at 127–28, 837 N.Y.S.2d at 97 (Saxe, J., dissenting).

71. Astarita v. Acme Bus Corp., 55 Misc. 3d 767, 773–74, 52 N.Y.S.3d 616, 620–21 (Sup. Ct. Nassau Cty. 2017) (citing *Discolo*, 41 A.D.3d at 127–28, 837 N.Y.S.2d at 97 (Saxe, J., dissenting)).

One would expect that *Astarita* and similar venue cases to lead in two possible directions. One possibility is to replace an old rule of certainty—the *Western* rule that the filed certificate of incorporation, including amendments, controls—with another rule of certainty, that the BCL § 408 biennial statement controls. Another possibility is that venue might grow into an issue regularly litigated at the outset, whenever there are two or more arguable choices for the location of an entity defendant's principal office.

B. Fiduciary Duties

In *In re Kenneth Cole Prods., Inc., Shareholder Litigation*, the Court of Appeals adopted Delaware's standard for going-private mergers.[72]

Kenneth Cole Productions, Inc. (KCP) is a corporation organized under New York law which "designs and markets apparel, footwear, handbags[,] and accessories."[73] KCP had a class of voting stock traded on the New York Stock Exchange.[74] Kenneth D. Cole owned all of the shares of a different class of stock which held voting power significantly in excess of the percentage needed to elect all five members of the board of directors.[75]

In February 2012, Cole announced to the board of directors that he proposed to take KCP private by a merger that would cash out all outstanding shares of stock not already owned by him at a price of $15.00 per share.[76] The board appointed a special committee of three directors to consider the merger and negotiate its terms.[77] Cole's "offer was conditioned on approval by the special committee and [by] a majority vote of the [remaining] shareholders."[78] Cole stated

> that he had no desire to seek any other type of merger and, as a stockholder, would not approve of one. He also stated that, if the special committee did not recommend approval or the stockholders voted against the proposed transaction, his relationship with KCP would not be adversely affected.[79]

After Cole's offer, the special committee engaged counsel and a

72. 27 N.Y.3d 268, 271, 52 N.E.3d 214, 216, 32 N.Y.S.3d 551, 553 (2016) (citing Kahn v. M&F Worldwide Corp., 88 A.3d 635, 648–49 (Del. 2014)).

73. *Id.*

74. *Id.*

75. *Id.* at 272, 52 N.E.3d at 216, 32 N.Y.S.3d at 553.

76. *Id.*

77. *In re Kenneth Cole Prods., Inc.*, 27 N.Y.3d at 272, 52 N.E.3d at 216, 32 N.Y.S.3d at 553.

78. *Id.*

79. *Id.*

financial advisor.[80] After negotiating for months, the committee and Cole agreed on a price of $15.25 per share, which the committee recommended to the remaining shareholders.[81] The remaining shareholders voted 99.8% in favor of the merger.[82]

A few days after Cole's offer, several shareholder plaintiffs brought class actions against Cole and the directors for breach of fiduciary duty.[83]

The plaintiffs wanted the Court to apply "the entire fairness standard,"[84] under which the directors have the burden of demonstrating "that they engaged in a fair process and obtained a fair price."[85] The defendants sought the protection of the business judgment rule.[86] The Court of Appeals stated that it was "adopt[ing] a middle ground. Specifically, the business judgment rule should be applied as long as the corporation's directors establish that certain shareholder-protective conditions are met; however, if those conditions are not met, the entire fairness standard should be applied."[87]

The Court began its analysis with a summary of the business judgment rule: "[W]here corporate officers or directors exercise unbiased judgment in determining that certain actions will promote the corporation's interests, courts will defer to those determinations if they were made in good faith."[88] A court may inquire, however, whether the directors were disinterested and independent.[89]

The Court in *Kenneth Cole Productions* observed that in freeze-out mergers, "a director's loyalty may be divided or compromised, thereby calling into question the applicability of the business judgment rule."[90] The Court defined a "freeze-out merger" as a merger where "the majority stock owner or group in control attempts to freeze out the interests of

80. *Id.* at 272, 52 N.E.3d at 217, 32 N.Y.S.3d at 554.

81. *Id.* at 272–73, 52 N.E.3d at 217, 32 N.Y.S.3d at 554.

82. *In re Kenneth Cole Prods., Inc.*, 27 N.Y.3d at 273, 52 N.E.3d at 217, 32 N.Y.S.3d at 554.

83. *Id.* at 272, 52 N.E.3d at 217, 32 N.Y.S.3d at 554.

84. *Id.* at 274, 52 N.E.3d at 218, 32 N.Y.S.3d at 555.

85. *Id.*

86. *Id.*

87. *In re Kenneth Cole Prods., Inc.*, 27 N.Y.3d at 274, 52 N.E.3d at 218, 32 N.Y.S.3d at 555.

88. *Id.* (first citing 40 W. 67th St. Corp. v. Pullman, 100 N.Y.2d 147, 153, 790 N.E.2d 1174, 1179, 760 N.Y.S.2d 745, 750 (2003) ("The business judgment rule is a common-law doctrine by which courts exercise restraint and defer to good faith decisions made by board of directors in business settings."); and then citing Chelrob, Inc. v. Barrett, 293 N.Y. 442, 459–60, 57 N.E.2d 825, 833 (1944) (stating that a court will ordinarily not review the directors' exercise of unbiased judgment)).

89. *Id.* at 274–75, 52 N.E.3d at 218, 32 N.Y.S.3d at 555 (citing Auerbach v. Bennett, 47 N.Y.2d 619, 623–24, 393 N.E.2d 994, 996, 419 N.Y.S.2d 920, 922 (1979)).

90. *Id.* at 275, 52 N.E.3d at 218, 32 N.Y.S.3d at 555.

minority shareholders."[91] Further, the Court identified

> [t]hree main types of freeze-out mergers: (1) two-step mergers, in which an outside investor purchases control of the majority shares of a target company, then uses that control to merge the target with a second company, thereby freezing out the minority shareholders of the target and forcing a cash-out of their shares; (2) parent-subsidiary mergers; and (3) going-private mergers, in which the majority shareholder seeks to remove public investors and gain ownership of the entire company.[92]

The Court then quoted its "seminal decision regarding freeze-out mergers[,] *Alpert v. 28 Williams St. Corp.*,"[93] to set forth the entire fairness standard:

> In reviewing a two-step merger in *Alpert*, we held that while, '[g]enerally, the plaintiff has the burden of proving that the merger violated the duty of fairness, . . . when there is an inherent conflict of interest, the burden shifts to the interested directors or shareholders to prove good faith and the entire fairness of the merger.' This 'entire fairness' standard has two components: fair process and fair price. The fair process aspect concerns timing, structure, disclosure of information to independent directors and shareholders, how approvals were obtained, and similar matters. The fair price aspect can be measured by whether independent advisors rendered an opinion or other bids were considered, which may demonstrate the price that would have been established by arm's length negotiations. Considering the two components, the transaction is viewed as a whole to determine if it is fair to the minority shareholders.[94]

The Court then said that *Alpert* did not necessarily mandate the entire fairness standard for the going-private merger of KCP:

> In *Alpert*, we specifically stated that we were not deciding whether the circumstances that would satisfy fiduciary duties in a two-step merger would be the same for other types of mergers. Thus, that decision is not dispositive of the standard for reviewing a going-

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91. *Id.*

92. *In re Kenneth Cole Prods., Inc.*, 27 N.Y.3d at 275, 52 N.E.3d at 218, 32 N.Y.S.3d at 555. Although Kenneth Cole owned less than a majority of the shares in absolute number, he owned approximately eighty-nine percent of the voting power. *Id.* at 271–72, 52 N.E.3d at 216, 32 N.Y.S.3d at 553.

93. *Id.* at 275, 52 N.E.3d at 219, 32 N.Y.S.3d at 556 (citing Alpert v. 28 Williams St. Corp., 63 N.Y.2d 557, 570, 473 N.E.2d 19, 27, 483 N.Y.S.2d 667, 675 (1984)).

94. *Id.* at 275–76, 52 N.E.3d at 219, 32 N.Y.S.3d at 556 (quoting *Alpert*, 63 N.Y.2d at 570, 473 N.E.2d at 27, 483 N.Y.S.2d at 675) (first citing Chelrob, Inc., v. Barrett, 293 N.Y. 442, 461–62, 57 N.E.2d 825, 834 (1944); and then citing Kahn v. Lynch Commc'n Sys. Inc., 638 A.2d 1110, 1115 (Del. 1994)).

> private merger, such as the one now before us.[95]

In particular, the Court of Appeals in *Alpert*, after listing the three kinds of freeze-out mergers (that is, two-step mergers, parent-subsidiary mergers, and going private mergers), had reasoned that, "[d]ue to differences in the 'relative [dangers] of abuse and on the social [values] of the objective served by the elimination of the minority interest[,]'" it might be appropriate to treat the three categories of freeze-out merger differently.[96]

In *Kenneth Cole Productions*, the Court of Appeals decided to treat a going-private merger differently than a two-step merger.[97] The Court expressly adopted a test established by the Delaware Supreme Court two years earlier in the case of *Kahn v. M & F Worldwide Corp.* (*MFW*), which also involved a controlling shareholder seeking to take the corporation private.[98] The shareholder made the going-private merger contingent upon "negotiation and approval by a special committee of independent directors, and approval by a majority of shareholders that were unaffiliated with the controlling shareholder."[99] As in the later case of *Kenneth Cole Productions*, the controlling shareholder in *MFW* stated that it would not favor any other sale or merger of the corporation, but, if its proposal to take the corporation private was not recommended by the special committee, the controlling shareholder's relationship with the corporation would not be adversely affected.[100]

In *MFW*, the Delaware Supreme Court decided to use the business judgment test rather than the entire fairness standard, if the following structure was applied:

> [I]n controller buyouts, the business judgment standard of review will be applied *if and only if*: (i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the

95. *Id.* (citing *Alpert*, 63 N.Y.2d at 567 n.3, 473 N.E.2d at 24 n.3, 483 N.Y.S.2d at 672 n.3).

96. *Alpert*, 63 N.Y.2d at 567 n.3, 473 N.E.2d at 24 n.3, 483 N.Y.S.2d at 672 n.3 (citing Victor Brudney & Marvin A. Chirelstein, *A Restatement of Corporate Freezeouts*, 87 YALE L. J. 1354, 1359 (1978)).

97. *See In re Kenneth Cole Prods., Inc.*, 27 N.Y.3d at 276, 52 N.E.3d at 219, 32 N.Y.S.3d at 556.

98. *Id.* at 278, 52 N.E.3d at 220, 32 N.Y.S.3d at 557 (quoting 88 A.3d 635, 645 (Del. 2014)).

99. *Id.* at 276, 52 N.E.3d at 219, 32 N.Y.S.3d at 556 (citing *MFW*, 88 A.3d at 638).

100. *Id.* at 276, 52 N.E.3d at 219, 32 N.Y.S.3d at 556 (citing *MFW*, 88 A.3d at 640–41).

minority is informed; and (vi) there is no coercion of the minority.[101]

In New York, the Court of Appeals approved the *MFW* test, or standard, because the standard insulates a decision of disinterested directors from judicial inquiry, consistent with *Auerbach v. Bennett* and the business judgment rule.[102] The *MFW* standard does allow inquiry into whether the directors were disinterested and whether their investigation was adequate:

> [T]he *MFW* standard properly considers the rights of minority shareholders—to obtain judicial review of transactions involving interested parties, and to proceed to trial where there is adequate proof that those interests may have affected the transaction—and balances them against the interests of directors and controlling shareholders in avoiding frivolous litigation and protecting independently-made business decisions from unwarranted judicial interference.[103]

The Court in *Kenneth Cole Productions* interpreted the standard to mean that, in a going-private merger, "a complaint is sufficient to state a cause of action for breach of fiduciary duty—and the plaintiff may proceed to discovery—if it alleges 'a reasonably conceivable set of facts' showing that any of the six enumerated shareholder-protective conditions did not exist."[104]

The Court then held that the alleged facts in the *Kenneth Cole Productions* complaint were not sufficient to challenge any one of the six necessary conditions.[105]

In the Court's discussion of the six conditions, one point in particular stands out: the ability of the controlling shareholder to choose the members of the committee does not, in itself, show that those members lack independence.

> [I]n challenging the independence of the special committee, [the] plaintiff alleged that Cole and/or his personally selected directors were responsible for nominating and electing the committee members to KCP's board. In this regard, the question is whether a director is beholden to the controlling party or so under that party's influence that the director's discretion would be compromised. Friendships, traveling in the same circles, some financial ties, and past business relationships are not enough to rebut the presumption

101. *MFW*, 88 A.3d at 645.

102. *In re Kenneth Cole Prods., Inc.*, 27 N.Y.3d at 278, 52 N.E.3d at 220, 32 N.Y.S.3d at 557 (citing Auerbach v. Bennett, 47 N.Y.2d 619, 623, 393 N.E.2d 994, 996, 419 N.Y.S.2d 920, 922 (1979)).

103. *Id.* at 278, 52 N.E.3d at 221, 32 N.Y.S.3d at 558.

104. *Id.* at 278, 52 N.E.3d at 221, 32 N.Y.S.3d at 558 (quoting *MFW*, 88 A.3d at 645).

105. *Id.* at 279, 52 N.E.3d at 222, 32 N.Y.S.3d at 558.

> of independence; the ties must be material in the sense that they could affect impartiality. None of the allegations of the complaint, even if true, indicate that any of the members of the special committee engaged in fraud, had a conflict of interest or divided loyalties, or were otherwise incapable of reaching an unbiased decision regarding the proposed merger.[106]

This holding is essential to the availability of the *MFW* test because, without it, *MFW* condition "(ii)," which is the independence of the Special Committee, would be absent in practically all going-private mergers.

Kenneth Cole Productions shows that New York courts continue to adopt Delaware decisional law in cases involving business entities.[107]

C. Dissolution

Kassab v. Kasab is a reminder that, in a dissolution proceeding, using corporate funds to pay legal fees in opposition to the dissolution proceeding is not in the "ordinary course of business."[108]

Nissim Kassab, who owned twenty-five percent of Corner 160 Associates, Inc. ("Corner"), brought a "hybrid proceeding"[109] against his brother, Avraham Kasab, who owned the other seventy-five percent of

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106. *Id.* at 279, 52 N.E.3d at 221, 32 N.Y.S.3d at 558 (first citing *MFW*, 88 A.3d at 648–49; and then citing Marx v. Akers, 88 N.Y.2d 189, 202, 666 N.E.2d 1034, 1042–43, 644 N.Y.S.2d 121, 129–30 (1996) (finding that in a shareholder derivative action alleging that the directors of a corporation voted to set their own compensation as directors at an excessively high level, the directors were not disinterested and therefore demand upon the board was excused)).

107. *See, e.g.*, *In re* 1545 Ocean Ave., LLC, 72 A.D.3d 121, 128, 893 N.Y.S.2d 590, 595 (2d Dep't 2010) (citing Red Sail Easter, L.P., v. Radio City Music Hall Prods., Inc., No. 12036, 1992 Del. Ch. LEXIS 203, at *16–*17 (Del. Ch. 1992) (following Delaware law regarding whether a limited liability company should be subject to judicial dissolution under N.Y. LTD. LIAB. CO. LAW § 702 (McKinney 2016) on the grounds that "it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement")).

108. (*Kassab I*), 137 A.D.3d 1141, 1142, 27 N.Y.S.3d 683, 685 (2d Dep't 2016) ((first citing Boucher v. Carriage House Realty Corp., 105 A.D.3d 951, 952, 962 N.Y.S.2d 718, 719 (2d Dep't 2013); then citing *In re* Park Inn Ford, Inc., 249 A.D.2d 307, 307, 671 N.Y.S.2d 288, 289 (2d Dep't 1998); then citing *In re* Penepent Corp., 198 A.D.2d 782, 783, 605 N.Y.S.2d 691, 692 (4th Dep't 1993); then citing *In re* Dissolution of Pub. Relations Aids, Inc., 109 A.D.2d 502, 511, 492 N.Y.S.2d 736, 742 (1st Dep't 1985); and then citing Reinschreiber v. Lipp, 70 A.D.2d 596, 596, 416 N.Y.S.2d 31, 32 (2d Dep't 1979)).

109. *Id.* at 1141, 27 N.Y.S.3d at 685. Nissim was also bringing actions to dissolve a limited liability company, which actions are discussed in two companion decisions, also titled *Kassab v. Kasab*. 137 A.D.3d 1135, 29 N.Y.S.2d 39 (2d Dep't 2016); 137 A.D.3d 1138, 27 N.Y.S.2d 680 (2d Dep't 2016). The two companion decisions involve the dissolution of a limited liability company and are discussed in Part IV(B) of this article. In all three decisions, the petitioner's last name "Kassab" is spelled with two *s*'s, and the respondent's last name "Kasab" is spelled with one *s*.

Corner.[110] The proceeding included a petition under § 1104-a of the BCL[111] for dissolution of Corner.[112] In 2013, at an earlier stage of the proceeding, the supreme court had issued a temporary restraining order prohibiting Avraham from any transfer of "property of [Corner], except in the ordinary course of business."[113] While this temporary restraining order was in effect, Avraham spent funds from Corner to pay his legal fees in the dissolution proceeding.[114] Nissim moved to hold Avraham in civil contempt for violating the temporary restraining order.[115]

Affirming the decision of the trial court, the Second Department held that Avraham should, for civil contempt, pay a fine of $250 and pay to Nissim attorney's fees and costs of $25,045.[116] The Second Department held that Avraham had "disobeyed a lawful order of the supreme court, clearly expressing an unequivocal mandate, with knowledge of its terms . . . ."[117] Significantly for this *Survey*, the Second Department added a further decision in the line of cases holding that "legal fees incurred by a shareholder in defending a dissolution proceeding are not payable with corporate funds as expenses occurred in the ordinary course of business."[118]

IV. LIMITED LIABILITY COMPANIES (LLCS)

A. Operating Agreement

Shapiro v. Ettenson illustrates the dangers of doing business as an

110. *Kassab I*, 137 A.D.3d at 1141, 27 N.Y.S.3d at 685.

111. *Id.* at 1141, 27 N.Y.S.3d at 684 (citing N.Y. BUS. CORP. LAW § 1104-a (McKinney 2003)).

112. *Id.*

113. *Id.* at 1141–42, 27 N.Y.S.3d at 685 (internal quotations omitted).

114. *Id.* at 1142, 27 N.Y.S.3d at 685.

115. *Kassab I*, 137 A.D.3d at 1142, 27 N.Y.S.3d at 685.

116. *Id.* at 1142, 27 N.Y.S.3d at 685–86.

117. *Id.* at 1142, 27 N.Y.S.3d at 685.

118. *Id.* (first citing Boucher v. Carriage House Realty Corp., 105 A.D.3d 951, 952, 962 N.Y.S.2d 718, 719 (2d Dep't 2013) (denying payment out of corporate funds to counsel defending the corporation in a dissolution proceeding under BCL § 1104-a); then citing *In re* Park Inn Ford, Inc., 249 A.D.2d 307, 307, 671 N.Y.S.2d 288, 289 (2d Dep't 1998) (enjoining a two-thirds majority shareholder from using corporate funds to pay counsel to defend against a dissolution proceeding); then citing *In re* Penepent Corp., 198 A.D.2d 782, 783, 605 N.Y.S.2d 691, 692 (4th Dep't 1993) (preventing a respondent in a BCL § 1104-a proceeding from using corporate funds to reimburse legal costs); then citing *In re* Dissolution of Pub. Relations Aids, Inc., 109 A.D.2d 502, 511, 492 N.Y.S.2d 736, 742 (1st Dep't 1985) (holding that corporate funds could not be used to pay a fifty-percent shareholder's legal expenses incurred prior to his exercise of a buy-out option under BCL § 1118); and then citing Reinschreiber v. Lipp, 70 A.D.2d 596, 596, 416 N.Y.S.2d 31, 32 (2d Dep't 1979) (denying use of corporate funds to reimburse a faction for its attorney's fees in defense of dissolution proceedings)).

LLC without a written operating agreement.[119]

Robert Shapiro, Gabriel Ettenson, and David Newman formed ENS Health, LLC (ENS) under New York law as a member-managed LLC, of which each owned one-third, but at the time of formation the three members did not agree upon the terms of a written operating agreement.[120]

After inconclusive negotiations among the members regarding the proposed operating agreement, on December 13, 2013, Ettenson and Newman told Shapiro that Ettenson and Newman had adopted an Operating Agreement for ENS, notwithstanding the absence of consent by Shapiro.[121] This Operating Agreement provided that: (1) Shapiro, Newman, and Ettenson were the Managers of ENS; (2) ENS would be managed by the Managers; (3) each of the three Managers had equal management rights; (4) any action by ENS could be taken by vote of two out of the three Managers; and (5) any action by the Members of ENS could be taken by Members whose aggregate interests in ENS exceeded fifty percent.[122] The Operating Agreement also provided that, if a majority of the Members determined that additional capital was necessary to conduct ENS's business, then they could make a capital call upon all of the Members;[123] thereafter, "if any Member fail[ed] to make his proportionate contribution of additional Capital Contributions," then the membership interests of the Members would "be adjusted proportionally."[124] On December 23, 2013, Newman filed an amendment to ENS's Articles of Organization with the New York Department of State to change ENS from being member-managed to being manager-managed.[125]

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119. No. 653571/2014, 2015 N.Y. Slip Op. 31670(U) (Sup. Ct. N.Y. Cty. Aug. 16, 2015), *aff'd in part and modified in part*, 146 A.D.3d 650, 45 N.Y.S.3d 439 (1st Dep't 2017) (discussing the risks of operating as an LLC without a written operating agreement).

120. *Id.* at 2.

121. *Id.*

122. *Id.* at 3.

123. *Id.*

124. *Shapiro*, 2015 N.Y. Slip Op. 31670(U), at 3 (quoting from the company's Operating Agreement). The *Shapiro* opinion does not state whether the Operating Agreement contained a formula for how the "proportional" adjustments would be made. *See id.* In a similar case, *Abuy Development, LLC v. Yuba Motorsports, Inc.*, involving the failure of a member of a two-member Delaware LLC to make a capital contribution, the court adjusted the percentage interests of the LLC members to match the change which occurred in their respective capital accounts when one member made the capital contribution and the other member did not. No. 4:06CV799SNL, 2008 U.S. Dist. LEXIS 31331, at *12–13 (E.D. Mo. Apr. 16, 2008). In *Abuy Development*, however, the limited liability company agreement expressly called for the adjustment to be proportionate to the change in the members' capital accounts. *Id.*

125. *Shapiro*, 2015 N.Y. Slip Op. 31670(U), at 4. Section 408(a) of LLC law provides that, if an LLC is to be managed by managers rather than by members, then the articles of organization filed with the Secretary of State must so provide. N.Y. LTD. LIAB. CO. LAW

In October 2014, Newman and Ettenson, at a meeting with Shapiro, voted to reduce Shapiro's salary to zero dollars and to make a capital call from each member for $10,000 each, payable by November 21, 2014.[126] The capital call stated that, if any member failed to pay the capital call, then other members could pay the deficiency and that each member's interest in ENS would then be "adjusted proportionally."[127]

Shapiro brought a complaint seeking (1) a declaration that the Operating Agreement and capital call were null and void and that no member could receive a salary unless all members consented, and (2) damages for outstanding salary owed to Shapiro.[128] Shapiro stated that he had never agreed to any of this, and that the three members had agreed orally that all material decisions must be unanimous.[129]

As the court analyzed Shapiro's complaint, it ultimately made no difference whether or not there had been an oral agreement among the three members requiring unanimity.

At the outset, the court observed that § 102(u) of LLC law defines "operating agreement as any written agreement of the members concerning the business of a limited liability company and the conduct of its affairs. . ."[130] The court then cited *Matter of 1545 Ocean Avenue, LLC*, for the proposition that "where an operating agreement . . . does not address certain topics, a limited liability company is bound by the default requirements set forth in the Limited Liability Company Law."[131]

Unlike *1545 Ocean Avenue*, where the members had agreed upon an operating agreement which addressed some topics,[132] just not the topics at issue in that case, in the *Shapiro* case the three members did not have any agreement.[133] Section 417 of LLC Law requires the operating agreement to be entered into no later than ninety days after the filing of the articles of organization.[134] The LLC Law does not contain any provision regarding what is supposed to happen if the members do not enter into an operating agreement before the end of the ninety-day period.[135]

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§ 408(a) (McKinney 2016).

126. *Shapiro*, 2015 N.Y. Slip Op. 31670(U), at 4–5.

127. *Id.* at 5.

128. *Id.* at 1.

129. *Id.* at 9.

130. *Id.* at 5 (internal quotations omitted) (quoting N.Y. LTD. LIAB. CO. LAW § 102(u) (McKinney 2016)).

131. *Shapiro*, 2015 N.Y. Slip Op. 31670(U), at 5 (quoting *In re* 1545 Ocean Ave., LLC, 72 A.D.3d 121, 129, 893 N.Y.S.2d 590, 596 (2d Dep't 2010)).

132. *In re 1545 Ocean Ave.*, 72 A.D.3d at 129, 893 N.Y.S.2d at 596.

133. *Shapiro*, 2015 N.Y. Slip Op. 31670(U), at 2.

134. N.Y. LTD. LIAB. CO. LAW § 417(c) (McKinney 2016).

135. *Shapiro*, 2015 N.Y. Slip Op. 31670(U), at 8–9 (citing Spires v. Lighthouse Sols.,

The applicable default provisions of the LLC Law provided for rule by the majority. Section 402 of the LLC Law provides that, "[e]xcept as provided in the operating agreement," members act by a majority vote in interest of the members' votes, including when the articles of organization or the operating agreement are adopted or amended.[136] The LLC Law defines a "'[m]ajority in interest of the members' means unless otherwise provided in the operating agreement, the members whose aggregate share of the current profits of the limited liability company constitutes more than one-half of the aggregate of such shares of all members."[137] Therefore, said the court, Ettenson and Newman as owners of two-thirds of the membership interests of ENS had authority to adopt an operating agreement and to amend the articles of organization to make ENS a manager-managed LLC.[138]

Shapiro protested that there was an oral agreement among the members in place that all material decisions would be made by unanimous vote.[139] The court answered that an oral agreement could not displace any of the default provisions in the LLC Law: "The LLC Law defines "[o]perating agreement" as "any *written* agreement of the members concerning the business of a limited liability company and the conduct of its affairs . . . ."[140] Prior to the Operating Agreement, there was no "written" operating agreement, and, therefore, the default provisions of the LLC Law controlled. Once the Operating Agreement was adopted, it became the operative, "written" agreement for ENS.[141] Assuming that Shapiro could have proven the existence of an oral agreement, it would have made no difference.

Once Newman and Ettenson had adopted the operating agreement, they were authorized by that operating agreement to eliminate Shapiro's salary and to make a capital call.[142]

Shapiro v. Ettenson shows that, on any subject where the default provisions of the LLC Law apply, there is no room for an oral agreement "concerning the business of a limited liability company and the conduct of its affairs."[143] A question still undecided by the courts is whether an

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LLC, 4 Misc. 3d 428, 431, 778 N.Y.S.2d 259, 262 (Sup. Ct. Monroe Cty. 2004) (finding that where there was no agreement concerning dissolution of the LLC, grounds for dissolution were provided by default provisions of LLC Law)).

136. N.Y. LTD. LIAB. CO. LAW § 402(c) (McKinney 2016).

137. N.Y. LTD. LIAB. CO. LAW § 102(o) (McKinney 2016).

138. *Shapiro*, 2015 N.Y. Slip Op. 31670(U), at 7–8.

139. *Id.* at 9.

140. *Id.* at 7 (alteration in original) (emphasis added).

141. *Id.* at 9 (quoting LTD. LIAB. CO. § 102(u)).

142. *Id.* at 11.

143. *Shapiro*, 2015 N.Y. Slip Op. 31670(U), at 9.

oral agreement "concerning the business of a limited liability company and the conduct of its affairs"[144] can be enforceable where the subject matter of that oral agreement is *not* covered by the default provisions of the LLC Law, or whether such an agreement would violate LLC Law § 102(u) because it is not written.

B. Dissolution

Two decisions, both titled *Kassab v. Kasab*, show continued strict construction of the requirements for a judicial dissolution of a limited liability company.[145]

Nissim Kassab, the owner of a twenty-five percent membership interest in a limited liability company named Mall 92-30 Associates, LLC, tried several approaches to separate the value of his interest from the control of his brother Avraham Kasab, who owned the other seventy-five percent membership interest.[146]

Nissim petitioned to dissolve the LLC under § 702 of the LLC Law "and recover the 'fair value' of his membership interest in the LLC."[147] Nissim alleged that his brother Avraham engaged in oppressive conduct, and, in particular, was attempting to exclude Nissim from management of the LLC and was failing to pay Nissim his share of income earned by the LLC.[148]

If true, these allegations were not sufficient grounds for dissolving the LLC. The Second Department confirmed the trial court's dismissal of this petition, citing the two-pronged test for dissolution that the Second Department set forth in the *In re 1545 Ocean Avenue* case:

> the petitioner's allegations, if true, would not establish that "the management of the entity is unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved, or [that] continuing the entity is financially unfeasible."[149]

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144. LTD. LIAB. CO. § 102(u).

145. (*Kassab II*), 137 A.D.3d 1135, 29 N.Y.S.2d 39 (2d Dep't 2016); (*Kassab III*), 137 A.D.3d 1138, 27 N.Y.S.2d 680 (2d Dep't 2016). A third decision titled *Kassab v. Kasab*, 137 A.D.3d 1141, 27 N.Y.S.3d 683 (2d Dep't 2016), involving the same parties, is discussed in Part IV(A) of this article.

146. *Kassab II*, 137 A.D.3d at 1136, 29 N.Y.S.2d at 40. Mall 92-30 Associates, LLC was presumably organized under New York law, because the decision considered only the application of New York law to the dissolution. *See Entity Information*, N.Y. DEP'T STATE, https://appext20.dos.ny.gov/corp_public/CORPSEARCH.ENTITY _SEARCH_ENTRY (last visited May 16, 2018) (showing only one entry for entities named "Mall 92-30 Associates, LLC").

147. *Kassab II*, 137 A.D.3d at 1136, 29 N.Y.S.3d at 40 (citing N.Y. LTD. LIAB. CO. LAW § 702 (McKinney 2016)).

148. *Id.*

149. *Id.* at 1137, 29 N.Y.S.3d at 41 (quoting *In re* 1545 Ocean Ave., LLC, 72 A.D.3d 121,

The court observed that Nissim's allegations regarding the LLC operating agreement "establish[ed] that the stated purpose of the LLC did not include [his] participation in management decisions."[150] Had the operating agreement included an express reference to Nissim as a manager of the LLC, the case might have been decided differently.

The other possible ground for dissolution under the *1545 Ocean Avenue* test, that "continuing the entity is financially unfeasible," was not available precisely because the LLC was profitable: "Further, the petitioner's allegations that the respondent failed to pay him his share of income earned by the LLC, and regarding the value of the property owned by the LLC, if true, would show that the LLC was financially feasible."[151]

This decision also addressed Nissim's attempt to obtain his share of the LLC by withdrawing from the LLC, in accordance with § 606(a) of the LLC law.[152] Section 606(a) provides, in relevant part:

> A member may withdraw as a member of a limited liability company only at the time or upon the happening of events specified in the operating agreement and in accordance with the operating agreement. Notwithstanding anything to the contrary under applicable law, unless an operating agreement provides otherwise, a member may not withdraw from a limited liability company prior to the dissolution and winding up of the limited liability company.[153]

Although the term "withdrawal" is not defined in the LLC law, Nissim claimed that he should be able to withdraw from the LLC and "recover the 'fair value' of his membership interest in the LLC."[154] The court held that § 606(a)

> prohibits the withdrawal of a member prior to dissolution of the LLC unless the operating agreement expressly provides otherwise, and [Nissim's] allegations concerning the subject operating agreement, if true, would establish only that withdrawal of a member was permitted

131, 893 N.Y.S.2d 590, 598–99 (2d Dep't 2010)) (first citing Barone v. Sowers, 128 A.D.3d 484, 485, 10 N.Y.S.3d 22, 24 (1st Dep't 2015) (finding that the petitioner failed to show that the *In re 1545 Ocean Ave.* test had been met); and then citing Doyle v. Icon, 103 A.D.3d 440, 440, 959 N.Y.S.2d 200, 201 (1st Dep't 2013) (denying dissolution where, after the petitioner's expulsion, the LLC continued to carry on its business profitably)).

150. *Id.* (citing *In re* Eight of Swords, LLC, 96 A.D.3d 839, 840, 946 N.Y.S.2d 248, 249–50 (2d Dep't 2012) (denying dissolution where the primary purpose of a two-member LLC was to operate a tattoo shop, and the nonpetitioning LLC member was continuing to work there as the primary tattoo artist)).

151. *Id.* (citing *Doyle*, 103 A.D.3d at 440, 959 N.Y.S.2d at 201).

152. *Kassab II*, 137 A.D.3d at 1136, 29 N.Y.S.2d at 40 (citing N.Y. LTD. LIAB. CO. LAW § 606(a) (McKinney 2016)).

153. LTD. LIAB. CO. § 606(a).

154. *Kassab II*, 137 A.D.3d at 1136, 29 N.Y.S.2d at 40.

"in accordance with the [Limited Liability Company Law]."[155]

Thus, in order to permit Nissim to withdraw, the operating agreement would have had to contain some express grounds of permission, which, according to the court, it did not.[156]

A companion decision by the Second Department in *Kassab v. Kasab*, involving the same dispute, included consideration of Nissim's causes of action "for an 'equitable buyout' of his" LLC membership interest, and "for rescission of the LLC's operating agreement."[157]

The Second Department noted that buyouts had been authorized in the Second Department's dissolution decisions in *Mizrahi v. Cohen* and *In re Superior Vending, LLC*.[158] The court, however, held that dissolution must first be ordered, before a buyout will be considered.[159] In the present dispute, Nissim failed to state a cause of action for dissolution under LLC law § 702, and hence "there [was] no basis for the equitable remedy of a buyout."[160]

With regard to Nissim's cause of action to rescind the LLC operating agreement, the court noted that, "[a]s a general rule, rescission of a contract is permitted 'for such a breach as substantially defeats its purpose.'"[161] In this case, Nissim had not alleged facts showing such a breach.[162]

Nissim's causes of action for withdrawal from the LLC, or for rescission of the operating agreement,[163] were unsuccessful attempts to

155. *Id.* at 1137–38, 29 N.Y.S.3d at 41 (second alteration in original) (citing LTD. LIAB. CO. § 606(a)).

156. *Id.*

157. *Kassab III*, 137 A.D.3d 1138, 1139, 27 N.Y.S.3d 680, 682 (2d Dep't 2016).

158. *Id.* at 1140, 27 N.Y.S.3d at 682 (quoting *In re* Superior Vending, LLC, 71 A.D.3d 1153, 1154, 898 N.Y.S.2d 191, 192 (2d Dep't 2010) (holding that members consented to the judicial dissolution of the LLC and a buyout at a price fixed by the trial court was the most equitable method of liquidation)) (citing Mizrahi v. Cohen, 104 A.D.3d 917, 920, 961 N.Y.S.2d 538, 542 (2d Dep't 2013) (affirming an LLC's dissolution because continuing the LLC was financially unfeasible and buyout was an appropriate remedy)).

159. *Id.* at 1140, 27 N.Y.S.3d at 682–83 (citing *Kassab II*, 137 A.D.3d at 1137, 29 N.Y.S.3d at 41).

160. *Id.* (citing *Kassab II*, 137 A.D.3d at 1137, 29 N.Y.S.3d at 41).

161. *Id.* at 1140, 27 N.Y.S.3d at 683 (first quoting R.R. Chester, LLC v. Arlington Bldg. Corp., 22 A.D.3d 652, 654, 803 N.Y.S.2d 100, 101 (2d Dep't 2005) (finding that the defendants' substantial failure to perform a contract term, requiring them to electrify a steam railroad and which pervaded the entire contract, justified rescission); and then quoting Callanan v. Keeseville, Ausable Chasm & Lake Champlain R.R. Co., 199 N.Y. 268, 284, 92 N.E. 747, 752 (1910) (holding that the failure to make a $5,000 down payment on an $8,000,000 purchase price did not necessarily justify rescission)) (citing Willoughby Rehab. & Health Care Ctr. v. Webster, 134 A.D.3d 811, 813, 22 N.Y.S.3d 81, 84–86 (2d Dep't 2015)).

162. *Kassab III*, 137 A.D.3d at 1140, 27 N.Y.S.3d at 683.

163. *Id.* at 1139, 27 N.Y.S.3d at 682.

work around the difficult standard for dissolution set by LLC law § 702, as construed in *In re 1545 Ocean Ave., LLC*. A claim for rescission of the LLC operating agreement should not, however, weaken the standard for dissolution. If an LLC member can show "such a breach" of the operating agreement "as substantially defeats its purpose," then an LLC member can likely show that "the management of the entity is unable or unwilling to reasonably permit or promote the stated purpose of the entity" thus satisfying the *1545 Ocean Ave.* standard for dissolution.

V. VEIL PIERCING

The Court of Appeals confirmed the general principle in New York, that the shareholder of a corporation is not liable for the debts of the corporation, in *Finerty v. Abex Corp.*[164]

The plaintiff worked on Ford vehicles in Ireland and was exposed to asbestos.[165] In 1985, the plaintiff moved to New York, and years later "was diagnosed with peritoneal mesothelioma."[166] The plaintiff brought a lawsuit in strict liability for defective design and failure to warn against Ford Motor Company ("Ford USA"), Ford Motor Company, Ltd. ("Ford UK") and Henry Ford & Son, Ltd. ("Ford Ireland").[167] The asbestos-containing parts were manufactured and sold by Ford UK.[168]

The Court considered several potential grounds on which Ford USA might be liable. Ford USA provided guidance to Ford UK regarding the design of Ford vehicle components.[169] Absent manufacturing or selling of the components, however, the Court did not consider that involvement sufficient to make Ford USA potentially liable "under a strict liability theory."[170] Ford USA exercised control over its trademark, but the Court

164. (*Finerty II*), 27 N.Y.3d 236, 242, 51 N.E.3d 555, 559, 32 N.Y.S.3d 44, 48 (2016) (citing Billy v. Consol. Mach. Tool Corp., 51 N.Y.2d 152, 163, 412 N.E.2d 934, 941, 432 N.Y.S.2d 879, 885–86 (1980)).

165. *Id.* at 239, 51 N.E.3d at 557, 32 N.Y.S.3d at 46.

166. *Id.* The Court's opinion assumes that the reader will know the connection between a mesothelioma diagnosis and a lawsuit for asbestos exposure. *See, e.g.*, Ben Berkowtiz, *Special Report: The Long, Lethal Shadow of Asbestos*, REUTERS (May 11, 2012, 7:03 AM), https://www.reuters.com/article/us-usa-asbestos-lawsuits/special-report-the-long-lethal-shadow-of-asbestos-idUSBRE84A0J920120511; Jessica Karmasek, *Industry Upset With Risk of Higher Verdicts in New York's Asbestos Court*, FORBES (Oct. 17, 2017, 12:46 PM), https://www.forbes.com/sites/legalnewsline/2017/10/17/industry-upset-with-risk-of-higher-verdicts-in-new-yorks-asbestos-court/#10200014e9a7.

167. *Finerty II*, 27 N.Y.3d at 239, 51 N.E.3d at 557, 32 N.Y.S.3d at 46. The plaintiff consented to the dismissal of Ford Ireland from the lawsuit for lack of personal jurisdiction.

168. *Id.*

169. *Id.* at 241, 51 N.E.3d at 559, 32 N.Y.S.3d at 48.

170. *Id.* at 241–42, 51 N.E.3d at 559, 32 N.Y.S.3d at 48 (citing Sage v. Fairchild-Swearingen Corp., 70 N.Y.2d 579, 586, 517 N.E.2d 1304, 1307, 523 N.Y.S.2d 418, 421 (1987)).

did not think that Ford USA could be potentially liable when it did not issue directions regarding what warnings, if any, should or should not be placed on the packaging of Ford UK products.[171]

When the case was heard at the Appellate Division below, the Appellate Division found that Ford USA could potentially be liable because "Ford USA played 'a substantial role in the design, development, and use of the auto parts *distributed* by Ford UK."[172] That role could subject Ford USA to liability because "Ford USA's 'role in *facilitating the distribution* of the asbestos-containing auto parts'" would place Ford USA "in the best position to exert pressure on Ford UK and to warn end users of the hazards presented by the auto parts."[173] The Court of Appeals recognized that it had "routinely applied" strict liability to sellers on the grounds that they "are in the best position to pressure the manufacturers to create safer products."[174] With regard, however, to Ford USA, the Court rejected the "exert pressure" rationale by the statement, "Of course, as Ford UK's parent company, Ford USA could 'exert pressure' on Ford UK, but we have never applied that concept to a parent company's presumed authority over a wholly-owned subsidiary."[175] Rather, potential liability for the parent corporation would require a traditional reason for piercing the corporate veil:

> Ford USA, as the parent corporation of Ford UK, may not be held derivatively liable to [the] plaintiff under a theory of strict products liability unless Ford USA disregarded the separate identity of Ford UK and involved itself directly in that entity's affairs such that the corporate veil could be pierced.[176]

Finerty is an important example of the continuing willingness of New York courts to insulate shareholders from corporate liabilities.

VI. FOREIGN ENTITIES

Where is venue proper for an action against a foreign corporation doing business in New York? CPLR 503(a) provides that venue is proper

171. *Id.* at 242, 51 N.E.3d at 559, 32 N.Y.S.3d at 48.

172. *Finerty II*, 27 N.Y.3d at 242, 51 N.E.3d at 559, 32 N.Y.S.3d at 48 (quoting Finerty v. Abex Corp. (*Finerty I*), 125 A.D.3d 564, 565, 5 N.Y.S.3d 40, 41 (1st Dep't 2015)).

173. *Id.* (quoting *Finerty I*, 125 A.D.3d at 565, 5 N.Y.S.3d at 42).

174. *Id.* at 243, 51 N.E.3d at 560, 32 N.Y.S.3d at 49 (first citing Sukljian v. Charles Ross & Son Co., 69 N.Y.2d 89, 95, 503 N.E.2d 1358, 1360, 511 N.Y.S.2d 821, 823 (1986); then citing Jaramillo v. Weyerhaeuser Co., 12 N.Y.3d 181, 192, 906 N.E.2d 387, 394, 878 N.Y.S.2d 659, 666 (2009); then citing Godoy v. Abamaster of Miami, Inc., 302 A.D.2d 57, 63, 754 N.Y.S.2d 301, 307 (2d Dep't 2001); and then citing Nutting v. Ford Motor Co., 180 A.D.2d 122, 129, 584 N.Y.S.2d 653, 657 (3d Dep't 1992)).

175. *Id.* at 242–43, 51 N.E.3d at 560, 32 N.Y.S.3d at 49.

176. *Id.* at 242, 51 N.E.3d at 559, 32 N.Y.S.3d at 48 (citing Billy v. Consol. Mach. Tool Corp., 51 N.Y.2d 152, 163, 412 N.E.2d 934, 941, 432 N.Y.S.2d 879, 886 (1980)).

"in the county in which one of the parties resided when it was commenced."[177] CPLR 503(c) provides that "a foreign corporation authorized to transact business in the state, shall be deemed a resident of the county in which its principal office is located."[178] Decisions during the *Survey* period followed the rule that the "principal office" referred to in CPLR 503(c) is the same as the "office of a corporation" referred to in BCL § 102(a)(10),[179] and, in the case of a foreign LLC, is the same as the "office of the limited liability company" referred to in LLC Law § 102(s).[180] In each case the office is deemed to be located in the county designated in the foreign corporation's, or foreign LLC's, application for authority to do business in New York as a foreign corporation or LLC.[181] The entity does not have to have its actual principal place of business in that county, however, or even conduct any business in that county at all.[182]

During the *Survey* period, the plaintiff in *Carlton Group, Ltd. v. Property Markets Group, Inc.* brought an action in Queens County against several defendants for "breach of contract, tortious interference with contract, and to recover in quantum meruit for services rendered."[183] The basis for the plaintiff's choice of venue was that Queens County was where property owned by one of the defendants, QPS 23-10 Development, LLC (QPS) was located, and that Queens County was the location of QPS's principal place of business.[184]

The Second Department ordered that venue be moved to New York County, because, in QPS's application for authority to conduct business as a foreign limited liability company, which was filed with the New York State Department of State under § 802 of the LLC Law, New York County was listed as the county in which its principal office was located.[185]

The court stated that

177. N.Y. C.P.L.R. 503(a) (McKinney 2006). CPLR 304(a) provides that a lawsuit is commenced "by filing a summons and complaint or a summons with notice in according with rule [2102] . . . ." N.Y. C.P.L.R. 304(a) (McKinney 2010). CPLR 2102(a) provides that papers "shall be filed with the clerk of the court in which the action is triable." N.Y. C.P.L.R. 2102(a) (McKinney 2012). Thus, while CPLR 503(a) states where a trial shall be held, the lawsuit is commenced where the trial shall be held. For this reason, CPLR 503(a) is the applicable venue statute for commencing a lawsuit.

178. N.Y. C.P.L.R. 503(c).

179. N.Y. BUS. CORP. LAW § 102(a)(10) (McKinney 2003).

180. N.Y. LTD. LIAB. CO. LAW § 102(s) (McKinney 2016).

181. BUS. CORP. § 102(a)(10); LTD. LIAB. CO. § 102(s).

182. *See* BUS. CORP. § 102(a)(10); LTD. LIAB. CO. § 102(a).

183. 134 A.D.3d 1018, 1018–19, 21 N.Y.S.3d 704, 704 (2d Dep't 2015).

184. *Id.* at 1019–20, 21 N.Y.S.3d at 705.

185. *Id.* at 1020, 21 N.Y.S.3d at 705–06.

> the sole residence of a foreign corporation or a foreign limited liability company for venue purposes is the county where its principal office is located as designated in its application for authority to conduct business filed with the New York State Department of State, regardless of where it transacts business or maintains its actual principal office or facility.[186]

The court observed that, as provided in LLC Law § 102(s), the designated office "need not be a place where business activities are conducted by the [LLC]."[187]

As noted earlier in this *Survey*, there is some judicial movement toward assigning venue, in cases against a domestic corporation, to the office specified in the biennial statement filed under BCL § 408, rather than to the office specified in the certificate of incorporation.[188] A biennial statement under BCL § 408 is also required of foreign corporations.[189] However, no decision was reported by the end of this *Survey* period concerning the possible conflict, in the case of foreign corporations or LLCs, between the address in the biennial statement and the address in application to do business as a foreign entity.

CONCLUSION

In this *Survey* period, decisions which answer logically intricate questions of the laws of business associations particularly stand out. Also,

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186. *Id.* at 1020, 21 N.Y.S.3d at 705 (first citing N.Y. C.P.L.R. 503(c) (McKinney 2006); then citing American Builders & Contractors Supply Co. v. Capitaland Home Improvement Showroom, LLC, 128 A.D.3d 870, 871, 11 N.Y.S.3d 80, 82 (2d Dep't 2015) ("[T]he plaintiff [foreign corporation] was not a resident of Nassau County because it had designated New York County as the location of its principal office in the application for authorization to conduct business in New York that it had filed with the Secretary of State."); then citing Negron v. Nouveau Elevator Indus., Inc., 104 A.D.3d 655, 656, 961 N.Y.S.2d 229, 230 (2d Dep't 2013); then citing Johanson v. J.B. Hunt Transp., Inc., 15 A.D.3d 268, 269, 790 N.Y.S.2d 17, 18 (1st Dep't 2005); and then citing Ashjian v. Orion Power Holdings, Inc., 9 A.D.3d 440, 440, 779 N.Y.S.2d 924, 924 (2d Dep't 2004)). In *Johanson v. J.B. Hunt Transportation, Inc.*, the defendants were a foreign corporation and a foreign LLC defendant, each of whom designated New York County as the location of its office but objected to venue in New York County, in an accident case where the plaintiff was from Maryland, the accident occurred in Vermont, and the accident involved a truck driver from Schuyler County and a minivan driver from Dutchess County. *Johanson*, 15 A.D. at 269, 790 N.Y.S.2d at 18. The court adhered to the rule that the choice of county in the application for authority "constitute[s] [the] designation of its residence for venue purposes under CPLR 503(c)." *Id.* Note that in *American Builders* and *Johanson*, the foreign entity was attempting to place venue in a County other than the County in New York State which the entity itself had chosen as the location of its principal office. *American Builders*, 128 A.D.3d at 871, 11 N.Y.S.3d at 82; *Johanson*, 15 A.D.3d at 269, 790 N.Y.S.2d at 18.

187. *Carlton*, 134 A.D.3d at 1020, 21 N.Y.S.3d at 705 (first quoting N.Y. LTD. LIAB. CO. LAW § 102(s) (McKinney 2016); and then quoting Dyer v. 930 Flushing, LLC, 118 A.D.3d 742, 742, 987 N.Y.S.2d 206, 206 (2d Dep't 2014)).

188. *See supra* Part III(A).

189. N.Y. BUS. CORP. LAW § 408(3) (McKinney 2003 & Supp. 2018).

because the Legislature recently enacted an extension of BCL § 630 to foreign corporations, further questions await resolution by the courts.