

Agenda for ULLCA II Meeting – February 25-27, 2005 (Phoenix)

TO: NCCUSL Drafting Committee on the Uniform Limited Liability Company Act and the Committee's Advisors and Observers

FROM: David S. Walker, Chair

DATE: January 19, 2005

Following is a detailed agenda for our upcoming meeting. As you will see, this meeting will not address the topics of fiduciary duty (except as pertaining to information rights) and oppression remedies. It is necessary to make progress on other important topics. The Committee will return to the topics of fiduciary duty and oppression as part of its fall, 2005 meeting.

This meeting will also not attempt to consider the entire Act line-by-line. Instead, the meeting will concentrate on approximately eight topics, and on those topics line-by-line analysis will be both appropriate and necessary.

The following agenda states some key issues. If there are other topics you want to include on this agenda, please send an email to me and the reporters: david.walker@DRAKE.EDU; cbishop@suffolk.edu; dkleinberger@wmitchell.edu.

Friday morning

(meeting begins promptly at 8:30 AM)

1. Management structure
 - a. key issues
 - i. should the default management structure be essentially identical for a manager-managed and member-managed LLC, except that a few key matters [which?] should be, in the default mode, reserved to members even in a manager-managed LLC?
 - ii. in the default mode, should the default management structure of a manager-managed LLC and a member-managed LLC differ from the default management structure of, respectively, a limited partnership and a general partnership, and, if so, how?
 - iii. what effect, if any, should management structure have on the causes of dissociation?
 - b. sections to be read
 - i. Section 407, Management of a Limited Liability Company
 - ii. Section 601, Events Causing Dissociation

2. Information duties
 - a. key issues
 - i. should the Act continue the Conference's approach of treating information duties as statutory rather than fiduciary?
 - ii. does the revised language adequately handle the various scenarios raised at the fall, 2004 meeting?
 - b. section to be read – Section 411, Right to Information of Members, Managers, and Former Members
3. Statements of authority
 - a. key issues
 - i. in general, can this provision be streamlined, or is it better to follow (as in the current draft) the RUPA structure?
 - ii. does the current language state correctly the reliance requirements and the effect of statements that do not concern real property?
 - b. sections to be read
 - i. Section 302, Statement of Limited Liability Company Authority
 - ii. Section 303, Statement of Denial

Friday afternoon

(meeting begins promptly 90 minutes after the end of the morning session and continues until 5:30 PM)

4. Charging orders
 - a. key issues
 - i. is the modernized approach an improvement in general?
 - ii. even if so, are there specific improvements to be made (e.g., providing that a person who has redeemed is entitled to interest on the amount paid to discharge the charging order; providing expressly that a charging order is self-executing – i.e., that the order necessarily directs the LLC to pay over to the holder of the order any distributions that would otherwise be paid to the member/transferee [there is some old authority to the contrary])
 - iii. should the caption be changed to include the phrase “charging order”?
 - iv. should the concept of redemption be re-labeled to avoid confusion? (to the uninitiated, the notion of a non-debtor redeeming property can be confusing)
 - v. should the provision expressly state the interface with Article 9, and, if so, how?
 - b. sections to be read
 - i. Section 503, Rights of Judgment Creditor of Member or Transferee
 - ii. for context:
 - (A) Section 501, Member's Transferable Interest
 - (B) Section 502, Transfer of Member's Transferable Interest

5. Becoming a member
 - a. key issues
 - i. does the current language in Section 401 adequately resolve the issue of “formed by filing” vs. “formed by agreement”?
 - ii. is the relationship between Section 401 and Section 701(a)(3) appropriate?
 - iii. should the caption to Section 401 be changed to “Becoming a Member”?
 - b. sections to be read
 - i. Section 401, How a Person Becomes a Member
 - ii. Section 701(a)(3) (dissolution occurs upon “the passage of 90 days during which the limited liability company has no members”)

Saturday

(meeting begins promptly at 9 AM, recesses for lunch, resumes 90 minutes later,
and continues until 5:30 PM)

6. Operating agreement
 - a. key issues
 - i. is there significance to the designation “operating agreement” other than the resulting power to modify the statutory default rules?
 - ii. where (statutory text, comment, or not at all) should the point be made that – given the definition of “operating agreement” – once an LLC comes into existence and has a member, the LLC necessarily has an operating agreement
 - iii. whether the definition of “limited liability company” should refer to the operating agreement; e.g., “an entity formed under this Act . . . and having an operating agreement”
 - iv. should the Act expressly authorize “no oral modification” provisions and other “channeling” methods to control “he said/she said” disputes?
 - v. should the Act permit a non-member to be party to the operating agreement?
 - vi. should the Act permit the operating agreement to (A) extend rights to a third party [no big deal – standard third party beneficiary law] and (B) provide that the agreement may not be amended without the consent of a non-party [arguably a significant change in third party beneficiary law]?
 - vii. assuming that a non-member is not party to the operating agreement and has no express rights under the operating agreement (e.g., a non-member manager), what rights should the non-member have if a change in the operating agreement prejudices the non-member’s rights under an agreement between that non-member and the LLC (e.g., damages only, damages plus injunctive relief if available under ordinary principles of equity, a right under the Act to prevent the change to the operating agreement)?
 - viii. in light of the expansive definition of “operating agreement,” *inter se* the members will the articles often (or sometimes) be evidence of the content of the operating agreement?

- ix. in light of the complexity of the concept of the operating agreement, should the Act eschew a simple definition based on the RUPA approach and substitute “‘operating agreement’ has the meaning stated in Section 110”?
 - x. can the language concerning conflicts between the articles and the operating agreement be streamlined?
 - xi. should the Act give more direction as to the meaning of the “manifestly unreasonable” standard (e.g., whether the standard is applied as of the time a provision is adopted/agreed to, or as of the time the provision is applied; whether “manifestly” has any meaning at all)?
 - xii. whether the Act should include any specification of non-waivable provisions (the RULPA/ULLCA/ULPA(2001) approach) or instead leave that topic to the courts under the rubric of public policy.
 - xiii. does the revised language in Section 110 adequately handle these issues and the other issues raises at the fall, 2004 meeting?
- b. sections to be read
- i. Section 102(12) (definition of operating agreement) [renumbered due to deletion of definition of “governance responsibility”]
 - ii. Section 110, Effect of Operating Agreement; Nonwaivable Provisions
 - iii. Section 201(d) (conflicts between provisions of articles and operating agreement)

Sunday morning

(meeting begins promptly at 8 AM and continues until 11 AM)

7. the direct/derivative distinction
- a. key issue – whether the distinction makes sense for a closely held LLC, especially a member-managed LLC, and whether the Act should somehow indicate that for a [defined] closely held LLC, the operating agreement can eliminate the distinction
 - b. sections to be read:
 - i. Section 901, Direct Action by Member
 - ii. for contrast (to be provided in the Reporters’ Notes section to Section 901)
 - (A) RUPA § 405 (b) (no direct/derivative distinction; no derivative cause of action)
 - (B) ULLCA § 410 (direct claims authorized, while Article 11 provides for derivative claims)
8. knowledge, notice provisions
- a. key issue: should this Act set aside the elaborate (and, some would say, confusing) provisions that NCCUSL imported from the UCC into RUPA, ULLCA, and ULPA (2001) ?
 - b. section to be read: Section 103, Knowledge and Notice