2015 SPRING MEETING
OF
ABA SECTION OF BUSINESS LAW

2015 Review of LLC Case Law Developments

2015 SUMMARY OF DELAWARE CASE LAW

RELATING TO

ALTERNATIVE ENTITIES[1]

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1 Morris Nichols maintains a Cumulative Survey of Delaware case law relating to alternative entities which is updated annually, organized by subject area and includes most cases that address significant alternative entity issues. The entire Cumulative Survey is available on the Morris Nichols website at www.MNAT.com under Publications.

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1. *Lewis v. AimCo Properties, L.P.*, C.A. No. 9934-VCP (Del. Ch. Feb. 10, 2015) (V.C. Parsons)

Plaintiffs in this matter were minority owners of limited partnership interests in four Delaware limited partnerships (the "LP Defendants"). Each LP Defendant had a corporate entity as its general partner (the "GP Defendant") and each such corporate general partner was indirectly owned by non-party Apartment Investment and Management Company, a Maryland real estate investment trust ("AimCo"); AimCo indirectly held a majority of the limited partnership interests in each LP Defendant. What gave rise to this action was the merger of the LP Defendants into a subsidiary of Aimco Properties, L.P., a Delaware limited partnership and an affiliate of Aimco ("Aimco OP"), without obtaining a vote from the minority limited partners of the LP Defendants. Plaintiffs asserted that the GP Defendants, Aimco OP and certain officers and directors of AimCo and the GP Defendants breached their fiduciary duties because the mergers were allegedly self-dealing transactions and were not entirely fair. Several defendants moved to dismiss the complaint against them for (i) lack of subject matter jurisdiction because two of the LP Defendants' partnership agreements contained a mandatory arbitration clause and (ii) failure to state a claim upon which relief could be granted because neither Aimco OP nor the officer-defendant of AimCo owed fiduciary duties to plaintiffs.

In ruling on the motion to dismiss for lack of subject matter jurisdiction, the court held that the relevant partnership agreements contained broad, mandatory arbitration clauses. According to binding Delaware precedent, the issue of substantive arbitrability was left to the arbitrator if the parties clearly and unmistakably agreed to submit that issue to the arbitrator. This "clear and unmistakable evidence" standard was met when the arbitration clause provided for arbitration of all disputes and incorporated a set of arbitration rules that allow arbitrators to decide arbitrability. The arbitration clauses of the partnership agreements of the relevant LP Defendants applied to the widest array of potential claims and provided that arbitration would be conducted in accordance with the rules of the American Arbitration Association, which empowered arbitrators to rule on their jurisdiction. The court therefore held that the partnership agreements required that the issue of substantive arbitrability be left to the arbitrator.

With respect to the motion to dismiss for failure to state a claim upon which relief could be granted, the court held that the moving defendants did not owe fiduciary duties to plaintiffs. Plaintiffs claimed that Aimco OP owed fiduciary duties to the limited partners of the LP Defendants because it controlled the LP Defendants and exercised that control to acquire unaffiliated minority interests held by the minority limited partners. The court restated plaintiffs' argument as follows: AimCo owned majority stakes in the LP Defendants through its affiliates; Aimco OP was an affiliate of AimCo; therefore, Aimco OP may have been liable for a breach of fiduciary duty as to one of the LP Defendants. The court, however, pointed out that this reasoning erroneously imposed on limited partnerships the corporate law concept of fiduciary duties owed by a controlling stockholder to the minority stockholders. The court disagreed with this assertion. The management and control of a limited partnership is vested with the general partner, and, even with a majority interest, a limited partner would not have the power to manage the business and affairs of the limited partnership without subjecting itself to personal

liability as a general partner. Thus, the court did not find that AimCo's indirect majority interest in the LP Defendants supported a reasonable inference that AimCo or Aimco OP owed a fiduciary duty to the LP Defendants or their limited partners. Additionally, since plaintiffs named the GP Defendants and their directors as parties to this action, the complaint implicitly recognized that those GP Defendants were the controllers of the LP Defendants, not Aimco OP. The court explained that according to the In re USACafes, L.P. Litigation line of cases, the proper defendants for these alleged breaches of fiduciary duties may be the GP Defendants and their officers and directors, but not Aimco OP or its officers. The complaint was therefore dismissed as to the moving defendants.

2. *Ellis v. OTLP GP, LLC*, C.A. No. 10495-VCN (Del. Ch. Jan. 30, 2015) (V.C. Noble)

Plaintiffs, limited partner unitholders of Oiltanking Partners, L.P. ("Oiltanking"), brought an action to challenge the proposed merger of Oiltanking with defendant Enterprise Products Partners L.P. ("Enterprise"), which owned about two-thirds of Oiltanking's limited partner interests. Before the court was plaintiffs' motion to expedite the action in order to seek a preliminary injunction to halt the upcoming merger vote.

In June 2014, Enterprise approached Marquard & Bahls AG ("M&B"), which owned all of Oiltanking's general partner, OTLP GP, LLC ("GP") along with a two-thirds interest in Oiltanking, about purchasing M&B's interest in Oiltanking and acquiring all of Oiltanking. M&B was open to selling its interest, but did not want to participate in any deal that would require the support of the unaffiliated common unitholders, a class which included the plaintiffs. Under Oiltanking's Limited Partnership Agreement (the "Agreement"), the majority of common unitholders (excluding the general partner and its affiliates) were required to approve any merger during the "subordination period", which was expected to end mid-November 2014. After the subordination period ended, the unaffiliated common unitholders were not entitled to a class vote on any merger. The Agreement also purported to eliminate all fiduciary duties save for those defined in the Agreement.

During negotiations for the sale of its ownership interests, M&B advised Enterprise that it should wait until the end of the subordination period to acquire the publicly held common units if it wanted to avoid a class vote on the merger. M&B then agreed to sell its interest in GP and its two-thirds interest in Oiltanking to Enterprise, a deal which closed on October 1. Shortly before closing, Enterprise notified Oiltanking of its intention to acquire the remainder of Oiltanking's limited partner interests at a price below what it paid M&B for its units. GP referred the consideration issue to the conflicts committee established under the Agreement, which negotiated a price that was increased but still lower than that paid to M&B. The subordination period subsequently ended and Enterprise proposed a vote on the merger by a simple majority of the common units, the outcome of which was preordained given its two-thirds interest.

Plaintiffs' first argument for an injunction was that since Enterprise's acquisition was announced during the subordination period, the class voting standard applicable during that period should apply to the upcoming merger vote. They alleged the Agreement was ambiguous on this issue, since it did not specify the voting standard that would apply

with respect to when an item for voting is announced, and that defendants breached the implied covenant of good faith and fair dealing in determining no class vote was required. The court found the Agreement to be unambiguous, since plaintiffs gave no reason why the voting standard should not be determined by reference to the time of the vote. Further, the failure of the Agreement's drafters to subject announcements of merger, as opposed to votes on a merger, to certain requirements did not implicate the implied covenant. The implied covenant supplies terms to fill gaps in express provisions of an agreement, but the voting provisions of the Agreement were clear and nothing about the timing of the announcement of the acquisition or merger vote defeated the common unitholders' expectations under the Agreement.

Plaintiffs further contended that M&B's sale of its interest and Enterprise's pursuit of a merger should be treated as a single transaction under the step-transaction doctrine. They argued that M&B breached its fiduciary duties to them by telling Enterprise that it would not participate in a transaction requiring a class vote, in an attempt to bypass its obligations to provide a class vote on the merger. The court found the step-transaction doctrine inapplicable. M&B was not a party to the merger and did not structure the merger – Enterprise decided to purchase M&B's interest and then took advantage of the timeline espoused in the Agreement. M&B had every right to tell Enterprise that it wanted no involvement with a class vote, and GP could not be deemed to have breached fiduciary duties because its affiliate M&B made a decision it was entitled to make. In addition, the court found that even if the step-transaction doctrine were applicable, M&B, GP and Enterprise did nothing out of the ordinary to defeat the class vote, merely allowing the subordination period to expire. When Enterprise obtained M&B's interest on October 1st, it was bound to honor the class vote requirement until the subordination period expired, which it did. The fact that the merger announcement occurred during the subordination period did not trigger a class vote.

Finally, plaintiffs challenged GP's handling of Enterprise's merger offer, suggesting either that GP should not have told Enterprise in June about the consequences of the expiration of the subordination period or that it was not exculpated under the Agreement because it did not seek the best possible merger price for the common unitholders. The court rejected these arguments, since the plaintiffs failed to explain how GP violated its fiduciary duties through its disclosure to Enterprise and since GP abided by the Agreement in determining the merger consideration. The lesser consideration plaintiffs received was merely an inevitable consequence of how the Agreement was drafted. Having rejected each of the plaintiffs' claims, the court denied their motion to expedite.

3. *The Renco Group, Inc. v. MacAndrews AMG Holdings LLC*, C.A. No 7668-VCN (Del. Ch. Jan. 29, 2015) (V.C. Noble)

Plaintiff, a member of AM General LLC (the "LLC"), filed an action directly and derivatively against the LLC's managing member ("MacAndrews AMG") and controllers. Defendants moved to dismiss. At issue were three relevant classes of claims—breach of contract claims, implied covenant of good faith and fair dealing claims and fiduciary duty claims—stemming from plaintiff's and defendants' dispute over

whether the defendants had given plaintiff the benefit of certain protections afforded plaintiff in the LLC's limited liability company agreement (the "LLC Agreement").

The breach of contract claims centered on the meaning of certain terms in the LLC Agreement. Because ambiguity existed around the meaning of the terms and the terms were reasonably susceptible to different interpretations, the court denied defendants' motion to dismiss the breach of contract claims. The court likewise denied defendants' motion to dismiss plaintiff's implied covenant claims because the court could not foreclose plaintiff's "reasonably conceivable claims" that MacAndrews AMG's conduct went to issues so fundamental that plaintiff's reasonable expectations were frustrated. However, the court granted defendants' motion to dismiss plaintiff's fiduciary duty claims because the LLC Agreement explicitly addressed the parties' rights on the matters plaintiff asserted in its fiduciary duty claims and the LLC Agreement provisions superseded fiduciary duties that might otherwise apply.

4. *Prokupek v. Consumer Capital Partners LLC*, C.A. No. 9918-VCN (Del. Ch. Dec. 30, 2014) (V.C. Noble)

Plaintiff, former Chairman and CEO of defendant Smashburger Master LLC ("Smashburger"), was granted a substantial amount of restricted equity of Smashburger as a term of employment, most of which would not vest unless Smashburger met certain "performance hurdles". After Smashburger terminated him and redeemed his vested units pursuant to its LLC Agreement (the "Agreement") at a price it determined to be fair market value, Plaintiff demanded certain of Smashburger's business records under Section 18-305(a) of the Delaware Limited Liability Company Act (the "LLC Act"), with the stated purpose of evaluating Smashburger's financial performance to determine whether it manipulated its financials to make it appear that it fell short of some of the performance hurdles. After Smashburger refused his demand, plaintiff petitioned the court for inspection, arguing that he retained equity in Smashburger and concomitant inspection rights because it did not call a substantial number of his units and also because it paid him too little for his units. Alternatively, he argued that he retained inspection rights by virtue of his status as a former member of Smashburger. Smashburger moved to dismiss plaintiff's claim, asserting that it had already redeemed his units, thus terminating his membership and precluding him from exercising inspection rights.

The court first addressed the issue of whether plaintiff was a member of Smashburger at the time of his demand. It noted that the unit redemption price and the number of units redeemed were undisputed facts fit for resolution on summary judgment. Addressing the plaintiff's first argument on this issue, the court found that under the redemption provision of the Agreement, Smashburger's manager was to determine the number of vested units by certifying whether Smashburger achieved the applicable performance hurdles. Since the manager decided Smashburger did not, Smashburger complied with the Agreement and plaintiff was no longer a member. Whether the EBITDA numbers the manager used to determine compliance with the performance hurdles were unreliable was a separate factual question that could support a breach of contract action, but did not affect plaintiff's membership status.

The court next addressed plaintiff's argument that he retained equity pursuant to a dispute mechanism in the Agreement. This mechanism allowed former employees to object to Smashburger's determination of fair market value within thirty days of receiving a call notice, with the parties having an additional fifteen days to agree on the fair market value and, if no agreement was reached, the option to retain an independent firm to give a valuation within thirty days. Plaintiff contended this mechanism required Smashburger to determine a fair price for his units prior to redeeming his units. The court rejected this argument based on the plain language of the redemption provision, which provided that all redemptions shall close within sixty days of the notice of termination and contained no exception for ongoing disputes covered by the dispute mechanism. In addition, the dispute mechanism contemplated a period of up to seventy-five days from the date of Smashburger's determination of fair market value to resolve disputes, whereas the redemption provision required closing to occur within sixty days. Thus, the only way to give effect to both provisions without altering the Agreement's express terms would be to recognize that valuation disputes may continue after a member's units have been validly called. Therefore, although the plaintiff may have had damages claims related to the redemption closings, the court found he was not entitled to the restoration of an equity interest.

Lastly, the court addressed plaintiff's argument that even if he was no longer a member, he retained inspection rights. The court looked to Section 18-305(a)'s corporate analogue, 8 Del. C. § 220, for guidance. Section 220 unambiguously limits inspection rights to current stockholders and is narrowly construed by the court. In addition, Section 18-305(a) confers inspection rights only on current members and plaintiff cited no Delaware authority holding that former members retain residual inspection rights. Since the LLC Act permits LLC agreements to grant members greater inspection rights than are provided by statute, the court found no reason to expand the LLC Act's plain language when the parties could have done so themselves. Having rejected all three of plaintiff's arguments, the court granted Smashburger's motion to dismiss.

5. *2009 Caiola Family Trust v. PWA, LLC*, C.A. No. 8028-VCP (December 18, 2014) (V.C. Parsons)

Nominal defendant Dunes Point West, LLC ("Dunes Point"), a Delaware limited liability company, was appointed by defendant PWA, LLC ("PWA"), a Kansas limited liability company, to serve as property manager of an apartment complex. Plaintiffs, non-managing members of Dunes Point, accused defendants PWA and Ward Katz, its managing member, of various breaches of Dunes Point's operating agreement (the "Agreement"). These included improper payment of asset management fees, provision of misleading financial reports, failure to improve and maintain the property, waste and other fiduciary duty breaches, and violation of the Agreement's "key person" provision. Both defendants moved to dismiss for failure to state a claim or, alternatively, on grounds of forum non conveniens. Katz also sought dismissal on grounds that he lacked sufficient minimum contacts with the State of Delaware for the court to exercise personal jurisdiction over him. Plaintiffs cross-moved for summary judgment, arguing that defendants' alleged actions justified removal of PWA from its position as managing member.

The court first addressed its jurisdiction over Katz, which was a two-part analysis. First, the court found that plaintiffs had authority to serve process on Katz under Delaware's long-arm statute, which gives the state jurisdiction over persons transacting business in the state. Several facts showed that Katz controlled and managed PWA, which managed Dunes Point, including that Katz executed multiple documents relating to Dunes Point, was listed as its principal manager, had sole authority to draw checks on its bank account, mailed its Delaware partnership returns, signed checks for its Delaware franchise tax payments, and signed and filed its tax returns. The court indicated that the fact that neither Katz nor PWA filed the documents related to Dunes Point's formation did not exempt them from the court's jurisdiction. Second, the court found that exercising jurisdiction over Katz comported with due process. Since he expected a significant monetary return from his management of Dunes Point, it was reasonable to require him to answer for alleging wrongdoing relating thereto in the court. The court rejected Katz's argument that expected benefits below a certain dollar amount would allow non-residents to avoid Delaware jurisdiction.

The court went on to deny defendant's motion to dismiss with respect to four of plaintiffs' claims, finding the complaint plead sufficient facts from which it could be inferred defendants (i) breached the Agreement by allegedly paying management fees in violation of the Agreement, by providing misleading financial reports to plaintiffs and by mismanaging Dunes Point, and (ii) breached their fiduciary duties by, for example, engaging in self-dealing by causing Dunes Point to pay management fees to an entity that was owned by Katz. Although the defendants argued the fiduciary duties claims should be dismissed because they were essentially in the nature of contract claims, the court found that the fiduciary duty claims were broader in scope than the contract claims. In so finding, the court highlighted that Katz was not a party to the Agreement and thus the claims against him could not constitute breach of contract claims. The court also found that the duty of loyalty could be implicated by the claimed self-dealing with respect to the alleged improper payment of management fees. The court dismissed the waste claim, however, since the standard for such a claim is extremely high and was not satisfied by plaintiffs' allegation that defendants charged somewhat lower rent than the alleged market rate for comparable apartments.

Finally, the court denied plaintiffs' cross-motion, finding there were genuine issues of material fact as to whether defendants improperly commingled tenant security deposits or whether Katz violated the "key person" provision by failing to remain actively involved in the management of the apartment complex.

6. *Matthew v. Laudamiel*, C.A. No. 5957-VCN (Del. Ch. Nov. 12, 2014) (V.C. Noble)

Defendant Fläkt Woods Group SA ("Fläkt Woods") moved for summary judgment on plaintiff Stewart Matthew's claims of aiding and abetting breach of fiduciary duties, tortious interference with contractual relations, unjust enrichment and civil conspiracy. Subsequent to Fläkt Woods' motion, plaintiff amended his complaint to add Fläkt Woods Limited ("FWL") as a defendant. Plaintiff's claims were premised upon Fläkt Woods' and FWL's role in the efforts of defendants Christophe Laudamiel and Roberto Capua to rid Aeosphere LLC, a Delaware limited liability company (the "Company"), of plaintiff.

The claims against Fläkt Woods and FWL were substantially the same, so all of the court's references to Fläkt Woods were to FWL, as well.

Plaintiff's allegations centered on the actions of Neil Yule, who represented Fläkt Woods in its dealings with the Company. The court noted that Yule's (and thus Fläkt Woods') desire for the Company to resolve its internal disputes and its wish to do business with Laudamiel were unobjectionable. However, although it found scant evidence of wrongful conduct by Yule, the record suggested he engaged in behavior that could support an inference that he developed and implemented the strategy to force plaintiff out of the Company.

For instance, Yule allegedly created scheduling conflicts to keep Matthew from attending potentially important meetings; joined meetings between Laudamiel and Capua to discuss how to exclude Matthew from the Company; made statements to the effect that any contact he had with Matthew was for the sole purpose of helping Laudamiel and Capua; offered to threaten that Fläkt Woods would discontinue its relationship with the Company, with the potential effect of causing Matthew to leave the Company; and took the position that DreamAir, the new entity Laudamiel formed after the Company was dissolved, would inherit the terms of the agreement in place between the Company and Fläkt Woods. Although these facts were not dispositive, the court stated they were considerable obstacles to granting Fläkt Woods' motion.

Against this general background, the court proceeded to discuss the specific claims against Fläkt Woods. It first addressed the fiduciary duty claim. Fläkt Woods argued these claims should be dismissed because they were based on plaintiff's breach of contract claims related to the dissolution or unwinding of the Company and were therefore duplicative. The court agreed that fiduciary duty claims cannot proceed in parallel with contract claims based on the same conduct, since this would undermine the primacy of contract law over fiduciary duty law in matters involving contractual rights and obligations and waste resources. However, although plaintiff's harm primarily arose from the dissolution and winding up of the Company and the Company's operating agreement addressed those topics, the court found plaintiff presented facts that could support claims independent of the contract. For example, plaintiff's allegation that Fläkt Woods was carrying on the Company's business with DreamAir raised material issues of fact about the scope of Fläkt Woods' violations and the resulting harm, since he contended that Laudamiel and Capua engaged in a scheme with Fläkt Woods to exploit the Company's assets, of which the dissolution of the Company was only a part. Therefore, the court denied Fläkt Woods summary judgment on the aiding and abetting of fiduciary duty claim. For largely the same reason, it also denied Fläkt Woods' motion for summary judgment on the civil conspiracy claim.

The court then turned to plaintiff's tortious interference claims, which were based on the Company's LLC agreement and plaintiff's employment agreement with the Company. To prevail, plaintiff had to demonstrate there was a contract about which Fläkt Woods knew, that it engaged in an intentional act which was a significant factor in causing a breach of the contract, that the act was without justification, and that it caused injury. First, the court rejected Fläkt Woods' argument that it was unaware of the employment

agreement, since Yule had conversations with plaintiff about his "employment in the organization," from which he could have inferred the existence of the agreement. Next, the court found Yule's actions could be construed as a substantial cause in the process leading to the dissolution, since the record supported an inference he wanted to move forward without Matthew and encouraged Laudamiel and Capua to work toward this goal. As for Fläkt Woods' contention that its conduct was legally justified, although it had legitimate concerns about the effect of the Company's internal dissention on its joint venture, the court found there was an insufficient factual record to determine what role, if any, Yule played in causing this dissension. Thus, it denied Fläkt Woods' motion for summary judgment on the tortious interference claims.

Finally, the court granted Fläkt Woods' motion for summary judgment on the unjust enrichment claim, since it found Fläkt Woods gained no economic advantage from its conduct. Although plaintiff may have been able to show an "impoverishment," he did not show Fläkt Woods was enriched or that he lacked an adequate remedy at law for his harm.

7. *In re Kinder Morgan, Inc. Corporate Reorganization Litigation*, C.A. No. 10093-VCL (November 5, 2014) (V.C. Laster)

In this case, plaintiffs sought a preliminary injunction against the closing of a merger (the "Merger") between defendant Kinder Morgan Energy Partners, L.P., a publicly traded Delaware limited partnership (the "Partnership"), and a wholly-owned subsidiary of Kinder Morgan Inc. ("Parent"), whereby certain limited partnership interests (the "Common Units") in the Partnership would be converted in to the right to receive cash, common stock of Parent or mixed consideration of cash and Parent's stock. Defendants believed that the Merger only needed approval from holders of a majority of the Partnership's three classes of limited partner units (collectively, the "Outstanding Units"), voting together as a single class. Plaintiffs' position was that under the Partnership's limited partnership agreement (the "LPA"), the Merger was required to meet more onerous provisions of the LPA's amendment section that required, inter alia, approval from a higher percentage of limited partners (the "LPA Amendment Provisions"). The court denied plaintiffs' motion for preliminary injunction because the plain language of the LPA supported defendants' position.

Other than containing a different vote threshold, the LPA's merger provision was generally consistent with Section 17-211 of the Delaware Revised Uniform Limited Partnership Act (the "Delaware Act"). The LPA authorized the Partnership to merge with other business entities upon receiving the affirmative vote or consent of at least a majority of the Outstanding Units. With respect to mergers, the LPA differed from Delaware Act, providing that if a merger agreement contained any provision which, if contained in an amendment to the LPA, the provisions of the LPA or the Delaware Act would require the vote or consent of a greater percentage of the Outstanding Units or of any class of limited partners, such greater percentage of vote or consent would be required to approve the merger agreement (the "Amendment-By-Merger Exception"). The purpose of the Amendment-By-Merger Exception was to prevent an amendment to

the LPA by a majority vote through a merger agreement that would otherwise require a higher voting threshold.

Plaintiffs argued that although the merger agreement was not expressly amending the LPA, the conversion of the Common Units as a result of the Merger was substantially similar to amending the LPA, requiring a vote that would satisfy the LPA Amendment Provisions. The court disagreed, holding that neither the LPA nor the Delaware Act provided for a similar conversion of limited partnership interests by amendment to the LPA. Since an amendment to the LPA could not accomplish what was being done by the merger agreement, the Amendment-By-Merger Exception was not triggered and the LPA Amendment Provisions were not applicable. The court held that since the LPA was not being amended by the Merger, the Merger only needed to receive the affirmative vote of the holders of a majority of the Outstanding Units.

8. *Yucaipa American Alliance Fund I, LP v. SBDRE LLC*, C.A. No. 9151-VCP (October 31, 2014) (V.C. Parsons)

In this case, the court resolved defendants' motion to dismiss or stay plaintiffs' complaint. Plaintiffs were investment funds that held a majority equity interest in a car-hauling and delivery business when the business entered bankruptcy; at the time of this decision, the bankruptcy case was still ongoing. Plaintiffs had purchased a majority of the business's debt, but defendants also owned a significant portion of that debt (collectively, the "Debt") and had formed an LLC (the "LLC") to realize upon assets acquired from the business's estate following a successful credit bid approved by the bankruptcy court. Relevant here is the relationship between the LLC's LLC Agreement and the credit agreement that governed the Debt.

In their complaint, among other things, plaintiffs sought a declaratory judgment that plaintiff elected itself managing member of the LLC and alleged that the LLC's LLC Agreement impermissibly modified certain lenders rights under the Credit Agreement and that one of the defendants (a lender) owed the other lenders fiduciary duties and breached those duties by granting itself extra powers in the LLC's LLC Agreement. Unfortunately for plaintiffs, they had bound themselves to a covenant in the credit agreement not to sue for certain claims. The court found that the covenant, by its terms, technically covered all of plaintiffs' claims. However, the court was persuaded by plaintiffs' argument that interpreting the covenant in such a broad manner would violate public policy, which "does not permit an intentional prospective waiver" of claims like plaintiffs' because the result would be that defendants could declare all of plaintiffs' portion of the debt void at any time and plaintiffs would have no recourse. The court found that, at the motion to dismiss stage, it was conceivable that plaintiffs could show the outer boundaries of the covenant ambiguous and that public policy would prevent a wholesale application of the covenant not to sue that the defendants advanced.

The court dismissed all of the claims mentioned above except for the claims related to the declaratory judgment, which it found could be outside the bounds of the covenant for the reasons discussed above. However, the court stayed resolutions of those claims pending resolution of the business's bankruptcy case.

9. *Seaport Village Ltd v. Seaport Village Operating Company, LLC*, C.A. No. 8841-VCL (Sept. 24, 2014) (V.C. Laster)

Defendant, the prevailing party in an action brought by plaintiff in California and continued in the Chancery Court of the State of Delaware, sought attorney's fees and expenses from plaintiff pursuant to a fee-shifting provision in defendant's limited liability company agreement (the "Agreement"). The Agreement provided that the prevailing party in any action brought by a party to the Agreement against another party to the Agreement that arose out of the Agreement "shall be entitled to recover from the other party reasonable attorneys' fees, costs and expenses incurred in connection with the prosecution or defense of such action." It was undisputed that defendant was the prevailing party, that both suits arose out of the Agreement and that the amount requested was reasonable. Plaintiff's only defense was that defendant was not a "party" to the Agreement because it did not sign the Agreement. Section 18-101(7) of the LLC Act provides that a limited liability company is not required to execute its limited liability company agreement and is bound by its limited liability company agreement whether or not it executed the agreement. Therefore, the court held that defendant was a party to the Agreement and thus could enforce the fee-shifting provision against plaintiff. The court further held that defendant was entitled to attorney's fees and expenses incurred in bring the motion to enforce the fee-shifting provision.

10. *Ross Holding and Management Co. v. Advance Realty Group LLC*, C.A. No. 4113-VCN (Del. Ch. Sept. 4, 2014) (VC Noble)

In this post-trial opinion, the court considered plaintiffs' claims of breach of fiduciary duty and the implied covenant of good faith and fair dealing, aiding and abetting breaches of fiduciary duty and request for the appoint of a receiver, among others, in connection with a reorganization of Advance Realty Group ("ARG"). In the reorganization, ARG's revenue-generating, developed assets were sold and its capital-intensive, undeveloped properties were split off into another entity ("ACP"). Plaintiffs, who were minority unitholders of ARG and former managers terminated shortly before the reorganization, were given the option of cashing out their holdings at a discounted price or converting them into equity in the newly-split off company, which would be run by the CEO who had recently terminated defendants. However, ARG's board, in negotiating the transaction, appeared to act in a self-interested manner without considering the interests of the minority unitholders. The parties disagreed as to what fiduciary duties ARG's board owed to ARG's members, whether entire fairness review applied and the merits of the entire fairness analysis.

The court first addressed what, if any, fiduciary duties ARG's board owed to ARG's members. ARG's board was comprised of members appointed by ARG's CEO and one of ARG's majority unitholders, referred to herein as "FARS". Defendants relied heavily on (i) Section 7.01 of the ARG operating agreement, which provided for management by the board and stated, "It is understood that the [board] shall act reasonably and in good faith in its management of [ARG]", (ii) the fact that the operating agreement required that the board be composed of designees of ARG's CEO and FARS and (iii) Section 7.05 of the ARG operating agreement, which provided a safe harbor for certain acts that might

otherwise violate the traditional duty of loyalty, to contend that (A) the board's only fiduciary duties were to act in an objectively reasonable manner and with subjective good faith and (B) ARG was free to engage in transactions with members of the board or the interests they represent. The court rejected defendants' arguments that traditional fiduciary duties had been modified or eliminated, noting that drafters must clearly, plainly and unambiguously evidence a modification or elimination of fiduciary duties. The court stated that using the phrase "it is understood" did not clearly evidence a disclaimer of traditional fiduciary duties. The court also noted that the structure of the board (being comprised of representatives of the parties interested in the transaction) did not evidence a clear intent to eliminate the duty of loyalty, as Delaware law provides for conflicted board to use independent parties to negotiate interested transactions. Finally, the court found that the Section 7.05 safe harbor, which did not apply to the transaction at hand, did not implicitly authorize the transaction, noting that a "failure to mention a duty or to contemplate a given conflicted transaction is not an adequate disclaimer of it."

Having found that the ARG operating agreement did not disclaim or modify traditional fiduciary duties, the court turned its attention to what standard of review applied and who bore the burden of proof. The court noted that a plaintiff can rebuff the business judgment rule presumption by providing evidence that a defendant breached its duty of loyalty or care. If a plaintiff provides such evidence, the burden shifts to the defendant to provide the entire fairness of the transaction. The court found that plaintiffs provided the requisite evidence by demonstrating that the majority of board members, representatives of ACP and FARS, were interested in the reorganization. This board majority did not view themselves as representatives of all of ARG's unitholders, including the minority, and ACP and FARS received the opportunity to convert their equity into debt, an option not granted to the minority unitholders. Additionally, no committee of independent directors was organized and no informed minority vote ratified the reorganization. Therefore, the court found that defendants bore the burden of proving that the reorganization was entirely fair.

Having determined that the entire fairness standard applied, the court analyzed whether the reorganization was fair by looking at whether the board dealt fairly with the minority and whether the board offered the minority a fair price. The court found that the reorganization was procedurally unfair because defendants controlled the timing and structure, made little to no effort to consider the minority unitholders' interests, kept plaintiffs uninformed about the reorganization and structured the reorganization to give benefits to ACP and FARS that were not provided to the minority unitholders (i.e., valuing their units at a price that was unsupported in the market and giving them priority over the other equity holders). However, after sifting through the evidence and credibility of three expert witnesses, the court found that the reorganization provided the minority unitholders with a fair price—because of the extreme reduction in the number of outstanding units that occurred as a result of the reorganization, the value of plaintiffs' units actually increased through the reorganization and, after taking into account the layering of debt on top of plaintiffs' equity, the court stated that the value plaintiffs received was a "close approximation" of the value they had before the reorganization.

The court then focused on the "unitary" inquiry of whether the reorganization was entirely fair. The court found that the process employed by the ARG board was so deficient that the court could not find that the reorganization was entirely fair, even though plaintiffs appeared to have nominally benefitted from the transaction. Because plaintiffs realized a nominal benefit, the court stated that damages were an inappropriate remedy; however, the court noted that an appropriate remedy would be to unwind the portion of the reorganization that provided FARS and ACP with preferential treatment for their units and requested that the parties brief this issue for the court's consideration as well as the issue of who was responsible for attorneys' fees.

Finally, the court found that plaintiffs did not succeed on their claims of violation of an implied duty of good faith and fair dealing, aiding and abetting breaches of fiduciary duties, appointment of a receiver or violation of the corporate opportunity doctrine.

11. *Comerica Bank v. Global Payments Direct, Inc.*, C.A. No. 9707-CB (Del. Ch. July 21, 2014) (C. Bouchard); *Comerica Bank v. Global Payments Direct, Inc.*, C.A. No. 9707-CB (Del. Ch. Aug. 1, 2014) (C. Bouchard)

Plaintiff, a financial institution, and defendant, a payment processor, formed a Delaware limited liability company as a joint venture called Global Payments Comerica Alliance, L.L.C. ("Alliance") to process credit and debit card transactions. Alliance was owned and managed by the parties (acting through their appointed representatives) with plaintiff owning a 49% membership interest and defendant owning a 51% membership interest. The parties' relationship was governed by a limited liability company agreement (the "LLC Agreement"), Contribution Agreements and a Service Agreement (collectively, the "Alliance Agreements"), where, in relevant part, the plaintiff agreed to refer merchants to Alliance exclusively and defendant agreed to be the exclusive payment processor for Alliance (these merchant-customer contracts are, collectively, the "Merchant Portfolio").

Sections 2 and 6(a) of the Service Agreement imposed exclusivity obligations on the parties for the services they provided and stated that this exclusivity was to exist during the term of the Service Agreement. The Service Agreement would automatically terminate on January 31, 2014 unless the parties agreed to renew. Section 15(d) of the Service Agreement permitted either party to extend the Service Agreement for a period of up to one year on the same "terms and conditions" as expressed in the Service Agreement; provided, however, that the party extending the agreement could choose which services it would be obligated to purchase from the other party and that other party could increase its fees to reflect commercially reasonable market rates (the "Exceptions"). The parties were also subject to certain non-competition obligations under the Contribution Agreements, but those obligations would end upon the termination of the LLC Agreement or Service Agreement or the dissolution of Alliance.

The LLC Agreement provided that upon the termination of the Service Agreement one member could negotiate to purchase the other member's interest in Alliance and if not exercised, that member could cause Alliance to be dissolved. Section 21 of the LLC Agreement governed dissolution and provided that upon dissolution, the members would wind up Alliance's affairs in accordance with the Delaware LLC Act, including settling

and closing Alliance's business, distributing Alliance's assets (the principal asset being the Merchant Portfolio) and providing for Alliance's liabilities, with any remaining assets distributed to members according to their membership interests. During the wind up, the Merchant Portfolio was to be divided by mutual decision of the members or, if the members could not agree, pursuant to a predetermined formula and distributed in kind according to the membership interests.

The parties agreed that the Service Agreement would not be renewed, but plaintiff exercised its right to extend certain services for up to one year to allow it time to transition to a new payment processor (the "Transition Period"). Defendant agreed to the extension, however, it took the position that the Service Agreement's exclusivity provisions would continue to apply during the Transition Period. The termination of the Service Agreement was a triggering event under the LLC Agreement allowing the members to dissolve Alliance. Plaintiff informed defendant that it had elected to dissolve Alliance and that Alliance would be wound up. The parties were unable to come to an agreement on the division of the Merchant Portfolio and plaintiff filed suit.

The principal relief sought by plaintiff was (i) a judicial declaration that plaintiff's exclusivity obligations under the Service Agreement ended upon termination of the Service Agreement and that all non-competition obligations under the Contribution Agreements ended upon Alliance's dissolution or termination of the Service Agreement and (ii) the appointment of a liquidating trustee under Section 18-803(a) of the Delaware LLC Act to divide Alliance's assets in an equitable manner as required under the LLC Agreement. In its first decision, the court addressed the issues of exclusively and non-competition, postponing its decision on the appointment of a liquidating trustee for its second decision.

Plaintiff contended that the exclusivity obligations were terminated along with the Service Agreement because Sections 2 and 6(a) of the Service Agreement (the exclusivity provisions) stated that they only applied for the term of the Service Agreement, and further argued that extending the exclusivity obligations conflicted with the other Alliance Agreements and was contrary to the parties' intent—specifically, the LLC Agreement required the closing of Alliance's business after dissolution and that upon dissolution there should be no restrictions on a member's ability to obtain processing services. Defendant argued that Section 15(d) of the Service Agreement required the extension of the Service Agreement to be on the same "terms and conditions" as expressed in the Service Agreement, and therefore, the exclusivity provisions survived.

The court first decided that it would look outside the four corners of the Service Agreement despite its integration clause which stated that the Service Agreement embodied the full understanding of the parties with respect to the subject matter of that agreement. The court found that this was an appropriate circumstance to apply the rule that contemporaneous contracts between the same parties concerning the same subject matter should be read together because (i) the LLC Agreement's integration clause expressly included the Contribution Agreements and the Service Agreement as being the entire agreement of the parties, (ii) the original Service Agreement was entered into simultaneously with the LLC Agreement, (ii) both agreements indisputably constituted

parts of an integrated transaction concerning the same overall subject matter, and (iii) the Service Agreement concerned one area of subject matter that was part of the overall relationship of the parties reflected in the Alliance Agreements.

The court declined to adopt defendant's argument that the exclusivity obligations survived termination of the Service Agreement for three reasons. First, extending the exclusivity obligations would conflict with (i) the LLC Agreement's provisions that precluded any restrictions on obtaining processing services and required the closing of Alliance's business post-dissolution, and (ii) the provisions in the Contribution Agreements that permitted plaintiff to compete with Alliance over the Merchant Portfolio upon the termination of the Service Agreement or dissolution of Alliance. Second, Section 15(d) of the Service Agreement did not unambiguously extend the exclusivity obligations because if the parties had intended to extend the entire Service Agreement beyond the termination date they could have so stated; instead, the agreement stated only that the terms and conditions of the Service Agreement would continue. Third, the purpose of Section 15(d) of the Service Agreement was to allow for a transition period, which could not practically occur if the exclusivity obligations remained in place.

Ultimately, the court held that the terms and conditions of the Service Agreement that were necessary to perform services during the Transition Period and which were requested to be extended by plaintiff would be extended under Section 15(d) of the Service Agreement, whereas those terms and conditions that would hinder the transition of services terminated with the Service Agreement. Additionally, in accordance with the express terms of the Contribution Agreements, the non-competition obligations provided for in the Contribution Agreements, the court held that the non-competition obligations ended upon termination of the Service Agreement.

In its second decision, the court ruled on Count 3 of plaintiff's complaint, which presented two issues: (1) whether plaintiff was entitled to receive information and assistance from defendant in order to effectuate its transition to a new payment processor, and, if so, was defendant required to incur the cost of this assistance; and (2) whether the court should intervene in the winding up of Alliance, and appoint a liquidating trustee. The court held that plaintiff was entitled to the information and assistance relating to the transition to a new payment processor it requested from defendant but that expenses relating to that transition would be borne by Alliance as a wind-up cost, and that cause existed for the court to appoint a liquidating trustee.

Plaintiff advised defendant that, during the Transition Period, it would initiate a request for proposals (the "RFP") for a new payment processor—defendant was encouraged to and did participate in the RFP, but was not selected. Plaintiff in the end decided that it would exercise its right to dissolve and wind up Alliance. Defendant allegedly reacted to plaintiff's desire not to renew the Service Agreement, the RFP and the requested dissolution of Alliance by (i) cutting off plaintiff's access to Alliance's transaction management system for 24 to 48 hours; (ii) tripling the fees it charged for its services; (iii) investigating what special treatment it was giving plaintiff as a result of the parties' relationship; (iv) attempting to appropriate the entire Merchant Portfolio for itself; (v) delaying negotiations regarding the proper division of the Merchant Portfolio; (vi)

delaying the transfer of Merchant Portfolio information requested by plaintiff; and (vii) refusing to agree to an equitable division of the Merchant Portfolio that defendant itself had proposed. Plaintiff filed this action after failing come to an agreement with defendant regarding the division of Alliance's assets.

As part of the transition of the Merchant Portfolio and Alliance dissolution, plaintiff had requested information and assistance from defendant in order to migrate its merchant customers to its new payment processor. Defendant contended it had no obligation to provide any assistance but agreed to perform the transfer services by the end of the one-year Transition Period. Plaintiff argued that (1) it was entitled to the migration information and assistance it requested under the Service Agreement and the LLC Agreement, which established a right to possess the information associated with its merchant agreements once divided between the members and (2) that the LLC Agreement obligated defendant to provide this assistance at its expense.

The court agreed with plaintiff in part and held that the LLC Agreement provided that upon dissolution all of Alliance's property would be equitably divided and that the Service Agreement assigned to each party the information applicable to merchant agreements owned by such party, barring any proprietary information. Thus, plaintiff was entitled to the information and assistance it sought. The court, however, did not agree that defendant was to bear the cost of providing that information and assistance because the provision in the LLC Agreement that plaintiff claimed created this cost-shifting only required that members "execute and deliver" documents reasonably requested by the other member, which the court found to mean that each member was to provide to the other such documentation necessary to transfer title to portion of the Merchant Portfolio owned by the other member as a result of the division—the LLC Agreement was silent as to who should bear the cost. Another section of the LLC Agreement contemplated that Alliance, not the member, would bear the cost of a member's assistance. Furthermore, contemporaneous agreements indicated that the parties knew how to expressly include a cost-shifting provision with respect to this type of assistance. Accordingly, Alliance, not defendant, would bear the expense of providing the requested information and assistance.

With respect to the division of Alliance's assets, the court determined that it would intervene and appoint a liquidating trustee. Under the Delaware LLC Act, the court has the power to wind up a company's affairs and appoint a liquidating trustee upon a showing of "cause" by any member. The court noted that "cause" was not defined in the Delaware LLC Act, but cited cases where an LLC was wound up through judicial intervention when the parties were unable to agree as to how the wind up should proceed and where member animosity between the parties created a deadlock. Defendant argued that the court could only appoint a liquidating trustee where there was a deadlock among the parties entitled to conduct the wind up, and since defendant had control over Alliance through its majority position, there was no deadlock. The court refused to adopt this reasoning because, taken to its logical end, it would render the court powerless to appoint a liquidating trustee in situations where one party had the authority to control a wind up irrespective of how poorly or faithlessly that party performed its duties. Since the standard for judicial intervention was "cause" as determined by the court, not a deadlock,

the court was left with the discretion to appoint a liquidating trustee on a case-by-case basis. The court here held that appointment of a liquidating trustee was appropriate because the parties were deeply divided over the winding up of Alliance and defendant was unwilling to conduct the wind-up process in an orderly and timely manner, as evidenced by defendant's confrontational approach since the termination of the Service Agreement. The court added that the default fiduciary duties owed by the manager of an LLC require it to distribute assets of the company promptly to maximize their value. Defendant did not act in the best interest of Alliance or its other member, but purely out of its own self-interest to extract higher fees from plaintiff when it delayed the wind up and made plaintiff's transition of its portion of the Merchant Portfolio unduly difficult. The court ordered the liquidating trustee to divide the Alliance assets according to a prior agreement of the parties that was never finalized.

12. *MPT of Hoboken TRS, LLC v. HUMC Holdco, LLC*, C.A. No. 8442-VCN (July 22, 2014) (V.C. Noble)

Plaintiff MPT of Hoboken TRS, LLC ("MPT Hoboken") and defendant HUMC Holdco, LLC ("Holdco") are the sole members of HUMC Opco, LLC (the "Company"). The LLC Agreement provided that the "General Manger"—Holdco—was to manage the business and operations of the Company, and in the event of a "Major Default," the "Special Manager"—MPT Hoboken or its designee—could assume certain powers.

Holdco caused the Company to establish a board of directors (the "Board"), which adopted Bylaws granting the Board purported management rights over the Company, and neither action was reviewed or approved by MPT Hoboken. Holdco designees represented nine of the fourteen Board votes, and the Bylaws provided that Holdco could modify or reject any action proposed by the Board and could compel the Board to take action. The court found that the Bylaws facially conflicted with the LLC Agreement because the LLC Agreement vested exclusive management authority in Holdco as the General Manager, but the Bylaws vest certain managerial rights in the Board. The issue before the court was whether the Board structure could fall within the LLC Agreement provision permitting "advisory committees." The court found that the Board structure could fall within one meaning of the term "advisory committee" because Holdco maintained management authority through its majority voting representation on the Board and ability to veto, modify or compel Board actions. Alternatively, requiring Holdco to compel the Board to act or modify the Board's actions could also exceed a reasonable interpretation of what an "advisory committee" is. Because the pleadings and incorporated documents did not contain dispositive evidence of the parties' intent with regard to the "advisory committee" term, the court held that meaning of "advisory committee" was an issue of material fact and denied plaintiffs' motion for judgment in their favor.

Defendants claimed that through Holdco's control over the Board, Holdco still exclusively managed the Company, and that plaintiffs' claim was not ripe because plaintiffs did not allege any current or imminent harm due to the Board structure or the Bylaws. The court has authority pursuant to 6 Del. C. § 18-110(a) to hear and determine the right of a person to become or continue to be a manager of a limited liability

company. Among other things, to hear a claim seeking declaratory judgment the court must find the issue is ripe for judicial determination. The court found that the dispute over the whether the Bylaws granted the Board managerial rights beyond those of an advisory committee "places a cloud over the management of the [Company]," noting that the Bylaws did not contemplate how the Company would be governed if MPT Hoboken exercised its power (under certain circumstances) to remove Holdco as General Manager. The court held that the risk of future harm to plaintiffs was sufficient to warrant a resolution, and the claim was ripe for judicial determination. However, because the meaning of "advisory committee" remained an issue of a material fact, the court denied defendants' Rule 12(c) motion to dismiss.

13. *Durham v. Grapetree, LLC*, C.A. No. 7325-VCG (May 16, 2014) (V.C. Glasscock); *Durham v. Grapetree, LLC*, C.A. No. 7325-VCG (July 21, 2014) (V.C. Glasscock)

Plaintiff, a member of defendant Grapetree, LLC, sued defendant for reimbursement for expenses that he incurred for the alleged benefit of defendant. Plaintiff was one of five siblings who owned an equal interest in defendant. Defendant operated two vacation rental properties and plaintiff incurred expenses while maintaining the landscaping of the properties. Plaintiff and defendant disagreed on whether plaintiff was entitled to reimbursement for some of the expenses. Both parties contended that the language of defendant's LLC Agreement governed their dispute.

The court looked to the language of the LLC Agreement and determined that the language, which stated that "[f]or all routine operational issues[,] the majority vote of (3/5) [sic] of the managing members may make all decisions", was ambiguous when applied to plaintiff's claim for reimbursement. Therefore, the court looked to the course of dealing among the parties to determine their intent. Because some of the expenditures made by plaintiff were routinely made by other members and reimbursed by defendant without any vote of the managing members, the court found that plaintiff was entitled to seek reimbursement for those types of expenses. The court also addressed defendant's motion for sanctions against plaintiff, noting that sanctions were appropriate given the type of communication used by plaintiff during the course of litigation.

In its subsequent decision, the court addressed plaintiff's attempt to authenticate documentation relating to the various expenditures that the court found plaintiff was entitled to seek reimbursement for. Plaintiff failed to substantiate the expenditures or explain how such expenditures benefitted Grapetree, LLC. The court refused to accept plaintiff's argument that the LLC Agreement did not require plaintiff to substantiate his expenditures, noting that plaintiff had the burden of proof to submit substantiation and failed to do so. Therefore, the court declined to award plaintiff anything other than the moneys that Grapetree, LLC conceded it owed plaintiff at trial. The court also denied plaintiff's second request to file a motion for sanctions and refused to allow plaintiff to reargue issues decided in the court's previous opinion.

14. *Lucas v. Hanson*, C.A. No. 9424-ML (Del. Ch. July 1, 2014) (M.C. LeGrow)

Plaintiff, the operating managing manager of the general partner of a Delaware limited partnership (the "Partnership"), was convicted by an Iowa court for theft and ongoing criminal conduct associated with Plaintiff's expenditure of Partnership funds and liquidation of Partnership assets. Plaintiff filed an action in the Chancery Court of the State of Delaware seeking declaratory and injunctive relief from the Iowa court's ruling that required the distribution of Partnership assets to current and former limited partners of the Partnership. Plaintiff argued that the ruling, among other things, was an attempt to regulate the internal affairs of a Delaware entity.

Plaintiff conceded that the complaint did not allege that he was a limited partner of the Partnership – a requirement to establish standing, but asserted that was merely an oversight. Noting that on a motion to dismiss the court cannot look outside the complaint for facts to support it, the Master in Chancery (the "MC") recommended that the court dismiss plaintiff's complaint without prejudice on the basis that plaintiff lacked standing to bring the action. The MC also recommended that the court grant defendant's motion to dismiss for want of personal jurisdiction over defendants. The MC acknowledged that a defendant may waive a defense based on personal jurisdiction by expressly consenting to jurisdiction by contract, which will eliminate the need for a minimum contacts analysis. However, because plaintiff did not file a copy of the partnership agreement with the court, the MC recommended that the court grant defendants' motion to dismiss without prejudice.

15. *Branin v. Stein Roe Investment Counsel, LLC*, C.A. No. 8481-VCN (Del. Ch. June 30, 2014) (V.C. Noble)

Plaintiff was an employee of defendants and sought indemnification under the limited liability company agreement (the "LLC Agreement") of one of the defendants, Stein Roe Investment Counsel LLC (the "Company"). Before joining the Company, plaintiff was a principal/owner and chief executive officer of another investment management firm. During that time, plaintiff's firm was acquired (the "Acquisition") by another investment management firm ("Bessemer"). The Acquisition was governed by a doctrine of New York law that prevented plaintiff from soliciting his former clients (the "Mohawk Doctrine"), although plaintiff could accept business from former clients if they approached him. While with the Company, plaintiff managed 30 clients that he previously managed while at Bessemer, and Bessemer sued plaintiff under the Mohawk Doctrine (the "Bessemer Action"). At the time plaintiff joined the Company and at the time the Bessemer Action was brought, the LLC Agreement provided broad indemnification rights that applied by its terms to employees of the Company (the "Original Indemnification Provision"). The Original Indemnification Provision provided indemnification "[t]o the full extent permitted by applicable law" for acts or omission taken on behalf of the Company in good faith and "in a manner reasonably believed to be within the scope of the authority conferred" by the LLC Agreement. A few months after Bessemer brought the Bessemer Action, the Company adopted an amendment to the LLC Agreement that excluded from the indemnification rights a claim based on actions by an employee that may have breached a contract between the employee and a third party that

predated the employee's employment with the Company (the "Amended Indemnification Provision"). Defendants asserted that the Amended Indemnification Provision applied and precluded plaintiffs' claim.

The court held that, although there was no question that the Company could amend the LLC Agreement as it did, the Company's liability to plaintiff under the LLC Agreement matured when the Bessemer Action was filed, and the Original Indemnification Provision was still in place at that time. The court noted that plaintiff discussed the potential of bringing over his former clients with the Company's president and CEO and discussed the possible impacts of the Mohawk Doctrine. Further, the Company benefitted from plaintiff's clients, and therefore indemnifying plaintiff was consistent with the policy behind the terms of the Original Indemnification Provision. Additionally, at the time of plaintiff's conduct giving rise to the Bessemer Action, plaintiff reasonably anticipated he would have the protection of the Original Indemnification Provision, despite the language in the LLC Agreement allowing for modification of the LLC Agreement.

The court held that plaintiff established a right to pursue a claim for indemnification, and if plaintiff satisfied the other substantive requirements of the indemnification provision—acting in good faith and in a manner reasonably believed to be within the scope of his authority—the Company's liability for the claim was fixed before the Amended Indemnification Provision, which did not modify or eliminate any liability that already existed. The court rejected defendants' claim that plaintiff was sued in his personal capacity or by reason of his employment with Bessemer, noting that the Supreme Court of Delaware has stated that "if there is a nexus or causal connection between any of the underlying proceedings . . . and one's official capacity, those proceedings are 'by reason of the fact' that one was a corporate officer." *Quoting Homestore, Inc. v. Tafeen*, 888 A.2d 204, 214 (Del. 2005). Noting plaintiff's discussions with the president and CEO of the Company, the court held that because plaintiff, as an employee of the Company, created tangible benefits for the Company because of his contacts and client accounts, such "nexus or causal connection" existed. However, the court dismissed plaintiff's motion for judgment on the pleadings because the parties disputed whether plaintiff acted in good faith and in a manner he reasonably believed to be within the scope of his authority, and thus there was a disputed question of fact.

16. *Capano v. Capano*, C.A. No. 8721-VCN (June 30, 2014) (V.C. Noble)

This case involved a family owned LLC with the following members: Louis, Joseph, the AAMM Trust, Louis III and the CI Trust. Another family member, Gerry, was the sole beneficiary of the CI Trust, a Delaware statutory trust with a third-party serving as trustee (the "Trustee"). The CI Trust served as the tie-breaking vote in the event of a deadlock among the other members of the LLC. The court was presented with a motion to dismiss by defendants Louis and Louis III, among others, relating to claims made by Gerry and Joseph, which claims included (i) Gerry's claim that a purported transfer by him to Louis of his interest in the CI Trust was invalid and (ii) a challenge by Gerry and Joseph to a purported merger effected by Louis of the LLC with and into an entity owned by Louis, which cashed out Joseph's interest in the LLC (the "Merger").

With respect to the first claim, the defendants relied on signed documents, pursuant to which Gerry purported to replace the Trustee as trustee of the CI Trust and then Gerry purported to assign all of his right, title and interest therein, including his position as trustee, to Louis. Gerry argued that there were a number of defects with these documents including, without limitation, that Louis backdated them without his consent and that Gerry was inebriated when he signed them. The trust agreement of CI Trust contained a spendthrift provision requiring the written consent of the trustee for the beneficial owner (i.e. Gerry) to transfer his interest in the CI Trust. The court denied the defendants' motion to dismiss this issue because, in light of the alleged defects noted above, there was a question as to who the trustee was at the time the transfer documents were effective and thus there was a question as to whether consent was given by the trustee in accordance with the trust agreement of CI Trust.

Turning to the Merger, the defendants argued that Gerry lacked standing to challenge the Merger because he had no rights in the CI Trust. The court found that if Gerry successfully demonstrated that the assignment of his interest in the CI Trust to Louis was invalid, then his remaining interest in the CI Trust would permit him to assert rights in the LLC to challenge the fairness of the Merger. Accordingly, the court denied defendants' motion to dismiss this claim for lack of standing.

Defendants also argued that Joseph lacked standing to challenge the transfer documents relating to the CI Trust because he was not an intended beneficiary of those documents. Joseph asserted that because the CI Trust held an interest in the LLC and essentially functioned as a tie-breaking voter, he was therefore an intended beneficiary of such documents. The court found in favor of the defendants on this issue by looking at the text of the trust agreement of the CI Trust, to which Joseph was not a party and was not identified as a third-party beneficiary. However, the court noted that Joseph would obviously have standing to challenge a transfer of interest in the CI Trust to the extent it violated the operating agreement of the LLC.

The court then turned to defendants' argument that the purported transfer of the interest in the CI Trust to Louis and another transfer by Louis of his interest in the LLC to a limited partnership (the "Louis LP") he controlled were ratified because the defendant members owned a majority of the voting power of the LLC. The court found that the power to wield a majority voting interest capable of ratifying the transfers was dependent upon compliance with the operating agreement of the LLC and if the transfer of interest in the CI Trust was invalid, a properly-constituted majority would not have ratified such transfers. Similarly, the defendants argued that because they controlled a majority of the economic interest, they "could" have consented. The court found that the factual issue must be resolved as to whether they actually did consent as a necessary precondition to Louis exercising the transferred interests under the operating agreement of the LLC.

In addition, Joseph alleged that the defendants (other than Louis but consisting of entities owned and/or controlled by Louis) aided and abetted Louis's alleged breaches of fiduciary duties owed to him. The defendants argued that a corporation could not be deemed to have conspired with its wholly owned subsidiary or its officers or agents. The court found that there were exceptions to this rule and cited a case that held that it was

"uncontroversial for parent corporations to be subjected to claims for aiding and abetting breaches of fiduciary duty committed by directors of their subsidiaries." Defendants also argued, in the alternative, that they were acting as agents while acting in their capacities as trustee of the CI Trust and general partner of the Louis LP, and that an agent could not aid and abet its principal. The court found that the defendants mischaracterized these relationships because they were not agents of the LLC. For these reasons, the court denied the defendants motion to dismiss this claim.

The defendants also sought to dismiss a books and records request by Joseph. The court found that Joseph did not have any rights to books and records of entities for which he was not a member, but that if Joseph were successful in unwinding the Merger, he could separately request the LLC's books and records at that time. Therefore, Joseph's books and records request was denied.

Lastly, the defendants argued that Gerry and Joseph were precluded from a remedy of rescission because the LLC had entered into numerous transactions with third parties that could not be undone. The court held that defendants' argument may be compelling after additional factual development, but that it was premature to conclude that plaintiffs had no possibility of recovery that could include such a remedy.

17. *Allen v. El Paso Pipeline GP Co., L.L.C.*, C.A. No. 7520-VCL (Del. Ch. June 20, 2014) (V.C. Laster)

This decision follows the Court of Chancery's prior decision granting plaintiffs' motion to certify a class consisting of all the limited partners (the "Unitholders") of El Paso Pipeline Partners, L.P., a publicly traded Delaware master limited partnership (the "Partnership"), wherein the court also found that plaintiffs' claims were not exclusively derivative and could support a direct characterization.

After completion of discovery, the court heard this case on defendants' motion for summary judgment. Plaintiffs had challenged whether a "drop-down" transaction (the "Drop-Down") between the Partnership and El Paso Corporation, the parent of the Partnership's general partner, El Paso Pipeline GP Company, L.L.C. (the "General Partner"), violated the express terms of the Partnership's limited partnership agreement (the "LPA") and the implied covenant of good faith and fair dealing, or in the alternative, aided and abetted those breaches. The crux of plaintiffs' argument was that although the LPA eliminated all fiduciary duties of the General Partner and replaced them with contractual duties, the General Partner breached the LPA by not considering the best interests of the Unitholders when approving the Drop-Down; specifically, plaintiffs alleged that certain incentive distribution rights (the "IDRs") owned by the General Partner caused the Drop-Down to be economically dilutive to Unitholders. Thus, the court analyzed whether the manner by which the Drop-Down was approved was either an express breach of the LPA or a breach of the implied covenant of good faith and fair dealing.

In basic terms, the General Partner's contractual duties were divided into three categories: when it was acting in its individual capacity, when it was acting as general

partner in a non-conflict of interest transaction and when it was acting as general partner in a conflict of interest transaction. When in a conflicted transaction, the General Partner had several options by which such a conflicted transaction could be approved without breaching the LPA, one of which was by special approval. Special approval could be obtained by a majority vote of the members of a conflicts committee—in this case, three outside members of the board of directors of the General Partner—acting in good faith. The LPA defined "good faith" for such purposes as the members' subjective belief that the conflict of interest transaction was in the best interest of the Partnership. The court noted, however, that it could only infer a party's subjective intent from external indications and, therefore, objective factors necessarily informed the court's analysis. With respect to the best interest prong of this contractual good faith standard, the court found that the LPA only required the conflicts committee to believe subjectively that the Drop-Down was in the best interest of the Partnership—leaving the conflicts committee free to consider the full universe of entity constituencies and not consider only the equity owners of the Partnership (which would be the case if traditional fiduciary duties applied).

The court went on to grant summary judgment on plaintiffs' LPA breach claim even under the plaintiff-friendly summary judgment standard of review, for the following reasons: (i) plaintiffs had conceded that the Partnership was not harmed by, or paid an excessive price for, the Drop-Down; (ii) all members of the conflicts committee testified that they subjectively believed the Drop-Down benefited the Partnership as an entity; (iii) the conflicts committee met formally six times and had consulted with financial and legal advisors familiar with the industry and the Partnership (with the financial advisor present at each meeting and presenting at three of the meetings); and (iv) the conflicts committee investigated the IDRs as they related to the Drop-Down and still determined that the Drop-Down was in the best interest of the Partnership, and ultimately conferred some benefit to the Unitholders (although not as great a benefit as received by the General Partner). The court noted that, at best, the evidence supported an inference that the conflicts committee performed its job poorly, not that it did not subjectively believe that the Drop-Down was in the best interest of the Partnership. Accordingly, there was no breach of the LPA.

Next, the court addressed plaintiffs' claim that the General Partner breached the implied covenant of good faith and fair dealing in approving the Drop-Down because the conflicts committee relied on a fairness opinion that did not value the consideration Unitholders actually received. The court began its analysis by explaining that the implied covenant does not create a free-floating duty of good faith, but is a cautiously applied gap-filler to ensure parties' reasonable expectations are fulfilled. In applying the implied covenant, a court must follow a three-step analysis. First, contract construction: the court must examine the contract to determine whether a gap exists and if the contract speaks directly on an issue, there is no gap. Second, even if a gap exists, the court should avoid filling intentional gaps (i.e., a term that the parties rejected ex ante or after negotiations decided should be omitted) and only fill unintentional gaps (i.e., a term that parties failed to consider during negotiations or was so fundamental did not need to be expressed) so as to avoid rewriting a contract that a party deems unfair in hindsight. Third, if the gap should be filled (a cautious enterprise that should be rarely used) the court must look to

the past to determine what the parties would have agreed to themselves had they considered the issue in their original bargaining position, not what the court deems to be fair at the time of the wrong.

Here, plaintiffs' implied covenant claim relied heavily on Gerber v. Enter. Prods. Hldgs., LLC, a Delaware Supreme Court case. In brief, the Gerber court faced a situation where a master limited partnership agreement replaced traditional fiduciary duties with contractual duties and limited partners challenged a general partner's approval of a conflicted transaction. Notably, the limited partnership agreement provided that the general partner would be conclusively presumed to have acted in good faith if it relied on a fairness opinion from a financial advisor without detailing what such fairness opinion should include. The general partner relied on a fairness opinion with respect to the challenged transaction, however, the fairness opinion failed to fully evaluate important aspects of the transaction and their effects on the consideration received by limited partners. The Supreme Court held that had the parties at the time of contracting addressed the specific standards required of a fairness opinion they would have agreed that any fairness opinion needed to fully evaluate whether the consideration was fair to the limited partners. Thus, the general partner was not entitled to the conclusive presumption of good faith because its reliance on the inadequate fairness opinion violated the implied covenant.

Plaintiffs' contended that, similarly, the fairness opinion obtained by the conflicts committee here did not consider all the elements of the consideration from the standpoint of the Unitholders because the dilutive effects of the IDRs were omitted from the financial advisor's fairness opinion calculus. The court, however, rejected this contention and found that Gerber did not control this case because there was no such conclusive presumption requirement for the Drop-Down approval; rather, what was required under the LPA was approval by the conflicts committee in their subjective belief that the Drop-Down was in the best interest of the Partnership.

The court began its implied covenant analysis with the contract construction step, which is where the court also concluded its analysis because the special approval process had no fairness opinion related gap, as was the case in Gerber. In so ruling, the court found that deploying the implied covenant to impose on the parties a fairness opinion requirement similar to Gerber would fundamentally rewrite the LPA by changing the conflict committee's inquiry from best interests of the Partnership to fairness to the Unitholders and expanding the scope of judicial review from subjective good faith of the conflicts committee to compliance with an obligation to obtain a fairness opinion that would satisfy a court after the fact. Because the LPA's special approval process did not require a fairness opinion there was no gap to fill.

Moreover, for illustrative purposes only, the court proceeded through the next steps of the implied covenant analysis and considered what the parties would have agreed to at the time of contracting. Examining the LPA in terms of the Partnership's prospectus from its initial public offering the court concluded that the drafters of the LPA anticipated numerous conflict of interest transactions and created a dispute resolution method that would limit potential litigation and after-the-fact judicial review. Therefore, assuming

the question had been raised during negotiations whether the Unitholders should have the ability to challenge the special approval process by litigating whether the conflicts committee obtained a fairness opinion that satisfied a test of reasonableness, met certain requirements, or otherwise complied with some form of objective standard, the record before the court suggested that such a provision would have been rejected. That being the case, summary judgment was granted for defendants' on the implied covenant claim.

Finally, the court granted summary judgment with respect to plaintiffs' aiding and abetting claim. The court held that since the LPA eliminated all fiduciary duties this was a pure breach of contract claim and the general rule in Delaware is that there is no claim available for aiding and abetting claim a breach of contract. In sum, defendants' motion for summary judgment was granted in toto.

18. *In re: El Paso Pipeline Partners, L.P. Derivative Litigation*, C.A. No. 7141-VCL (June 12, 2014) (V.C. Laster)

This case involved a master limited partnership drop-down transaction. El Paso Corporation ("El Paso Parent"), the sponsor and indirect controlling entity of El Paso Pipeline Partners, L.P. (the "MLP") sold part of its interest in two entities to the MLP in a transaction that constituted a conflict of interest. Plaintiffs sued defendants alleging, among other things, breach of the MLP's limited partnership agreement (the "MLP LPA"), breach of the implied covenant of good faith and fair dealing and aiding and abetting. The court previously dismissed the additional allegations in a bench ruling. Plaintiffs and defendants each moved for summary judgment.

In 2010, El Paso Parent offered to sell the MLP 51% of its interest in an entity ("Southern LNG") that owned a liquefied natural gas ("LNG") terminal and the entity ("Elba Express") that owned the natural gas pipeline that connected the LNG terminal to interstate pipelines (the "Drop-Down"). At the time of the Drop-Down proposal, shale gas discoveries had led to higher levels of production and lower gas prices, weakening the market for imported LNG. However, Southern LNG and Elba Express maintained services agreements ("Services Agreements") that provided revenue regardless of any actual storage or transport of LNG. The plaintiffs focused on two issues with regard to the Service Agreements: (i) the counterparties were judgment-proof special purpose entities with no assets and (ii) the Services Agreements were backed by guarantees that only covered roughly 20% of the revenue that the Services Agreements might generate (collectively, the "Risks").

After the Drop-Down was proposed, the MLP determined that the transaction posed a conflict of interest for the general partner of the MLP and sought "Special Approval" by way of a conflicts committee, as contemplated by the MLP LPA. The conflicts committee met five times over the course of two months and received input from a financial advisor, then unanimously approved the Drop-Down proposal. Unbeknownst to the conflicts committee, El Paso Parent turned down a right of first refusal option to purchase LNG assets for itself at the time the Drop-Down was proposed. El Paso Parent and the members of the general partner's board who know about the right of first refusal offer did not disclose its existence to the conflicts committee.

The court first addressed plaintiffs' claim that the defendants breached the express terms of the MLP LPA and granted defendants' motion to dismiss. The court determined that Section 7.9(a) of the MLP LPA required the general partner to proceed in one of four contractually specified ways (including seeking "Special Approval") when faced with making a decision that involved a conflict of interest. Because the Drop-Down implicated a conflict of interest, Section 7.9(a) controlled, and the general partner had sought Special Approval, defined by the MLP LPA as "approval by a majority of the members of the Conflicts Committee acting in good faith." Under settled Delaware law, the standard for good faith is a subjective, not objective, belief that the determination or action is in the best interests of the company. The record supported the fact that the conflicts committee understood the state of the LNG market, was informed about the terms of the Service Agreements and guarantees and considered the revenue risk involved in the Drop-Down proposal. While reasonable minds could differ on the weight that the conflicts committee should have placed on the Risks, the court found that the conflict committee's judgment and process was not so extreme or egregious that it could support a potential finding of bad faith. Further, the conflicts committee had no knowledge of El Paso Parent's failure to consummate its right of first refusal to purchase LNG assets and, therefore, could not have acted in bad faith based on facts it did not know.

The court then addressed the plaintiffs' claims that the general partner breached the implied covenant of good faith and fair dealing by "intentionally" concealing the information about El Paso Parent's refusal to purchase LNG assets and, again, granted defendants' motion to dismiss. The court initially clarified that the MLP LPA's "good faith" standard did not override the implied covenant, noting that the implied covenant is intended to be a gap-filler. In applying the implied covenant, the court stated that it must determine (i) whether there was a gap to be filled, (ii) whether the implied covenant should be used to fill the gap and (iii) how to fill the gap. Here, the court determined a gap existed because the MLP LPA was silent on whether the general partner was required to volunteer information to the conflicts committee. However, the court declined to use the implied covenant to infer an affirmative disclosure obligation. The court recognized that the Supreme Court in *Gerber v. Enter. Prods. Hldgs., LLC*, 67 A.3d 400 (Del. 2013) had stated that a failure to volunteer information could constitute a breach of the implied covenant, but noted that statement was dictum. In this case, the MLP LPA expanded the general partner's freedom to act, specifically eliminated all fiduciary duties of the general partner (which would traditionally include disclosure obligations), did not include a contractual duty to disclose information and affirmatively renounced the traditional corporate opportunity doctrine. The court coupled these facts with plaintiffs' failure to identify any indication that the parties to the MLP LPA believed that the general partner would volunteer information to the conflicts committee and declined to permit plaintiffs to use the implied covenant to create a disclosure requirement.

Finally, the court dismissed the aiding and abetting claims, noting that secondary liability could not exist when the underlying causes of action had been dismissed.

19. *Crothall v. Zimmerman*, No. 608, 2013 (Del. June 9, 2014) (C.J. Strine)

Appeal was taken by defendants below to the Court of Chancery's award of attorney's fees to plaintiff's intervening attorney for allegedly creating a corporate benefit. In its post-trial opinion, the Court of Chancery ruled in favor of plaintiff on only one of his derivative claims—that defendant's operating agreement had been violated by the issuance of units without an amendment approved by the common unitholders. Prior to agreeing to a form of final judgment, however, plaintiff sold his units, lost standing to pursue his derivative claims and his suit was dismissed. Seeking attorney's fees, plaintiff's attorney was granted leave to intervene and the Court of Chancery ultimately awarded $300,000 in attorney's fees for successfully arguing that the operating agreement had been violated, which was a corporate benefit.

The Supreme Court declined to address the merits of the Court of Chancery's mooted ruling on the breach of contract claim, but concluded that attorney's fees were improperly awarded. Since no final judgment was ever rendered upon which an appeal could be taken, plaintiff's attorney never obtained an authoritative ruling of the Court of Chancery and therefore did not create a corporate benefit. Plaintiff's attorney unsuccessfully argued that attorney's fees were previously granted in cases where claims were mooted prior to a final judgment. The Supreme Court found those cases to be distinguishable because the claims therein were mooted by actions taken by defendants and not plaintiffs. In reversing the award of attorney's fees the court stated, "A plaintiff who generates a favorable trial court decision on a closely contested issue of corporate governance but then abandons his claim and renders the decision moot before it becomes final has not created a corporate benefit, he has merely caused uncertainty." Furthermore, the Supreme Court reasoned that to rule otherwise would bring it "perilously close to rendering an advisory opinion" and require the use of limited judicial resources to rule on a claim that a plaintiff voluntarily withdrew.

20. *Allen v. El Paso Pipeline GP Co., L.L.C.*, C.A. No. 7520-VCL (Del. Ch. May 19, 2014) (V.C. Laster)

Plaintiff, a unitholder of El Paso Pipeline Partners, L.P., a Delaware master limited partnership (the "Partnership"), challenged a transaction (the "Transaction") wherein the Partnership acquired a 25% interest in Southern Natural Gas Co. ("Southern") from El Paso Corporation ("El Paso Parent"), the parent company and 100% owner of the Partnership's general partner, El Paso Pipeline GP Company, L.L.C. (the "General Partner"). Plaintiff asserted directly that the Transaction violated the Partnership's limited partnership agreement (the "LPA") and the implied covenant of good faith and fair dealing and moved to certify a class consisting of unitholders of the Partnership. Defendants, the Partnership, the General Partner and the members of the board of directors of the General Partner (the "GP Board"), opposed the motion on the grounds that plaintiff's claims were derivative, not direct.

The Transaction created a conflict of interest for the General Partner because El Paso Parent controlled the Partnership and owned the interest in Southern that would be acquired by the Partnership. The LPA eliminated all common law duties that defendants

would otherwise owe to the Partnership and its limited partners. In place of common law duties, the LPA established express contractual duties for decisions made by the General Partner in its capacity as general partner that involved a conflict of interest. Specifically, the LPA provided, in the case of a conflict transaction, that the transaction be (i) approved in good faith by a committee of disinterested members of the GP Board (the "Committee"), (ii) approved by a majority of disinterested common unitholders, (iii) on terms no less favorable to the Partnership than those generally being provided to or available from unrelated third parties or (iv) fair and reasonable to the Partnership, taking into account the totality of the relationships between the parties involved.

The General Partner elected to have the Transaction approved by the Committee. After reviewing the Transaction with advisors over several meetings, the Committee approved the Transaction. Plaintiff filed his complaint, asserting that the Transaction involved a conflict of interest and defendants violated the LPA when the Committee approved the Transaction because certain incentive distribution rights held by the El Paso Parent would cause the Transaction to be dilutive to the unaffiliated unitholders and the GP Board's failure to consider this dilutive effect caused its decision to not have been made in good faith, violating the LPA.

In ruling on whether the claim was direct or derivative, the court recognized that the test for distinguishing between direct and derivative claims in the limited partnership context is substantially the same as in the corporate context, and thus, the standard established by the Delaware Supreme Court in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.* controlled. The *Tooley* test asks: "(1) who suffered the alleged harm (the [partnership] or the suing [unitholders], individually); and (2) who would receive the benefit of any recovery or other remedy (the [partnership] or the [unitholders], individually)." Defendants argued that plaintiff essentially claimed the Partnership paid too much in the Transaction and therefore the injury was to the Partnership. The court, however, viewed the issue not just as a claim that the Partnership overpaid, but also as a breach of a contractual right possessed by plaintiff under the LPA—the right to have the conflict transaction procedure followed—and although the breach affected each unitholder equally, the right implicated belonged to the unitholders, not the Partnership.

To support its reasoning, the court cited to post-*Tooley* cases that permitted direct suits for breach of contractual rights held by all stockholders. For example, stockholders were permitted to sue directly when a certificate of incorporation or bylaws contained a protective provision for the benefit of stockholders (e.g., class vote, consent right, etc.). Stockholders were also permitted to sue directly to enforce a statutorily created constraint on board authority, the violation of which injured the stockholders, not the corporation. Important to the court's analysis was Delaware precedent holding that the question of whether a contractual relationship was violated presented an issue of law that could not be within the realm of a board's business judgment (i.e., board discretion) and consequently not subject to a demand requirement. The court also noted that, although suits by a limited partner for breach of the LPA might be direct, suits challenging the discretion afforded a general partner may still be derivative. Plaintiff here not only claimed that the Partnership overpaid in the Transaction, but that the General Partner

breached the LPA by not following the express procedure for conflict transactions, making the claim direct.

In addressing the second prong of *Tooley*, the court noted that although one possible remedy for the alleged breach would be for El Paso Parent to pay back some of the Transaction consideration to the Partnership—supporting a derivative claim—that was not the only remedy. Since defendants were also unitholders of the Partnership, if plaintiff was ultimately successful, then the court could award the returned consideration to only the innocent unitholders or provide injunctive relief that would operate only at the unitholder level without benefiting the Partnership itself. Accordingly, the court held that the remedy could support direct or derivative claims, therefore, the first *Tooley* prong carried more weight and ultimately supported the finding that plaintiff's claims were direct.

21. *2009 Caiola Family Trust v. PWA, LLC*, C.A. No. 8028-VCP (April 30, 2014) (V.C. Parsons)

This case involved an LLC that owned and operated an apartment complex. The parties cross-moved for summary judgment for a determination as to whether a provision in the LLC agreement gave the non-managing members of the LLC the unilateral right to terminate and replace a property manager previously engaged by the LLC. The applicable provision in the LLC agreement provided that the "prior written approval" of a majority of the non-managing members was required for the LLC to terminate or retain a property manager, among other enumerated actions, and that the managing member of the LLC was required to "use all commercially reasonable efforts to carry out and implement" any such decisions so approved. The non-managing members argued that the duty of the managing member to carry out and implement decisions approved by the non-managing members under this provision provided the non-managing members with the right to vote for the LLC to take such actions and obligated the managing member to implement the outcome of that vote. In applying well-settled Delaware contract interpretation principles, the court found that, to the contrary, this provision gave the non-managing members only a veto right over such actions. The court found that nothing in this provision could reasonably be read to give the non-managing members affirmative authority to mandate unilaterally that any of such actions be taken by the LLC. The court also looked to other provisions of the LLC agreement for support of this interpretation that gave broad authority to the managing member of the LLC to manage the LLC.

The court then turned to a provision in the LLC agreement that provided that, to the extent any provision of the LLC agreement would create any exposure to liability with respect to a non-managing member, such provision shall be stricken from the LLC Agreement. The court noted that if the non-managing members interpretation of the above-referenced voting provision were correct and that therefore the non-managing members had the ability to unilaterally dictate that the LLC take certain actions, then such provision would likely have to be deemed stricken because this interpretation could create liability for the non-managing members under Section 18-109 of the Delaware LLC Act by giving the non-managing members the right to participate materially in the management of the LLC.

22. *VTB Bank v. Navitron Projects Corp.*, C.A. No. 8514-VCN (Del. Ch. Apr. 28, 2014) (V.C. Noble)

Plaintiff, VTB Bank, a Ukrainian company, provided loans in 2008 to two Ukrainian entities that were part of a corporate family (the "AIS Group") owned and controlled by defendants, Development Max, LLC, a Delaware limited liability company ("Development Max"), and its managing member, Navitron Projects Corp., a Panamanian corporation ("Navitron"). The AIS Group's principal business was selling cars in Ukraine and under the loan terms it pledged to plaintiff real and personal property held in Ukraine. Plaintiff alleged that the AIS Group fraudulently transferred cars it purchased with proceeds of the loans to shell companies with the sale proceeds going to defendants. The AIS Group eventually defaulted on the loans and plaintiff initiated litigation in Ukraine to foreclose on the loan collateral. The litigation in Ukraine was purportedly delayed by the AIS Group, during which time defendants allegedly facilitated the fraudulent transfer of the collateral to defendants. In its complaint, plaintiff made claims of fraudulent transfer and unjust enrichment and sought the remedy of constructive trust and equitable appointment of a receiver.

Navitron moved to dismiss plaintiff's claims for lack of personal jurisdiction. Plaintiff asserted that the court had personal jurisdiction over Navitron by virtue of the Delaware Long-Arm Statute, 10 Del. C. § 3104, and Section 18-109 of the Delaware Limited Liability Company Act, 6 Del. C. § 18-101 et seq. (the "LLC Act"). The court deemed plaintiff to have waived the Long-Arm Statute argument for failing to brief or argue it to the court. The court then decided whether Section 18-109 LLC Act provided it with personal jurisdiction over Navitron.

Section 18-109 authorizes service of process on managers of Delaware limited liability companies in actions "involving or relating to the business of the limited liability company or a violation of the manager . . . of a duty to the limited liability company or any member of the limited liability company." The court read this implied consent provision in a manner consistent with constitutional due process and Delaware precedent, stating, "[the] implied consent provision does not establish a statutory basis for personal jurisdiction over a manager where claims do not relate to the 'rights, duties and responsibilities' that the manager owes to the company or to the manager's involvement in the company's 'internal business affairs' or 'day-to-day operations.'"

Plaintiff argued that the court may exercise personal jurisdiction over Navitron because a party subjects itself to the court's jurisdiction generally when it becomes the managing member of a Delaware limited liability company. The court disagreed and granted the motion to dismiss because plaintiff's complaint asserted that plaintiff was harmed by defendants' conduct independent of their corporate structure, and therefore the claim was not related to Navitron's rights, duties, or responsibilities as a managing member of Development Max.

Development Max moved to dismiss the complaint on forum non conveniens grounds, asserting it would face an overwhelming hardship in defending itself in Delaware. The court applied the forum non conveniens analysis wherein the court must weigh the *Cryo-*

Maid factors in order to determine whether an overwhelming hardship would result. Although the court found (i) that most of the evidence and witnesses were based in Ukraine, (ii) the matter involved Ukrainian law, (iii) the parties had pending litigation on this matter in Ukraine, and (iv) there were significant practical difficulties in maintaining this litigation in Delaware, the court denied the motion to dismiss. In so holding, the court emphasized that the primary remedy sought by plaintiff—equitable appointment of a receiver—implicated the court's fundamental and immutable responsibility to supervise Delaware entities and, in light of the allegation of systemic and systematic fraudulent conduct, the court concluded this responsibility outweighed any hardship on the defendant in litigating in Delaware.

23. *In re Interstate General Media Holdings, LLC*, C.A. No. 9221-VCP (Del. Ch. April 25, 2014) (V.C. Parsons)

In this subsequent decision, the court determined the method by which a certain LLC's assets should be auctioned upon its judicial dissolution. In 2012, Interstate General Media Holdings, LLC ("Interstate") acquired Philadelphia Media Network LLC ("PMN") and its subsidiaries, including the Philadelphia Inquirer, the Daily News, and Philly.com. Interstate's interests were owned by two principle companies, General American Holdings, Inc. ("General American") and Intertrust GCN, LP ("Intertrust"), each of which had the right to appoint a member to Interstate's two-member management committee which directed Interstate's day-to-day business and required the unanimous consent of both committee members to act. Following Interstate's acquisition of PMN, the committee members could not agree on the management of Interstate, frustrating Interstate's ability to effectuate business. Intertrust petitioned the court to dissolve Interstate. The instant dispute involved the type of auction that would be most appropriate to wind down Interstate's affairs—an "English-style" open-outcry auction, favored by General American, or a public auction orchestrated by an auctioneer, advocated by Intertrust.

The court first noted that a company's LLC agreement will control the manner in which its assets should be auctioned. Interstate's LLC agreement, however, lacked a provision governing auction form and, thus, the court found that the parties' likely intended that the court select the appropriate type of auction. In light of this, the court found that the LLC agreement was "essentially irrelevant" to the instant dispute and, instead, the court should select the best auction method that would result in Interstate being wound up in a manner that best maximized its value.

The court determined that a public auction would be unlikely to maximize the company's value because the record contained evidence supporting a reasonably probability that no serious outside bidders would emerge to bid on Interstate. Because only the parties involved desire to purchase Interstate, a private auction, such as the one advocated by General American, would be more likely to expediently and efficiently liquidate Interstate. The court also concluded that a private "English-style" auction would be cheaper and thus, the best method to auction assets.

24. *Filip v. Centerstone Linen Servs., LLC*, C.A. No. 8712-ML (Del. Ch. Feb. 27, 2014) (V.C. Glasscock)

This case arose from exceptions taken by defendant to an interlocutory final report of the Master in Chancery on plaintiff's right to advancement of legal fees and expenses. The Master's report held that the limited liability company agreement of defendant mandated advancement of expenses and costs incurred by plaintiff by reason of his position with the defendant, subject to a duty to repay those expenses if found to have committed fraud or bad faith. The indemnification provision read as follows:

> The Company shall indemnify, defend and hold harmless each Manager and Officer for all costs, losses, liabilities, and damages whatsoever paid or incurred by such Manager or Officer in the performance of his duties in such capacity, including, without limitation, reasonable attorney's fees, expert witness and court costs, to the fullest extent provided or permitted by the Act or other applicable laws. Further, in the event fraud or bad faith claims are asserted against such Manager or Officer, the Company shall nonetheless bear all of the aforesaid expenses subject to the obligation of such Manager or Officer to repay all such expenses if they are finally determined to have committed such fraud or bad faith acts.

The court noted that the parties were in agreement that the indemnification provision provided some form of mandatory advancement, however, the parties disputed the scope of that advancement. Specifically, defendant's position was that the indemnification provision was bifurcated, with the first sentence providing for indemnification and the second sentence providing for advancement only when the covered party was defending against a claim of fraud or bad faith—subject to a duty to repay any advancement if found to have committed fraud or bad faith.

In interpreting the indemnification provision, the court recognized that in common usage the obligation to defend is not equivalent to an obligation to advance defense costs. Thus, if the indemnification provision were limited to the first sentence, it would be ambiguous and not necessarily provide for mandatory advancement. The court, however, reading the provision as a whole, held that the second sentence clarified that "defend" encompassed advancement because the second sentence required repayment of the expenses covered in the first sentence if the covered party were found to have committed fraud or bad faith. This cured any ambiguity in the first sentence because only expenses that were advanced could be subject to an undertaking to repay. Therefore, the provision was not ambiguous, nor was any of it surplusage, and mandatory advancement existed. The case was remanded to the Master to determine the remaining factual issues in light of the court's legal analysis.

* * *