

The Use Of A Special Litigation Committee Under The Revised Minnesota LLC Act



By Janel Dressen

With the full scale implementation of Minnesota Statutes Chapter 322C (the "Revised Act") on January 1, 2018, more detailed statutory rules now govern the appointment, authority and use of special litigation committees ("SLCs") by Minnesota limited liability companies ("LLCs") when facing a derivative claim. Up until January 1, 2018, there was very little guidance with respect to SLCs in the governing statutes. Practitioners were required to review and understand case law, such as the Minnesota Supreme Court's decision in *In re UnitedHealth Grp. Inc. Derivative Litig.*, 754 N.W.2d 544, 550 (Minn. 2008). Now, with the adoption of the Revised Act, Minnesota LLCs have more direction when choosing to appoint an SLC to address a member derivative demand and/or member derivative litigation. This article is intended to highlight some of the specific statutory provisions under the Revised Act that did not exist under the previous MN LLC Act, Chapter 322B, and which do not exist under the Minnesota Business Corporation Act, Chapter 302A.

As an initial matter, the appointment of an SLC is a highly effective response by a company when a derivative demand is made by an owner. An SLC enables a company, through the appointment of an SLC, to take control of claims even when a majority of the board is

in a conflict of interest position. Indeed, the comments to the Revised Uniform Limited Liability Company Act, which the Revised Act is patterned after, highlight that an "SLC can serve as an ADR mechanism, help protect an agreed upon arrangement from strike suits, protect the interests of members who are neither plaintiffs nor defendants (if any), and bring to any judicial decision the benefits of a specially tailored business judgment."^[1]

Once it is determined that derivative claims are alleged against a Minnesota LLC, the LLC may appoint an SLC to investigate the claims asserted and determine whether it is in the best interests of the company to pursue those claims.^[2] While it is common for courts to stay derivative litigation pending the completion of an SLC investigation, the Revised Act explicitly provides that the "court shall stay discovery for the time reasonably necessary to permit the committee to make its investigation."^[3] This court directive is important because it allows the SLC to conduct its investigation without the company having to participate in two proceedings at the same time. That being said, Section 905 also provides that staying discovery is not intended to prevent the court from enforcing a member's right to information as provided under Minn. Stat. § 322C.0410, or, for good cause shown, granting extraordinary relief in the form of a temporary restraining order or preliminary injunction.^[4]

The Revised Act also identifies who must appoint the SLC. The appointment of an SLC is now dependent upon whether the LLC is governor-managed, manager-managed or member-managed. The managers in control of the LLC must appoint the SLC.^[5]

The Revised Act also addresses what the SLC can do after it completes its investigation. This is, perhaps, the most useful addition to the LLC Act. After an "appropriate investigation," the SLC may determine that it is in the best interests of the LLC to: (1) continue the derivative action under the control of the plaintiff; (2) continue the derivative action under the control of the SLC; (3) settle the derivative action by the SLC; or (4) seek to dismiss the derivative action.^[6] Thus, the Revised Act gives express authority to the SLC, rather than the LLC, to continue the derivative action under the SLC's control and to settle the matter.

Finally, the Revised Act codifies the teachings of *In re UnitedHealth Grp. Inc.*

Derivative Litig., supra, by providing that the court shall "determine whether the members of the committee were disinterested and independent and whether the committee conducted its investigation and made its recommendation in good faith, independently, and with reasonable care."^[7] This determination is made by the court after the SLC files a "statement of its determination and its report supporting its determination" with the court, and gives the plaintiff notice of the same.^[8] Importantly, the Revised Act states that the SLC has the burden of proof.^[9] The court is directed to enforce the determination of the committee so long as the committee "acted in good faith, independently, and with reasonable care."

The statutory roadmap now governing SLCs in Minnesota is expected to be welcomed by the courts. The Revised Act provides express direction as to how to proceed when an SLC is appointed and makes its recommendation. Moreover, the appointment of an SLC allows the court to defer to the business judgment of an independent committee who sits with extensive knowledge and understanding after conducting a thorough investigation of the derivative matters at hand. Whether the courts will look to the Revised Act as guidance when deciding corporate SLC cases remains to be seen.

[1] *Comments to Revised Uniform Limited Liability Company Act* § 905.

[2] Minn. Stat. § 322C.0905, subd. 1.

[3] *Id.*, emphasis added.

[4] *Id.*

[5] Minn. Stat. § 322C.0905, subd. 3.

[6] *Id.* at subd. 4.

[7] *Id.* at subd. 5.

[8] *Id.*

[9] *Id.*

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