

# Locke Lord QuickStudy: There Is a Big Difference Between ??“Void” and “Voidable”?

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In the iconic “The Princess Bride,” Miracle Max observes that there is a big difference between “all dead” and “mostly dead” and then goes on to prove it. In *Holifield v. XRI Investment LLC*, 2023 WL 5761367 (Del. Supr. Sept. 7, 2023), the Delaware Supreme Court held that there is a big difference between “void” and “voidable” in a limited liability company agreement, despite Vice Chancellor Laster’s inviting them in *XRI Investment Holdings LLC, v. Holifield*, 283 A.3d 581 (Del.Ch. 2022), to do otherwise.

In this case, XRI challenged as ineffective the transfer by Holifield of his LLC interest as collateral for a personal loan without his having obtained the approval of the LLC’s board as required by XRI’s LLC agreement. The LLC agreement provided that any transfer in violation of the agreement was “void.”

The Court of Chancery found that XRI’s board was aware of and facilitated the arrangement and did not complain about it until some time later when the LLC interests became more valuable. Accordingly, the Court found that XRI acquiesced in the transfer and indicated that it would have found that enforcing the void ab initio provision would have been inequitable, as it would have if the transfer were “voidable.” However, the court felt bound by the Delaware Supreme Court’s decision in *Compo Secure LLC v. CardUX LLC*, 206 A.3d 807 (Del. 2018), giving effect to the parties declaring noncompliant actions as “void,” resulting in those actions being “incurably void” and not subject to equitable defenses.

In an extensive analysis, Vice Chancellor Laster invited the Supreme Court to revisit its decision in *Compo* and gave his reasons for why private parties in a contract by calling a noncompliant action “void” should not be able to deprive a court, especially a court of equity like the Delaware Court of Chancery, of its ability to apply equitable defenses, as a court could do if the noncompliant action was “voidable.” This position is not surprising in view of Vice Chancellor Laster’s having co-authored an article on “When Contracts Seek to Prevent Judicial Discretion.”<sup>[1]</sup>

On appeal, the Delaware Supreme Court affirmed the Court of Chancery’s decision to give effect to the parties providing that the noncompliant action was “void,” so that the action was “incurably void,” although it remanded the case to determine if any damages or attorney’s fees should be awarded. The Supreme Court indicated that it saw no reason to revisit its precedent in *Compo*, noting that the Court of Chancery did not suggest that the reasoning in *Compo* is wrong.

## Takeaway

Practitioners, in drafting and negotiating agreements on behalf of clients, should be aware of the difference between provisions that declare actions that violate provisions of the agreement “void” as opposed to “voidable” and the consequences of a noncompliant action being “void.” In addition, if a noncompliant action is intended to be void, the drafter should consider amplifying the term “void” to make clear that it means “incurably void” by using expressions such as “void and without any effect” or “void ab initio.” Doing so may foreclose the ability of the other party to assert equitable defenses.

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[1] Laster and Adams, “When Contracts Seek to Preempt Judicial Discretion,” 101 *Judicature* No. 3, p.33 (2007), [Judicature-Fall2017-contracts.pdf \(duke.edu\)](#)

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