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**Delaware Statute of Frauds Applies to Limited Liability Company Operating Agreements**

In a matter of first impression that could have significance for Virginia limited liability companies, the Delaware Court of Chancery recently held that the statute of frauds applies to limited liability company operating agreements. Olson v. Halvorsen, C.A. No. 1884-VCL, 2008 Del. Ch. LEXIS 156 (Del. Ch. Oct. 22, 2008). Olson involved a dispute among hedge fund founders relating to payments to be made to one founder upon his removal from the limited liability company. The removed founder argued that an unsigned, draft LLC operating agreement controlled. It provided that the removed founder was entitled to a multi-year earnout worth potentially in excess of \$100 million. The other founders argued that certain signed documents under which a departed founder would be entitled only to his capital account balance and unpaid compensation governed instead.

Section 18-101(7) of the Delaware Limited Liability Company Act expressly permits oral operating agreements but is silent on whether the statute of frauds applies to them. Subject to certain exceptions, the Delaware statute of frauds provides that “[n]o action shall be brought to charge any person upon . . . any agreement that is not to be performed within the space of one year from the making thereof . . . unless the contract is reduced to writing . . .” 6 Del. C. § 2714(a). The Court observed that the statute of frauds does not limit the enforcement of any oral LLC operating agreement provision that can be performed within one year and that “[f]ew oral LLC operating agreements are likely to contain any term or provision that cannot possibly be performed within one year.” Olson, 2008 Del. Ch. LEXIS 156 at \*12. However, “if an [oral] LLC agreement contains a provision or multiple provisions which cannot possibly be performed within one year, such provision or provisions are unenforceable.” Id. In Olson, only the first of the earnout payments under the unsigned LLC operating agreement could be calculated within one year of the alleged agreement, and the unsigned LLC operating agreement imposed substantive restrictions and obligations on the remaining founders that extended for multiple years. Accordingly, the Court ruled that the unsigned LLC agreement violated the one year provision of the statute of frauds and that none of the exceptions to the statute of frauds applied. Id. at \*23.

Like Delaware, Virginia has adopted a statute of frauds. It provides, in part, that unless an agreement “is in writing and signed by the party to be charged or his agent, no action shall be brought . . . [u]pon any agreement that is not to be performed within a year”. Va. Code Ann. § 11-2. Virginia’s Limited Liability Company Act also expressly permits oral operating agreements. Va. Code Ann. § 13.1-1023(B)(1). Because there appears to be no case law in Virginia—or in any other jurisdiction (see Olsen at \*10)—on whether the statute of frauds would apply to oral operating agreements, the ruling in Olson may be persuasive authority to any Virginia courts that are faced with this issue in the future.

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