



Proposed Amendment to Delaware's LLC Act Addresses Existence of Default Fiduciary Duties of LLC Managers

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Following the suggestion of the Delaware Supreme Court in *Gatz Properties, LLC v. Auriga Capital Corp.*, 2012 Del. Lexis 577 (Del. Nov. 7, 2012), the Delaware State Bar Association ("DSBA") has drafted a proposed amendment to Section 18-1104 of the Delaware Limited Liability Company Act, 6 Del. C. §§ 18-101. *et seq.*, which clarifies that the traditional or default fiduciary duties of care and loyalty apply to LLC managers in the absence of a provision in the applicable LLC agreement eliminating, restricting or modifying those duties. If the amendment is enacted by Delaware's General Assembly and is approved by the Governor, it is expected to become effective on August 1, 2013.

The proposed amendment comes in the wake of and, if enacted, would resolve, a debate that, according to some legal pundits, appears to have been brewing between Delaware's Supreme Court -- which has never formally ruled on the issue -- and the Court of Chancery -- which has found in multiple decisions that default fiduciary duties exist in the LLC context. The debate came to a head in the Supreme Court's *per curiam* decision in *Gatz*, which disagreed with the Chancellor's finding that the LLC Act "imposed 'default' fiduciary duties upon LLC managers and controllers unless the parties to the LLC Agreement contract that such duties shall not apply." The Supreme Court's decision stated that the issue "is one about which reasonable minds could differ," relegated the Court of Chancery's finding to "*dictum* without any precedential value" on the grounds that the case could have been decided solely by reference to the specific LLC agreement involved, and suggested that the issue might be best addressed by legislation.

Within approximately a month of the Supreme Court's widely publicized decision in *Gatz*, another member of the Court of Chancery, in the case of *Feeley v. HNAOCG, LLC, C.A. No. 7304-VCL* (Del. Ch. Nov. 28, 2012), which squarely presented the issue, cited the Court of Chancery's analysis and finding in *Gatz* as persuasive authority and held that default fiduciary duties apply to LLC managers where the LLC agreement is silent on the issue. *Feeley* was viewed by one commentator as the Court of Chancery's commitment to the proposition that default fiduciary duties exist.

The chairman of one of the DSBA sections involved in drafting the proposed amendment has been reported as stating that it would not create new law, but merely would confirm existing law established through multiple Court of Chancery decisions for the 600,000 LLCs that have been formed in Delaware, and is consistent with the current provisions of the LLC Act and the views of the Act's original drafting committee.

Whether the amendment is enacted or not, these developments highlight the importance of carefully and explicitly addressing the intended existence and scope (or lack thereof) of fiduciary duties of LLC managers in LLC agreements governed by Delaware law. In that regard, drafters of LLC agreements are reminded of the expressed policy of the LLC Act to give maximum effect to the principle of freedom of contract and to the enforceability of LLC



agreements, including the freedom, pursuant to Section 18-1101 of the Act, to expand, eliminate, restrict or modify LLC managers' fiduciary duties in the LLC agreement.