



Hedge Funds

Limited Partners' Right of Access

After Parkcentral Global, L.P., v. Brown Investment Management, L.P.

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As a result of the decision of the Supreme Court of Delaware in *Parkcentral Global, L.P., v. Brown Investment Management, L.P.* (“P-G case”), the general consensus by the legal/financial community appears to be that General Partners who wish to bar access to confidential information between Limited Partners (“LPs”) can do so by simply

inserting appropriate language into the original or amended Limited Partner Agreement (“LPA”). If the reasoning for this consensus is limited to a reading of the P-G case, there would be no reason to disagree. However, when you compare the statutory language found at Title 6, Subtitle II, Chapter 17, Subchapter III, Section 17-305 (a)-(f) (the

“Statute”) with the Court’s decision, you should reach a more cautionary conclusion about re-writing LPA Agreements. This writer proposes that the issue is not settled and will be revisited.

The Statute

The statutory language that created the right of access to information by Limited Partners can be found at Section 17-305 of Title 6, Subtitle II, Chapter 17, Subchapter III, of the Delaware Code. Section 17-305 (a) states in pertinent part:

Each limited partner has the right, subject to such reasonable standards (including standards governing what information and documents are to be furnished, at what time and location and at whose expense) as may be set forth in the partnership agreement or otherwise established by the general partners, to obtain from the general partners from time to time upon reasonable demand for any purpose reasonably related to the limited partner’s interest as a limited partner:

...

So far, so good. Nothing in the above provision serves to completely “bar” access to information, it simply provides for “reasonable standards” to be applied to the statutorily created right of access to certain information.

Section 17-305 (f) states:

The rights of a limited partner to obtain information as provided in this section may be restricted in an original partnership agreement or in any subsequent amendment approved or adopted by all of the partners or in compliance with any applicable requirements of the partnership agreement. The provisions of this subsection shall not be construed to limit the ability to impose restrictions on the rights of a limited partner to obtain information by any other means permitted under this chapter.

Again, nothing in the above provision serves to completely bar the right of access. It simply allows for the imposition of reasonable “restrictions” on said right. So how does the Statute align with the P-G case? This critical answer was not provided by the Court.

The Court’s Reasoning in P-G

[Keep in mind that the Court rejected all of the arguments posited for denying or barring access to information by LPs under the guise of “reasonable restrictions”; so, the case remains a victory for LPs who wish to exercise their statutory right of access to information.](#) Furthermore, setting aside the Court’s contradictory, but incidental, reference to denying access to information by way of inserting more explicit language in Partnership Agreements, the decision still stands for the

the proposition that the Courts have taken the right of access seriously and will apply a presumption in favor of the right.

The problem with the decision in the P-G case is not about the evidence presented at trial, or the arguments raised on appeal; rather, it resides in the Court's incidental language noted above, and the potential for misinterpreting the law by assuming that the Court opened a door for effectively eviscerating the statutorily created right in the future by simply allowing for the insertion of more explicit language in Partnership Agreements so as to deny LPs the right of access to certain information. In what should be more appropriately interpreted as *obiter dictum* (an incidental or passing remark), the Court, after rejecting one of the arguments for denying access on the basis that "The General Partner's policy [went] beyond reasonably governing access to information; [because] it purports to deny completely a right granted in the Partnership Agreement," then injected the entirely unnecessary comment that "[i]f the General Partner wished to bar access to the names and addresses of partners, it could have done so explicitly in the Partnership Agreement under 17-305(f)" of the Statute. In any event, nothing in Section 17-305(f) of the Statute provides for the complete denial of access to the right created by the General Assembly.

If the Court's comment is taken as authoritative and controlling, then what previously

seemed to be a clearly worded substantive right has now been made illusory because it can be easily voided by the mere "stroke of the pen" when writing an LP Agreement. Under the circumstances, is it reasonable to assume that Delaware's General Assembly would agree that it was their intent, after first articulating the right in one provision of the statute, only to have it so easily taken away through a series of purportedly reasonable "restrictions" found in another provision of the same statute? This writer doesn't think so.

How Can the Apparent Conflict Between the Statute and the Court be Resolved?

"Delaware's rules of statutory construction are straightforward. A court must first determine whether or not the statute is ambiguous. If the statute is found to be clear and unambiguous, then the plain meaning of the statutory language controls. The fact that the parties disagree does not create ambiguity. Rather, a statute is ambiguous only if it is reasonably susceptible to different interpretations, or if a literal reading of the statute would lead to an unreasonable or absurd result not contemplated by the legislature. When confronting an ambiguous statute, a court should construe it in a way that will promote its apparent purpose and harmonize [it] with other statutes within the statutory scheme." *See Insurance Commissioner of the State of Delaware v. Sun Life Assurance Company of Canada (U.S.), S. Ct. of*

Delaware (May 13, 2011).

As discussed above, the Statute unambiguously created a right of access, subject only to reasonable standards or restrictions. When the issue of whether the right could be completely barred or denied reached the courts, all of the arguments presented for denying access were rejected. Furthermore, the Court never reached the issue raised by its own incidental comment because there was no explicit language barring access to information in the Partnership Agreement. In other words, the Court merely offered a hypothetical that had no actual bearing on the facts and arguments necessary to reach its decision.

In conclusion, practitioners involved in writing or interpreting Partnership Agreements need to consider and decide how to deal with the Court's incidental remark in the P-G case. If the language is not viewed as merely an incidental observation that is not legally binding (*obiter dictum*), then it is difficult to see how one can square the competing authorities because the Court's decision doesn't supply the reasoning for such an apparent *non sequitur*. This writer believes that the better course is to embrace the P-G decision as one that stands for protecting and defending the statutory right; not eviscerating it. Reasonable restrictions on access to information between LPs are certainly permissible to protect the confidentiality of information,

but when such restrictions effectively deny any and all access, the Partnership Agreement may very well violate a statutorily created right of access that remains the law in Delaware. ~

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