

Court of Chancery Confirms Managerial Bump-Out Theory Is Not Valid Under Delaware Law

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Delaware Law Update

12.29.2020

In *Llamas v. Titus*, C.A. No. 2018-0516-JTL (Del. Ch. June 18, 2019), the Delaware Court of Chancery addressed the validity of the appointment of managers of a Delaware LLC, recognizing that Section 18-110 (a) of the Delaware LLC Act, which is the counterpart to DGCL Section 225, allows for an expedited procedure to determine the proper composition of a corporate board.

In this case, a member who owned 90% in a Delaware LLC and served as one of its two managers died. The surviving member owned the other 10% interest and served as the LLC's other manager. When the 90% member died, his status as a member terminated, and the economic rights associated with his interest passed to his estate. His status as a manager likewise terminated. The surviving member was left as the sole member and sole manager of the company. After learning of the death of the 90% member, one of the deceased member's advisors recommended that the surviving member appoint two individuals of his choosing as additional managers of the company, as the advisor believed it would indirectly give him control of the company. Not fully recognizing the implications, the surviving member, by written consent, appointed the two individuals as managers of the company, but shortly thereafter began to evaluate the implications. After consultation with the company's counsel, the surviving member amended the company's operating agreement and executed another written consent purporting to appoint two other individuals as managers of the company. However, the new written consent did not expressly remove any of the incumbent managers.

In analyzing whether the incumbent managers were properly removed as managers of the company, the court explained that the managerial bump-out theory lacks any support in Delaware law. The court reiterated an earlier ruling that "an individual cannot be appointed to a board with no vacancies," further adding that "without a vacancy, there is no room for an individual to be appointed."

This is an interesting case that highlights the importance of not glossing over what may seem to be customary written consents. As a general matter, if managers are being appointed to a Delaware LLC, we would recommend you review the LLC agreement to determine the proper way to remove and appoint managers. Absent any clear guidance, if a written consent is to be executed, parties should make clear whether any incumbent managers are to be removed.