

Delaware Chancery Court Lacks Personal Jurisdiction Under LLC Act's Implied Consent Provision Unless Defendant Has "Control" or "Decision-Making" Capability

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The ***Delaware Court of Chancery*** held that it lacked personal jurisdiction over the defendant because the allegations failed to show that the defendant possessed the necessary “control” or “decision-making” capability required for “material participation” under the ***Delaware Limited Liability Company Act’s (the “LLC Act”)*** implied consent provision.

Summetria, LLC, a Delaware limited liability company (“Summetria”), owned 100% of the company Arctic Ease, LLC (“Arctic Ease”) that was in the business of developing and marketing reusable cryotherapy wraps. Summetria was owned by three ownership groups: the Forden Entities; the Heck Parties; and Costar Partners. The Costar Partners were comprised of William Cohen and Mitchel Weinberger. Carol Forden was the sole Managing Member of Summetria.

Cohen was not only an owner through Costar Partners but was also on the Summetria board of directors. Cohen helped to conduct other business for Summetria such as facilitating negotiations of reseller and distribution contracts. It was also alleged that Cohen acted in an investor relations role and provided the other owners with information about the current state of the business. When Arctic Ease’s business needed additional capital Cohen provided a one million dollar loan to the company. Despite Cohen’s loan, the company continued to flounder. Cohen extended the original loan, and provided additional funding. When the company needed further capital, Cohen attempted to arrange a bridge financing through his personal investment banking connections.

Summetria was unable to secure the bridge financing because Cohen refused to guarantee the financing. After the failed financing, Cohen resigned from the board of directors and notified Summetria of its default on the loan from Cohen. Later Summetria and Arctic Ease defaulted on loans to other creditors. As a result of their defaults Summetria and Arctic Ease’s assets were sold at a foreclosure. Cohen then purchased the assets using a company he controlled and Costar Partners.

The Forden Entities filed a petition seeking dissolution of Summetria and Arctic Ease. Thereafter, Forden, the Forden Entities, and the Heck Parties asserted claims against the Cohen and related parties for breach of fiduciary duty, fraud, misrepresentation, and other related claims.

The question before the court was whether it had personal jurisdiction over Cohen necessary to hear

the claims against him, and if so, whether it had personal jurisdiction under a conspiracy theory over the companies Cohen controlled to purchase the assets. However, conspiracy is not itself an independent basis for personal jurisdiction.

The court stated that under Delaware law there are two bedrock principles for personal jurisdiction: 1) a statutory basis for process; and 2) the requisite minimum contacts with the forum to satisfy constitutional due process. The Court of Chancery has previously held that Delaware's long-arm statute grants personal jurisdiction to the maximum extent possible under the due process clause. However, a party's "ownership" of interests in a Delaware entity alone is not enough to satisfy the minimum contacts test.

The LLC Act contains an implied consent provision that allows the courts to exercise personal jurisdiction over parties that "manage" the actions involving or relating to the business of a Delaware LLC. The Act describes two types of persons that satisfy the implied consent provision: 1) "managers" defined in the operating agreement; and 2) those parties who "participate materially in the management" of a Delaware LLC. To participate materially a person must have "control" or a "decision-making role" in the company.

In this case Forden, the Forden Entities, and Heck Parties asserted that Cohen was a manager of Summetria under the LLC Act because he was an original member of Summetria and he had voting power. But, the Summetria Operating Agreement only listed Carol Forden as the Managing Member of the company. Further, the Operating Agreement also made clear that Carol Forden was the sole manager, and that she had the authority to manage, act for, or bind the Company. The Operating Agreement stated that other members "shall not take part in, or interfere in any manner with, the management, conduct or control of the business and affairs of the Company, and shall not have any right or authority to manage, act for or bind the Company unless so authorized by the Managing Member." The only management authority granted to Summetria's board members was the ability to set board members' pay.

The court held that the facts alleged by Forden, the Forden Entities, and Heck Parties failed to demonstrate the necessary "control or decision-making role" required for "material participation in the management" of Summetria. The court held that what power Cohen did have was subject to Forden's decision making authority under the Summetria's Operating Agreement.

The court also disagreed with the assertion that Delaware's long-arm statute gave the court jurisdiction over Cohen because no facts were alleged that Cohen committed any act in Delaware, or that Cohen conducted any business in Delaware either personally or through an agent.

Finally, the court held that it did not have personal jurisdiction over Weinberger, Costar, or Cohen's other company because conspiracy is not an independent basis for personal jurisdiction.

[imo-dissolution-of-arctic-ease-memorandum-opinion-161209](#)

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National Law Review, Volume VI, Number 356

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