

Inquirer Ruling Casts Doubt On Pa. Power Over Delaware LLCs

By **Matt Fair**

Law360, Philadelphia (May 23, 2014, 6:57 PM ET) -- A recently dropped appeal in a case finding that a Pennsylvania judge could not oversee the dissolution of the Philadelphia Inquirer's parent company because it was based in Delaware leaves unanswered questions about the ability of out-of-state courts to interpret Delaware's Limited Liability Company Act, attorneys say.

Judge Patricia McInerney in the Philadelphia County Court of Common Pleas ruled that the statute vested the Delaware Court of Chancery with exclusive jurisdiction over the dissolution of Delaware-based limited liability companies. But Francis G.X. Pileggi, an attorney with Eckert Seamans Cherin & Mellott LLC's Wilmington, Delaware, office, told Law360 there was no binding case law in the state to support her conclusion.

"I'm not saying that Judge McInerney is necessarily wrong, I just don't think it's that clear-cut," Pileggi said. "It's certainly not a settled issue. It's certainly not a matter that has been settled definitively by the Delaware courts."

The issue of the Pennsylvania court's ability to preside over the dissolution of a Delaware-based LLC came as part of a bitter feud between the owners of Interstate General Media LLC, the parent company of both the Philadelphia Inquirer and the Philadelphia Daily News.

A group of investors had purchased the two papers — along with the website Philly.com — in 2012, only to see the partnership sour over the course of the next 18 months. Minority investors Lewis Katz and H.F. "Gerry" Lenfest, who hold a share of IGM under the corporate moniker Intertrust GCN LP, filed a petition for dissolution in Philadelphia County's commerce court in early January. The following day, the majority owners of IGM filed their own dissolution petition in the Delaware Court of Chancery.

Judge McInerney found that IGM's limited liability agreement organized the company under Delaware law and mandated that any judicial dissolution be carried out under the LLC Act. Combined with a plain reading of the statute, this meant that the dispute had to move forward in the Court of Chancery, the judge held.

In particular, she cited Section 18-802 of the LLC Act, which provides that "on application by or for a member or manager, the Court of Chancery may decree dissolution of a limited liability company."

"A plain reading of the statute implies that exclusive subject matter jurisdiction lies with the Delaware Court of Chancery," Judge McInerney said in her opinion. "This interpretation is in accord with the

nature of judicial dissolution. Judicial dissolution is a drastic remedy that terminates the existence of an entity created pursuant to an enabling state's rules. Courts should exercise caution in such situations so that judicial dissolution may occur as the parties' desire, in this case within the state which enabled its creation. Here, IGM was created in Delaware and therefore should be resolved, as requested by the parties, by a judicial decree entered by a Delaware court."

Katz and Lenfest appealed Judge McNerney's decision to the Pennsylvania Superior Court, but the appeal was dropped on May 14 as the two sides move toward an auction of the company in Delaware, set for Tuesday.

As part of their appeal, Katz and Lenfest petitioned the Pennsylvania Supreme Court to exercise extraordinary jurisdiction in the dispute. While the court ultimately declined to hear the case, Chief Justice Ronald Castille filed a dissenting statement expressing his concern over the precedent Judge McNerney's decision seemed to set.

"I have strong reservations against accepting the notion that a Delaware statute which merely speaks to the discretionary power of the Court of Chancery to order dissolution operates to deny Pennsylvania the power to render justice in a case, properly brought within its borders, seeking a similar remedy," he said.

Joseph Podraza, an attorney with Sprague & Sprague representing Katz and Lenfest, told Law360 that he was heartened by Chief Justice Castille's skepticism over the ruling.

"We totally agree with what the chief wrote, and we think he's absolutely right," he said.

He said he believed the decision cast serious doubt on the long-accepted precedent allowing courts to enforce and interpret the laws of other jurisdictions.

"The U.S. Supreme Court has supported the notion that a court in one state can interpret and apply the laws of another state in resolving a dispute where it has subject-matter jurisdiction over the parties," he said. "Only in the very limited area where the law that was created by the state requires very specific enforcement has the Supreme Court endorsed exclusivity."

While some laws in Delaware do vest the courts there with exclusive jurisdiction over certain issues, Pileggi said he didn't believe the the dissolution provision in the LLC statute was one of them.

"It's very common for courts all over the country to apply Delaware law on issues involving Delaware LLCs and Delaware corporations. It happens every day of the week," he said.

He noted that dissolutions in Delaware have in some circumstances been carried out through arbitration instead of through litigation before a judge, suggesting that the Court of Chancery was not the sole means of dissolving an LLC.

"There are cases where LLC agreements have mandatory arbitration clauses that require arbitration on any issue involving the company," he said. "There was a decision where such an arbitration clause required a dissolution petition to be submitted to an arbitrator. So if the Court of Chancery had exclusive jurisdiction, it would seem that you wouldn't be required to arbitrate it."

But Dechert LLP attorney Robert Heim, who represents a faction of IGM's majority ownership group controlled by New Jersey insurance tycoon and political power broker George Norcross III, said he

believed Judge McInerney had gotten the ruling right.

"The two majority owners were not Pennsylvanians and had elected to form a Delaware LLC under a Delaware statute," he said. "The court carefully and thoroughly deliberated on the circumstances and the construction of the Delaware statute."

He noted that courts addressing similar jurisdictional questions in other states had arrived at the same conclusion. In particular, he pointed to a decision by a Vermont state appeals court in 2009 that found that Section 18-802 did not authorize judges outside of Delaware to claim jurisdiction over dissolution.

"Delaware has not spoken to the issue, which makes it harder for other courts, but I think the majority of other state courts that have looked at this issue have agreed with Judge McInerney," he said. "There have been a number of other states that have dealt with it, and there have been decisions both ways, but I think a majority of courts have come out similarly."

Buchanan Ingersoll & Rooney PC attorney Geoffrey Grivner said Delaware courts had a history of reserving their authority to preside over issues involving state law.

"Delaware judges, especially our former chancellor and now Chief Justice [Leo] Strine, are very fond of the saying that courts should stay in their lane, and this would be the classic example of staying in your lane," he said. "The issues surrounding the dissolution of a Delaware entity would classically be the province of Delaware courts. I'm not terribly surprised by the ruling."

Morgan Lewis & Bockius LLP attorney Marc Sonnenfeld, who represents IGM, said the issue was a narrow one that was unlikely to present problems in the future.

"The issue hasn't arisen before, and I don't know that it's likely to occur again," he said. "But if it does arise again, the decision gives clarity to the issue. We did spend a lot of time and money litigating where this matter should go forward, so hopefully others won't have to expend the time and money reinventing the wheel."

Podraza, however, said the lack of clarity from the Delaware courts and the discontinued appeal before the Pennsylvania Superior Court meant the issue was likely to crop up again.

"You have an unsettled area that is going to require potentially unnecessary additional litigation," he said. "It's created an issue that's going to replicate itself down the road in a similar situation."

--Editing by Kat Laskowski and Katherine Rautenberg.