

Delaware LLC Act Amended to Confirm Fiduciary Duties Exist Absent Express Agreement to the Contrary

Effective August 1, 2013, Section 18-1104 of the Delaware Limited Liability Company Act (the Act) was amended to confirm that, absent a provision in the limited liability company agreement to the contrary, the managers and controlling members of a limited liability company owe the fiduciary duties of care and loyalty to the limited liability company and its members. The Delaware General Assembly enacted this amendment to clarify the uncertainty resulting from the Supreme Court of Delaware's decision in *Gatz Properties, LLC v. Auriga Capital Corp.*,¹ which called into question precedent establishing so-called "default" fiduciary duties apply in Delaware limited liability companies.

Prior to *Gatz*, multiple decisions from the Delaware Court of Chancery held that managers and controlling members of a limited liability company had fiduciary duties unless they were expressly negated in the limited liability company agreement. However, in *Gatz*, the Supreme Court of Delaware stated the Court of Chancery's holding that managers and controlling members had default fiduciary duties was mere dicta and criticized the Court of Chancery for engaging in improper judicial activism. The Supreme Court upheld the Court of Chancery's decision on different grounds, but suggested that the issue of whether default fiduciary duties exist in the limited liability context would be best addressed by legislation.

Notwithstanding this amendment, parties still have the contractual freedom to eliminate, restrict or expand fiduciary duties pursuant to Section 18-1101(c) of the Act. Therefore, it is still advisable for parties to clearly address the applicability and extent of fiduciary duties in the limited liability company agreement. Moreover, the Pennsylvania Limited Liability Company Law does not contain a provision granting the parties the freedom to negate fiduciary duties. Since the Pennsylvania courts have yet to rule on this issue, it is unclear whether parties can eliminate, restrict or expand fiduciary duties in an operating agreement if the statute does not specifically grant the right to do so.

To discuss any questions you may have regarding the issues discussed in this Alert, or how they may apply to your particular circumstances, please contact Steven N. Haas at (610) 832-7441 or at shaas@cozen.com or Eileen T. Salimbene at (215) 665-4779 or esalimbene@cozen.com.

¹ 59 A.3d 1206 (Del. 2012).



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