Joint Editorial Board on Uniform Unincorporated Organization Acts
Report to the ULC Executive Committee
June 28, 2020

The Joint Editorial Board on Uniform Unincorporated Organization Acts (the "***JEB***") considered two proposed recommendations at its last meeting on April 23, 2020.[1] The first item is a recommendation to the ULC Executive Committee to empanel a drafting committee to make certain corrections and amendments to the Uniform Partnership Act ("***RUPA***"), the Uniform Limited Partnership Act ("***RULPA***"), and the Uniform Limited Liability Company Act ("***RULCCA***") (collectively, the "***Unincorporated Org Acts***"), each of which were last modified in 2013, as discussed in detail below. Based on that discussion, and the various analyses undertaken during the JEB's meetings during the last three years on these issues, the JEB is recommending that the Executive Committee approve the empaneling of a drafting committee to address the issues raised, as well as similar issues arising from the consideration of evolving case law and other concerns raised in connection with the various states' consideration of the Unincorporated Org Acts. The second recommendation involved consideration of a request by Commissioner Peter Dykman for the ULC to create a drafting committee on corporate social responsibility. The JEB actually discussed creation of a study committee, rather than a drafting committee, and unanimously concluded not to recommend proceeding with further study.

The JEB met via Zoom call on April 23, 2020, after deferring its scheduled in-person meeting in Boston on March 28th, as a result of the cancellation of the ABA Spring meeting (in conjunction with which the JEB meeting as scheduled) due to the COVID-19 pandemic.

PROPOSAL 1. Amendments to Unincorporated Org Acts.

Much of the meeting was focused on issues arising with the Unincorporated Org Acts, either as a result of developing jurisprudence, or in connection with states that are considering adopting the acts. A number of the specific issues discussed, and which form the basis for the recommendation of moving forward with a drafting committee to address them are set forth below (in no particular order):

1. **Definition of Partnership and related issues: RUPA §§ 102(11); 302(d).** The existing RUPA definition requires "an association of two or more persons", rendering the definition inconsistent with RUPA § 801(6) (the passage of 90 consecutive days during which the partnership does not have at least two partners).One proposed corrected definition of "partnership," is "an entity created under RUPA 201", eliminating and no longer including the "two or more" requirement. There is a related issue under RUPA § 302(d) (If a person holds all the partners' interests in the partnership, all the partnership property vests in that person). There are two reasons to eliminate § 302(d): (i) it is inconsistent with Section § 801(6), and (ii) it reflects the abandoned "aggregate" theory of partnerships.

[1] All current JEB Members were in attendance, as well as Emeriti, Messrs. Frost, Altman, and Donn and Research Director Jim Wheaton. Libby Snyder, Legislative Counsel, and Tim Schnabel, ULC Executive Director also participated.

2. **Dissolution; Rescission. RUPA § 803.** Did harmonization of prior § 802(b) (1997) inadvertently eliminate need to have dissociating partner participate in any agreement to rescind dissolution? Prof. Elizabeth Pollman raised the following question regarding the RUPA § 802(b) (1997) as compared to RUPA § 803 (2013): whether the harmonized version still requires the consent of all of the partners, including the dissociating partner, for rescinding dissolution, or has been changed so that the dissociating partner's consent is not required and would be subject to buyout? (That is, a partner in an at-will partnership could express his will to withdraw and the remaining partners could rescind the dissolution and give that partner the buyout amount. The dissociating partner could no longer force dissolution and winding up.) The 1997 language from §802(b) provides that rescinding dissolution requires "all of the partners, including any dissociating partner other than a wrongfully dissociating partner." The harmonized language from 2013 requires "the affirmative vote or consent of each partner" and in the comments says "unanimous consent." Under the definitions, §102(10), the term "partner" does not include a partner who dissociated under §601.

3. **Definitions of Domestic and Foreign Entities: RUPA §§ 102 (5), (6), (9), (11) and analogs for RULPA and RULCCA.** The ULC's Protected Series Act draft includes a new subsection (b) of Section 102 (Definitions) to address a recurring problem, namely, that several of the business organization acts use terms that seemingly refer only to a domestic entity, but are also used to refer to foreign counterparts. The new subsection provides that, with limited exceptions, whenever a term defined in the definition section of that act is used in that Act in reference to a foreign series limited liability company or ... [foreign] protected series, the term has the meaning provided in the statute under which the foreign company was formed or the foreign protected series established. The JEB suggests that the business organization statutes should consider a fix to more carefully address each instance where consistency is warranted and those where is not so intended. Consideration to be addressed include (a) the recognition that without the suggested fix, a "home" statute would not include charging orders over foreign entities (see Fannie Mae v. Heather Apartments case);[2] and (b) there may not be identical terms in foreign statutes, so the drafting committee might consider reference to "analogous" terms.

4. **Definition of Domestication (and related definitions): META § 102 (and housed within each entity Act that has not enacted UBOC)**. The term "domestication" requires attention both as to the intent of the term (*i.e.*, what is accomplished in a domestication) and its use. For example, must a domestication be inter-state? It was noted that once the definitional issue is resolved it will need to be applied consistently across not only the uniform unincorporated acts, but also perhaps in the MCBA in coordination with the Corporate Laws Committee.

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[2] See *Fannie Mae v. Heather Apartments Ltd. P'ship*, No. A13-0562, 2013 WL 6223564, at *6 (Minn. Ct. App. Dec. 2, 2013) (holding that the "exclusive remedy" language in the charging order provision of the Minnesota LLC Act did not apply to a limited liability company organized under the law of a foreign jurisdiction and noting that the LLC Act "defines a 'limited liability company' as 'a limited liability company, other than a foreign limited liability company, organized or governed by this chapter'").

5. **Competition; Taking of Entity Opportunity: RULLCA § 409(b).** Allowing competition post-dissolution/termination but not a taking an opportunity, ignoring the fact that successful competition involves the taking of an opportunity. This dichotomy should be addressed.

6. **Partnership Losses: RUPA § 401.** Since 2017, the JEB has been discussing an apparent error in RUPA § 401(a) (2013), which added some extraneous language regarding partnership losses. The language of §401(a) is as follows:

> "Each partner is entitled to an equal share of the partnership distributions and, except in the case of a limited liability partnerships, is chargeable with a share of the partnership losses in proportion to the partner's share of the distributions."

One option is to revise § 401(a) to strike the language "is chargeable with" through the end of the sentence,. A second is to revise the language as follows:

> "Each partner is entitled to an equal share of the partnership distributions."

A third option is to add to § 401(a) language to the effect of "made by a partnership before its dissolution and winding up". Once a path is selected, RULLCA will need to be harmonized.

7. **Allocation of Profits and Losses; Default Distribution Rules: RUPA § 401; 806**. Should we return to allocation of profits and losses, and if so, how? Also, to address whether to provide loss sharing among partners pertaining to times when the partnership is an LLP, and when it is not an LLP and other distribution paradigms. (See attached memo from Steve Frost)
8. **Charging Orders**. Should charging orders in a multiple-member entity be the sole remedy when all the interests are owned by debtors of the same creditor? Other charging order issues/inconsistencies?

9. **RUPA §§ 807-810**. Re-evaluating whether partners should be able to elect into an LLP and affect obligations incurred before LLP status, whether to extend the "notice-to-creditors/liability-discharge" provisions, §§ 807-809 [similar to ULLCA §§ 704-706 and MBCA §§ 1407-1409], currently applicable only to limited liability partnerships, to non-LLP general partners; and other revisions discussed in February 2019:

    (i) proposal to extend to general partnerships notice-to-creditor/liability-discharge provisions (currently limited to limited liability partnerships);

    (ii) whether to cross reference 306(c) – temporal limitation (note - would need to address in limited partnerships as well);

(iii) revise § 810 (providing that discharge of partnership also discharges partners) to more clearly encompass piercing liability;

(iv) consideration of general policy determinations regarding the cutoff of liability of general partners following notice given in connection with dissolution. A critical concern is that a general partnership can cut off GP liability by filing a notice of conversion to an LLP and then immediately dissolving.

(See attached memo from Lisa Jacobs)

10. **The Term "Series".** Conforming the use of "series" throughout the Unincorporated Org Acts (perhaps including USTEA) and elsewhere to the Protected Series Act.

11. **Protected Agreements: META § 102(37); .** Review use of "protected agreements" in various statutes and consider elimination. Among the issues with the current formulation is that the use of the term "effective date of this [act]]" can create unintended consequences in certain circumstances.

"Protected agreement" is defined as:
(A) a record evidencing indebtedness and any related agreement in effect on [the effective date of this [act]];
(B) an agreement that is binding on an entity on [the effective date of this [act]];
(C) the organic rules of an entity in effect on [the effective date of this [act]]; or
(D) an agreement that is binding on any of the governors or interest holders of an entity on [the effective date of this [act]]

The issue arises in the context of entity transactions other than mergers. For example, META § 301(c) provides, with respect to interest exchanges, as follows:

> (c) If a protected agreement contains a provision that applies to a merger of a domestic entity but does not refer to an interest exchange, the provision applies to an interest exchange in which the domestic entity is the acquired entity as if the interest exchange were a merger until the provision is amended after [the effective date of this [act]].

Some jurisdictions already contemplated interest exchanges prior to "the effective date of this act". In such cases, the parties had the ability to layer in (or not) interest exchanges into the provisions that permit or restrict mergers in a protected agreement and to create a trap for the unwary. This language would have unintended consequences for such agreements. Two alternative proposals considered by the JEB were: (i) eliminating the concept; or (ii) changing the time frame to

grandfather in other entity transactions that were statutorily available prior to the "effective date of this [act]]" in that jurisdiction.

12. **Limited Liability: Commissioner Tom Geu (JEB Member),** based on a case out of South Dakota (SDIF _____, 2018 WL 6493160 (D.S.D. Dec 10, 2018), raised the issue of whether the Unincorporated Org Acts might better define what is limited liability. In that instance certain members had given personal guarantees of company indebtedness. When called upon to satisfy those guarantees they defended on the basis of personal liability from company debts and obligations as the claim that the guarantees we not approved under the terms of the operating agreement.

In order to address the foregoing issues, as well as issues that continue to reveal themselves to JEB members and others, the JEB recommends the empaneling of a drafting committee. We respectfully request that the committee be accorded a bit of leeway as to the specific issues to be addressed as the committee studies them, and as additional pertinent information, both from case law and from those jurisdictions considering adopting or amending the Unincorporated Org Acts, comes to light.

PROPOSAL 2. Possibility of ULC Study Committee to Assess "Social Responsibility" Questions Amendments to Unincorporated Org Acts

Commissioner Peter Dykman proposed the creation of a drafting committee to address issues of corporate social responsibility. (See Dykman memo attached). The JEB considered the possibility of a study committee, rather than a drafting committee to consider a few approaches that would not run afoul of the long-standing bifurcation of corporate statute drafting responsibility (ABA Business Law Section) and that for unincorporated entities (ULC). (See memo to Lisa Jacobs dated January 17, 2020 attached). The JEB has determined not to support either a study committee or a drafting committee. The reasons for that determination are three-fold:

1. While the issue of "Corporate Responsibility" and its related concepts are quite "au current", the focus has been on large, national or global, often publicly traded entities that are almost universally of a "corporate" nature. As noted above, the responsibility for statutory law relating to corporations is the province of the ABA Business Law Section. That body has publicly taken a position that it does not wish to modify its statute, the Model Business Corporation Act ("***MBCA***").

2. Unincorporated organizations are "creatures of contract" and have significant flexibility inherent in their statutory governance schemes. Unlike the fairly strict rules (fiduciary and otherwise) applicable to the corporate structure, there is nothing in the Unincorporated Org

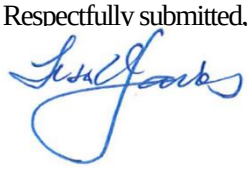
Acts that restrict an entity from adding to its private organic rules requirements that would emulate those sought by proponents of statutory modifications to the MBCA.

3. Unincorporated business entities are divorced from the profit-maximization obligation (if in fact there is one) of the business corporation.

OTHER BUSINESS

In addition to general housekeeping and appointment of a secretary (Tom Rutledge) for the next term, the only other issue addressed was the need for better communication and interaction with other JEBs and PEBs. The recent publication by the UCC PEB of comments with respect to Series was discussed. On the technical front, there is discussion at the level of the Style Committee on the standard definition of a "person." More broadly, the absence of coordination between the UCC JEB and this JEB was highlighted. The question of creating a cross-liaison role was raised, it being noted that a new position would be dependent upon someone wanting to fill it. At minimum, it was suggested that there be a policy of no publication unless and until other interested groups have the opportunity to review and comment.[3] All members were encouraged to send to Jim Wheaton comments on the report so that he can compile and into a report from this JEB.[4]

Respectfully submitted,



Lisa R. Jacobs, Chair

[3] As a postscript, a liaison position to the UCC Monitoring Committee was created with Ms. Jacobs currently filling that position.

[4] As a postscript, no such comments were received.