

## New Jersey's Revised Uniform Limited Liability Company Act (RULLCA)

*Legal Alert*

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March 26, 2013

**Alan H. Zuckerman, Shareholder**

Effective for new LLCs March 18, 2013 and all LLCs March 1, 2014

New Jersey recently enacted major changes to its limited liability company ("LLC") law, adopting the new Revised Uniform Limited Liability Company Act ("RULLCA" or the "Act"). These changes are effective for any new limited liability company formed on or after March 18, 2013, and will apply to pre-existing LLCs beginning March 1, 2014. The new law allows an existing LLC to elect to be subject to the new law's provisions earlier than March 1, 2014.

### Default Rules Will Be Different

The Act greatly changes the statutory default provisions that will govern an LLC and its members where there is no Operating Agreement that overrides the default provisions. Furthermore, even with respect to existing LLCs that have current Operating Agreements in place, the Act could result in a change in the terms applicable to the members. Thus, it is important that each LLC should review its Operating Agreement to determine:

1. Whether it should elect to be subject to the new law before March 1, 2014, and
2. What changes it should make to its Operating Agreement in anticipation of the new law taking effect next year.

### Summary of Changes

Some of the most important changes in RULLCA include the following:

- 1. Operating Agreement.** May be oral or written. Under prior law, only a written agreement would be valid as an LLC's operating agreement.
- 2. Distributions.** Absent an Operating Agreement, distributions are per capita. This means, for example, that if there are two members with one owning 99% and the other 1% of the LLC, if they do not have an Operating Agreement that addresses distributions, then distributions will under the new law be made 50% to each member.
- 3. Management.** LLC can be manager-managed or member-managed. Absent an Operating Agreement, the Company will be member-managed and management decisions will be made per capita, regardless of the percent owned by each member.
- 4. Member Consent.** Absent an Operating Agreement, any act outside the ordinary course of the activities of the LLC requires unanimous consent of all members of a member-managed Company. Further, even in a manager-managed LLC, absent an Operating Agreement provision, unanimous consent of the members is required for certain major events including, for example, sale of all or substantially all of the assets.

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- 5. Dissolution and Barring of Creditors.** There are new procedures for barring of creditors on dissolution.
- 6. Charging Orders.** RULLCA makes New Jersey less desirable as an asset protection state because it provides creditors with an additional remedy other than the typical charging order. It now allows a court to foreclose the effective lien that the charging order creates. Specifically, the Act provides that upon a showing that distributions under a charging order will not pay the judgment debt within a reasonable time, the court may foreclose the lien and order the sale of the transferable interest. However, the purchaser at the foreclosure sale would obtain only a transferee interest and would not become a member. Nonetheless, this can still give creditors more leverage and in our view makes New Jersey a less attractive state for asset protection LLCs.
- 7. Duty of Loyalty.** RULLCA creates new rules regarding duty of loyalty between members/managers and the LLC. Absent contrary provisions in the Operating Agreement, members/managers are prohibited from competing with the LLC and from dealing with the LLC as a third party, including lending money or leasing property to the LLC. It could be important to waive these provisions in the Operating Agreement. There is a savings provision that allows all of the members of a member managed LLC or a manager managed LLC to authorize or ratify, after full disclosure, any otherwise prohibited actions in this regard.
- 8. Oppression.** RULLCA adds remedies for a member who is a victim of oppression by managers or the other members. The Act gives a court the right to dissolve an LLC, to appoint a custodian or provisional managers, to order sale of a member's LLC interest to the LLC or to other members, to award legal fees, etc. These remedies are similar, but not identical, to the corresponding remedies for oppressed minority shareholders under the NJ Business Corporation Act. Under RULLCA, an Operating Agreement cannot alter a court's power to decree dissolution for oppression, but can waive the other new remedies.
- 9. Withdrawal.** RULLCA substantially changes the provisions concerning withdrawal, and now provides that a withdrawing member (a dissociated member) is not automatically entitled to fair value for his/her interest or any special distributions. In such case, a withdrawing member becomes a transferee (i.e., an assignee of an economic interest) without a right to vote or to participate in management.
- 10. Indemnification.** RULLCA now provides for mandatory indemnification of member/managers in certain situations.
- 11. Exculpation.** The existing Act provided for good faith reliance on LLC records and experts' opinions. However, RULLCA removes this and is now silent on the issue. Thus, any desired exculpation must be addressed in an Operating Agreement.
- 12. Right to Information.** RULLCA changes the information that a member is entitled to obtain from the LLC.

Many LLCs have been organized in reliance on the *old* New Jersey law, but the ground rules have suddenly changed. Every Operating Agreement should be reviewed to consider the potential impact of the RULLCA provisions, and explicit overriding language should be considered to prevent many of them from unwittingly amending the members' business and economic arrangements.

For more information on this topic, please contact Alan H. Zuckerman at 856.661.2266 or [alan.zuckerman@flastergreenberg.com](mailto:alan.zuckerman@flastergreenberg.com) or any member of our Business and Corporate Law Department.

#### ATTORNEYS MENTIONED

Alan Zuckerman