

ALERT

New Jersey Eases Fiduciary Duties for LLCs

By Helen (Wendy) J. Williamson and Andrew M. Walsh

On September 19, 2012, Governor Chris Christie signed into law the Revised Uniform Limited Liability Company Act, in furtherance of his goal of encouraging the formation of business entities in New Jersey. The Act is New Jersey's version of the model Uniform Limited Liability Company Act that was adopted in 2006 by the National Conference of Commissioners on Uniform State Laws. To date, California, the District of Columbia, Idaho, Iowa, Nebraska, Utah and Wyoming have enacted their versions of the model legislation, and Kansas and Minnesota are currently considering it.

The Act, which takes effect on March 18, 2013, and will apply to all companies formed thereafter, contains significant changes. It is intended to update the existing New Jersey law (adopted in 1993) to reflect developments over the last 20 years, as well as to fill gaps regarding the operation of LLCs. For existing LLCs, the Act will be effective on April 1, 2014. One of the more noteworthy provisions of the act provides that an LLC operating agreement may alter (but not eliminate) the "duty of loyalty, the duty of care and any other fiduciary duties...if not manifestly unreasonable." While this does not, of course, permit intentional misconduct or knowing violations of law, the Act permits eliminating particular aspects of [fiduciary duties].

This shift is made against the backdrop of recent Delaware and New York case law permitting waivers of fiduciary duties owed to LLC members. For example, recent Delaware cases have found that managers and controlling members of LLCs owe fiduciary duties to the company and its members, but that LLC agreements can eliminate or waive fiduciary duties. In *Feeley v. NHACOG, LLC*, the Court of Chancery of the State of Delaware held that, absent a clear holding of the Delaware Supreme Court to the contrary, and relying on dicta of previous Supreme Court decisions, "default" fiduciary duties for LLC managers and even controlling LLC members can exist absent "plain and unambiguous" provisions in the LLC agreement limiting or eliminating such fiduciary duties. In *Pappas v. Tzolis*, the New York Court of Appeals held that a waiver of LLC fiduciary duties was enforceable and that reliance on a default fiduciary duty of an LLC member was not reasonable where sophisticated LLC members, whose relationship was "antagonistic" and "not one of trust," had entered into an LLC agreement enabling the members to engage in

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competing ventures “without obligation of any kind to the LLC or to the other Members”; since the LLC members had also executed certificates releasing the defendant from his fiduciary duties to the other members, reliance on representations without further inquiry was not reasonable.

Other noteworthy provisions of the New Jersey Revised Uniform Limited Liability Company Act are:

- **Perpetual Duration:** The Act changes the previous default duration of an LLC's existence (absent a statement to the contrary in the certificate of formation) from a limited lifespan to perpetual duration.
- **Purpose:** The Act permits an LLC to be formed for any purpose permitted by law, whether it is for profit or not-for-profit.
- **Operating Agreement:** The Act defines “operating agreement” as the agreement among the LLC members, regardless of whether such agreement is “oral, in a record [written], implied, or in any combination thereof.” Accordingly, where a written operating agreement is silent on a particular topic, the Act's default provisions will not necessarily apply if there are oral modifications to such agreement.
- **Indemnification:** Company indemnification of members and managers is the default position, subject to alteration or elimination by the provisions of the operating agreement.
- **Third-Party Approval to Amendment:** The Act permits the operating agreement to provide that the effectiveness of amendments thereto is subject to the consent of non-members or to the satisfaction of a condition.
- **Statement of Authority:** The Act provides that an LLC may file a statement of authority with the New Jersey Division of Revenue, which gives the person(s) named therein the authority to execute documents on behalf of the LLC, including documents relating to the transfer of real property.
- **Dissolution Upon Application of Minority Members:** The Act enables the New Jersey Superior Court to order the dissolution of an LLC upon the application of a minority member asserting that the controlling managers and / or members have acted in an “oppressive” manner and causing direct harm to the minority member.
- **Conversion and Domestication:** The Act permits domestication of a foreign LLC and conversion of another form of entity, such as a corporation, limited partnership or general partnership, to a limited liability company. ▲

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