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▶ THE NEW JERSEY REVISED UNIFORM LIMITED LIABILITY COMPANY ACT

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On September 19, 2012, New Jersey enacted the Revised Uniform Limited Liability Company Act (the "Act" or "RULLCA"), which is codified at N.J.S.A. 42:2C-1 et seq. It will apply to new limited liability companies ("LLC") formed in New Jersey on and after March 18, 2013, and to all New Jersey LLCs beginning on March 1, 2014, when New Jersey's current LLC law will be repealed. Therefore, the Act will impact every New Jersey LLC. For a general summary of the Act, see Gianfranco A. Pietrafesa, "[New Jersey Adopts the Revised Uniform Limited Liability Company Act](#)."



RULLCA updates and, on the whole, improves New Jersey's LLC law. Like New Jersey's existing LLC law, RULLCA governs any matter not addressed in an LLC's operating agreement. New Jersey's existing LLC law is modeled after the Delaware Limited Liability Company Act, while New Jersey's version of RULLCA is modeled after RULLCA drafted by the Uniform Law Commission. This article examines six major default provisions under RULLCA and compares them to the default provisions under the Delaware LLC Act as well as New Jersey's current law.

Distributions.

Under RULLCA, each member of an LLC is entitled to an equal share of the profits or losses, regardless of capital contributions or percentage ownership interests. This applies to both regular distributions, N.J.S.A. 42:2C-34(a), and liquidating distributions (after the payment of unreturned capital contributions). N.J.S.A. 42:2C-55(b). Under both Delaware law and New Jersey's current law, each member is entitled to share in the profits or losses based on the agreed value of each member's capital contribution to the LLC. 6 Del. 18-504; N.J.S.A. 42:2B-35. For an example of the differences between RULLCA and New Jersey's current law, see Gianfranco A. Pietrafesa, "[An Operating Agreement is Essential under RULLCA](#)," 210 N.J.L.J. 664 (November 19, 2012).

Voting.

Under RULLCA, ordinary matters are decided by a majority of the members, with each member having one vote ("per capita"), N.J.S.A. 42:2C-37(b)(3), and extraordinary matters, including mergers, are decided unanimously by the members. N.J.S.A. 42:2C-37(b)(4). Under both Delaware law and New Jersey's current law, most matters, including mergers, are decided by a majority of the members' current profit percentages. N.J.S.A. 42:2B-27(a) & 20(b); 6 Del. 801(a) & 402. Under RULLCA and New Jersey's current law, dissolution of an LLC requires the unanimous approval of all members. N.J.S.A. 42:2C-48(a); N.J.S.A. 42:2B 48(a). Under Delaware law, dissolution requires the approval of two-thirds of the members' then current profit percentages. 6 Del. 18-801. For an example of the differences between RULLCA and New Jersey's current law, see Pietrafesa, "[An Operating Agreement is Essential under RULLCA](#)," 210 N.J.L.J. 664, *supra*.

Resignation.

Under RULLCA, a member may resign, but continues to own an economic interest as a dissociated member of an LLC. N.J.S.A. 42:2C-45(a). As such, it continues to receive distributions, if any, made by the LLC, but has no management or voting rights. N.J.S.A. 42:2C-34(a), 47(a) & 56(b)(2). Under Delaware law, a member may not resign from an LLC, unless permitted by the LLC agreement. 6 Del. 18 603. However, if a member is permitted to resign but the LLC agreement does not specify the terms of the LLC's purchase of the resigning member's equity interest, the member is entitled to fair value for its LLC interest. 6 Del. 18-604. Under New Jersey's current law, a member may resign from an LLC and have its equity interest purchased by the LLC for fair value, less applicable discounts. N.J.S.A. 42:2B-39.

Duty of Loyalty.

Under RULLCA, members of a member-managed LLC and managers of a manager-managed LLC owe a duty of loyalty to the LLC and to the members. N.J.S.A. 42:2C 39(a) & -39(i)(1). (In a manager-managed LLC, the members do not have a duty of loyalty.) The duty of loyalty includes refraining from competing with the LLC and accounting to the LLC for any profits or benefits derived by a member or manager from misappropriating an opportunity belonging to the LLC. N.J.S.A. 42:2C 39(b).

Although RULLCA imposes a new statutory duty of loyalty, it permits the duty to be restricted and even eliminated in an LLC operating agreement, so long as doing so is not manifestly unreasonable. N.J.S.A. 42:2C-11(d). It also allows an LLC agreement to include a mechanism for disinterested and independent persons, after full disclosure of all material facts, to authorize or ratify an act that violates the duty of loyalty. N.J.S.A. 42:2C-11(e). Even if the LLC agreement does not restrict or eliminate the duty of loyalty, the members may unanimously authorize or ratify a member's act that violates the duty. N.J.S.A. 42:2C-39(f).

By way of comparison, Delaware LLC law and New Jersey's current LLC law do not specify any duty of loyalty, but state that fiduciary duties may be restricted or eliminated. 6 Del. 1101(c); N.J.S.A. 42:2B-66(b)(2). Nonetheless, the existence of fiduciary duties in a Delaware LLC is unclear. In fact, the wrangling between the Delaware Supreme Court and the Delaware Court of Chancery on the issue makes for interesting reading. Compare *Gatz Properties LLC v. Auriga Capital Corp.*, 2012 WL 5425227 (Del. Nov. 7, 2012), with *Auriga Capital Corp. v. Gatz Properties LLC*, 2012 WL 294892 (Del. Ch. Jan. 27, 2012). By contrast, there are no New Jersey cases clearly setting forth the existence of fiduciary duties under New Jersey's current LLC law.

Oppression.

RULLCA provides protection for an oppressed member of an LLC by providing it with rights and remedies that were not previously available under New Jersey's current LLC law; for example, permitting the appointment of a custodian or provisional managers and requiring the LLC and the other members to purchase the equity interest of an oppressed member. N.J.S.A. 42:2C 48. These rights and remedies are similar to those available to an oppressed minority shareholder of a corporation under New Jersey's Business Corporation Law. N.J.S.A. 14A-12-7(c). Delaware LLC law and New Jersey's current LLC law do not provide a member with any rights or remedies for oppression.

Conversion and Domestication.

RULLCA allows a corporation or other form of entity to convert into an LLC in a straightforward manner, similar to Delaware law. N.J.S.A. 42:2C-78 to 81; 6 Del. 18-214 & 216. Likewise, RULLCA allows an out-of-state entity to easily domesticate into a New Jersey LLC in a straightforward manner, similar to Delaware law. N.J.S.A. 42:2C 82 to 85; 6 Del. 18 214 & 213. However, conversions cannot be accomplished until amendments are made to New Jersey's other business entities

statutes, which are already in the works. Current New Jersey law does not provide for conversions and domestications. Instead, in order to perform a “conversion” or “domestication,” first a new NJ LLC needs to be formed and then the existing domestic or foreign entity needs to be merged into the new NJ LLC.

* * *

RULLCA may be appealing to LLCs owned by equal members who opt not to enter into an LLC operating agreement and who decide to rely on the default provisions in RULLCA. Otherwise, the members may utilize the flexibility in RULLCA by altering its default provisions. The first four items in this article and, to an extent, even the fifth, can be altered in an LLC operating agreement.

Finally, members and managers of existing New Jersey LLCs should review and, if necessary or desirable, amend their LLC operating agreements. Such LLC agreements may not address fiduciary duties, such as the duty of loyalty, and may not include buy-sell provisions, thus subjecting the LLCs and their members and managers to the default provisions of RULLCA.

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