



## Risky Business for Owners Part III: Understanding the Limits of Limited Liability

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*This is the last installment in a three-part series on managing personal liability risk as a business owner. Although the shareholders and members of a company are not generally liable for the debts of the business, there are circumstances in which owners can be found liable for a company's obligations—and there are also ways to minimize that risk. The first two articles of this series examined two of the most common personal liability risks, personal guaranties of business indebtedness and the possibility that you could encounter personal liability while acting as an officer or director of a company. This final installment examines personal liability risks that can arise during the course of a company's operations.*

There are only a handful of circumstances in the day-to-day operations of a business in which personal liability can arise, whether you are the owner or simply an employee. Being aware of them can help you avoid the risk that you might be found personally liable for an obligation of your business.

- **Taxes.** Shareholders and responsible officers of a business can be personally liable to the Internal Revenue Service and state taxing authorities for failing to timely pay the tax liabilities of a company and for failing to timely remit taxes that the company has, or should have, withheld or collected. The circumstances

in which personal liability arise are quite fact specific, but you should consult with a qualified tax advisor if your business is not able to remit taxes on time.



Robert D. Wolford

- **Use of Company**

- **Credit Cards.** Credit

card applications often require an individual to be named on the application or provide that the party whose name is on the card is also liable for any purchases. When a business is unable to satisfy its credit card obligations, it is common for the issuing bank to pursue that person for collection.

- **Trade Debt Application Guaranties.**

Occasionally, a trade vendor will include a personal guaranty section at the end of its credit application, hoping that the purchasing representative completing the credit application will sign the application and unknowingly agree to the personal guaranty. Whether or not you are an owner, if it's your job to complete credit applications for your business, you should carefully review them before you sign, to make sure no personal guaranty is included.

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In the News

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- **In What Capacity Are You Signing?** When signing on behalf of the business, you should always sign in your corporate capacity, not in your individual capacity. You know you are signing in your corporate capacity if the name of the business is listed above your signature and your name and title with the company below it. Otherwise, you may be signing in your individual capacity, and the agreement at issue could be enforced against you personally.
- **Sloppy Recordkeeping.** To take advantage of the limited liability benefits of a corporation or limited liability company,

you must observe certain corporate formalities as well as the distinctions between the company and yourself. If these formalities are not sufficiently followed or the company’s finances and yours as owner are not kept separate and distinct, creditors can seek to pierce the corporate veil and pursue the shareholders for the company’s debts. It is critical that this separation be maintained.

*If you would like to discuss this article or any business liability issues you might be facing, please don’t hesitate to contact the author or any member of Miller Johnson’s Business Section to discuss.*

## WELCOME TO MILLER JOHNSON



**CONNIE R. THACKER** joined Miller Johnson as a Member in the Grand Rapids office. Her family law practice includes complex divorce, business valuations, custody, and parenting time. She is a certified mediator of family law cases and certified in domestic violence

screening. She is recognized as a *Best Lawyer in America*® for family law and is a fellow in the prestigious American Academy of Matrimonial Lawyers.



**SARA A. NICHOLSON** is continuing her practice in estate planning and tax law. She comes to our Kalamazoo office from a law firm in Charlottesville, Virginia where she was an associate advising clients on estate planning and tax matters and she was also a tax associate

with a firm in Washington, D.C. following law school. She earned her J.D. *cum laude*, from the University of Michigan Law School, and a LL.M. in Taxation from New York University School of Law.



**PATRICK M. EDSENGA** is an Associate in the firm’s employment and labor section. After earning his J.D. from the University of Michigan in 2008 he worked for a law firm in Chicago. Prior to joining our Grand Rapids office, he was with the Social Security Administration in

the Office of General Counsel for a couple of years.



**ANDREW A. CASCINI** is a new Associate beginning his practice in the employment and labor section. He earned his Juris Doctorate from Columbia Law School in 2012 and his B.A. from the University of Michigan.



**KATERINA M. VUJEA** is a new Associate in the litigation section. She received her bachelor’s degree from the University of Dayton (Ohio) and earned her Juris Doctorate from the University of Notre Dame Law School in 2012.

# Guide to 2013 Michigan Property Taxes

by Jeffrey S. Ammon; [ammonj@millerjohnson.com](mailto:ammonj@millerjohnson.com); 616.831.1703



Jeffrey S. Ammon

Your 2013 property tax assessment notices will arrive in January or February. With them comes your burden to navigate quickly through a complex set of deadlines and procedures. Read this checklist to identify and solve problems.

## THE BASIC QUESTION: ARE YOU OVERTAXED?

Read the “taxable value” on your notice. Double it. Ask yourself whether you could sell that property for at least that amount. If the answer is no, you will be overtaxed in 2012 unless you act quickly. Ignore “accessed value” and “SEV” numbers for now.

## QUESTIONS TO ANSWER BY JANUARY 31

- Have you received assessment notices for every parcel of property you own? One location can have several tax parcels.
- Is the classification on each notice correct? Has it changed since last year? Some classifications generate more tax savings than others.
- If your company is a tenant, has the assessment notice gone to the landlord? If you are responsible for the property taxes as the tenant, does your lease permit you to appeal that assessment?
- Does the notice state that a transfer of ownership occurred in 2012? Do you know what event caused that transfer?
- Does your city or township require an assessor’s appeal in February?

## PERSONAL PROPERTY TAX: QUESTIONS FOR FEBRUARY

- Will you file your personal property statement by February 20? Failure to file on time may disqualify you from tax credits and exemptions. And a failure can make an otherwise optional Board of Review appearance mandatory.
- Did the assessor base your “taxable value” on the numbers you reported on your statement?
- Have you discovered over-reporting or other errors in previous statements? Some kinds of errors in previous years can be corrected this year.

- Could you have sold the personal property on December 31, 2012 for twice the “taxable value?” If not, you may be overtaxed.
- Gov. Snyder signed the new personal property tax reform law—are you ready to take advantage of it?

## APPEAL DEADLINES: FEBRUARY, MARCH, MAY, JUNE, OR JULY?

- February? If your local jurisdiction requires you to file an assessor’s appeal, what is the deadline?
- March? Some appeals require a local Board of Review appeal in March. Others can be taken directly to the Michigan Tax Tribunal without a Board of Review appeal. Making a local Board of Review appearance might be a good strategy even if it is not required.
- May, June, or July? May 31 is the deadline for appealing a Board of Review decision for most kinds of business property. June 30 is the deadline for appealing Board of Review classification decisions. July 31 is the appeal deadline for residential and certain other kinds of property classifications. Consult with experienced legal counsel to identify the relevant deadlines.

## STRATEGY AND ADVICE

If you suspect problems with your property taxes, you will need to make some quick decisions. To evaluate your potential savings, risks, likelihood of success, and means of controlling your property tax expenses within your overall business and real estate strategies, please contact Jeffrey S. Ammon or another member of Miller Johnson’s Real Estate practice group.

## NEWS YOU NEED TO KNOW

*Client Alert* is an electronic newsletter which our practice groups send with time-sensitive changes on which you may need to act. This includes relevant breaking news, deadline reminders, and recent court decisions as well as legislation.

December was a busy month in Lansing with a number of bills being passed which Governor Snyder signed into law. We have *Client Alerts* posted on “hot topics” including Right to Work and the new Personal Property Tax bill.

You can view these in the Publication section at [www.millerjohnson.com](http://www.millerjohnson.com). You can also sign-up on our web site to receive *Client Alerts* as well as our Priority Read newsletters dedicated to business, employment, health care reform, and real estate/construction.

# Keeping Up with Non-Competes

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Many employers use noncompetition agreements—or “non-competes”—to keep key employees, client relationships, and confidential information out of the hands of competitors. The world in which non-compete agreements operate is constantly changing. The judges who interpret the law are changing, the market is changing, the economy is changing, and aspects of certain non-competes may need to change as well. Be sure your non-competes are up-to-date, and know how to respond when they are violated.

## UPDATING NONCOMPETITION AGREEMENTS

**The interests to be protected.** In Michigan, noncompetition agreements are enforceable to protect an employer’s “reasonable competitive business interest.” This means that a court will investigate *why* a company needs the noncompetition agreement and what it hopes it will protect. If your goal is to protect customer relationships, trade secrets, your company’s good will and reputation, or all of these things, it can be helpful to directly say so in your noncompetition agreement.

**Geography.** The geographic scope of your non-competes should be updated to reflect your current business needs. If your agreement prevents an employee from working for a competitor anywhere in Michigan, and your business has recently expanded to cover Michigan and Ohio, it should be changed to reflect that. Michigan law requires reasonable geographic restrictions. Today, though, many businesses compete in a global economy. A non-compete may cover a territory as broad as the reach of your business and the employee’s ability to affect that business.

**Duration.** The length of time for which an employee is prohibited from competing is a common issue in litigation. Many employers use a two-year non-compete, in part because they’ve been held to be enforceable. Although a two-year non-compete term might be enforceable in some contexts, courts will examine whether the duration is reasonable in light of the employee’s responsibilities and your interests. For example, if your product development is a four-year process, courts may enforce a four-year restriction. But, if pricing information is at issue and it changes semi-annually, a court may be unwilling to enforce a restriction of more than six months.



Sara G. Lachman



Jason C. Miller

**Individualize.** Non-competes are not one-size-fits-all. You’ll have different reasons for using noncompetition agreements with the sales force, the design team, and the CEO, and your non-competes should be tailored to reflect that. For example, many engineers have little direct involvement in sales. A non-compete focused on customer contacts may be useless against such an employee. Matching your non-compete to the person it covers will help when it comes to enforcement.

**Collecting fees.** Once in litigation, employers often wish they had included a term sometimes rejected or not considered at the drafting stage: the provision awarding attorneys’ fees. The risk of a fee award can provide tremendous leverage and encourage early settlement of disputes before the legal fees increase. The flipside is that some judges may be reluctant to enforce a non-compete that also triggers a large fee award, or at least that specific provision. Whatever you decide, you should at least think about including a provision awarding attorneys’ fees incurred in enforcing the agreement.

**Liquidated damages.** Proving money damages can be hard in non-compete cases and might require testimony from customers. To avoid that, you may want to rely on a liquidated damages clause—a designated dollar amount that reflects a reasonable estimation of the harm caused by a breach. Of course, a liquidated damages clause can work against you if it ends up being lower than your actual damages. It could also signal to a judge that money damages, rather than a court order barring the former employee from unlawfully competing, are sufficient to remedy the harm.

**Bottom line.** Many judges, especially during an economic downturn, approach noncompetition agreements skeptically. If you reach for too much on things that don’t matter, you may find it harder to enforce the contract terms that really do. That’s

“Keeping Up with Non-Competes,” *continued on page 5*



why it's important to periodically revisit your non-competes and make sure they'll truly protect your business.

## UPDATING YOUR RESPONSE TO POTENTIAL VIOLATIONS

When you're faced with the threat of an employee breaching a noncompetition agreement, your initial reaction is critical. A quick and appropriate response can protect your business from unlawful competition, increase the likelihood that a court will enforce your agreement, and dramatically decrease the legal costs associated with getting your agreement enforced. Here are some key steps.

**Investigating the facts.** When a key employee may be unfairly competing, it is important to get all the facts. Each investigation should start with a detailed check list designed to turn up the information you need to assess whether your agreement is being violated and your business is at risk. Your checklist could include the following questions:

- What files or documents might the employee have at home? Did the employee use a personal computer or mobile device for work?
- What files or documents did the employee keep at the office? Is everything accounted for?
- How did the employee communicate with customers and prospects? Is customer and prospect contact information such as customer lists and business cards accounted for?
- What kind of information does the employee have on a cellular phone? Does this include confidential or proprietary information such as customer contacts?
- Asking these questions right away can save legal fees and lost business.

**Retaining legal counsel.** Noncompetition breaches are easiest to remedy before those involved have become entrenched in new jobs or new businesses, stolen clients, or passed on your business information to a competitor. Early involvement by an attorney might prevent the damage from being done and keep the dispute out of court. If the case must be litigated, the sooner the attorney gets it into court the easier it may be to convince a judge to act immediately to prevent imminent harm to your company.

**Preserving and collecting data.** Employers are increasingly using forensic computer analysis in noncompetition cases. They may create a “map” of the former employee's computer, gather all of his or her emails from the server, and identify any files on a shared computer network that were accessed in the lead-up to the departure. The more that judges see this type of information, the more likely they are to expect it in future cases. An early analysis can also help you determine how much, if any, of your business information may be at risk. This type of information is delicate and can be altered or destroyed easily. Working with your attorney to appropriately collect the data as soon as possible helps your case.

## CONCLUSION

Protecting your company from unfair competition requires constant vigilance. Periodically updating your noncompetition agreements and updating your plans for responding to a violation will protect you in case a dishonest employee or former employee threatens your business. If you have any questions about this article, or would like to discuss noncompetition agreements, please contact one of the authors or another member of Miller Johnson's Unfair Competition practice group.

## HONORS

**JEFFREY S. AMMON** received the 2012 Stephen H. Schulman Outstanding Business Lawyer Award from the State Bar of Michigan's Business Section on September 20, 2012 at the Sheraton Detroit. This prestigious award exemplifies the highest quality of practice; the utmost professionalism; dedication to service and commitment; and ethical conduct and collegiality within the practice.

**DAVID J. GASS** was inducted as a Fellow of the American College of Trial Lawyers on October 20, 2012 at an event in New York City. Fellowship is extended only by invitation, after

careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality.

**J. LEE MURPHY** celebrated his 50th anniversary at the firm. He's an integral part of the business section including the taxation, mergers and acquisitions, and probate and estate planning practice groups. He graduated from University of Michigan Law School in 1959. He has played a leadership role with the firm as well as the State Bar of Michigan and GRBA.

# MILLER JOHNSON IN THE NEWS

The following Miller Johnson attorneys were interviewed for stories or did guest articles which ran in news publications. Here is a list of recent articles:

**T.J. ACKERT** was profiled in the article "Ackert set to helm Bar Association; Smith ends term stays committed" which was on the cover of *Grand Rapids Legal News* July 11, 2012 issue.

**JEFFREY S. AMMON** was featured in "Ammon's latest honor reflects years of service to State Bar." The article appeared in *Grand Rapids Legal News* on August 17, 2012. He also contributed to the article on Proposal 6 - Building an International Bridge which was part of *Michigan Lawyers Weekly's* "Voter's Guide to 2012 Ballot Proposals" released in October 2012.

**MARY V. BAUMAN** was interviewed for the article "Verdict is in: Experts advise proper planning to deal with health care reform" which ran in *MiBiz* on July 9, 2012. She was also a participant in the Health Care Summit hosted by the Grand Rapids Area Chamber of Commerce and Blue Cross Blue Shield in November 2012. She received coverage for this in the *Grand Rapids Business Journal* article "Employers face deadline for health mandates" on November 26, 2012.

**MATTHEW K. BISHOP** and **ROBERT D. WOLFORD** were invited to write an article for *Michigan Lawyers Weekly*. Their article "Victory for Secured Creditors: Decision in RadLAX gives secured lender the right to credit bid at auction" was published on August 20, 2012.

**JOSEPH H. DOELE, MICHAEL B. QUINN** and **CONNIE R. THACKER** were interviewed for "Miller Johnson continues to expand multi-service family law practice." The article was printed October 24, 2012 in *Grand Rapids Legal News*.

**FAMILY LAW PRACTICE GROUP** now has a new blog to provide readers with practical insight into the divorce process and information regarding the legal issues, current case law and family law related topics. It can be found at [www.michigan-divorcelaywers.com](http://www.michigan-divorcelaywers.com)

**JEFFREY J. FRASER** did a presentation for The Employers Association which was covered in the article "HR pros explore policy details at Employers' Association event" in the *Grand Rapids Business Journal* on November 26, 2012.

**DAVID J. GASS** was on the cover of *Grand Rapids Legal News* on November 2, 2012 in "Gass inducted as fellow of American College of Trial Lawyers."

**RAJ A. MALVIYA** was interviewed for the article "Time's right for selling" published in the November 12, 2012 issue of *MiBiz*.

**CRAIG A. MUTCH** was interviewed by *Michigan Lawyers Weekly* in the article "Though new associates clamor for spots, big firms expect some will leave" which was published July 23, 2012.

**JON R. MUTH** was profiled in the article "Academy of Distinguished Neutrals Michigan chapter gets underway" in the November 21, 2012 issue of *Grand Rapids Legal News*.

**JAMES R. PETERSON** was interviewed for the article "Snyder signs legislation establishing 17 business courts" appearing in the December 3, 2012 *Grand Rapids Business Journal*.

**THOMAS P. SARB** contributed to the article on Proposal 1 - Emergency Manager Law which was part of *Michigan Lawyers Weekly's* "Voter's Guide to 2012 Ballot Proposals" released in October 2012.

**CONNIE R. THACKER** was interviewed for the article "Grand Rapids Lawyers head national committee establishing gay marriage rights" which was on MLive and in the *Grand Rapids Press* on November 21, 2012.

# MILLER JOHNSON IN THE NEWS

## Leadership appointments and presentations:

**KATHLEEN H. AGUILAR** presented “Elder Law-Top Ten Questions” on September 21, 2012 at the State Bar of Michigan Annual Meeting.

**JEFFREY S. AMMON** will conduct the “Reduce Your Business Property Taxes & Maximize Property Tax Incentives” course for the Michigan Chamber of Commerce on February 5 in Lansing and February 6 in Novi. He recently had several other engagements including presenting “Michigan Business Law Update” on September 21, 2012 at the State Bar of Michigan Annual Meeting, participating on a panel about the personal property tax at the November 7, 2012 Michigan Association of Certified Public Accountants’ annual conference, and serving as emcee for the “Excellence in Construction” Awards Celebration for the Associated Builders and Contractors West Michigan on November 1, 2012.

**MARY V. BAUMAN, FRANK E. BERRODIN,** and **JAMES C. BRUINSMA** will present “Health Care Reform Update: How to Prepare for 2014” seminars on January 15 in Grand Rapids, January 16 in Lansing and January 17 in Novi for the Michigan Chamber of Commerce.

**CHRISTOPHER L. EDGAR** is the chair of Miller Johnson’s new Oil & Gas practice. Attorneys in this group are achieving favorable financial outcomes for property owners while also limiting landowner liability and land disruptions as well as protecting the environmental integrity of the land. Members also have extensive experience in litigating oil and gas disputes.

**CAROL J. KARR** was elected to serve another term as the chair of the Metro Health Hospital Foundation Board of Directors.

**NEIL J. MARCHAND** was accepted into the 2012-2013 class of Leadership Grand Rapids, a nine-month community leadership program offered by the Grand Rapids Chamber of Commerce’s Center for Community Leadership. He is also on the planning committee for the Great Gardens Party on May 8, 2013 which supports the Frederik Meijer Gardens & Sculpture Park.



**LAURIE K. MURPHY** presented “Hot Topics in Elder Law” for the GR Bar Association Probate Section on December 5, 2012. She was also reappointed to the Grand Rapids Art Museum Foundation Board.

**CYNTHIA P. ORTEGA** and **ERIC R. STARCK** are co-chairs of the State Bar of Michigan program “The Lawyer’s Guide to Buying Distressed Property” on January 17 in Birmingham.

**MARK E. RIZIK** spoke on the health care reform act at St. Thomas church and on WVHF radio.

**THOMAS P. SARB** was elected to the Hospice of Michigan Foundation Board of Directors.

**ERIC R. STARCK** gave a presentation on the “Commercial Real Estate Broker’s Lien Act” in October 2012 to Colliers International.

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Any of the lawyers listed can also put you in contact with Miller Johnson attorneys who practice in the areas of Banking, Construction, Economic Development, Health Care, Health Professionals, Immigration, Manufacturing, and Small Business.



Miller Johnson is a member of Meritas, a global alliance of over 7,000 lawyers serving in more than 170 full-service law firms across more than 70 countries. For direct access to locally-based legal expertise worldwide, please visit the Meritas website at [www.meritas.org](http://www.meritas.org).



*U.S. News Media Group* and *Best Lawyers* awarded Miller Johnson with high rankings for 34 practice areas in Grand Rapids and 11 in Kalamazoo as part of their 2013 "Best Law Firms" report. Achieving a high ranking is a special distinction that signals a unique combination of excellence and breadth of expertise according to the report. Services ranked as Tier 1 include employee benefits, bankruptcy and creditor/debtor rights, corporate law, labor and employment, mergers and acquisitions, banking and finance, commercial litigation, mediation, real estate, tax law, trusts and estates, and family law.