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No. 64812-8-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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BERSCHAUER PHILLIPS CONSTRUCTION CO.,

Plaintiff/Appellant,

vs.

CONCRETE SCIENCE SERVICES OF SEATTLE, LLC, d/b/a  
CONCRETE SCIENCE SERVICES NW, et al.

Defendants.

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BRIEF OF JENNIFER FALLER

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COURT OF APPEALS  
DIVISION I  
JENNIFER FALLER

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2. Can a terminated limited liability company hold any property after it is terminated by the state or do allegedly “after-accrued” claims belong to its former members?
3. If such a claim exists and accrued in April 2005, does it still exist more than five years after it allegedly accrued in light of Minnesota’s two year statute of limitations for general tort claims?
4. Is the purported claim of the terminated limited liability company against the president of one of its members too uncertain to constitute “property” subject to attachment and execution in Washington in light of the fact that it has not been recognized by the controlling jurisdiction, that the purported owner of the claim has not existed since 2003 and cannot own property, that the purported claim if it existed would be personal to the former member, managers and governors of the former company, that the

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5. Does the public policy against allowing a litigation opponent to assert a judgment debtor's claims against the judgment debtor's representatives for acts or omissions relating to the litigation prohibit a judgment creditor from taking over a purported claim against the president of one of the opponent's members for conduct which occurred during the litigation?

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## I. ASSIGNMENTS OF ERROR

### *Assignments of Error*

Jennifer Faller assigns no error to the trial court's decisions.

### *Issues Pertaining to Assignments of Error*

Jennifer Faller disagrees with Plaintiff/Appellant Berschauer Phillips Construction Company's statement of issues pertaining to its assignments of error. Faller believes the issues on appeal are more properly stated as follows:

1. Does the State of Minnesota recognize a duty and claim by a limited liability company against the president of one its members who was not the company's agent for service of process for not notifying the terminated limited liability company's liability insurer of a lawsuit two years after the company was terminated based on the person's signing of a declaration for a litigant where the caption on the declaration identified the terminated company as one of the defendants?

2. Can a terminated limited liability company hold any property after it is terminated by the state or do allegedly "after-accrued" claims belong to its former members?

3. If such a claim exists and accrued in April 2005, does it still exist more than five years after it allegedly accrued in light of Minnesota's two year statute of limitations for general tort claims?

4. Is the purported claim of the terminated limited liability company against the president of one of its members too uncertain to constitute “property” subject to attachment and execution in Washington in light of the fact that it has not been recognized by the controlling jurisdiction, that the purported owner of the claim has not existed since 2003 and cannot own property, that the purported claim if it existed would be personal to the former member, managers and governors of the former company, that the purported claim was never asserted by the former company or any of its members, governors or managers, and that even if it existed it could not be asserted because it would be time-barred?

5. Does the public policy against allowing a litigation opponent to assert a judgment debtor’s claims against the judgment debtor’s representatives for acts or omissions relating to the litigation prohibit a judgment creditor from taking over a purported claim against the president of one of the opponent’s members for conduct which occurred during the litigation?

## **II. STATEMENT OF THE CASE**

Plaintiff/Appellant Berschauer Phillips Construction Co. (“BP”) is a general contractor which subcontracted with Defendant Concrete Science Services of Seattle, LLC (“CSS”) regarding repairs of prior construction defects at a school in June and July of 2002. (CP 108-126)

CSS was a Minnesota limited liability company. (CP 43) Its business was cleaning concrete floors. (CP 106) It was organized under the laws of the State of Minnesota on August 15, 2000, under Minn. Stat. § 322B (Minnesota's LLC Act). (CP 612) CSS had two members: Concrete Science Corporation and Surface Technology Systems, Inc. (CP 41-42) CSS's manager was Steven W. Hicks. (CP 41-24, 614, 615) CSS's board of governors had two governors: Steven W. Hicks and Norman A. Eckert. (CP 42)

BP's assertion that Jennifer Faller was personally a member of CSS is incorrect. She was the president and a stockholder in one of CSS's members (Surface Technology Systems, Inc.), but was not herself a member, governor, or agent for service of process on CSS. (CP 41-42, 43, 106, 204, 206).

**A. 2002 Construction Work.**

CSS's work on the 2002 school project consisted of removing a concrete stain which had previously been applied by others and failed to adhere to the concrete. (CP 106-113)<sup>1</sup> Faller participated in CSS's removal of the previous concrete stain. (CP 106-114) Removal of the prior stain proved much more difficult and costly than CSS had anticipated. CSS

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<sup>1</sup> The signature for this declaration is at CP 126.

charged BP approximately \$2.00 per square foot to remove the prior stain, but its labor costs alone proved to be four times higher. (CP 109) As a result, CSS went broke and ceased operations in 2002. (CP 106, 109)

After CSS removed the previous stain, BP purchased a new concrete stain manufactured by Defendant Vexcon Chemicals. (CP 110) BP contracted with Defendant Paul M. Wolff Company to apply the new Vexcon stain. (CP 110) After the new Vexcon stain was applied in the summer of 2002, it also failed to adhere to the concrete. (CP 110-112) This occurred because, unbeknownst to Faller or CSS, the floors had previously been sealed by others with silicone – a substance incompatible with the Vexcon stain or any other coating (CP 114, 125). BP was aware of the presence of silicone and unsuitability of the surface for application of coatings from its own expert's analysis before the Vexcon stain was applied, but it did not inform Faller or CSS about it. (CP 113, 114, 125)

#### **B. Dissolution and Termination of CSS.**

CSS stopped doing business in 2002, shortly after its work on the school project for BP because it went broke. (CP 106, 109) On July 1, 2003, its members and governors voted to dissolve CSS (CP 41-42) and its Manager, Steven W. Hicks, executed a Notice of Dissolution (CP 43). There were no pending legal, administrative or arbitration proceedings by or against CSS at that time. (CP 615) BP had not made any claim against CSS at that

time and the company was insolvent. CSS's Manager, Hicks, distributed any and all remaining property of CSS to its members. (CP 41, 615)

On September 12, 2003, Hicks filed the Notice of Dissolution and Articles of Termination with the Minnesota Secretary of State. (CP 614, 615). The Minnesota Secretary of State issued a Certificate of Termination, also on September 12, 2003. (CP 617) The Certificate of Termination provided that "the existence of the limited liability company is terminated as of this date." (CP 617)

**C. BP Claim Against CSS and Default Judgment.**

BP commenced suit against CSS and other subcontractors who worked on the project in March 2004. (CP 35) Although CSS had previously been terminated by the State of Minnesota, BP did not apply to any court in Minnesota to reopen a claim against CSS or to recover distributions to members as part of the termination, as provided by Minnesota law (Minn. Stat. § 322B.863 (subd. 2)).

BP obtained an order of default and default judgment against CSS in the State of Washington on August 31, 2005. (CP 1) BP's claims against all other parties were dismissed on summary judgment. BP never named nor joined Faller as a party in this matter and asserted no claims against her.

In September 2005, after obtaining the default judgment, BP's lawyers notified CSS's insurer, Mutual of Enumclaw Insurance Company

(“MOE”), of the lawsuit and default judgment and demanded payment. (CP 167) MOE retained attorneys Scott Clement and John Drotz to appear for CSS. (CP 170) Clement and Drotz brought a motion to set aside the default judgment. (CP 12) BP successfully opposed this motion, arguing that there was no ground to set aside the default. (CP 152; 232) Clement and Drotz pursued an appeal. BP successfully opposed the appeal. (CP 256)

**D. Purported Claim/Chose of Action of CSS Against Faller.**

Though Faller was not CSS’s agent for service of process, BP’s brief alleges that CSS has a chose of action against Faller for failing “to give MOE [Mutual of Enumclaw] notice of the lawsuit against CSS.” (BP Brief, p. 31) BP alleges that this duty arose out of the fact that Faller became aware of the lawsuit when she signed a declaration for another party’s motion for summary judgment because the declaration she signed listed CSS in the case caption. (*Id.*, p. 14) BP alleges that this purported claim “accrued around April 4, 2005, the date on which Ms. Faller executed her declaration.” (*Id.*)

BP’s brief contains no reference to any authority that such a claim exists. Neither CSS nor any of its members, governors or Manager has ever instituted or otherwise made a claim or brought any legal action of any kind against Faller, nor has any expressed any intent to do so. (CP 634)

BP took its first step toward executing on the purported claim/chose of action of CSS against Faller on December 2, 2009, when it obtained an *ex*

*parte* writ of execution directing the Thurston County Sheriff's Department to levy and sell CSS's "claims against its registered agent [sic], Jennifer Faller." <sup>2</sup> (CP 627-629) This was more than seven years after the construction project, more than six years after CSS was terminated, and more than four and a half years after the alleged accrual date.<sup>3</sup>

Faller moved to quash the writ of execution and sheriff's sale insofar as it related to purported claims against her. (CP 632) The Superior Court, the Honorable Paris Kallas, quashed the writ and sheriff's sale. (CP 861-862)<sup>4</sup> Judge Kallas ruled that, as a result of the termination of CSS, there was no property of CSS that was capable of being executed upon, and that the purported claims were so uncertain that they are not subject to execution. (CP 861-862)

### III. SUMMARY OF ARGUMENT

Faller agrees with and incorporates by reference the legal arguments and authorities set forth in MOE's and Clement and Drotz' response briefs.

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<sup>2</sup> Jennifer Faller was never CSS's registered agent. CSS's registered agent in Washington was CT Corporation. (CP 204, 206)

<sup>3</sup> BP's brief states that BP "believes" it obtained an earlier writ of execution as to claims against Faller in June 2009, but concedes that "the record does not reflect this fact." (BP Brief, p. 9) This time period was also more than four years after the April 2005 accrual date of the purported CSS claim against Faller.

<sup>4</sup> The court also quashed writs and sheriff's sales as to purported claims of CSS against MOE, Clement and Drotz. (CP 607-608; 861-862)

The purported claim/chose of action of CSS against Faller is not “property” which can be sold in an execution sale. Minnesota law governs the property, dissolution and termination of CSS and the relationship between CSS and Faller. Minnesota law does not recognize a claim of CSS against Faller for not notifying CSS’s insurer of BP’s lawsuit against CSS when, approximately two years after CSS was terminated, she signed a declaration for another party which contained a caption listing CSS as a party. If such a claim were recognized, it allegedly arose after CSS was terminated and could not hold property, the only persons who have the right to assert it would be CSS’s former managers, governors and members, it was never asserted by anyone who might have a right to assert it, and it would be time barred.

The alleged failure of CSS to comply with the winding up procedure did not nullify the termination of CSS. Minnesota’s LLC Act provides post-termination remedies to creditors in the case of illegal distributions or failure to provide for creditor claims during the winding up process. BP did not avail itself of these opportunities and the time under which such remedies are permitted has long since expired.

Under Washington law, not every right nor every “chose in action” is sufficiently certain to constitute “property” subject to attachment and execution. The right and action must have some indicia of certainty and have been commenced by the party in interest. When the rights are personal to the

debtor, the debtor must have taken some action to exercise the right, such as making a claim or asserting the right, before the claim or right can be executed upon. The purported claim against Faller is uncertain because it is not recognized at law, if it exists it belongs to and can only be asserted by CSS's former managers, members, and governors, and it is time-barred.

Moreover, public policy does not permit a litigation opponent to assert a judgment debtor's claims against the judgment debtor's representatives for acts or omissions relating to the litigation

#### **IV. ARGUMENT**

##### **A. The Purported Claim/Chose of Action of CSS Against Faller Is Not "Property" Which Can Be Sold in an Execution Sale.**

The purported claim and chose of action of CSS against Faller is not "capable of being converted into a judgment" and, therefore, is not "property" which can be levied against under RCW 6.17.090.

##### **1. The Purported Claim of CSS Against Faller Does not Exist.**

BP cites no authority that the purported claim of CSS against Faller exists, nor that she owed any legally cognizable duty to CSS to notify CSS's insurer of BP's lawsuit against CSS at any time merely because she signed a declaration which bore a caption listing CSS as a defendant, much less after the company was terminated and she no longer had any association with it.

Under RCW 25.15.005(3)(a), CSS was a “foreign limited liability company” because it was an entity that was formed under the LLC laws of Minnesota. With respect to foreign LLCs, RCW 25.15.310(1)(a) provides that “[t]he laws of the state . . . under which a foreign limited liability company is organized govern its organization and internal affairs and the liability of its members and managers[.]”<sup>5</sup>

It is not surprising that BP can cite no authority for the existence of a purported cause of action of CSS against Faller. Protecting agents, officers and investors from personal liability related to the LLCs is a fundamental purpose of LLC laws. Minnesota’s LLC Act is no different. Under Minnesota’s Act, an agent of an LLC is generally protected from personal liability unless there is a basis under Minnesota case law for piercing the corporate veil. Minn. Stat. § 322B.303(subd. 1) (“a member, governor, manager or other agent of a limited liability company is not, merely on account of this status, personally liable for the acts, debts, liabilities, or obligations of the limited liability company.”) “Indeed, the avoidance of personal liability is a legitimate reason for forming a limited liability company.” *Krueger v. Zeman Constr. Co.*, 758 N.W. 881, 890 (Minn. 2008).

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<sup>5</sup> Minnesota’s LLC Act has a complementary comity clause. *See* Minn. Stat. § 322B.23.

The only exception is where the corporate veil is permitted under Minnesota case law. Minn. Stat. § 322B.303(subd. 2). A court may pierce the corporate veil to hold a party liable for the acts of a corporate entity if the entity is used for a fraudulent purpose or the party is the alter ego of the entity. *Victoria Elevator Co. v. Meriden Grain Co.*, 283 N.W.2d 509, 512 (Minn. 1979).

BP alleges that Faller failed to notify CSS's insurer of BP's 2004 lawsuit against CSS almost two years after CSS and her association with it was terminated, but this allegation does not constitute fraud nor of using the entity as an alter ego. Thus, to the extent she was an agent of CSS, Faller is protected from liability from all other acts under Minnesota law, not exposed to it.

Moreover, Faller was not personally a member, governor, Manager or agent for service of process of CSS. (CP 41-43, 204, 206) There is nothing in Minnesota's LLC Act or other law which imposed upon her a duty to notify BP's insurer when she signed a declaration in April 2005 which listed CSS as a party defendant. The purported claim/chose of action of CSS against Faller simply does not exist. The Superior Court did not err in quashing the order which purported to sell a non-existent claim/chose of action against Faller.

**2. As a Terminated Entity, CSS Does not Exist, Has No Property and Can Hold No Property; Only Its Former Managers, Governors and Members May Bring Claims in CSS's Name.**

CSS went broke. There is no evidence in the record that it had any property after it went out of business in 2002. But even if it did, CSS was divested of any and all property after CSS dissolved, as required by Minnesota's LLC Act. (CP 615)

CSS was dissolved after it was started up and initial capital contributions had been made. After notice of dissolution, CSS's board of governors was required to wind up and terminate CSS. Minn. Stat. § 322B.80 (subd. 2, paragraph 4). The board was required to dispose of all of CSS's property as part of the winding up process by collecting all known debts owed to CSS, paying all known liabilities owed by CSS and distributing any and all remaining property to CSS's members. Minn. Stat. § 322B.813.

All tangible or intangible property, including money, remaining after the discharge of, the debts, obligations, and liabilities of the limited liability company must be distributed to the members in accordance with sections 322B.52 [which provides that members have no right to received distributions in any form other than cash except as provided in the articles of organization or a member control agreement] and 322B.873 [setting a priority of disposition upon liquidation].

Minn. Stat. § 322B.813 (subd. 5) (emphasis added).

CSS was in fact divested of any and all remaining property during the winding up process. (CP 615) Thus, as required by law, CSS no longer had any property -- tangible or intangible -- upon its termination. The Minnesota Secretary of State issued the certificate of termination on September 12, 2003. (CP 617)

After termination, a limited liability company no longer exists. Minn. Stat. § 322B.81 (subd 2) (“The limited liability company existence continues to the extent necessary to wind up the affairs of the limited liability company *until the dissolution is revoked or articles of termination are filed with the secretary of state.*”) (emphasis added); Minn. Stat. § 233B.826 (“When the articles of termination have been filed with the secretary of state . . . the limited liability company is terminated.”); Minn. Stat. § 322B.75 (subd. 2, clause 3) (“‘Termination’ means the end of a limited liability company’s existence as a legal entity and occurs when a notice of termination is filed with the secretary of state under section 322B.826.”).

After termination, a limited liability company can no longer hold any property, tangible or intangible, including claims or choses of action against others. Minn. Stat. § 322B.813 (subd. 5) (“All tangible or *intangible property* . . . must be distributed”) (emphasis added); Minn. Stat. § 322B.82 (“The articles of termination must state: . . . (2) that the remaining property, assets *and claims* of the limited liability company have been distributed.”)

(emphasis added); Minn. Stat. § 322B.75 (subd. 2, clause 3) (“‘Termination’ means the end of a limited liability company’s existence as a legal entity”). If CSS ever had a claim against Faller, it was disposed of at or before CSS’s 2003 termination.

BP argues that CSS failed to provide for payment of its “claim” even though BP never asserted a claim against CSS prior to its termination. BP first asserted a claim against CSS when it commenced this lawsuit in 2004. It did not become a creditor until the default judgment was entered on August 31, 2005.

But BP’s claim against CSS is not the issue. BP asserted its claim in this lawsuit and obtained a judgment on its claim against CSS. Instead, the claim in issue in this appeal is the purported claim of CSS against Faller and others for allowing and/or failing to succeed in their attempt to get the judgment against CSS set aside.

BP argues that the purported claim against Faller accrued after CSS was terminated and, therefore, was not distributed when CSS’s business was wound up in 2003. But BP cites no authority that a limited liability company which no longer exists can acquire and hold property. This argument is inconsistent with statutes requiring that limited liability companies be divested of all property at or before their termination. It is also inconsistent with the statutes which provide that a terminated liability company no longer

exists as a legal entity after termination. The fact that there was no “subsequent distribution” to CSS’s members after any and all remaining property was distributed in 2003 is meaningless.

*Hurwitz v. Padden*, 581 N.W.2d 359 (Minn. Ct. App. 1998), does *not* hold that a limited liability company can obtain or hold assets after it has been terminated and no longer exists. *Hurwitz* concerns a dispute between law firm partners during the winding up phase and before termination as to contingency fees for cases acquired before the firm’s dissolution. *Id.* at 362.

BP also refers to *Faegre & Benson, LLP v. R&R Investors*, 772 N.W.2d 846 (Minn. Ct. App. 2009), another law partnership dissolution case. That law partnership was never a limited liability company and the decision contains no discussion or holding regarding terminated limited liability companies.

BP also refers to *Lamborn and Company v. United States*, 106 Ct. Cl. 703, 65 F. Supp. 569 (1946), *Daby v. Ericsson*, 45 N.Y. 786 (1871), and *Pagan v. Sparks*, 18 F. Cas. 976 (C.C. Pa. 1808), none of which has anything whatsoever to do with Minnesota laws, Minnesota’s LLC Act, or any uniform act relating to limited liability companies. None of these cases contains any discussion or holding suggesting that a terminated limited liability company continues to exist or can hold property after termination.

CSS no longer existed or held any property in late 2009 when BP obtained the *ex parte* order from the King County Superior Court to execute on and sell property purportedly possessed by CSS at that time (*i.e.* the alleged claims of CSS against Faller and others). While RCW 6.17.090 permits execution and sale of “property” of a judgment creditor, CSS simply had no “property” in late 2009. There was no point in authorizing the Thurston County Sheriff to auction off “property” of CSS which does not exist. In fact, permitting such an auction would assist in a fraud on unwitting buyers who would justifiably assume that something being sold by law enforcement under a court order actually exists. The Superior Court correctly quashed the order.

BP complains that CSS did not wait long enough after filing its notice of dissolution before filing its articles of termination. Even if that is true, BP’s extrapolation that CSS was “never terminated” is not true. The State of Minnesota did in fact terminate CSS (CP 617), its property was in fact disposed of (CP 615), and it had no “property” which could be executed on and sold in late 2009 or 2010.<sup>6</sup>

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<sup>6</sup> Washington law is similar. Washington’s LLC Act uses the term “cancellation” instead of “termination,” and Washington courts have held that cancellation ceases the existence of a limited liability company so that it cannot sue or be sued. *Chadwick Farms Owner’s Ass’n v. FHC, LLC*, 166 Wn.2d 178, 207 P.3d 1251, 1253-54 (2009) (“Under the plain terms of the Act, a limited liability company ceases to exist as a legal entity and cannot be

BP cites no authority for its assertion that a failure to follow procedures during the winding up process nullifies a termination. The statutory scheme does not contain any provision suggesting that the failure to follow a winding up procedure nullifies a termination or re-instates a terminated company. To the contrary, Minnesota's LLC Act provides remedies to creditors whose claims were not resolved prior to termination and for illegal distributions to members without nullifying or changing its terminated status. The Minnesota LLC Act permits creditors to reopen claims up to one year after articles of termination have been filed with the secretary of state in order to recover any property belonging to the dissolved company:

At any time within one year after articles of termination have been filed with the secretary of state pursuant to section 322B.816 or 322B.82, subdivision 1, clause (2), or a decree of termination has been entered, a creditor or claimant who shows good cause for not having previously filed the claim may apply to a court in this state to allow a claim:

(1) against the limited liability company to the extent of undisposed assets; or

(2) if the undisposed assets are not sufficient to satisfy the claim, against a member, whose liability is limited to a portion of the claim that is equal to the portion of the distributions to members in liquidation or termination received by the member, but in no event may a member's liability exceed the

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sued once its certificate of formation is cancelled. At the same time, it cannot sue other entities once it is canceled.”).

amount that the member actually received in the termination.

Minn. Stat. § 322B.863 (subd. 2). This statute permits a creditor to recover property after it is distributed to members *if* the creditor takes action within twelve months after termination.

BP did not avail itself of this remedy. BP commenced its suit against CSS in March 2004 – six months after CSS was terminated. BP obviously knew at that time that it has a claim against CSS. The fact that CSS had been terminated in 2003 was a matter of public record. BP could have but did not avail itself of the opportunity, within twelve months of termination, to reopen its claim and recover property that may have been distributed to members.

Minnesota's LLC Act also provides a remedy against governors and members for illegal distributions to members. *See* Minn. Stat. § 322B.54, -.55 and -.56. However, there is a statute of limitations which requires that any action for an illegal distribution must be brought within two years from the date of the distribution. Minn. Stat. § 322B.55 (subd. 2); Minn. Stat. § 322B.56 (subd. 2). BP did not avail itself of this remedy. It has been far more than two years since the 2003 disposition of CSS's property. It has also

been well over two years since the alleged April 2005 accrual of the purported claim against Faller.<sup>7</sup>

Finally, BP points to Minn. Stat. § 322B.866 (right to sue or defend after termination), which provides: “After a limited liability company has been terminated, any of its former managers, governors, or members may assert or defend, in the name of the limited liability company, any claim by or against the limited liability company.” This statute makes it clear that a terminated limited liability company itself and persons other than former managers, governors or members are not among the persons who are permitted to bring claims in the name of the company. This statute is entirely consistent with the statutory scheme of divesting a limited liability company of all property prior to termination and discontinued existence of the company as of the date of termination. Since the company no longer exists after termination and any remaining property has been distributed to its members, the limited liability company can no longer sue or defend. The

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<sup>7</sup> BP refers to Minn. Stat. § 322B.833 (judicial intervention), arguing that the court can “grant any equitable relief it considers just.” This statute must be read in conjunction with the related § 322B.836 (judicial intervention procedures). These statutes provide pre-termination remedies which permit courts to put a limited liability company into receivership, supervise the winding up process and judicially force dissolution, divestment of property and termination. These pre-termination remedies are irrelevant after termination. The post-termination remedies are set forth in Minn. Stat. §§ 322B.55, -.56 and -.863 and were discussed above.

persons who formerly had an interest in the company – its former managers, governors, or members – are given the right to assert or defend any claim by or against the terminated company. This section does not, as BP argues, authorize CSS to bring a lawsuit after termination. It only authorizes a former manager, governor or member to do so. Section 322B.866 in no way suggests that a terminated limited liability company can continue to exist or hold property after termination; it suggests the opposite.<sup>8</sup>

CSS could not legally hold any property after its 2003 termination. The right to bring any claims in CSS's name after its 2003 termination -- including the purported claim against Faller -- belongs to its former managers, governor and members -- not to CSS itself.

The Superior Court correctly quashed the order which directed the sheriff to sell non-existent property of CSS in 2010, including claims which, if they existed, could only be asserted by a former manager, governor or member of CSS and not by CSS itself.

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<sup>8</sup> BP meekly admits that its interpretation of Section 322B.866 does not fit with its argument that CSSS was never terminated. BP correctly notes that the statute, by its express terms, only applies after termination. (BP Opening Brief, p. 21)

**3. Any Claim of CSS against Faller for failing to Notify CSS's insurer of BP's 2004 Lawsuit Would Be Time-Barred.**

BP alleges that the purported claim of CSS against Faller for not reporting BP's lawsuit to CSS's insurer accrued by April 4, 2005, when Ms. Faller signed a declaration for another party's motion which listed CSS in the caption." (BP's Opening Brief, p. 14)

Even if such a claim were legally cognizable and could be brought by someone other than a former manager, governor or member of CSS, the statute of limitations would have expired by April 4, 2007. The general statute of limitations for torts in Minnesota establishes a two-year limitations period. Minn. Stat. § 541.07 (2 year limitations period applies to actions for torts and "for malpractice, error, mistake, or failure to cure, whether based on contract or tort"). Any claim by CSS against Faller, if it existed, was time barred. The Superior Court did not err in quashing the order directing the Thurston County Sheriff to execute and sell this purported claim in 2010.

**4. Un-Asserted, Uncertain Claims are Not Subject to Attachment or Execution in Washington.**

Under Washington common law, a writ of execution could not be levied against a chose in action. *Woody's Olympia Lumber, Inc. v. Roney*, 9 Wn. App. 626, 637, 513 P.2d 849 (1973).

RCW 6.17.090 (formerly RCW 6.04.060) provides that “All property, real and personal, of the judgment debtor that is not exempted by law is liable to execution.” Several Washington state courts have addressed the issue of whether some purported interests are so intangible, non-specific and uncertain that they do not constitute “property” which can be attached and executed upon. In *United Pac. Ins. Co. v. Lundstrom*, 77 Wn.2d 162, 459 P.2d 930 (1969), the court held that the debtor’s interest in a judgment of uncertain value was not “property” subject to execution. The court explained: “The basis for the rule is that such claims are contingent or uncertain and therefore the amount to become due on the claims cannot be determined until it is reduced to judgment.” 77 Wn.2d at 172. The court noted that at the time of the attachment it was uncertain whether a sum of money would ever be due from the judgment debtor to the person whose interest was being attached, and the problems of contingency, uncertainty, possibility and dependency that had caused most states to decree that such a claim cannot be attached were clearly present. 77 Wn.2d at 173.

In reaching this conclusion, the *Lundstrom* court distinguished an earlier decision, *Johnson v. Dahlquist*, 130 Wash. 29, 225 P.2d 817 (1924). In *Johnson*, a plaintiff sued a defendant to collect a \$1,700 debt. While that lawsuit was pending, the defendant obtained an award of costs against the plaintiff. To satisfy the defendant’s award of costs, the defendant executed

on the plaintiff's cause of action against him. The Supreme Court affirmed the execution. *Johnson* was different from *Lundstrom*, according to the court, because in *Johnson* the value of the attached cause of action would be mathematically ascertainable when judgment was rendered. This was not true in *Lundstrom*. *Lundstrom* holds that a claim is not subject to execution if it is not capable of being rendered certain upon judgment.

Since *Johnson* and *Lundstrom*, two other decisions have addressed what constitutes property subject to execution. In *Woody's Olympia Lumber, Inc. v. Roney*, 9 Wn. App. 626, the court held that a judgment creditor could attach a judgment debtor's unliquidated medical malpractice tort claim. At the time of the execution, the debtor had filed suit and the malpractice claim was pending in court. The court recognized that the debtor's actual claim made and asserted in court carried sufficient certainty to constitute "property."

In contrast, in *Safeco Ins. Co. v. Skeen*, 47 Wn. App. 196, 734 P.2d 41 (1987), the court held that the debtor's interest in stock appreciation rights (SAR's) were not "property" subject to execution. The court reasoned that the SAR's were purely personal to the debtor and could not bind his employer "unless and until [the debtor] should choose to exercise them." 47 Wn. App. at 201. *Accord In re Elliott*, 74 Wn.2d 600, 622, 446 P.2d 347 (1968) ("debtor's right to surrender a life insurance policy may not be attached:

“[T]he right of the insured to create such a debt by the exercise of the option is not an asset available to creditors, but is a right purely personal to the insured alone.”)

These decisions show that not every right nor every “chase in action” is sufficiently certain to constitute “property” subject to attachment and execution. The right and action must have some indicia of certainty and have been commenced by the party in interest. When the rights are personal to the debtor, the debtor must have taken some action to exercise the right, such as making a claim or asserting the right, before the claim or right becomes attachable. A mere personal expectancy is insufficient.

BP relies upon *Ikuno v. Yip*, 912 F.2d 306, 314-15 (9th Cir. 1990), where the Ninth Circuit interpreted Washington law as permitting execution of a corporation’s potential legal malpractice claim against the corporation’s lawyers despite the *Woody’s Olympia* decision’s suggestion that the claim must have already been commenced by the judgment debtor in order for it to be sufficiently certain to constitute “property” which can be executed upon. However, no Washington court has permitted execution on a legal claim that had not been commenced by the judgment debtor. The federal court’s interpretation is not binding precedent on matters of state law. Moreover, *Ikuno v. Yip* is no longer good law in light of the Washington Supreme Court’s determination in *Kommavongsa v. Haskell*, 149 Wn.2d 288, 310,

67 P.3d 1068 (2003), where our Court recognized the public policy reasons which had been rejected by the Ninth Circuit. Our Court held that legal malpractice claims are inherently personal and that public policy prohibits their assignment to a litigation opponent.

Here, neither CSS nor any of its members, governors or Manager ever instituted or otherwise commenced a claim of any kind against Faller, nor has any expressed any intent to do so. After termination, only “the former managers, governors or members” may assert claims in CSS’s name. Minn. Stat. § 322B.866. No former manager, governor or member has ever asserted any claim against Faller in CSS’s name. If a claim exists, it was unasserted and personal to the members of CSS. There was nothing to execute and levy upon.<sup>9</sup>

The Thurston County Sheriff was directed to sell something which does not exist and which would be worthless to anyone who might try to buy

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<sup>9</sup> BP has not attempted to execute upon claims which could be brought by any former manager, governor or member of CSS, nor is it entitled to do so. BP has no judgment against any former manager, governor or member of CSS. Moreover, BP cannot compel a former manager, governor or member of CSS to exercise any such right. *See Safeco Ins. Co. v. Skeen*, 47 Wn. App. 196, 734 P.2d 41 (1987) (stock appreciation rights were not binding unless debtor chose to exercise them and, therefore, were not “property” subject to execution.); *In re Elliott*, 74 Wn.2d 600, 622, 446 P.2d 347 (1968) (“debtor’s right to surrender a life insurance policy may not be attached: “[T]he right of the insured to create such a debt by the exercise of the option is not an asset available to creditors, but is a right purely personal to the insured alone.”)

it. Would a buyer then have a claim against the Sheriff for selling something that does not in fact exist?

There is no need to answer this question. RCW 6.17.090 only permits execution and sale of “property.” While RCW 6.17.090 is broadly worded, it is not unlimited. *MP Medical Inc. v. Wegman*, 151 Wn. App. 409, 416, 213 P.3d 931 (2009). Purported rights and claims which are personal to the debtor and which require the debtor to exercise a right are “contingent and uncertain” claims which are not subject to execution. *See, e.g. United Pac. Ins. Co. v. Lundstrom*, 77 Wn.2d at 172-73; *Safeco Ins. Co. v. Skeen*, 47 Wn. App. 196; *In re Elliott*, 74 Wn.2d at 622.

Since CSS was terminated, only its former managers, governors and members are permitted to bring a claim in its name. Minn. Stat. § 322B.866. The right to bring a claim against Faller of conduct occurring during BP’s lawsuit against CSS, is a personal right which belongs to CSS’s former managers, governors and/or members. BP has no judgment against CSS’s former managers, governors and/or members. BP has no right to execute on, sell or take over personal rights belonging to CSS’s former managers, governors and/or members at this time.

The Superior Court did not err in quashing the writ of execution and striking the sheriff’s sale.

**5. Public Policy Does Not Permit a Litigation Opponent to Assert a Judgment Debtor's Claims Against the Judgment Debtor's Representatives for Acts or Omissions Relating to the Litigation.**

The Washington Supreme Court in *Kommavongsa v. Haskell*, *supra*, prohibited the assignment of a legal malpractice claim to an adversary where the claim was based upon acts done in the same litigation. Citing *Chaffee v. Smith*, 645 P.2d 966 (Nev. 1982), our Court agreed that a legal malpractice claim is not a commodity to be sold to a bidder who has never even had a relationship with a lawyer and “is one peculiarly vested in the client.” The court stated that, as a matter of public policy, it did not wish to lend credence (and substance) to the perception that our adversary system of justice is a game rather than a search for the truth. 149 Wn.2d at 309.

The public policy underscored by the Washington Supreme Court in *Kommavongsa v. Haskell* was applied in the context of a purported execution levy in *MP Medical Inc. v. Wegman*, 151 Wn. App. 409. In *MP Medical Inc.*, an adversary obtained a writ of execution and sought to purchase its adversaries' rights to pursue its own appeal. The Court of Appeals determined that the trial court erred by failing to exercise its supervisory authority over its own process to prevent one party from destroying the opposing party's cause of action by becoming the owner of the cause of action under review. 151 Wn. App. at 417.

The same public policy applies here. BP argues that the purported choses of action of CSS “against its insurance company, MOE, its counsel, Messrs., Clement and Drotz, and against its principal [sic], Ms. Faller – *all accrued during the course of BP’s superior court action against CSS.*” (BP Opening Brief, p. 14) (emphasis added) Having obtained and vociferously defended its right to judgment against CSS, and having prevailed in its lawsuit against CSS, BP now argues that CSS has claims against its insurer, lawyers and an officer of one of its investors for alleged negligence, malpractice and bad faith in failing to successfully defend CSS from BP’s lawsuit. BP seeks to take over and assert these purported claims and to pursue new litigation against representatives of its litigation opponent for acts and omissions which allegedly occurred “during the course of BP’s superior court action against CSS.”

As in *Kommavongsa* and *MP Medical*, permitting BP to execute upon, have the sheriff sell and purchase purported claims of its adversary against its adversary’s representatives for tactical advantage in continued litigation between the two would be against public policy.

## V. CONCLUSION

The purported claim/chose of action of CSS against Faller is not “property” which can be sold in an execution sale. The purported claim does not exist. If such a claim exists, it allegedly arose after CSS was terminated

and could not hold property, the only persons who would have the right to assert it would be CSS's former managers, governors and members, it was never asserted by anyone who might have a right to assert it, and it would be time barred.

The alleged failure of CSS to comply with the winding up procedure did not nullify the termination of CSS. Minnesota's LLC Act provides post-termination remedies to creditors in the case of illegal distributions or failure to provide for creditor claims during the winding up process. BP did not avail itself of these opportunities and the time under which such remedies are permitted has long since expired.

The purported claim against Faller is too uncertain to constitute "property" subject to execution and sale in the state of Washington. Moreover, public policy does not permit a litigation opponent to assert a judgment debtor's claims against the judgment debtor's representatives for acts or omissions relating to the litigation.

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The superior court's order quashing the *ex parte* order directing the execution and sale of CSS's purported claim and chose of action against Faller should be affirmed.

DATED this 12<sup>th</sup> day of August, 2010.

BURGESS FITZER, P.S.

By:   
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**DECLARATION OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on 8-13-10 I served the foregoing brief depositing a copy in first class U.S. Mail, postage-prepaid, to:

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APPENDIX

Minn. Stat. § 322B.23 ..... 2

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Minn. Stat. § 322B.54 ..... 4

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## **Minnesota Statutes**

### **§ 322B.23. Transaction of Business Outside Minnesota.**

By enacting this chapter the Minnesota legislature recognizes the limited liability company as an important and constructive form of business organization. The legislature understands that:

- (1) businesses organized under or governed by this chapter will often transact business in other states;
- (2) for businesses organized under or governed by this chapter to function effectively and for this chapter to be a useful enactment, this chapter must be accorded the same comity and full faith and credit that states typically accord to each other's corporate laws; and
- (3) specifically, it is essential that other states recognize both the legal existence of limited liability companies organized under or governed by this chapter and the legal status of all members of these limited liability companies.

The legislature therefore specifically seeks that, subject to any reasonable registration requirements, other states extend to this chapter the same full faith and credit under section 1 of Article IV of the Constitution of the United States, and the same comity, that Minnesota extends to statutes that other states enact to provide for the establishment and operation of business organizations.

**History.** 1992 c 517 art 2 s 24; 2006 c 250 art 2 s 14

## **Minnesota Statutes**

### **§ 322B.303. Personal Liability of Members As Members.**

#### **Subdivision 1. Limited liability rule.**

Subject to subdivision 2, a member, governor, manager, or other agent of a limited liability company is not, merely on account of this status, personally liable for the acts, debts, liabilities, or obligations of the limited liability company.

#### **Subd. 2. Piercing the veil.**

The case law that states the conditions and circumstances under which the corporate veil of a corporation may be pierced under Minnesota law also applies to limited liability companies.

#### **Subd. 3. Limited liability after dissolution.**

The limited liability described in subdivisions 1 and 2 continues in full force regardless of any dissolution, winding up, and termination of a limited liability company.

**History.** 1992 c 517 art 2 s 26

## **Minnesota Statutes**

### **§ 322B.54. Limitations on Distribution.**

#### **Subdivision 1. When distributions are permitted.**

(a) The board of governors may authorize and cause the limited liability company to make a distribution only if the board of governors determines, in accordance with subdivision 2, that the limited liability company will be able to pay its debts in the ordinary course of business after making the distribution and the board of governors does not know before the distribution is made that the determination was or has become erroneous.

(b) The limited liability company may make the distribution if it is able to pay its debts in the ordinary course of business after making the distribution.

(c) The effect of a distribution on the ability of the limited liability company to pay its debts in the ordinary course of business after making the distribution must be measured in accordance with subdivision 3.

(d) The right of the board of governors to authorize, and the limited liability company to make, distributions may be prohibited, limited, or restricted by the articles of organization, a member control agreement, or bylaws or an agreement.

#### **Subd. 2. Determination presumed proper.**

A determination that the limited liability company will be able to pay its debts in the ordinary course of business after the distribution is presumed to be proper if the determination is made in compliance with the standard of conduct provided in section 322B.663 on the basis of financial information prepared in accordance with accounting methods, or a fair valuation or other method, reasonable in the circumstances. No liability under section 322B.663 or 322B.56 will accrue if the requirements of this subdivision have been met.

#### **Subd. 3. Effect measured.**

(a) In the case of a distribution made by a limited liability company in connection with a redemption of its membership interests, the effect of the distribution must be measured as of the date on which money or other property is transferred, or indebtedness payable in installments or otherwise is incurred, by the limited liability

company, or as of the date on which the member ceases to be a member of the limited liability company, whichever is the earliest.

(b) The effect of any other distribution must be measured as of the date of its authorization if payment occurs 120 days or less following the date of authorization, or as of the date of payment if payment occurs more than 120 days following the date of authorization.

(c) Indebtedness of a limited liability company incurred or issued in a distribution in accordance with this section to a member who as a result of the transaction is no longer a member is on a parity with the indebtedness of the limited liability company to its general unsecured creditors, except to the extent subordinated, agreed to, or secured by a pledge of any assets of the limited liability company or a related organization, or subject to any other agreement between the limited liability company and the member.

(d) Sections 322B.54 to 322B.56 supersede all other statutes of this state with respect to distributions, and the provisions of sections 513.41 to 513.51 do not apply to distributions made by a limited liability company governed by this chapter.

**Subd. 4. Restrictions.**

(a) A distribution may be made to the owners of a class or series of membership interests only if:

(1) all amounts payable to the owners of membership interests having a preference for the payment of that kind of distribution, other than those owners who give notice to the limited liability company of their agreement to waive their rights to that payment, are paid; and

(2) the payment of the distribution does not reduce the remaining net assets of the limited liability company below the aggregate preferential amount payable in the event of liquidation to the owners of membership interests having preferential rights, unless the distribution is made to those members in the order and to the extent of their respective priorities or the owners of membership interests who do not receive distributions in that order give notice to the limited liability company of their agreement to waive their rights to that distribution.

A determination that the payment of the distribution does not reduce the remaining net assets of the limited liability company below the aggregate preferential amount payable in the event of termination to the owners of membership interests having

preferential rights is presumed to be proper if the determination is made in compliance with the standard of conduct provided in section 322B.663 on the basis of financial information prepared in accordance with accounting methods, or a fair valuation or other method, reasonable in the circumstances. Liability under section 322B.663 or 322B.56 will not arise if the requirements of this paragraph are met.

(b) If the money or property available for distribution is insufficient to satisfy all preferences, the distributions shall be made pro rata according to the order of priority of preferences by classes and by series within those classes unless those owners who do not receive distributions in that order give notice to the limited liability company of their agreement to waive their rights to that distribution.

**History.** 1992 c 517 art 2 s 60; 1993 c 137 s 40; 1996 c 361 s 33; 1999 c 85 art 2 s 55,96

**Minnesota Statutes**

**§ 322B.55. Liability of Members for Illegal Distributions.**

**Subdivision 1. Liability.**

A member who receives a distribution made in violation of section 322B.54 is liable to the limited liability company, its receiver or other person winding up its affairs, or a governor under section 322B.56, subdivision 2, but only to the extent that the distribution received by the member exceeded the amount that properly could have been paid under section 322B.54.

**Subd. 2. Statute of limitations.**

An action must not be commenced under this section more than two years from the date of the distribution.

**History.** 1992 c 517 art 2 s 61

## **Minnesota Statutes**

### **§ 322B.56. Liability of Governors for Illegal Distributions.**

#### **Subdivision 1. Liability.**

In addition to any other liabilities, a governor who is present at a meeting and fails to vote against, or who consents in writing to, a distribution made in violation of section 322B.54, subdivision 1 or 4, or a restriction contained in the articles of organization, a member control agreement, or bylaws or an agreement, and who fails to comply with the standard of conduct provided in section 322B.663, is liable to the limited liability company, its receiver or any other person winding up its affairs jointly and severally with all other governors so liable and to other governors under subdivision 3, but only to the extent that the distribution exceeded the amount that properly could have been paid under section 322B.54.

#### **Subd. 2. Contribution from members.**

A governor against whom an action is brought under this section with respect to a distribution may implead in that action all members who received the distribution and may compel pro rata contribution from them in that action to the extent provided in section 322B.55, subdivision 1.

#### **Subd. 3. Impleader and contribution from governors.**

A governor against whom an action is brought under this section with respect to a distribution may implead in that action all other governors who voted for or consented in writing to the distribution and may compel pro rata contribution from them in that action.

#### **Subd. 4. Statute of limitations.**

An action must not be commenced under this section more than two years from the date of the distribution.

**History.** 1992 c 517 art 2 s 62; 1996 c 361 s 34; 1999 c 85 art 2 s 56,96

## **Minnesota Statutes**

### **§ 322B.75. Effective Date of Merger or Exchange and Effect.**

#### **Subdivision 1. Effective date or time.**

A merger or exchange is effective when the articles of merger or exchange are filed with the secretary of state or on a later date or at a later time specified in the articles of merger or exchange.

#### **Subd. 2. Effect on constituent organizations.**

When a merger becomes effective:

- (1) the constituent organizations become a single entity, the surviving limited liability company or corporation, as the case may be;
- (2) the separate existence of all constituent organizations except the surviving organization ceases;
- (3) as to any limited liability company that was a constituent organization and is not the surviving organization, the articles of merger serve as the articles of termination, and, unless previously filed, the notice of dissolution;
- (4)(i) if the surviving organization is a limited liability company, the surviving limited liability company has all the rights, privileges, immunities, and powers, and is subject to all the duties and liabilities of a limited liability company under this chapter; and  
(ii) if the surviving organization is not a limited liability company, the surviving organization has all the rights, privileges, immunities, and powers, and is subject to all the duties and liabilities of the organization under its governing law;
- (5) the surviving organization, whether a limited liability company, a foreign limited liability company, a domestic corporation, a foreign corporation, or a cooperative organized under chapter 308A or 308B, possesses all the rights, privileges, immunities, and franchises, of a public as well as of a private nature, of each of the constituent organizations. All property, real, personal, and mixed, and all debts due on any account, including subscriptions to shares and contribution agreements, as the case may be, and all other choses in action, and every other interest of or belonging to or due to each of the constituent organizations vests in the surviving organization

without any further act or deed. Confirmatory deeds, assignments, or similar instruments to accomplish that vesting may be signed and delivered at any time in the name of a constituent organization by its current officers or managers, as the case may be, or, if the organization no longer exists, by its last officers or managers, as the case may be. The title to any real estate or any interest in real estate vested in any of the constituent organizations does not revert nor in any way become impaired by reason of the merger;

(6) the surviving organization is responsible and liable for all the liabilities and obligations of each of the constituent organizations. A claim of or against or a pending proceeding by or against a constituent organization may be prosecuted as if the merger had not taken place, or the surviving organization may be substituted in the place of the constituent organization. Neither the rights of creditors nor any liens upon the property of a constituent organization are impaired by the merger; and

(7) the articles of organization or articles of incorporation, as the case may be, of the surviving organization are considered to be amended to the extent that changes in its articles, if any, are contained in the plan of merger.

**Subd. 3. Effect on members.**

When a merger or exchange becomes effective, the membership interests in a limited liability company to be converted or exchanged under the terms of the plan cease to exist in the case of a merger, or are considered to be exchanged in the case of an exchange. The members owning those membership interests are entitled only to the ownership interests, securities, money, or other property into which those membership interests have been converted or for which those membership interests have been exchanged in accordance with the plan, subject to any dissenters' rights under section 322B.383.

**History.** 1992 c 517 art 2 s 101; 1996 c 361 s 44; 2006 c 250 art 2 s 26,27

## **Minnesota Statutes**

### **§ 322B.80. Dissolution.**

#### **Subdivision 1. Dissolution events.**

A limited liability company dissolves upon the occurrence of any of the following events:

(1) when the period, if any, fixed in the articles of organization for the duration of the limited liability company expires, or if the limited liability company's term expires pursuant to section 322B.20, subdivision 2, paragraph (a);

(2) by order of a court pursuant to sections 322B.833 and 322B.843;

(3) prior to accepting contributions pursuant to section 322B.803;

(4) after accepting contributions pursuant to section 322B.806;

(5)(i) for limited liability companies whose existence begins before August 1, 1999, except as otherwise provided in the articles or a member control agreement, upon the occurrence of an event that terminates the continued membership of a member in the limited liability company, but the limited liability company is not dissolved and is not required to be wound up by reason of any event that terminates the continued membership of a member if (A) there is at least one remaining member and the existence and business of the limited liability company is continued by the consent of all the remaining members obtained no later than 90 days after the termination of the continued membership, or (B) if the membership of the last or sole member terminates and the legal representative of that last or sole member causes the limited liability company to admit at least one member;

(ii) for limited liability companies whose existence begins on or after August 1, 1999, upon the occurrence of an event that terminates the continued membership of a member in the limited liability company, but only if: (A) the articles of organization or a member control agreement specifically provide that the termination causes dissolution and in that event only as provided in the articles or member control agreement; or (B) if the membership of the last or sole member terminates and the legal representative of that last or sole member does not cause the limited liability company to admit at least one member within 180 days after the termination;

(6) a merger in which the limited liability company is not the surviving organization;  
or

(7) when terminated by the secretary of state according to section 322B.960.

**Subd. 2. Procedures following dissolution.**

A limited liability company dissolved by one of the dissolution events specified in subdivision 1 must be wound up and terminated under the following dissolution provisions:

(1) when a limited liability company is dissolved under subdivision 1, clause (1), by reason of the expiration of its limited period of duration, the limited liability company must be wound up and terminated under sections 322B.81 to 322B.82, 322B.826, 322B.83, and 322B.873;

(2) when a limited liability company is dissolved under subdivision 1, clause (2), by reason of a court order, the limited liability company must be wound up and terminated under sections 322B.83 to 322B.856;

(3) when a limited liability company is dissolved under subdivision 1, clause (3), by its organizers, the limited liability company must be wound up and terminated under sections 322B.803 and 322B.81 to 322B.83;

(4) when a limited liability company is dissolved under subdivision 1, clause (4), by its members, the limited liability company must be wound up and terminated under sections 322B.806 to 322B.83 and 322B.873; and

(5) when a limited liability company is dissolved under subdivision 1, clause (5), by reason of a termination of the continued membership of a member, the limited liability company must be wound up and terminated under sections 322B.81 to 322B.82, 322B.826, 322B.83, and 322B.873.

**Subd. 3. Security interests.**

Notwithstanding any provision of law, articles of organization, member control agreement, bylaws, other agreement, resolution, or action to the contrary, a limited liability company is not dissolved and is not required to be wound up upon the granting of a security interest in a member's membership interest, governance rights, or financial rights, or upon the foreclosure or other enforcement of a security interest

in a member's financial rights, or upon the secured party's assignment, acceptance, or retention of a member's financial rights in accordance with chapter 336.

**History.** 1992 c 517 art 2 s 104; 1993 c 137 s 46,47; 1995 c 128 art 3 s 8; 1997 c 10 art 2 s 8; 1999 c 85 art 2 s 86,96; 2006 c 250 art 2 s 32; 2008 c 233 art 2 s 11

## **Minnesota Statutes**

### **§ 322B.81. Filing Notice of Dissolution and Effect.**

#### **Subdivision 1. Contents.**

If dissolution of the limited liability company is approved pursuant to section 322B.806, subdivision 2, or it occurs under section 322B.80, subdivision 1, clause (1) or (5), the limited liability company shall file with the secretary of state a notice of dissolution. The notice must contain:

- (1) the name of the limited liability company;
- (2)(i) if the dissolution is approved pursuant to section 322B.806, subdivision 2, the date and place of the meeting at which the resolution was approved; and a statement that the requisite vote of the members was received, or that members validly took action without a meeting;
- (ii) if the dissolution occurs under section 322B.80, subdivision 1, clause (1), by the expiration of the limited liability company's duration, a statement of the expiration date; and
- (iii) if the dissolution occurs under section 322B.80, subdivision 1, clause (5), by the termination of a membership interest of a member, a statement that the continued membership of a member has terminated and the date of that termination.

#### **Subd. 2. Winding up.**

When the notice of dissolution has been filed with the secretary of state, and subject to section 322B.823, the limited liability company shall cease to carry on its business, except to the extent necessary for the winding up of the business of the limited liability company. The members shall retain the right to revoke the dissolution in accordance with section 322B.823 and the right to remove governors or fill vacancies on the board of governors. The limited liability company existence continues to the extent necessary to wind up the affairs of the limited liability company until the dissolution is revoked or articles of termination are filed with the secretary of state.

#### **Subd. 3. Certain mergers permitted during winding up.**

As part of winding up, the limited liability company may participate in a merger with another limited liability company or with a domestic or foreign corporation under

sections 322B.70 to 322B.76, but the dissolved limited liability company shall not be the surviving organization.

**Subd. 4. Remedies continued.**

The filing with the secretary of state of a notice of dissolution does not affect any remedy in favor of the limited liability company or any remedy against it or its governors, managers, or members in those capacities, except as provided in section 322B.816, 322B.82, or 322B.863.

**History.** 1992 c 517 art 2 s 107

## **Minnesota Statutes**

### **§ 322B.813. Procedure in Winding Up.**

#### **Subdivision 1. Procedures to be followed where winding up accomplished by merger.**

If the business of the limited liability company is wound up and terminated by merging the dissolved limited liability company into a successor organization:

- (1) the procedures stated in sections 322B.70 to 322B.76 must be followed;
- (2) sections 322B.816 to 322B.823 and 322B.863 to 322B.866 do not apply; and
- (3) once the merger is effective, a creditor or claimant of the terminated limited liability company, and all those claiming through or under the creditor or claimant, are barred from suing the terminated limited liability company on that claim or otherwise realizing upon or enforcing it against the terminated limited liability company, but the creditor, claimant, and those claiming under the creditor and claimant, may, if not otherwise barred by law, assert their claims against the surviving organization of the merger.

#### **Subd. 2. Procedures to be followed otherwise.**

If the business of the limited liability company is to be wound up and terminated other than by merging the dissolved limited liability company into a successor organization, the procedures stated in subdivisions 3 to 5 must be followed.

#### **Subd. 3. Collection and payment.**

When a notice of dissolution has been filed with the secretary of state, the board of governors, or the managers acting under the direction of the board of governors, shall proceed as soon as possible:

- (1) to give notice to creditors and claimants under section 322B.816 or to proceed under section 322B.82;
- (2) to collect or make provision for the collection of all known debts due or owing to the limited liability company, including unperformed contribution agreements; and

(3) except as provided in sections 322B.816, 322B.82, and 322B.863, to pay or make provision for the payment of all known debts, obligations, and liabilities of the limited liability company according to their priorities under section 322B.873.

**Subd. 4. Transfer of assets.**

Notwithstanding section 322B.77, when a notice of dissolution has been filed with the secretary of state, the governors may sell, lease, transfer, or otherwise dispose of all or substantially all of the property and assets of a dissolved limited liability company without a vote of the members.

**Subd. 5. Distribution to members.**

All tangible or intangible property, including money, remaining after the discharge of, or after making adequate provision for the discharge of, the debts, obligations, and liabilities of the limited liability company must be distributed to the members in accordance with sections 322B.52 and 322B.873.

**History.** 1992 c 517 art 2 s 108; 1996 c 361 s 48; 1999 c 85 art 2 s 87

**Minnesota Statutes**

**§ 322B.826. Effective Date of Termination and Certificate of Termination.**

**Subdivision 1. Effective date.**

When the articles of termination have been filed with the secretary of state, or on a later date or a later time each within 30 days after filing if the articles of termination so provide, the limited liability company is terminated.

**Subd. 2. Certificate.**

The secretary of state shall issue to the limited liability company or its legal representative a certificate of termination that contains:

- (1) the name of the limited liability company;
- (2) the date and time the termination is effective; and
- (3) a statement that the limited liability company is terminated at the effective date and time of the termination.

**History.** 1992 c 517 art 2 s 112; 2002 c 311 art 2 s 17

## Minnesota Statutes

### § 322B.833. Judicial Intervention and Equitable Remedies, Dissolution, and Termination.

#### Subdivision 1. When permitted.

A court may grant any equitable relief it considers just and reasonable in the circumstances or may dissolve, wind up, and terminate a limited liability company:

- (1) in a supervised winding up and termination pursuant to section 322B.83;
- (2) in an action by a member when it is established that:
  - (i) the governors or the persons having the authority otherwise vested in the board of governors are deadlocked in the management of the affairs of the limited liability company and the members are unable to break the deadlock;
  - (ii) the governors or those in control of the limited liability company have acted fraudulently, illegally, or in a manner unfairly prejudicial toward one or more members in their capacities as members or governors of any limited liability company, or as managers or employees of a closely held limited liability company;
  - (iii) the members of the limited liability company are so divided in voting power that, for a period that includes the time when two consecutive regular meetings were held, they have failed to elect successors to governors whose terms have expired or would have expired upon the election and qualification of their successors;
  - (iv) the limited liability company assets are being misapplied or wasted; or
  - (v) an event of dissolution has occurred under section 322B.80, subdivision 1, clause (1), (4) or (5) but the limited liability company is not acting to wind up its affairs;
- (3) in an action by a creditor when:
  - (i) the claim of the creditor has been reduced to judgment and an execution on the judgment has been returned unsatisfied; or
  - (ii) the limited liability company has admitted in writing that the claim of the creditor is due and owing and it is established that the limited liability company is unable to pay its debts in the ordinary course of business; or

(4) in an action by the attorney general to dissolve the limited liability company in accordance with section 322B.843 when it is established that a decree of termination is appropriate.

**Subd. 2. Buy-out on motion.**

In an action under subdivision 1, clause (2), in which one or more of the circumstances described in that clause is established, the court may, upon motion of a limited liability company or a member, order the sale by a plaintiff or a defendant of all membership interests of the limited liability company held by the plaintiff or defendant to either the limited liability company or the moving members, whichever is specified in the motion, if the court determines in its discretion that an order would be fair and equitable to all parties under all of the circumstances of the case.

The purchase price of any membership interest so sold must be the fair value of the membership interest as of the date of the commencement of the action or as of another date found equitable by the court. If the articles of organization or a member control agreement states a price for the redemption or buy-out of membership interests, the court shall order the sale for the price and on the terms set forth in them, unless the court determines that the price or terms are unreasonable under all the circumstances of the case.

Within five days after the entry of the order, the limited liability company shall provide each selling member with the information it is required to provide under section 322B.386, subdivision 5, paragraph (a).

If the parties are unable to agree on fair value within 40 days of entry of the order, the court shall determine the fair value of the membership interests under the provisions of section 322B.386, subdivision 7, may allow interest or costs as provided in section 322B.386, subdivisions 1 and 8, and may allocate payment among the member whose membership interest is being sold and any assignees of the financial rights of that member.

The purchase price must be paid in one or more installments as agreed on by the parties, or, if no agreement can be reached within 40 days of entry of the order, as ordered by the court. Upon entry of an order for the sale of a membership interest under this subdivision and provided that the limited liability company or the moving members post a bond in adequate amount with sufficient sureties or otherwise satisfy the court that any full purchase price of the membership interest, plus the additional costs, expenses, and fees awarded by the court, will be paid when due and payable,

the selling member shall no longer have any rights or status as a member, manager, or governor, except the right to receive the fair value of the membership interest plus other amounts as might be awarded.

**Subd. 3. Condition of limited liability company.**

In determining whether to order relief under this section and in determining what particular relief to order, the court shall take into consideration the financial condition of the limited liability company but shall not refuse to order any particular form of relief solely on the ground that the limited liability company has accumulated or current operating profits.

**Subd. 4. Considerations in granting relief involving closely held limited liability companies.**

In determining whether to order relief under this section and in determining what particular relief to order, the court shall take into consideration the duty that all members in a closely held limited liability company owe one another to act in an honest, fair, and reasonable manner in the operation of the limited liability company and the reasonable expectations of all members as they exist at the inception and develop during the course of the members' relationship with the limited liability company and with each other. For purposes of this section, any written agreements, including employment agreements and buy-sell agreements, between or among members or between or among one or more members and the limited liability company are presumed to reflect the parties' reasonable expectations concerning matters dealt with in the agreements.

**Subd. 5. Considerations as to dissolution.**

In determining what relief to order, the court shall take into account that relief that results in the termination of a member's membership interest may cause dissolution of the limited liability company. If the court orders relief that results in dissolution of the limited liability company, the court shall make appropriate orders providing for the winding up and termination of the dissolved limited liability company.

**Subd. 6. Liquidation remedy.**

In deciding whether to order winding up through liquidation, the court shall consider whether lesser relief suggested by one or more parties, or provided in a member control agreement, such as any form of equitable relief, or a buy-out or partial liquidation coupled with the continuation of the business of the dissolved limited

liability company through a successor organization, would be adequate to permanently relieve the circumstances established under subdivision 1, clause (2) or (3). Lesser relief may be ordered in any case where it would be appropriate under all the facts and circumstances of the case.

**Subd. 7. Expenses.**

If the court finds that a party to a proceeding brought under this section has acted arbitrarily, vexatiously, or otherwise not in good faith, it may in its discretion award reasonable expenses, including attorneys' fees and disbursements, to any of the other parties.

**Subd. 8. Venue and parties.**

Proceedings under this section must be brought in a court within the county in which the registered office of the limited liability company is located. It is not necessary to make members parties to the action or proceeding unless relief is sought against them personally.

**History.** 1992 c 517 art 2 s 114; 1996 c 361 s 49-51; 1999 c 85 art 2 s 89-91

## **Minnesota Statutes**

### **§ 322B.836. Judicial Intervention Procedures.**

#### **Subdivision 1. Action before hearing.**

In proceedings under section 322B.833, the court may issue injunctions, appoint receivers with all powers and duties the court directs, take other actions required to preserve the limited liability company assets wherever situated, and carry on the business of the limited liability company until a full hearing can be held.

#### **Subd. 2. Action after hearing.**

After a full hearing has been held, upon whatever notice the court directs to be given to all parties to the proceedings and to any other parties in interest designated by the court, the court may appoint a receiver to collect the limited liability company assets, including all amounts owing to the limited liability company by persons who have made contribution agreements and by persons who have made contributions by means of enforceable promises of future performance. A receiver has authority, subject to the order of the court, to continue the business of the limited liability company and to sell, lease, transfer, or otherwise dispose of all or any of the property and assets of the limited liability company either at public or private sale.

#### **Subd. 3. Discharge of obligations upon liquidation.**

If the court determines that the limited liability company is to be dissolved with winding up to be accomplished by liquidation, then the assets of the limited liability company or the proceeds resulting from a sale, lease, transfer, or other disposition must be applied in the following order of priority to the payment and discharge or:

- (1) the costs and expenses of the proceedings, including attorneys' fees and disbursements;
- (2) debts, taxes, and assessments due the United States, the state of Minnesota and their subdivisions, and other states and their subdivisions, in that order;
- (3) claims duly proved and allowed to employees under the provisions of chapter 176; provided, that claims under this clause shall not be allowed if the limited liability company carried workers' compensation insurance, as provided by law, at the time the injury was sustained;

(4) claims, including the value of all compensation paid in any medium other than money, duly proved and allowed to employees for services performed within three months preceding the appointment of the receiver, if any; and

(5) other claims duly proved and allowed.

**Subd. 4. Remainder to members.**

After payment of the expenses of receivership and claims of creditors duly proved under subdivision 3, the remaining assets, if any, must be distributed to the members in accordance with section 322B.873, subdivision 1.

**History.** 1992 c 517 art 2 s 115

## **Minnesota Statutes**

### **§ 322B.863. Claims Barred and Exceptions.**

#### **Subdivision 1. Claims barred.**

Except as provided in this section, a creditor or claimant whose claims are barred under section 322B.816, 322B.82, or 322B.846 includes a person who is or becomes a creditor or claimant at any time before, during, or following the conclusion of termination proceedings, and all those claiming through or under the creditor or claimant.

#### **Subd. 2. Claims reopened.**

At any time within one year after articles of termination have been filed with the secretary of state pursuant to section 322B.816 or 322B.82, subdivision 1, clause (2), or a decree of termination has been entered, a creditor or claimant who shows good cause for not having previously filed the claim may apply to a court in this state to allow a claim:

- (1) against the limited liability company to the extent of undisposed assets; or
- (2) if the undisposed assets are not sufficient to satisfy the claim, against a member, whose liability is limited to a portion of the claim that is equal to the portion of the distributions to members in liquidation or termination received by the member, but in no event may a member's liability exceed the amount that the member actually received in the termination.

#### **Subd. 3. Obligations incurred during termination proceedings.**

All known contractual debts, obligations, and liabilities incurred in the course of winding up and terminating the limited liability company's affairs must be paid or provided for by the limited liability company before the distribution of assets to a member. A person to whom this kind of debt, obligation, or liability is owed but not paid may pursue any remedy before the expiration of the applicable statute of limitations against the managers and governors of the limited liability company who are responsible for, but who fail to cause, the limited liability company to pay or make provision for payment of the debts, obligations, and liabilities or against members to the extent permitted under section 322B.56. This subdivision does not apply to dissolution and termination under the supervision or order of a court.

**Subd. 4. Statutory homeowner warranty claims preserved.**

The statutory warranties provided under section 327A.02 are not affected by a dissolution under this chapter.

**History.** 1992 c 517 art 2 s 123; 2006 c 202 s 4

## **Minnesota Statutes**

### **§ 322B.866. Right to Sue or Defend after Termination.**

After a limited liability company has been terminated, any of its former managers, governors, or members may assert or defend, in the name of the limited liability company, any claim by or against the limited liability company.

**History.** 1992 c 517 art 2 s 124

## Minnesota Statutes

### § 541.07. Two- or Three-year Limitations.

Except where the Uniform Commercial Code, this section, section 148A.06, 541.05, 541.073, or 541.076 otherwise prescribes, the following actions shall be commenced within two years:

(1) for libel, slander, assault, battery, false imprisonment, or other tort resulting in personal injury, and all actions against veterinarians as defined in chapter 156, for malpractice, error, mistake, or failure to cure, whether based on contract or tort; provided a counterclaim may be pleaded as a defense to any action for services brought by a veterinarian after the limitations period if it was the property of the party pleading it at the time it became barred and was not barred at the time the claim sued on originated, but no judgment thereof except for costs can be rendered in favor of the party so pleading it;

(2) upon a statute for a penalty or forfeiture, except as provided in sections 541.074 and 541.075;

(3) for damages caused by a dam, other than a dam used for commercial purposes; but as against one holding under the preemption or homestead laws, the limitations shall not begin to run until a patent has been issued for the land so damaged;

(4) against a master for breach of an indenture of apprenticeship; the limitation runs from the expiration of the term of service;

(5) for the recovery of wages or overtime or damages, fees, or penalties accruing under any federal or state law respecting the payment of wages or overtime or damages, fees, or penalties except, that if the employer fails to submit payroll records by a specified date upon request of the Department of Labor and Industry or if the nonpayment is willful and not the result of mistake or inadvertence, the limitation is three years. (The term "wages" means all remuneration for services or employment, including commissions and bonuses and the cash value of all remuneration in any medium other than cash, where the relationship of master and servant exists and the term "damages" means single, double, or treble damages, accorded by any statutory cause of action whatsoever and whether or not the relationship of master and servant exists);

(6) for damages caused by the establishment of a street or highway grade or a change in the originally established grade;

(7) against the person who applies the pesticide for injury or damage to property resulting from the application, but not the manufacture or sale, of a pesticide.

**History.** (9193) RL s 4078; 1925 c 113 s 1; 1935 c 80 s 1; 1945 c 513 s 1; 1953 c 378 s 3; 1955 c 843 s 1; 1963 c 749 s 2; 1965 c 812 s 21; 1978 c 738 s 2; 1982 c 546 s 2; 1984 c 608 s 4; 1989 c 190 s 1; 1989 c 286 s 1; 1990 c 419 s 1; 1992 c 511 art 7 s 23; 1997 c 213 art 3 s 1; 1999 c 23 s 1; 2000 c 471 s 2

**Washington Statutes**

**§ 6.17.090. Property liable to execution**

All property, real and personal, of the judgment debtor that is not exempted by law is liable to execution.

**History.** 1987 c 442 § 409; 1929 c 25 § 6; RRS § 518. Prior: Code 1881 § 333; 1877 p 70 § 337; 1854 p 177 § 251. Formerly RCW 6.04.060.

## **Washington Statutes**

### **§ 25.15.005. Definitions**

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

- (1) "Certificate of formation" means the certificate referred to in RCW 25.15.070, and the certificate as amended.
- (2) "Event of dissociation" means an event that causes a person to cease to be a member as provided in RCW 25.15.130.
- (3) "Foreign limited liability company" means an entity that is formed under:
  - (a) The limited liability company laws of any state other than this state; or
  - (b) The laws of any foreign country that is: (i) An unincorporated association, (ii) formed under a statute pursuant to which an association may be formed that affords to each of its members limited liability with respect to the liabilities of the entity, and (iii) not required, in order to transact business or conduct affairs in this state, to be registered or qualified under Title 23B or 24 RCW, or any other chapter of the Revised Code of Washington authorizing the formation of a domestic entity and the registration or qualification in this state of similar entities formed under the laws of a jurisdiction other than this state.
- (4) "Limited liability company" and "domestic limited liability company" means a limited liability company having one or more members that is organized and existing under this chapter.
- (5) "Limited liability company agreement" means any written agreement of the members, or any written statement of the sole member, as to the affairs of a limited liability company and the conduct of its business which is binding upon the member or members.
- (6) "Limited liability company interest" means a member's share of the profits and losses of a limited liability company and a member's right to receive distributions of the limited liability company's assets.

(7) "Manager" or "managers" means, with respect to a limited liability company that has set forth in its certificate of formation that it is to be managed by managers, the person, or persons designated in accordance with RCW 25.15.150(2).

(8) "Member" means a person who has been admitted to a limited liability company as a member as provided in RCW 25.15.115 and who has not been dissociated from the limited liability company.

(9) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, or a separate legal entity comprised of two or more of these entities, or any other legal or commercial entity.

(10) "Professional limited liability company" means a limited liability company which is organized for the purpose of rendering professional service and whose certificate of formation sets forth that it is a professional limited liability company subject to RCW 25.15.045.

(11) "Professional service" means the same as defined under RCW 18.100.030.

(12) "State" means the District of Columbia or the Commonwealth of Puerto Rico or any state, territory, possession, or other jurisdiction of the United States other than the state of Washington.

**History.** 2008 c 198 § 4; 2002 c 296 § 3; 2000 c 169 § 1; 1995 c 337 § 13; 1994 c 211 § 101.

**Note:**

**Finding -- 2008 c 198:** See note following RCW 39.34.030.

**Effective date -- 1995 c 337:** *"This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1995."* [1995 c 337 § 23.]

## **Washington Statutes**

### **§ 25.15.310. Law governing**

(1) Subject to the Constitution of the state of Washington:

(a) The laws of the state, territory, possession, or other jurisdiction or country under which a foreign limited liability company is organized govern its organization and internal affairs and the liability of its members and managers; and

(b) A foreign limited liability company may not be denied registration by reason of any difference between those laws and the laws of this state.

(2) A foreign limited liability company is subject to RCW 25.15.030 and, notwithstanding subsection (1)(a) of this section, a foreign limited liability company rendering professional services in this state is also subject to RCW 25.15.045(2).

(3) A foreign limited liability company and its members and managers doing business in this state thereby submit to personal jurisdiction of the courts of this state and are subject to RCW 25.15.125.

**History.** 1995 c 337 § 21; 1994 c 211 § 901.

**Note:**

*Effective date -- 1995 c 337: See note following RCW 25.15.005.*