2008 SPRING MEETING
OF
ABA SECTION OF BUSINESS LAW

LLCs – Important Case Law Developments

2007-2008 SUPPLEMENT TO

CUMULATIVE SURVEY OF DELAWARE CASE LAW

RELATING TO

ALTERNATIVE ENTITIES*

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* The entire Cumulative Survey is available on the Morris Nichols website at www.MNAT.com under Publications/Treatises and General Publications.

II. LIMITED PARTNERSHIPS

A. Fiduciary Duties

1. Duties of General Partners

a. *Forsythe v. ESC Fund Management Co. (U.S.), Inc.*, 2007 WL 29822

Plaintiffs were current or former employees of Canadian Imperial Bank of Commerce ("CIBC") and limited partners in a Delaware limited partnership operating as a private equity fund (the "Fund") who brought a derivative action against the Fund, its corporate general partner (the "General Partner"), past and present directors of the General Partner, the Fund's investment advisor (the "Investment Advisor"), the Fund's special limited partner (the "Special Limited Partner") and CIBC alleging breach of fiduciary duty, breach of the Fund's partnership agreement and aiding and abetting. Defendants moved to dismiss on the grounds that (i) plaintiffs did not make demand and demand was not excused; (ii) plaintiffs failed to state a claim upon which relief could be granted; (iii) plaintiffs' claims were barred by laches and/or the statute of limitations; and (iv) plaintiffs waived their right to bring suit.

The Fund was created by CIBC to co-invest with CIBC in accordance with the investment criteria set forth in the Fund's partnership agreement and offering documents. Under the Fund's partnership agreement, the General Partner had the sole right to manage and administer the affairs of the Fund but the partnership agreement also provided for the General Partner to delegate certain of its responsibilities and pursuant thereto the General Partner delegated its authority to select and dispose of the Fund's investments to the Special Limited Partner. The General Partner also delegated other investment management and related powers, such as exercising the Fund's voting rights in its investments, to the Investment Advisor which also had the authority to develop investment policies and strategies and to recommend particular investments for the Fund. The Investment Advisor in turn delegated much of this investment decision authority to CIBC's investment committee, which consisted of upper level CIBC executives. The Investment Advisor could also buy investments for the Fund with approval of the Special Limited Partner. Notwithstanding the foregoing delegations, the court found that the General Partner retained supervisory responsibility because under the partnership agreement the exercise of their powers by the delegatees and the performance of their duties was "subject to the oversight of the General Partner." The partnership agreement also provided that the General Partner, Investment Advisor, Special Limited Partner and certain other persons were liable only for actions or omissions resulting from bad faith, willful misconduct, gross negligence or material breach of the partnership agreement.

The Fund lost over 75% of its initial value and over half of its investments were written down or written off. The complaint alleged that these losses resulted from defendants' breaches of fiduciary duties. Specifically, the complaint alleged that the Fund was designed to "co-invest" with CIBC. Under this design, when CIBC's investment committee decided to make a particular investment on behalf of CIBC, the Investment Advisor or Special Limited Partner would then decide if the investment met the Fund's eligibility requirements and, if so, invest along side CIBC. According to the complaint, however, investments were not made in this way. Rather, the same CIBC senior executives who served on CIBC's investment committee also acted for the Investment Advisor and the Special Limited Partner, and when an investment owned by CIBC lost value, these individuals acting for the Special Limited Partner or Investment Advisor allegedly approved the Fund's purchase of these investments from CIBC at prices equal to CIBC's original cost of investment and also paid CIBC a 7% finders fee. The complaint alleged that CIBC, the Special Limited Partner and the Investment Advisor violated their fiduciary duty to the Fund through this activity and the General Partner violated its duty by failing to oversee these activities.

With regard to plaintiffs' claims against the General Partner and its directors, the court dismissed the claims against two of the directors because they were not on the board when the allegedly improper acts occurred. The court, however, denied the motion to dismiss against the General Partner and the directors of the General Partner at the time of the wrongful acts finding that plaintiffs' allegations of wrongdoing by the Investment Advisor and Special Limited Partner and of the General Partner's complete failure to supervise the conflicted delegatees created a substantial likelihood of the General Partner's liability for gross negligence in discharging its oversight duty or material breach of the partnership agreement and were therefore sufficient to excuse demand also withstood a Rule 12(b)(6) attack. However, plaintiffs' failure to brief their claim that the directors of the General Partner aided and abetted the General Partner's breach of its oversight duties constituted a waiver of this claim and required its dismissal.

b. *Twin Bridges Limited Partnership v. Draper*, C.A. No. 2351 (Del. Ch. Sept. 14, 2007)

This case, although involving a dispute over the governance of a family owned limited partnership, raises significant issues of limited partnership law including whether the step transaction principal applied to the analysis of transactions under tax law should be applied to an amendment of a partnership agreement and subsequent merger so that the two are viewed as a single transaction, whether the doctrine of independent legal significance applies to Delaware limited partnerships, whether a supermajority provision in a partnership agreement can be reduced or eliminated by amendment with a lesser vote and whether a general partner can violate its fiduciary duty, and limited partners can aid and abet that violation, by proposing and adopting amendments to a partnership agreement that eliminate the general partners' fiduciary duties in connection with certain interested transactions. The partnership at issue had two general partners, Schutt and Draper, with joint authority to make all major decisions regarding the partnership. As the two general partners disagreed on the management of the partnership's principal asset, the Partnership was effectively in gridlock with respect to the development of that asset. Schutt and limited partners who collectively held 87% of the economic interests and voting power in the partnership decided to pursue a solution without Draper and the two limited partners who were his sons. This they did, without prior notice to Draper or his sons, by executing written consents to amend the partnership agreement to add a provision authorizing the partnership to merge with approval of partners holding two-thirds of the partnership interests and then approving the merger of the partnership into a newly formed limited partnership with a different governing structure. On the same day they effected the merger, Schutt and the limited partners aligned with her filed a declaratory judgment action seeking a declaration of the validity of the amendment to the partnership agreement, the merger of the partnership into another Delaware limited partnership and the merger agreement pursuant to which the merger was effected. Draper and his sons asserted counterclaims for breach of contract, a declaration of invalidity of the amendment and merger, breach of fiduciary duty against Schutt and a claim for aiding and abetting a breach of fiduciary duty against the limited partners aligned with Schutt.

With regard to defendants' claim against Schutt for breach of fiduciary duty, the court defined the issue before it as whether Schutt's involvement in passing the amendment and approving the merger could result in a breach of her fiduciary duty of loyalty to the partnership. Plaintiffs first sought dismissal of that claim on the grounds that any allegation of a self-interested transaction by Schutt was only "hypothetical" and therefore not ripe for decision. In addition to their unripeness claim, plaintiffs argued that because the amendment and merger were valid transactions under the partnership agreement and the DRULPA, Schutt's voting of her interest was not restricted by her fiduciary obligation as a general partner. With regard to plaintiffs' technical validity defense, the court, citing *Schnell v. Chris-Craft Industries, Inc.*, noted that while the integrated transaction might be valid under the new partnership agreement and the DRULPA, that did not necessarily immunize Schutt from a claim that she breached her fiduciary duty of loyalty to the partnership in spearheading the transaction. The court also rejected plaintiffs' ripeness defense. The court found there was no question that prior to the transactions at issue, Schutt, as a general partner, owed a fiduciary duty of loyalty to the partnership, that under DRULPA Section 1101(d), the elimination of a general partner's fiduciary duties was permissible and that the relevant provision of the new partnership agreement eliminated all fiduciary duties relating to the development and implementation of a development plan. Thus, the court concluded that any future review of a self-dealing transaction by Schutt as part of a development plan would be subject only to the lesser standard of the implied covenant of good faith and fair dealing and, therefore, such a limitation on defendants' right to challenge a development plan would have an immediate and practical impact on them and was ripe for adjudication. The court also noted that it could not rule out the possibility that depriving Draper of notice and an opportunity to address an issue as important as eliminating fiduciary duties constituted a breach of Schutt's fiduciary duty. Finally, with regard to defendants' aiding and abetting a claim against the limited partners aligned with Schutt, the court held that defendants had alleged sufficient facts to support a claim that those limited partners knowingly participated in Schutt's alleged breach of fiduciary duty.

3. Fiduciary Duties of Limited Partners and Others

a. *Forsythe v. ESC Fund Management Co. (U.S.), Inc.*, 2007 WL 29822

Plaintiffs were current or former employees of Canadian Imperial Bank of Commerce ("CIBC") and limited partners in a Delaware limited partnership operating as a private equity fund (the "Fund") who brought a derivative action against the Fund, its corporate general partner (the "General Partner"), past and present directors of the General Partner, the Fund's investment advisor (the "Investment Advisor"), the Fund's special limited partner (the "Special Limited Partner") and CIBC alleging breach of fiduciary duty, breach of the Fund's partnership agreement and aiding and abetting. Defendants moved to dismiss on the grounds that (i) plaintiffs did not make demand and demand was not excused; (ii) plaintiffs failed to state a claim upon which relief could be granted; (iii) plaintiffs' claims were barred by laches and/or the statute of limitations; and (iv) plaintiffs waived their right to bring suit.

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With regard to defendants' motion to dismiss for failure to state a claim, the court noted that the Special Limited Partner allegedly ratified investments without independent discussion or consideration and also allowed the Fund to invest in investments that did not fit its time horizon, and the court concluded that these facts supported a reasonable inference that the Special Limited Partner acted with gross negligence or in contravention of the partnership agreement. With respect to the Investment Advisor, the defendants argued that it did not owe fiduciary duties to the Fund. The court noted that a straight-forward, arm's length commercial relationship arising from contract does not give rise to fiduciary duties but that a fiduciary relationship does arise in the situation where one person reposes special trust in, and reliance on, the judgment of another. In the court's view, plaintiffs' allegations that the Investment Advisor, as a delegatee of the General Partner, ratified investment decisions and had authority to purchase and sell investments for the Fund adequately alleged that the Investment Advisor owed a fiduciary duty to the Fund. The court also concluded that these facts supported a reasonable inference that the Investment

Advisor breached its fiduciary duty. The court did dismiss plaintiffs' claims that the Investment Advisor and Special Limited Partner aided and abetted the General Partner's breach of its oversight duties finding that plaintiffs had waived these claims by failing to brief them in their opposition to the motion to dismiss.

4. Aiding and Abetting

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With regard to plaintiffs' claims against CIBC, the court found that plaintiffs had not established either that CIBC was the Fund's defacto General Partner or that CIBC owed the Fund fiduciary duties and for that reason dismissed the breach of fiduciary duty claim against CIBC, but with respect to plaintiffs' claim that CIBC aided and abetted breaches of the fiduciary duties of the Investment Advisor and the Special Limited Partner, the court found that because CIBC created the Fund and populated the Fund's decision making entities with CIBC's own employees, the court could infer CIBC's knowledge of the Special Limited Partner's and Investment Advisor's breaches of fiduciary duty and, therefore, refused to dismiss the aiding and abetting claims. However, the court would not infer CIBC's knowledge of the General Partner's breaches of duty because the General Partner was independent of CIBC, so these claims were dismissed.

H. <u>Derivative Actions</u>

2. Demand Requirements

a. *Forsythe v. ESC Fund Management Co. (U.S.), Inc.*, 2007 WL 29822

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With respect to the issue of plaintiffs' failure to make a demand, the court referred to the two-part test developed in *Aronson v. Lewis* as modified by *Rales v. Blasband* in the context of a complaint challenging a board's failure to exercise business judgment. Under *Rales*, the court held that demand would be excused if the particularized facts alleged in the complaint established that there was a substantial likelihood of liability for the General Partner. This in turn raised the issue of determining the standard of liability governing the General Partner's duty of oversight. The defendants argued that the applicable standard derived from *In re Caremark International Derivative Litigation* which requires a showing that the directors knew they were not discharging their fiduciary obligations. The plaintiffs countered that the appropriate standard was found in *Davenport Group MG, L.P. v. Strategic Investment Partners, Inc.* which, they asserted, stood for the proposition that the misconduct of a General Partner's delegatees is always imputed to the General Partner even when notice of such misconduct is never actually communicated to the General Partner. The court held, however, that neither the standard in *Caremark* nor the standard in *Davenport* applied in the present case because the partnership agreement set the proper standard of liability. Here the court found the partnership agreement left the General Partner with the duty to oversee the activities of the CIBC-related entities that actually managed the affairs of the Fund, and the partnership agreement also provided that the General Partner would be liable for acts or omissions resulting from bad faith, willful misconduct, gross negligence or a material breach of the partnership agreement thus establishing the General Partner's standard of liability. In rejecting application of the *Caremark* standard, the court also noted that the standard established in *Caremark* was based on the premise that those to whom corporate boards delegated management duties generally owed their loyalty to the corporation, whereas in the present case, the General Partner's duties were delegated to third parties occupying inherently conflicted positions. The court therefore concluded that the facts alleged in the complaint were sufficient to support an inference that the General Partner exercised no oversight and created a substantial likelihood of the General Partner's liability for gross negligence in discharging its oversight duty or material breach of the partnership agreement. For these reasons, the court excused demand.

I. Disclosures

1. *Forsythe v. ESC Fund Management Co. (U.S.), Inc.*, 2007 WL 29822

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With respect to the defendants' argument that based on the disclosures of the offering documents and the partnership agreement the plaintiffs waived their right to object to the alleged wrongdoing, the court was unpersuaded. It found that the alleged disclosures did not convey full knowledge of all of the facts and noted that the plaintiff limited partners were entitled to rely on the good faith and competence of the Fund's fiduciaries in selecting investments. Thus, the court rejected defendants' waiver claim.

J. <u>Procedural Issues</u>

4. Statute of Limitations

a. *Forsythe v. ESC Fund Management Co. (U.S.), Inc.,* 2007 WL 29822

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With respect to defendants' statute of limitations and laches defenses, the court noted that limitations periods would be tolled where the facts of the underlying claim were so hidden that a reasonable plaintiff could not timely discover them. In this regard, the court agreed with plaintiffs that the statute of limitations was tolled for a period of time during which the plaintiffs had no knowledge or reason to know that the Fund purchased worthless or improper investments.

Q. <u>Step Transaction and Independent Legal Significance</u>

1. *Twin Bridges Limited Partnership v. Draper*, C.A. No. 2351 (Del. Ch. Sept. 14, 2007

This case, although involving a dispute over the governance of a family owned limited partnership, raises significant issues of limited partnership law including whether the step transaction principal applied to the analysis of transactions under tax law should be applied to an amendment of a partnership agreement and subsequent merger so that the two are viewed as a single transaction, whether the doctrine of independent legal significance applies to Delaware limited partnerships, whether a supermajority provision in a partnership agreement can be reduced or eliminated by amendment with a lesser vote and whether a general partner can violate its fiduciary duty, and limited partners can aid and abet that violation, by proposing and adopting amendments to a partnership agreement that eliminate the general partners' fiduciary duties in connection with certain interested transactions. The partnership at issue had two general partners, Schutt and Draper, with joint authority to make all major decisions regarding the partnership. As the two general partners disagreed on the management of the partnership's principal asset, the Partnership was effectively in gridlock with respect to the development of that asset. Schutt and limited partners who collectively held 87% of the economic interests and voting power in the partnership decided to pursue a solution without Draper and the two limited partners who were his sons. This they did, without prior notice to Draper or his sons, by executing written consents to amend the partnership agreement to add a provision authorizing the partnership to merge with approval of partners holding two-thirds of the partnership interests and then approving the merger of the partnership into a newly formed limited partnership with a different governing structure. On the same day they effected the merger, Schutt and the limited partners aligned with her filed a declaratory judgment action seeking a declaration of the validity of the amendment to the partnership agreement, the merger of the partnership into another Delaware limited partnership and the merger agreement pursuant to which the merger was effected. Draper and his sons asserted counterclaims for breach of contract, a declaration of invalidity of the amendment and merger, breach of fiduciary duty against Schutt and a claim for aiding and abetting a breach of fiduciary duty against the limited partners aligned with Schutt.

With regard to the question of the validity of the amendment and merger, plaintiffs argued that the partnership agreement specified the requirements for amendment, the amendment complied with those requirements, the merger was approved pursuant to the requirements of the amended partnership agreement and that under the doctrine of independent legal significance, the validity of the amendment should be analyzed separately from the validity of the merger and, as separately analyzed, both were valid acts under the relevant provisions of the partnership agreement and the DRULPA. The defendants countered that the amendment and the merger, although technically creating a new partnership with a new partnership agreement, in substance effected a further amendment of the old partnership agreement. Therefore, plaintiffs maintained, the two parts of the transaction should be treated as one integrated transaction under the step transaction doctrine and, when so viewed, would be found to violate the provisions of the original partnership agreement. In analyzing this issue, the court agreed with the defendants that it was appropriate to view the two transactions as one. In so holding, the court cited only one case in which the Delaware Court of Chancery applying New York law treated two separate corporate transactions as one. The court bolstered its conclusion relying on the general concept that equity looks not at the form of an arrangement but at its substance. In addition, the court stated that whether the doctrine of independent legal significance applies in the context of a limited partnership dispute was an open question in Delaware and concluded because of its resolution of the substantive issues it did not need to address that question. It presumably came to this conclusion because, although it accepted the defendants' position that the amendment and subsequent merger should be treated as an integrated transaction with the result that the partnership agreement of the new partnership was analyzed as if it were an amendment of the old partnership agreement, the court concluded that it was a permissible amendment. In this regard, the defendants had argued that as part of the new governance structure one of the limited partners in the old partnership had become a general partner of the new partnership – in order to provide a tie breaking vote – and that this constituted an amendment to the original partnership agreement that allowed the limited partners to take part in the control of the business of the partnership which, pursuant to the amendment provision of the original partnership agreement, required the consent of all of the general and limited partners. However, the court found that the person at issue who had been a limited partner in the original partnership had in fact become a general partner of the new partnership and it was in its capacity as a general partner rather than in its capacity as a limited that it was taking part in the control of the business of the partnership. Thus, its change of status did not implicate the unanimity requirement of the amendment provision. Defendants had also argued, under the Delaware corporate rule that a supermajority provision in a charter cannot be reduced or eliminated by a lesser vote than the specified supermajority, that the plaintiffs could not amend the provision in the partnership agreement that required the approval of all general partners for all major decisions affecting the partnership business by a vote that did not include all of the general partners. The plaintiffs responded that pursuant to Section 17-302(f) of the DRULPA, a limited partnership agreement may be amended as provided in the agreement and that the challenged amendment had been adopted in accordance with the two-thirds vote required for amendments under the partnership agreement and was therefore valid. The court, finding that the conceptual underpinnings of Delaware's corporation law and limited partnership law were different and that there was no provision in the DRULPA comparable to Section 242(b)(4) of the Delaware General Corporation Law (which requires any alteration, amendment or repeal of a supermajority vote requirement in a certificate of incorporation to be accomplished with the approval of the same supermajority), rejected defendants' position and dismissed their claims for breach of contract and failure to comply with the merger provisions of the DRULPA.

R. Amendments; Supermajority Provisions

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III. LIMITED LIABILITY COMPANIES

B. Inspection of Limited Liability Company Books and Records

1. *NAMA Holdings, LLC v. World Market Center Venture, LLC,* C.A. No. 2756-VCL (Del. Ch. July 20, 2007)

Plaintiff brought an action to inspect the books and records of a Delaware limited liability company (the "Company") pursuant to a contractual right provided in the Company's limited liability company agreement. Prior to bringing the action, plaintiff had indicated that it would exercise its rights of inspection through a professional real estate advisory service, acting as its authorized representative, and that it would copy and retain, among other things, lease agreements, appraisals and all communications between the Company and its managers, attorneys and/or accountants. The Company responded that certain of the information and material sought by plaintiff was highly proprietary, confidential and entitled to trade secret protection, that it would strictly enforce the contractual provisions governing plaintiff's right to inspect its books and records, that plaintiff's right of access was contingent upon execution of a confidentiality agreement, that only a principal of plaintiff (and not a third party designee) would be allowed access to the Company's documents and that copying of any records would be limited. In addition, the Company claimed that its managing members were contractually entitled to impose other reasonable limitations on plaintiff's inspection rights. Focusing on the language of the LLC agreement giving plaintiff "reasonable access" to the Company's books and records, the court concluded that the parties intended some limitation to be placed on plaintiff's right of access and that it was the managing members of the Company that had the discretionary authority to determine exactly what limitations would constitute "reasonable access." The court bolstered this conclusion by noting that the managing members were generally vested with the power and obligation to manage the assets and affairs of the Company. Turning to the specific restrictions imposed by the Company, the court found that the managing members acted reasonably by limiting the scope of the inspection to only non-sensitive information, prohibiting photocopying and requiring a confidentiality agreement, particularly in light of the fact that affiliates of plaintiff had threatened to leak certain of the Company's records to a competitor. The only point on which the court agreed with plaintiff was with respect to who could conduct the inspection. On this issue, the court held that it was unreasonable for the managing member to require that a principal of plaintiff conduct the inspection rather than an agent or representative. Analogizing to the corporate context, the court noted that it had held that a stockholder who was granted a right of access to the books and records of a corporation pursuant to a stockholder's agreement may utilize duly constituted agents such as attorneys, accountants or clerks to conduct an inspection even though the agreement did not specifically provide for such delegation. In this regard, the court agreed with plaintiff's observation that if inspection rights were to have any substantive force, the party who benefited from them must be able to enlist the sophisticated assistance of attorneys, accountants and other experts to evaluate meaningfully complex financial information.

C. <u>Indemnification and Advancement</u>

1. *Bernstein v. Tractmanager, Inc.*, C.A. No. 2763-VCL (Del. Ch. Nov. 20, 2007)

Plaintiff had been a manager of a Delaware limited liability company (the "Company") that was converted to a Delaware corporation. Plaintiff also served as legal counsel for the Company prior to and following the conversion. Plaintiff brought suit in New York seeking recovery of legal fees and the Company counterclaimed against plaintiff. Thereafter plaintiff brought an action seeking advancement of the litigation expenses incurred by plaintiff in the New York action and expenses incurred in securing the advancement. Both parties filed motions for summary judgment. Defendant argued that the operating agreement of the Company prior to its conversion did not provide its managers with mandatory advancement and the bylaws of the Company following the conversion, although providing mandatory advancement to its directors and officers, did not provide any advancement to the persons who served as managers of the Company prior to its conversion. Additionally, defendant argued that the actions brought against plaintiff were brought "by reason of the fact" that he was the Company's attorney, not a director of the Company and, therefore, not covered by the mandatory advancement provisions of the Company's bylaws. With respect to defendant's first argument, the court reasoned that although under Section 18-216(h) of the LLC Act, upon a conversion the converted entity becomes liable for any contractual obligations of the LLC under its operating agreement including any contractual indemnification obligations, the scope of that liability would be the same as provided in the applicable operating agreement, and the operating agreement of the Company did not provide for mandatory advancement. Thus, the court concluded that plaintiff would not be entitled to advancement for actions taken as a manager of the Company. The court also rejected plaintiff's claim for advancement for acts occurring after the conversion when he was a director or officer of the Company finding that none of the claims brought against him in the New York litigation were "by reason of the fact" that he was a director or officer of the Company as required by the Company's bylaws, but rather rose out of actions taken by plaintiff as the Company's attorney. The court therefore granted the defendant's motion for summary judgment.

K. Procedural Issues

1. Arbitration

a. *Brown v. T-Ink, LLC*, C.A. No. 2190-VCP (Del. Ch. December 18, 2007)

The parties, who were members of a Delaware limited liability company (the "Company"), brought various actions against one another in the state and federal courts of Michigan. Additionally, defendant brought an AAA arbitration proceeding pursuant to the Company's LLC Agreement. Plaintiff filed an action in the Court of Chancery seeking to enjoin defendant from proceeding with arbitration pending final resolution of the parties' claims in the Michigan courts. Defendant filed a motion to dismiss for lack of subject matter jurisdiction because the two issues raised in plaintiff's complaint – substantive arbitrability (*i.e.* whether defendant's claims were arbitrable) and procedural arbitrability (*i.e.* whether defendant complied with the terms of the arbitration clause of the LLC agreement) – were themselves subject to mandatory arbitration under the LLC agreement. The court held that under Delaware law there is a presumption that a court, not an arbitrator, will have jurisdiction to decide issues of substantive arbitrability and that such presumption is not overcome unless the applicable arbitration clause evidences a "clear and unmistakable" intent to submit the issues of substantive arbitrability to an arbitrator. In this case, the scope of the arbitration clause in the LLC agreement limited arbitrable matters to those "concerning the interpretation or performance of the [LLC agreement]," and the court concluded that this language failed to show such a clear and unmistakable intent. Thus, the court held that it had subject matter jurisdiction to determine whether defendant's claims were arbitrable and found that defendant's contract based claims were subject to arbitration but that defendant's fraud claims as well as those of defendant's fiduciary duty claims that arose from general fiduciary duty principles under Delaware law, as opposed to those related to specific aspects of the LLC agreement, were not subject to arbitration. The court also held that under Delaware law wrongful enforcement of an arbitration clause constituted irreparable harm and that the balance of the equities slightly favored the plaintiff. Thus, the court found that plaintiff had satisfied the requirements for injunctive relief with regard to certain of its claims and enjoined the defendant from pursuing those claims in arbitration, although it denied plaintiff's request for an injunction with respect to claims it had found to be covered by the arbitration clause of the LLC agreement. With regard to the matters of procedural arbitrability, the court held that under Delaware law those questions presumptively are for an arbitrator to decide. Thus, with respect to those matters, the court also denied plaintiff's request for injunctive relief and allowed defendant to proceed to arbitration.

3. Jurisdiction

a. *Christ v. Cormick*, C.A. No. 06-275-GMS (D. Del. July 10, 2007)

Plaintiff brought suit in the District Court of Delaware against a Delaware limited liability company (the "Company"), its promoter and affiliates of the promoter alleging various causes of action arising from plaintiff's investment with the promoter in the Company and a South African corporation. All of the non-resident defendants sought to dismiss the suit under Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction. Only the jurisdictional issues with respect to the promoter raised issues under the LLC Act. As to the promoter, a citizen of Australia and a resident of the United Kingdom and the Republic of Zimbabwe, plaintiff alleged that he was subject to personal jurisdiction in Delaware pursuant to Section 18-109(a) of the LLC Act because he was a person who participated materially in the management of the Company. The court noted that under Section 18-109(a), a manager of a limited liability company may be served with process in all civil actions or proceedings brought in the State of Delaware "involving or relating to the business of the limited liability company or a violation by the manager . . . of a duty to the limited liability company." The court also noted that for purposes of Section 18-109(a), the term "manager" refers to any person who participates materially in the management of the limited liability company whether or not such person is a member of the limited liability company or officially designated as a manager of the limited liability company. The court found that under the facts alleged, the promoter met the definition of manager set forth in Section 18-109(a) and was therefore subject to personal jurisdiction under that statute because the requirement that the action or proceeding involve or relate to the business of the limited liability company was satisfied. The plaintiff also alleged that the promoter "purposefully availed [himself] of the privilege of conducting activities" within the State of Delaware and the court observed that under its precedent, "[a] single act of incorporation in Delaware will suffice to confer personal jurisdiction over a non-resident defendant if such purposeful activity in Delaware is an integral component of the total transaction to which plaintiff's cause of action relates." Here the court noted that the promoter's single contact with Delaware was directly related to the cause of action before the court because plaintiff had alleged that the formation of the Company was part of a scheme to defraud him, and the court found that one aspect of the case would "fall upon the rights, duties and obligations of [the promoter] as sole founder and manager" of the Company. Finally, the court recognized that the State of Delaware had a strong interest in providing a forum for the resolution of disputes relating to the use of the laws of formation of a limited liability company and that, because plaintiff's allegations related to the promoter's act of founding the LLC under the LLC Act, the maintenance of the suit would not offend traditional notions of fair play and substantial justice. Thus, the court denied the promoter's Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction.

9. <u>Intervention</u>

a. *The Follieri Group, LLC v. Follieri/Yucaipa Investments, LLC,* No. Civ. A. 3015-VCL (Aug. 23, 2007)

A member of a Delaware limited liability company (the "Company") sought judicial dissolution of the Company under Section 18-802 of the LLC Act. A putative creditor of the Company sought to intervene under either Court of Chancery Rule 24(a) (intervention of right) or Court of Chancery Rule 24(b) (permissive intervention). The creditor argued that the litigation seeking dissolution of the Company, if allowed to proceed without the creditor intervening, would adversely affect its ability to collect its debt from the Company. The court denied the creditor's motion. With respect to Rule 24(a), the court found that the creditor failed to meet the requirements of that Rule because there was "no statute that conferred on it an unconditional right to intervene" and it had "no interest in 'the property or transaction that [was] the subject of [the] action'" which centered on whether it was reasonably practicable to carry on the business of the Company in conformity with its LLC agreement. The court noted that even if the Company were dissolved, under Sections 18-803 and 18-804 of the LLC Act governing winding up and distribution of assets, respectively, the interests of creditors are fully protected. With respect to Rule 24(b), the court found that there was no statute that conferred even a conditional right to intervene and that the creditor failed to satisfy the only additional basis of this Rule which was "that its 'claim or defense' (i.e. its claim for payment) and the dissolution action 'have a question of law or fact in common.'" Finally, the court found that the cases cited by the creditor relating to motions by judgment creditors to intervene in foreclosure actions or sheriff's sales provided no support for the proposition that a putative creditor should be permitted to intervene in a statutory dissolution action.

IV. GENERAL PARTNERSHIPS AND JOINT VENTURES

E. Withdrawal of Partners

1. *Anderson v. Snyder's Fishing Club*, C.A. No. 2137-MA (Master's Report Del. Ch. June 21, 2007)

Plaintiff was a partner in a family partnership (the "Partnership") that owned a piece of real estate in Sussex County, Delaware (the "Property"). After action by the other family members to remove plaintiff as president of the Partnership, plaintiff submitted a notice of withdrawal from the Partnership. Plaintiff's withdrawal was accepted but a disagreement arose regarding what payment plaintiff was entitled to upon her withdrawal. Plaintiff filed an action in the Court of Chancery seeking a determination of the buyout price for her interest in the Partnership. The dispute was referred by the court to a Master in Chancery and this is a summary of the master's report. Plaintiff asserted that pursuant to Section 15-701 of DRUPA, she was entitled to one-ninth of the fair value of the Property. The Partnership countered that DRUPA was irrelevant because the partnership agreement of the Partnership provided a specific and unambiguous formula for determining the value of a retiring partner's interest in the event that the remaining partners continued the Partnership. The master agreed with defendant that the partnership agreement expressly provided a method for determining the value of a retiring partner's share and that, therefore, Section 15-701 of DRUPA did not apply. However, the master found that the terms of the partnership agreement were confusing and ambiguous and therefore turned to its extrinsic evidence. Based on this evidence, the master found that it was the intent of the parties that a retiring partner's buyout price was limited to his or her net capital investment in the Partnership and ordered that this amount be paid over to plaintiff. The master also briefly addressed plaintiff's claim that she withdrew her retirement notice, but finding that she received the Partnership's letter officially accepting her letter of retirement on the same day she mailed her letter rescinding her notice, the master concluded, based on contract principles of offer and acceptance, that her attempt to revoke her retirement letter was unavailing.

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