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Virginia Supreme Court Case Highlights L.L.C. Managers' Fiduciary Duties; Duty is Owed to the L.L.C., not to Individual Members

In *Remora Investments, L.L.C. v. Orr*, 277 Va. 316 (2009), the Court considered whether a manager owed fiduciary duties to individual members or, alternatively, to the L.L.C. *Remora* involved O.A.L.L.C. ("O.A."), an L.L.C. with two members, David L. Orr ("Orr") and Remora Investments, L.L.C. ("Remora"). Orr and Remora each held a 50% interest in O.A. In turn, O.A. held a 50% interest in Beaumeade IA Investment L.L.C. ("Beaumeade"). Orr served as the manager of both O.A. and Beaumeade. When Beaumeade sold its only asset, a parcel of real property, in October 2003, Orr deposited O.A.'s share of the proceeds into O.A.'s investment account. At that time, Remora demanded that its share of the proceeds be disbursed to it. It was not until two years later that Orr disbursed O.A.'s assets to himself and Remora. In January 2004, Remora initiated suit against Orr. In a second amended bill of complaint, Remora asserted that Orr breached the fiduciary duties that Orr owed to it and O.A. The trial court rejected Remora's claim that it had standing to bring a cause of action directly against Orr; it held that an L.L.C. member's claim against the manager could only be brought as a derivative action.

The Virginia Supreme Court affirmed the trial court's ruling. The Court noted that the duties of a manager are similar to the duties of a corporation's director. Specifically, Code §§ 13.1-1024.1(A) and 13.1-690 state that managers and directors shall discharge their duties in the best interests of the L.L.C. or corporation, respectively. In contrast, under Virginia general partnership law, partners owe the duties of care and loyalty to the partnership *and the other partners*. Code § 50-73.102(A).

In addition, the Court rejected Remora's argument that two prior decisions, *Adelman v. Conotti Corp.*, 215 Va. 782 (1975) and *Glass v. Glass*, 228 Va. 39 (1984) establish that managers owe L.L.C. members fiduciary duties. *Adelman* and *Glass* involved suits by shareholders of a corporation against corporate directors. Remora sought analogous application of these decisions to L.L.C.s. The duties referenced in *Adelman* and *Glass* applied to shareholders as a class, not to individual shareholders. Citing *Simmons v. Miller*, 261 Va. 561 (2001), the Court ultimately held that, like shareholders of a corporation, members of an L.L.C. could only bring their claims through a derivative suit against the managers. Finally, the court noted that O.A.'s operating agreement "did not establish fiduciary duties between . . . a member and a manager" and that "[s]uch provisions can . . . be included in an L.L.C.'s operating agreement."

The holding of the *Remora* case emphasizes the importance of paying particular attention to provisions in operating agreements relating to the duties owed by managers. In drafting L.L.C. operating agreements, specifically state the duties the manager owes to members. If your client is the manager, incorporate the provisions of the Virginia Limited Liability Company Act. If your clients are the members, it may be prudent to specifically state that the duties are owed to each member and individual members shall have the right to bring a cause of action directly against the manager for a breach of those duties. Also, in the case of an L.L.C. with two members, each owning 50% interests, pay special attention to deadlock provisions between

members and provisions giving members the right to remove and replace managers. Depending on the circumstances, there may be much at stake. Failure to pay close attention to these provisions could eliminate your L.L.C.'s member's remedies against the manager; or it could expose your manager to an increased risk of litigation and liability.