



JONES DAY
COMMENTARY

DELAWARE UPDATE: LLC MANAGERS HAVE FIDUCIARY DUTIES

In a recent decision, Vice Chancellor J. Travis Laster of the Delaware Court of Chancery held that limited liability company managers are subject to “default” fiduciary duties under the Delaware Limited Liability Act. *Feeley v. NHAOGC, LLC*, C.A. No. 7304-VCL (Del. Ch. Nov. 28, 2012). This is the first time the issue has been addressed since the Delaware Supreme Court declined to resolve it in *Gatz Props., LLC v. Auriga Capital Corp.* 2012 Del. LEXIS 577 (Del. Nov. 7, 2012) (“*Auriga II*”).

THE DECISION

In a limited liability company dispute, a member claimed that the manager’s gross negligence and willful misconduct breached default fiduciary duties. Because the operating agreement was silent on the subject, the plaintiff had to establish that the Delaware LLC Act imposed fiduciary duties on LLC managers or managing members.

The LLC Act, however, does not explicitly do so, and the Delaware Supreme Court has not definitively addressed this question. Numerous Court of Chancery decisions have held that default fiduciary duties do apply to managers of LLCs, most recently in *Auriga Capital Corp. v. Gatz Props, LLC* 40 A.3d 839 (Del. Ch. 2012) (“*Auriga I*”). That finding, however, was held to be dictum by the Delaware Supreme Court in *Auriga II*, which, in dicta of its own, noted that reasonable minds could differ about whether the LLC Act imposes default fiduciary duties. In the wake of *Auriga II*, Vice Chancellor Laster concluded that the Act does in fact impose default fiduciary duties.

The court relied on several provisions of the Delaware LLC Act and on pre-*Auriga II* decisions. First, section 18-1104 provides for equitable protection. Applying traditional principles of equity, Vice Chancellor Laster concluded that the manager of an LLC is a fiduciary because it has more than an arm’s-length,

contractual relationship with the LLC's members. Second, the court noted that section 18-1101(c), which expressly authorizes fiduciary duties to be expanded, restricted, or eliminated in operating agreements, "support[s] the existence of default fiduciary duties, because otherwise there would be nothing for the operating company agreement to expand, restrict or eliminate." Third, Vice Chancellor Laster noted that this language mirrors that of the Delaware Limited Partnership Act, which itself imposes fiduciary duties on general partners of Delaware limited partnerships. Finally, the court found further support for the existence of default fiduciary duties in prior Delaware Chancery Court decisions.

CONCLUSION

As Vice Chancellor Laster acknowledged, there will be continuing uncertainty regarding the existence of default fiduciary duties in the LLC context until the Delaware Supreme Court finally resolves the issue. *Feeley* would be an ideal test case for the Delaware Supreme Court because it directly presents the issue of whether, in the absence of applicable contract language, LLC managers are subject to fiduciary duties under the LLC Act.

However, until the Delaware Supreme Court resolves this issue, practitioners drafting LLC agreements should keep *Feeley* in mind and be sure to expressly disclaim fiduciary duties if that is the intent in the particular situation. Given *Auriga I* and *Feeley*, silence on this issue risks the imposition of default fiduciary duties.

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