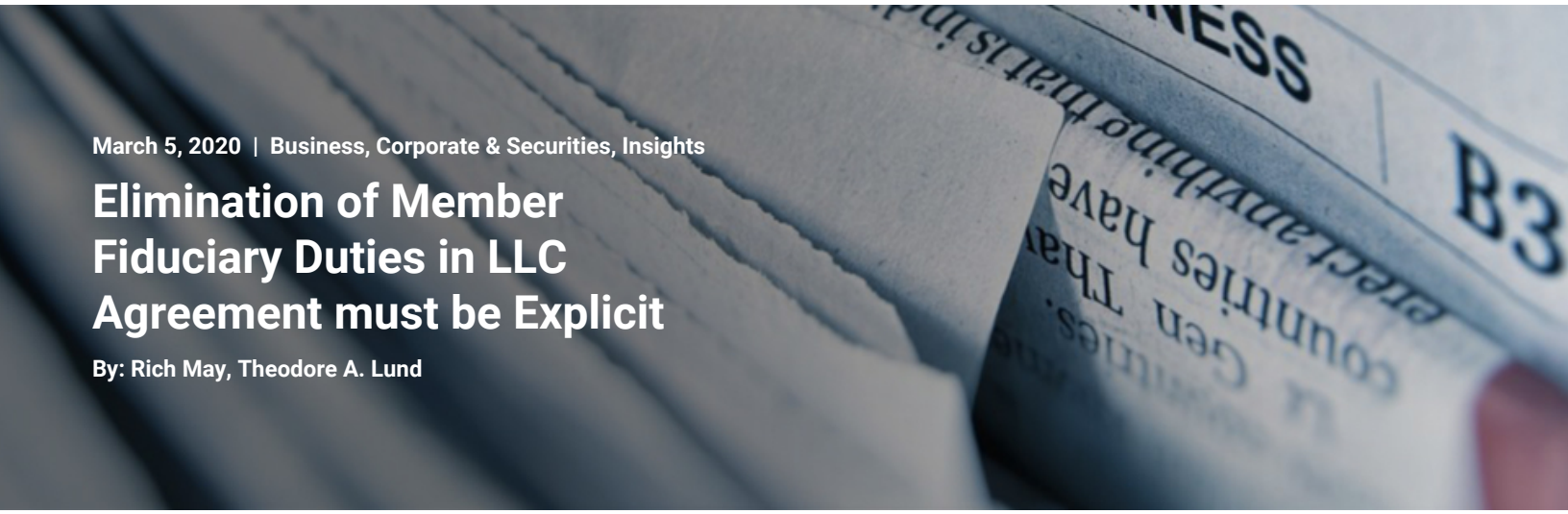


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# Elimination of Member Fiduciary Duties in LLC Agreement must be Explicit

By: Rich May, Theodore A. Lund

A recent decision by the Delaware Court of Chancery (*Skye Mineral Investors, LLC, et al. v. DXS Capital (U.S.) Limited et al.*) makes clear that a limited liability company operating agreement must include language explicitly limiting or eliminating member-level fiduciary duties to eliminate or otherwise limit those duties.

The majority members of Skye Mineral Partners ("SMP") alleged that the minority members had purposefully used their blocking rights to harm SMP and force SMP's wholly owned subsidiary into bankruptcy so that the minority members could then purchase the assets of the wholly owned subsidiary out of bankruptcy at a steep discount.

The minority members asserted as a defense that a provision in SMP's operating agreement, which stated "except as otherwise specifically provided in this Agreement, all votes, approvals, or consents of a Member may be given or withheld, conditioned or delayed, as such Member may determine *in such Member's sole and absolute discretion*" operated as a clear waiver of any member level fiduciary duty that would otherwise apply.

The Court held, however, that any such waiver of member level fiduciary duties must be explicitly stated in "the most painstaking clear terms" and could not be by implication.

*Disclaimer: This summary is provided for educational and information purposes only and is not legal advice. Any specific questions about these topics should be directed to attorney Theodore Lund.*



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