Nebraska Law Review

Volume 89 | Issue 3 Article 2

3-2011

Nebraska's New Limited Liability Company Act: A Welcome Improvement for Legal Guidance Concerning Limited Liability Companies

Matthew D. Maser
Koley Jessen P.C., Omaha, Nebraska

Joseph R. Hefflinger
Koley Jessen P.C., Omaha, Nebraska

Matthew D. Maser and Joseph R. Hefflinger*

Nebraska's New Limited Liability Company Act: A Welcome Improvement for Legal Guidance Concerning Limited Liability Companies

TABLE OF CONTENTS

* Joseph R. Hefflinger and Matthew D. Maser were both attorneys at the law firm of Koley Jessen P.C., L.L.O. in Omaha, Nebraska, at the time this Article was written. Mr. Hefflinger is now a Financial Advisor with Renaisance Financial Corporation in Omaha, Nebraska, and Mr. Maser is Senior Vice President and General Counsel of Five Points Bank in Grand Island, Nebraska. Mr. Maser is also General Counsel for West Family Holdings, L.L.C. Messrs. Maser and Hefflinger both served as members of the Nebraska State Bar Association Business Law Section *RULLCA* Review Committee and assisted in drafting the Nebraska Uniform Limited Liability Company Act. The authors would also like to acknowledge the efforts of Helmut Brugman, an Associate at Koley Jessen P.C., L.L.O., in helping to put this Article together.

I. INTRODUCTION

On April 1, 2010, Legislative Bill 888, adopting the Nebraska Uniform Limited Liability Company Act (the New LLC Act), was signed into law.[1] The New LLC Act is largely based on the *Revised Uniform Limited Liability Company Act* (*RULLCA*), as drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 2006. The NCCUSL drafted the original *Uniform Limited Liability Company Act* (*ULLCA*) in 1992 and adopted it in 1994.[2] The NCCUSL thereafter amended the *ULLCA* in 1996 as a result of the then newly adopted federal tax "check-the-box" regulations.[3] The *RULLCA* is the result of three years of drafting by the NCCUSL and represents a comprehensive and integrated limited liability company (LLC) statute that blends the best elements of the 1996 *ULLCA* and two decades of legal developments related to LLCs.[4]

Members of the Nebraska State Bar Association Business Law Section *RULLCA* Review Committee (the Review Committee) assisted in drafting the New LLC Act and supported its adoption by the Nebraska Unicameral Legislature.[5] The Review Committee also consulted with

1. Legis. B. 888, 101st Leg., 2d Sess. (Neb. 2010) (to be codified at NEB. REV. STAT. §§ 21-101 to -197).
2. *See* REVISED UNIF. LTD. LIAB. CO. ACT prefatory note (amended 2006), *available at* http://www.law.upenn.edu/bll/archives/ulc/ullca/2006act_final.htm.
3. *Id.*
4. *Id.*
5. In addition to Messrs. Maser and Hefflinger, the other members of the Review Committee included Julie Karavas (Baylor, Evnen, Curtiss, Grimit & Witt, LLP),

two members of the Drafting Committee for *RULLCA*: David Walker, Dean of Drake University Law School, who was also the chair of such committee, and Daniel Kleinberger, a law professor and author of one of the leading treatises on LLCs.[6] The New LLC Act becomes operative January 1, 2011, but provides a two year grace period so that existing LLCs will not be subject to the New LLC Act until January 1, 2013.[7] Thus, LLCs formed on or after January 1, 2011, will be governed by the New LLC Act, while existing LLCs may elect to be governed by the New LLC Act prior to January 1, 2013, if they so desire.[8]

This Article first discusses the differences between the New LLC Act and Nebraska's current Limited Liability Company Act (the Current LLC Act).[9] Next, this Article discusses legal questions raised by the New LLC Act and how such questions may be answered.[10] Finally, this Article provides practitioners with useful guidance for practicing law under the New LLC Act.[11]

II. KEY DIFFERENCES BETWEEN THE NEW LLC ACT AND THE CURRENT LLC ACT

The New LLC Act provides a much more thorough statutory setting for creating and governing Nebraska LLCs. This section provides a summary of some of these key variations between the New LLC Act and the Current LLC Act.

A. Default Statute and Power of the Operating Agreement

One of the major improvements of the New LLC Act is that it is expressly a default statute, meaning most matters will be governed by an operating agreement entered into by the members of the LLC (with certain enumerated exceptions), and the New LLC Act will govern when the operating agreement is silent.[12] Therefore, the operating agreement will be the controlling document between the members of the LLC, with certain exceptions, and the New LLC Act will control

Steven Amen (Kutak Rock LLP), David Rasmussen (Wolfe Snowden Hurd Luers & Ahl, LLP), Larry Ruth (Mueller Robak LLC), Professor Steven Willborn (University of Nebraska College of Law), Wayne Rasmussen (Rasmussen & Mitchell), and William Marienau (Legal Counsel, Nebraska Unicameral Legislature's Banking, Commerce and Insurance Committee).

6. Mr. Kleinberger spoke about the *RULLCA* at the Business Law Section segment of the 2009 Annual Meeting of the Nebraska State Bar Association. For a thorough overview of the *RULLCA*, see Daniel S. Kleinberger, *The Next Generation: The Revised Uniform Limited Liability Company Act*, 62 BUS. LAW. 515 (2007).
7. NEB. REV. STAT. § 21-197.
8. *Id.*
9. *See infra* at notes 12–23.
10. *See infra* at notes 24–75.
11. *See infra* at notes 76–114.
12. NEB. REV. STAT. § 21-110(a) (Cum. Supp. 2010).

only where the operating agreement is silent. As the comments to *RULLCA* § 110 provide, an LLC is "as much a creature of contract as of statute."[13] Thus, the New LLC Act allows members of an LLC to be bound by the contractual operating agreement rather than governed solely by the terms of the New LLC Act.

Comparatively, the Current LLC Act is not expressly a default statute and is silent on a number of issues (e.g., fiduciary duties of members), leaving practitioners uncertain as to what matters they can or cannot include in an operating agreement. The New LLC Act remedies this by explicitly stating what provisions an operating agreement cannot vary and by stating that the operating agreement governs in the event of any other inconsistency between the New LLC Act and the operating agreement.[14] The default nature of the New LLC Act should provide practitioners with greater certainty in advising clients with respect to their operating agreements.

B. Fiduciary Duties and the Contractual Obligation of Good Faith and Fair Dealing

While the Current LLC Act makes no mention of fiduciary duties, the New LLC Act clarifies certain obligations that are included within the duties of loyalty and care owed by a member of a member-managed LLC (or a manager of a manager-managed LLC) without strictly defining such duties.[15] Additionally, the New LLC Act specifically ad-

---

13. Revised Unif. Ltd. Liab. Co. Act § 110 cmt. (amended 2006), *available at* http://www.law.upenn.edu/bll/archives/ulc/ullca/2006act_final.htm.

14. The New LLC Act provides that the operating agreement cannot: (1) vary an LLC's capacity to be sued in its own name; (2) vary Nebraska as the governing state law for the internal affairs of the LLC and the liability of a member or manager for the debts, obligations, or other liabilities of the LLC; (3) vary the power of a court to order a person required by the New LLC Act to sign a record, to deliver a record to the Nebraska Secretary of State for filing, or to have the Secretary of State file the record unsigned; (4) subject to certain exceptions, eliminate the fiduciary duties of loyalty and care; (5) subject to certain exceptions, eliminate the contractual obligation of good faith and fair dealing; (6) unreasonably restrict the rights and duties of members or managers to certain information concerning the LLC; (7) vary the power of a court to decree dissolution in certain circumstances; (8) vary the requirement to wind up the LLC's business after dissolution; (9) unreasonably restrict the right of a member to maintain an action against another member, a manager, or the LLC itself; (10) with certain exceptions, restrict the right of a member to approve a merger, conversion, or domestication where that member will have personal liability with respect to a surviving, converted, or domesticated organization; or (11) except as to the obligations of the LLC and its members to a person in the person's capacity as a transferee or dissociated member, restrict the rights under the New LLC Act of a person other than a member or manager. Neb. Rev. Stat. §§ 21-110(b)(1) to -110(b)(10) (Cum. Supp. 2010).

15. For a member in a member-managed LLC or for a manager in a manager-managed LLC, the New LLC Act provides that the duty of loyalty includes the duties: (1) to account to the LLC and to hold as trustee for it any property, profit, or

dresses how members of an LLC may address fiduciary duties within the operating agreement.[16] Although the New LLC Act provides that an operating agreement cannot eliminate the fiduciary duties of loyalty and care or the contractual obligation of good faith and fair dealing, the New LLC Act does provide that, if not manifestly unreasonable, the operating agreement may "restrict or eliminate [certain aspects of the duty of loyalty], identify specific types or categories of activities that do not violate the duty of loyalty, [and] alter the duty of care, except to authorize intentional misconduct or knowing violations of law."[17] Additionally, under the New LLC Act, if not manifestly unreasonable, the operating agreement may "alter any other fiduciary duty, including eliminating particular aspects of a particular duty."[18] The New LLC Act also provides that the operating agreement may specify how a transaction "that would otherwise violate the duty of loyalty may be authorized or ratified by one or more disinterested and independent persons."[19] Finally, the New LLC Act allows an operating agreement to "prescribe the standards by which to measure the performance of the contractual obligation of good faith and fair dealing."[20] This clarity as to how members may alter fiduciary duties through the operating agreement, as well as the power to contract around certain duties within the operating agreement, is a clear improvement over the silence of the Current LLC Act regarding fiduciary duties.

benefit derived by the member or manager: (A) in the conduct or winding up of the LLC's activities; (B) from use by the member or manager of the LLC's property; or (C) from the appropriation of an LLC opportunity; (2) to refrain from dealing with the LLC in the conduct or winding up of the LLC's activities as or on behalf of a person having an interest adverse to the LLC; and (3) to refrain from competing with the LLC in the conduct of the LLC's activities before the dissolution of the LLC. *Id.* § 21-138(b). Subject to the business judgment rule, the duty of care of a member in a member-managed LLC or a manager in a manager-managed LLC in the conduct and winding up of the LLC's activities "is to act with the care that a person in a like position would reasonably exercise under similar circumstances and in a manner the member [or manager] reasonably believes to be in the best interests of the [LLC]. In discharging this duty, a member [or manager] may rely in good faith upon opinions, reports, statements, or other information provided by another person that the member [or manager] reasonably believes is a competent and reliable source for the information." *Id.* §§ 21-138(c).

16. *Id.* § 21-110.
17. *Id.* §§ 21-110(c)(1) to -110(c)(3).
18. *Id.* § 21-110(c)(4).
19. *Id.* § 21-110(d).
20. *Id.* § 21-110(c)(5).

C. Certificate of Organization

In order to form an LLC under the Current LLC Act, "articles of organization" must be filed with the Nebraska Secretary of State.[21] The Current LLC Act requires many substantive matters to be included in the articles of organization when filed.[22] However, it is more appropriate for certain of these substantive provisions, such as the form of the LLC's management, cash contributed to the stated capital of the LLC, descriptions and agreed value of property contributed to the LLC, and the rights and conditions of members to admit additional members to the LLC to be addressed in the operating agreement, rather than the articles of organization, particularly if not all of such provisions have been agreed to by the members at the time of formation.

The New LLC Act simplifies the formation process in this regard by requiring very limited information to be included in the "certificate of organization," which the *RULLCA* uses in place of the articles of organization. The only items required in the certificate of organization under the New LLC Act are the name and address of the LLC and its registered agent and the professional services to be provided by the LLC, if any.[23] Thus, under the New LLC Act, the substantive matters governing the LLC can now be included more appropriately in the operating agreement, giving practitioners more clarity in terms of knowing what provisions should be located in which organizational document.

III. LEGAL QUESTIONS RAISED BY THE NEW LLC ACT

One of the major improvements of the New LLC Act is its treatment of fiduciary duties owed by a member of a member-managed LLC (or a manager of a manager-managed LLC). As previously stated, the Current LLC Act does not reference duties owed in an LLC context. Additionally, Nebraska case law does not provide a basis for

---

21. Neb. Rev. Stat. § 21-2605 (Reissue 2007).
22. The matters that must be included in the articles of organization under the Current LLC Act include: (1) the name of the LLC; (2) the purpose for which the LLC is formed, or if formed to provide a professional service, a statement of the profession to be practiced; (3) the address of the LLC's principal place of business in the state as well as the name and address of the LLC's registered agent in the state; (4) the amount of cash contributed to the LLC's stated capital and a description and agreed value of property contributed to the LLC; (5) total additional contributions agreed to be made by all members and when or upon the happening of which events will cause the contributions to be made; (6) the right and terms and conditions of the admission of additional members; and (7) if the LLC is manager-managed, the names and addresses of the managers, or if the LLC is member-managed, the names and addresses of the members who will serve as managers. *Id.* § 21-2606(1).
23. Neb. Rev. Stat. § 21-117(b) (Cum. Supp. 2010).

establishing fiduciary duties of members or managers of an LLC. In fact, at least one Nebraska court has held that since the Current LLC Act does not impose any fiduciary duties upon members or managers of an LLC, no such fiduciary duties exist for LLCs under the Current LLC Act.

In *Poppert v. Dicke*,[24] a minority member in an LLC brought an action against the majority member for, among other things, breach of the fiduciary duties of loyalty, care, and good faith and fair dealing.[25] The district court concluded that no such fiduciary duties exist, since, under the Current LLC Act, there is "no express fiduciary duty relating to the conduct of members and managers of a limited liability company."[26] The New LLC Act should provide clarity to Nebraska courts by providing that members and managers of an LLC do owe the traditional fiduciary duties of care and loyalty—although such duties can be altered or possibly eliminated—and Nebraska courts may need to interpret the extent to which such duties exist.

Under the New LLC Act, an operating agreement may not, subject to certain provisions discussed below, eliminate the fiduciary duties of loyalty or care or the contractual obligation of good faith and fair dealing.[27] Additionally, the New LLC Act provides that a member of a member-managed LLC or a manager of a manager-managed LLC owes to the LLC and the other members the fiduciary duties of loyalty and care.[28] The New LLC Act also provides that "a member in a member-managed [LLC] or a manager-managed [LLC] shall discharge the duties under the [New LLC Act] or under the operating agreement and exercise any rights consistently with the contractual obligation of good faith and fair dealing."[29] Therefore, whereas the Current LLC Act does not discuss the fiduciary duties owed in an LLC context—and at least one Nebraska court has held that no such duties exist under the Current LLC Act—these provisions of the New LLC Act specifically provide that certain fiduciary duties are owed and that the operating agreement cannot eliminate the duties of loyalty or care.

Although the New LLC Act generally makes clear that the fiduciary duties of loyalty and care exist in the LLC context, Nebraska courts in the future may need to provide further clarity regarding the extent to which these duties, as well as any other fiduciary duties, can be restricted or eliminated. Under the New LLC Act, if not manifestly unreasonable, an operating agreement may restrict or eliminate certain elements of the duty of loyalty to:

24. Poppert v. Dicke, 275 Neb. 562, 747 N.W.2d 629 (2008).
25. *Id.* at 563–64, 747 N.W.2d at 631.
26. *Id.* at 564, 747 N.W.2d at 632.
27. NEB. REV. STAT. §§ 21-110(b)(4) to -110(b)(5) (Cum. Supp. 2010).
28. *Id.* § 21-138(a).
29. *Id.* § 21-138(d).

> [1] account to the limited liability company and to hold as trustee for it any property, profit, or benefit derived by the member in the conduct or winding up of the company's business, from a use by the member of the company's property, or from the appropriation of a limited liability company opportunity; . . . [2] refrain from dealing with the company in the conduct or winding up of the company's business as or on behalf of a party having an interest adverse to the company; and . . . [3] refrain from competing with the company in the conduct of the company's business before the dissolution of the company."[30]

Additionally, if not manifestly unreasonable, an operating agreement may identify specific types or categories of activities that do not violate the duty of loyalty,[31] and the operating agreement may alter the fiduciary duty of care.[32] However, it is important to note that, unlike certain elements of the duty of loyalty, the operating agreement cannot altogether eliminate the duty of care. Finally, the operating agreement may reasonably "alter any other fiduciary duty, including eliminating particular aspects of that duty"[33] and "prescribe the standards by which to measure the performance of the contractual obligation of good faith and fair dealing."[34]

This framework adopted in the New LLC Act is beneficial because the New LLC Act expressly provides that the fiduciary duties of loyalty and care and the contractual obligation of good faith and fair dealing are owed in an LLC context. Nevertheless, this framework leaves unanswered questions that the comments to the *RULLCA* do not address. First, what is the standard that will be used to determine if eliminating or altering part or all of a duty is manifestly unreasonable? Second, although the New LLC Act permits the operating agreement to reasonably eliminate certain aspects of the duty of loyalty, the comments to the *RULLCA* state that other uncodified aspects of the duty of loyalty would remain.[35] Thus, what other aspects of the duty of loyalty remain other than those identified in the New LLC Act? Third, the New LLC Act provides that if not manifestly unreasonable, the operating agreement may alter any other fiduciary duty, including eliminating particular aspects of that duty.[36] What other fiduciary duties are applicable to an LLC other than the fiduciary duties of loyalty and care? Finally, what is the standard by which the contractual obligation of good faith and fair dealing will be measured?

Although Idaho, Iowa and Wyoming have adopted versions of the *RULLCA*, case law from these states does not provide guidance to

30. *Id.* §§ 21-110(c)(1)(A) to -110(c)(1)(C).
31. *Id.* § 21-110(c)(2).
32. *Id.* § 21-110(c)(3).
33. *Id.* § 21-110(c)(4).
34. *Id.* § 21-110(c)(5).
35. REVISED UNIF. LTD. LIAB. CO. ACT § 110(d)(1) cmt. (amended 2006).
36. NEB. REV. STAT § 21-110(c)(4) (Cum. Supp. 2010).

these questions.[37] Since these states only recently adopted the *RULLCA*, more time will be needed for case law to develop regarding interpreting the *RULLCA*'s provisions.[38] This section attempts to provide a framework from which attorneys and judges practicing under the New LLC Act may attempt to answer such questions.

A. Manifestly Unreasonable Standard

The "manifestly unreasonable" standard was inserted into the *RULLCA* in an effort to try to strike a balance between the ability of the parties to an operating agreement to freely contract their arrangement and the dangers that exist when some members have powers over the interests of others.[39] The New LLC Act provides that any court deciding a claim under section 21-110(c) that a term of an operating agreement is manifestly unreasonable:

> 1) shall make its determination as of the time the challenged term became part of the operating agreement and by considering only circumstances existing at that time; and 2) may invalidate the term only if, in light of the purposes and activities of the limited liability company, it is readily apparent that: (A) the objective of the term is unreasonable; or (B) the term is an unreasonable means to achieve the provision's objective.[40]

Similar to the *RULLCA*, the *Revised Uniform Partnership Act of 1997* (*RUPA*) replaced the common law fiduciary duties with statutory provisions and also provided the parties considerable freedom to bargain out of fiduciary duties. Both the *RULLCA* and *RUPA* contain the "manifestly unreasonable" standard as a guideline in determining whether the parties' agreement to bargain out of certain fiduciary duties is just.

However, a few states have enacted LLC statutes that provide for a more "contractarian" view on fiduciary duties. For instance, Delaware amended its LLC statute to permit an operating agreement to fully eliminate the fiduciary duties associated with an LLC.[41] Proponents of the Delaware LLC statutory scheme believe that parties should be able to craft any sort of arrangement they desire and enforcing agreements as written will increase their certainty and reliability.[42] Presumably, a finding of unconscionability would be one of the only ways

37. Nat'l Conference of Comm'rs on Unif. State Laws, *A Few Facts About the* Uniform Limited Liability Company Act (2006), http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ullca06.asp (last visited Jan. 6, 2011).
38. *See* Idaho Code Ann. §§ 30-6-101 to -1104 (2010); Iowa Code Ann. §§ 489.101 to 489.1304 (2009); Wyo. Stat. Ann. §§ 17-29-101 to -1105 (2010).
39. Revised Unif. Ltd. Liab. Co. Act § 110(d) cmt. (amended 2006).
40. Neb. Rev. Stat § 21-110(g) (Cum. Supp. 2010).
41. Del. Code Ann. tit. 6, § 18-1101 (2010).
42. Mark J. Loewenstein, *Fiduciary Duties and Unincorporated Business Entities: In Defense of the "Manifestly Unreasonable" Standard*, 41 Tulsa L. Rev. 411, 413 (2006).

a party to such an agreement could set aside the bargained-for contract.[43]

Opposite of the contractarian view are those that believe that LLCs are not solely contractual entities because the parties have a moral obligation or duty to one another that cannot be eliminated by contract. The "fiduciarians" holding this view support their theories based on the dangers that exist when some parties have power over the interests of others and when situations arise outside of the reasonable expectations of the parties.[44] The comments to section 10 of the *RULLCA* summarize:

> The open-ended nature of fiduciary duty reflects the law's long-standing recognition that devious people can smell a loophole a mile away. For centuries, the law has assumed that (1) power creates opportunities for abuse and (2) the devious creativity of those in power may outstrip the prescience of those trying, through ex ante contract drafting, to constrain that combination of power and creativity.[45]

While it is difficult to argue that parties being allowed to craft the arrangement they desire is not advantageous, concerns still remain regarding the dangers that exist when parties are left only to the justice of their bargained-for arrangement. The *RULLCA* and *RUPA* have struck a middle ground allowing parties to contract around fiduciary duties but still allowing the courts to step in when such contracting is manifestly unreasonable. While many seem to support this middle ground, still others criticize the manifestly unreasonable standard adopted by the *RULLCA* for its vagueness in interpretation.[46]

The argument that the "manifestly unreasonable" standard is vague is not unfounded, since few courts have actually interpreted the meaning of the standard, even though the it is also found in provisions of the *RUPA* and the *Uniform Commercial Code* (*UCC*). While many of the cases construing the "manifestly unreasonable" standard come from the *UCC* context,[47] comments to the *RULLCA* set forth that the standard must be defined in its own context as it relates to business entities, because the definition is different in the commercial context.[48] Unfortunately, since the *RULLCA* has only recently been adopted in small number of states, the interpretation of the "manifestly unreasonable" standard has yet to be decided within the LLC context.

---

43. *Id.*
44. *Id.* at 413–14.
45. REVISED UNIF. LTD. LIAB. CO. ACT § 110(d) cmt. (amended 2006).
46. CARTER G. BISHOP & DANIEL S. KLEINBERGER, LIMITED LIABILITY COMPANIES: TAX AND BUSINESS LAW § 14.05(4)(a)(ii) (1994).
47. Fundhcion Zo Musdo De Arte Contemporaneo De Caracas-Sofia Imber v. CVI-tdb Union Bancaire Privee, 996 F. Supp. 277 (S.D.N.Y. 1998); Stowell v. Cloquet Co-op Credit Union, 557 N.W.2d 567 (Minn. 1997).
48. REVISED UNIF. LTD. LIAB. CO. ACT § 110(h) cmt. (amended 2006).

Even outside of the LLC context, relatively few cases specifically address the meaning of manifest unreasonableness as it relates to business entities. As noted by a Texas state appellate court, *Black's Law Dictionary* defines "manifest" as "[e]vident to the senses, especially to the sight, obvious to the understanding, evident to the mind, not obscure or hidden, and is synonymous with open, clear, visible, unmistakable, indubitable, indisputable evidence, and self-evident."[49] Similarly, a federal district court in Pennsylvania set forth that certain contractual restrictions should be permitted unless they are beyond "the outer limit of permissiveness."[50]

Other courts seem to disregard the importance of the term "manifestly" and interpret the standard based on reasonableness.[51] However, courts seem to differ on when the reasonableness of a challenged provision must be evaluated. Some courts held the provisions should be evaluated at the time of its adoption.[52] Conversely, comments to the *RULLCA* state that "some decisions have considered reasonableness as of the time of the complaint, which means that a prospectively reasonable allocation of risk could be overturned because it functioned as agreed."[53]

---

49. Morgan Bldg. & Spas, Inc. v. Turn-Key Leasing, Ltd., 97 S.W.3d 871, 880 (Tex. App. 2003) (quoting BLACK'S LAW DICTIONARY 962 (6th ed. 1990)) (internal quotation marks omitted).
50. Baron v. Strawbridge & Clothier, 646 F. Supp 690, 698 (E.D. Pa. 1986).
51. *See, e.g.*, F.B.I. Farms, Inc. v. Moore, 798 N.E.2d 440, 447 (Ind. 2003).
52. *Id.*
53. REVISED UNIF. LTD. LIAB. CO. ACT § 110(h) cmt. (amended 2006). Two cases provides telling illustrations of the manifestly unreasonable standard in the context of the Uniform Commercial Code.

In *Stowell v. Cloquet Co-op Credit Union*, 557 N.W.2d 567 (Minn. 1997), an account holder at a credit union sued the credit union to recover amounts paid on forged checks from his accounts by an individual that was stealing the credit union's monthly statements from the holder's mail. *Id.* at 569–70. The account holder complained in December that he had not received his November statement, and the bank sent a duplicate statement, which was also intercepted by the wrongdoer. *Id.* For the next eight months, the account holder continued to complain about the absence of his statements to the credit union, and the credit union continued to mail duplicate statements that were intercepted by the wrongdoer. *Id.* The forging scheme was finally discovered when the credit union called the account holder concerning an overdraft. *Id.* The account holder and the credit union had entered into a Draft Withdrawal Agreement relating to the account holder's obligation to review and report inaccuracies in the monthly account statements. *Id.* Minnesota's version of section 4-406 of the UCC requires account holders to exercise "reasonable promptness" in examining the account and notify the bank of any forged checks as the default standard. *Id.* at 570–71. The Minnesota statute also allows the parties to determine by agreement the standards in which the bank's responsibilities are to be measured if those standards are not manifestly unreasonable. *Id.* The Draft Withdrawal Agreement signed by the account holder required inspection of the statements within twenty days of mailing. *Id.* at 571. The court ultimately found that this twenty-day period was not manifestly unreasonable. *Id.* at 573.

Outside of the business entity context, courts have interpreted the "manifestly unreasonable" standard in the context of the *UCC*, where the standard makes several appearances. In particular, a number of courts have examined the standard as it relates to section 4-406 of the *UCC*, a provision that sets a default notification period during which a client must notify her bank of any unauthorized signatures on her account and also provides that the parties may contract around such default provisions as long as the time period is not manifestly unreasonable.[54] One court interpreting this provision of the *UCC* found a fourteen-day period not manifestly unreasonable because (1) the *UCC* provisions "require persons to be vigilant in the conduct and safeguarding of their own affairs"; (2) the fourteen-day period was gauged to be reasonable in light of how other states have modified the default one-year period in their enactment of section 4-406; (3) the court granted "substantial weight to cases from other jurisdictions that address the validity of reduced time limits for notice" under similar statutes, including some courts that upheld the fourteen-day notification period; and (4) the reduction in the notification period was "in accord with public policy" because it is likely to "limit[ ] disputes in a society where millions of bank transactions occur every day."[55]

When addressing issues involving the sale or lease of goods, some courts construing the manifestly unreasonable standard seem to give deference to agreements between sophisticated parties—unless the agreement stripped a right or remedy that was bargained for or was a right, remedy, or protection granted by a default rule of the *UCC*.[56]

Similarly in *Fundhcion Zo Musdo De Arte Contemporaneo De Caracas-Sofia Imber v. CVI-tdb Union Bancaire Privee,* 996 F. Supp. 277 (S.D.N.Y. 1998), an account holder at a bank commenced action against the drawee and depository banks arising from payment on forged checks. *Id.* at 280. Under the terms and conditions of the account agreement governing the account holder's account at the banks, the account holder had a duty to report any unauthorized signatures within thirty days after the bank mailed the account statement to the account holder. *Id.* at 291. The applicable UCC set a period of one-year as a default standard for determining whether a customer's examination of a bank statement is prompt, but it allowed for the notice period to be varied by agreement between the parties so long as a substitute standard was not manifestly unreasonable. *Id.* The court found that the thirty-day period for notifying the bank of any irregularities as contained in the terms and conditions was not manifestly unreasonable. *Id.*

54. Borowski v. First Star Bank Milwaukee, N.A.*,* 579 N.W.2d 247, 251 (Wis. Ct. App. 1998).

55. *Id*. at 252–53 (quoting Parent Teacher Ass'n v. Mfrs. Hanover Trust Co., 524 N.Y.S.2d 336, 340 (N.Y. Civ. Ct. 1988)) (internal quotation marks omitted).

56. See *PPG Industries, Inc. v. Shell Oil Co.*, 919 F.2d. 17 (5th Cir. 1990), where an ethylene buyer brought a breach of contract action against an oil company for failing to deliver ethylene to the buyer following an explosion at a refinery. The oil company did not perform the contract and deliver the ethylene due to the force majeure clause in the contract that excused non-performance due to explosion. *Id.* at 18. The buyer tried arguing that the section 1.102(c) of the applicable UCC

However, some courts have determined certain bargained-for rights to be manifestly unreasonable where one party was able to show it was unfairly injured through circumstances that were not contemplated by the parties at the time of the contract negotiations.[57]

The manifestly unreasonable standard will act as a limitation on the parties' ability to bargain away aspects of fiduciary duties and the contractual obligation of good faith and fair dealing in an LLC operating agreement. Similar to how courts have interpreted the manifestly unreasonable standard under the *UCC*, Nebraska courts will likely weigh the sophistication of the parties, the overall bargain, and the parties' expectations when interpreting the manifestly unreasonable standard under the New LLC Act. Any LLC operating agreement that results in oppressive conduct from unfair dealing or the appearance of a situation outside of the reasonable expectations of the parties in regard to fiduciary duties will likely be subject to court-imposed limitations on contractual freedom and will thus subject the parties to the default fiduciary duties provided in the New LLC Act.

---

created a non-waivable duty of good faith and diligence which the oil company's force majeure clause contravened. *Id.* at 18–19. However, section 1.102(c) also permits the parties to determine the standard by which the performance of contractual obligations is to be measured if such standards are not manifestly unreasonable. *Id.* at 19. The court ultimately concluded that the force majeure clause did not manifestly exceed bounds of commercial reasonableness under section 1.102(c) because the manifestly unreasonable standard imposed a limitation rather than a prohibition on the parties' right to anticipate and allocate business risks between them. *Id.* The limitation is the manifestly unreasonable standard, one that the court would "deferentially apply to the contracts of such sophisticated parties." *Id.*

57. See *Loucks v. New Holland Manufacturing., Inc.*, No. C0-92-2305, 1993 WL 152288, *1 (Minn. Ct. App. May 11, 1993), where the parties agreed to a one-year warranty for a combine purchased by the buyer. The buyer argued that the one-year warranty in the agreement was manifestly unreasonable. *Id.* The Minnesota statute provided that "whenever this chapter requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement." *Id.* The court held that the warranty was not unreasonable merely because the defect was discovered after the warranty was expired and accordingly that the one-year warranty was not manifestly unreasonable. *Id.* During the court's discussion it distinguished *Held v. Mitsubishi Aircraft International, Inc.*, 672 F. Supp. 369 (Minn. 1987) (finding one-year warranty to be manifestly unreasonable where the discovery of the alleged defect was only discoverable in an ice storm), and *McCullough v. General Motors Corp.*, 577 F. Supp. 41 (W.D. Tenn. 1982) (finding one-year warranty to be manifestly unreasonable where discovery of the alleged defect within the one-year period was only discoverable in an automobile accident). The court found *Held* and *McCullough* to be distinguishable from the facts of this case because the defects were discoverable through the ordinary use of the combine and not due to an unusual occurrence. *Loucks*, 1993 WL 152288, at *1.

B. Aspects of the Duty of Loyalty

Under the New LLC Act, if not manifestly unreasonable, an operating agreement may restrict or eliminate certain elements of the duty of loyalty, including the duties to: (1) "account to the [LLC] and to hold as trustee for it any property, profit, or benefit derived by the member in the conduct or winding up of the company's business, from a use by the member of the company's property, or from the appropriation of [an LLC] opportunity;" (2) "refrain from dealing with the company in the conduct or winding up of the company's business as or on behalf of a party having an interest adverse to the company;" and (3) "refrain from competing with the company in the conduct of the company's business before the dissolution of the company."[58] Additionally, subject to the not manifestly unreasonable standard, an operating agreement may "identify specific types or categories of activities that do not violate the duty of loyalty."[59] However, the comments to the *RULLCA* state that "other, uncodified aspects of the duty of loyalty" would remain.[60] As previously discussed, Nebraska courts have not developed case law regarding the fiduciary duty of loyalty in the context of LLCs. Similarly, case law from states outside of Nebraska does not provide detail for the duty of loyalty in the LLC context distinct from that referenced in the New LLC Act. Therefore, it appears unlikely that a Nebraska court will determine that there are other aspects of the duty of loyalty beyond those referenced in the New LLC Act.

C. Other Fiduciary Duties

The New LLC Act provides that, if not manifestly unreasonable, the operating agreement "may alter any other fiduciary duty, including eliminating particular aspects of that duty."[61] As evidenced in the *Poppert* case, Nebraska case law does not even provide a legal standard for the fiduciary duties of loyalty and care in the LLC context. Therefore, Nebraska law does not provide a basis for determining what, if any, other fiduciary duties may apply to an LLC. If confronted with the question of whether other fiduciary duties beyond those of loyalty and care apply in the LLC context, will Nebraska courts determine that only those two fiduciary duties apply, or will they look to case law from other states to import other fiduciary duties?

58. Neb. Rev. Stat. §§ 21-110(c)(1)(A) to -110(c)(1)(C) (Cum. Supp. 2010).
59. *Id.* § 21-110(c)(2).
60. Revised Unif. Ltd. Liab. Co. Act § 110(d)(1) cmt. (amended 2006).
61. Neb. Rev. Stat. § 21-110(c)(4) (Cum. Supp. 2010).

Other jurisdictions and commentators have stated that members of an LLC may owe a duty of disclosure to other members.[62] Additionally, managing members in a member-managed LLC may owe a fiduciary duty of management to non-managing members.[63] Courts outside Nebraska have also determined, in certain circumstances, that controlling members have a fiduciary duty to minority members.[64] Such interpretations may find traction in Nebraska courts. For example *In re Heritage Organization, LLC*, found unenforceable a provision in a Delaware LLC operating agreement providing that the manager of the company did not owe any fiduciary duties to the company or other members, including any "duty of reasonableness, [or] duty to exercise proper business judgment."[65] Thus, there remains the potential for Nebraska courts to look to case law from other jurisdictions to import fiduciary duties upon managers and members of LLCs outside of the duties of loyalty and care.

This uncertainty as to what fiduciary duties might apply in the LLC context was not an unexpected consequence of the *RULLCA* and Nebraska's adoption of the New LLC Act. Prior to the adoption of the *RULLCA*, the *Uniform Limited Liability Company Act* (*ULLCA*) provided that the duties of loyalty and care were "[t]he *only* fiduciary duties a member owes to a member-managed company."[66] By contrast, the New LLC Act provides that a member of a member-managed LLC or the manager of a manager-managed LLC "owes to the company and

62. *See, e.g.*, Bartfield v. Murphy, 578 F. Supp.2d 638, 648 (S.D.N.Y. 2008) (applying New York law and stating "the duty of full disclosure is one owed by" one member of a limited liability company to another); Salm v. Feldstein, 20 A.D.3d 469, 470 (N.Y. App. Div. 2005) (stating as a co-member with the other member of the limited liability company, the defendant member owed the plaintiff member "a fiduciary duty to make full disclosure of all material facts"); Daniel S. Kleinberger & Carter G. Bishop, *The Next Generation: The* Revised Uniform Limited Liability Company Act, 62 BUS. LAW. 515, 523 (2007) (stating the 'cabin in' approach of attempting to codify all the aspects of fiduciary duties creates difficulty regarding member-to-member disclosure obligations).

63. Ann K. Wooster, Annotation, *Construction and Application of Limited Liability Company Acts—Issues Relating to Derivative Actions and Actions Between Members of Limited Liability Company*, 48 A.L.R. 6TH 1, 122 (2009) (citing Lio v. Mingyi Zhong, 814 N.Y.S.2d 562 (N.Y. Sup. Ct. 2006)).

64. Wooster, *supra* note 63 at 123-24 (citing Hofmesiter Family v. FGH Industries, LLC, 2007 WL 1106144 (E.D. Mich. 2007) (applying Michigan law and determining that minority members in an LLC had a viable claim of minority oppression against the controlling LLC members); Mroz v. Hoaloha Na Eha, Inc., 410 F. Supp.2d 919 (D. Haw. 2005) (applying Hawaii law and finding a minority member adequately alleged that other members owed the minority member fiduciary duties as a minority member); Carson v. Lynch Multimedia Corp., 123 F. Supp. 2d 1254 (D. Kan. 2000) (applying Kansas law and determining that the Kansas Limited Liability Company Act did not immunize the managers of the LLC from allegations of breach of fiduciary duties and minority oppression)).

65. No. 04-35574-BJH-11, 2008 WL 5215688, at *16 (Bankr. N.D. Tex. Dec. 12, 2008)

66. UNIF. LTD. LIAB. CO. ACT § 409(a) (1996) (emphasis added).

. . . the other members the fiduciary duties of loyalty and care."[67] Additionally, as previously stated, after discussing eliminating or altering aspects of the fiduciary duties of loyalty and care, the New LLC Act provides that if not manifestly unreasonable, the operating agreement may alter any other fiduciary duty.[68] As is apparent, additional fiduciary duties are not foreclosed by the language in the New LLC Act.

The comments to the *RULLCA* reveal that this "uncabining" of fiduciary duties was discussed at length by the National Conference of Commissioners on Uniform State Laws, which eventually determined that the "cabin in" approach of fiduciary duties followed by the *Uniform Partnership Act* and the *ULLCA* did "not fit in the very complex . . . world of LLCs" and that it was "impracticable to cabin all LLC-related fiduciary duties within a statutory formulation."[69] Further, the comments to the *RULLCA* provide that one important effect of "uncabining" fiduciary duties "is to allow courts . . . to use fiduciary duty concepts to police disclosure obligations in member-to-member and member-LLC transactions."[70]

Since Nebraska case law has not established what other fiduciary duties might be owed by members and managers of an LLC, will Nebraska courts interpret the New LLC Act such that *only* the fiduciary duties of loyalty and care exist in the LLC context, or will they decide that, since the statute refers to "any other fiduciary duty," the fiduciary duties owed in the LLC context are not limited to the duties of loyalty and care? In order to avoid such judicial second-guessing, it may be prudent for practitioners drafting operating agreements to include language eliminating any duties other than the duties of loyalty and care which may be owed by members and managers of the LLC.

D. Good Faith and Fair Dealing

Under the New LLC Act, a member of an LLC must "discharge the duties under the [New LLC Act] or under the operating agreement and exercise any rights consistently with the contractual obligation of good faith and fair dealing."[71] The operating agreement may not eliminate this contractual obligation of good faith and fair dealing, but, if not manifestly unreasonable, the operating agreement may prescribe the standards by which to measure the performance of the contractual obligation of good faith and fair dealing.[72] However, neither the *RULLCA* nor the New LLC Act provide a definition for the contractual

67. Neb. Rev. Stat. §§ 21-138(a), -138(g)(1) (Cum. Supp. 2010).
68. *Id.* § 21-110(c)(4).
69. Revised Unif. Ltd. Liab. Co. Act § 409(a), (b) cmt. (amended 2006).
70. *Id.*
71. Neb. Rev. Stat. § 21-138(d) (Cum. Supp. 2010).
72. *Id.* §§ 21-110(b)(5), -110(c)(5).

obligation of good faith and fair dealing. Nevertheless, as explained below, comments to the *RULLCA* and case law do provide a basis for understanding how the obligation of good faith and fair dealing operates, and this should inform practitioners' decisions whether to include in operating agreements the standards by which to measure the performance of the contractual obligation of good faith and fair dealing.

The comments to the *RULLCA* reference the comment to section 305(b) of the *Uniform Limited Partnership Act (2001)*, which explains:

> [The obligation] of good faith and fair dealing is *not* a fiduciary duty, does not command altruism or self-abnegation, and does not prevent a partner from acting in the partner's own self-interest. Courts should not use the obligation to change *ex post facto* the parties' or this Act's allocation of risk and power. To the contrary, in light of the nature of a limited partnership, the obligation should be used only to protect agreed-upon arrangements from conduct that is manifestly beyond what a reasonable person could have contemplated when the arrangements were made . . . . In sum, the purpose of the obligation of good faith and fair dealing is to protect the arrangement the partners have chosen for themselves, not to restructure that arrangement under the guise of safeguarding it.[73]

Case law also provides a basis for interpreting how the contractual duty of good faith and fair dealing operates. Nebraska courts have held that the covenant of good faith and fair dealing "exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract."[74] Delaware courts, often cited for their well-developed business law, have held that the covenant of good faith:

> requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the contract. This doctrine emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party. The parties' reasonable expectations at the time of contract formation determine the reasonableness of the challenged conduct.[75]

IV. PRACTICAL CONSIDERATIONS FOR PRACTICING UNDER THE NEW LLC ACT

As previously discussed, the New LLC Act provides better clarity for practioners who work with LLCs. This section provides insight into various provisions of the New LLC Act to assist practioners when forming LLCs and drafting operating agreements under the New LLC Act.

---

73. Revised Unif. Ltd. Liab. Co. Act § 409(d) cmt. (citing Unif. Ltd P'ship Act § 305(b) cmt. (2001)).
74. Cimino v. FirsTier Bank, N.A., 247 Neb. 797, 811, 530 N.W.2d 606, 616 (1995).
75. Cont'l Ins. Co. v. Rutledge & Co., Inc., 750 A.2d 1219, 1234 (Del. Ch. 2000) (citations omitted) (internal quotations marks omitted).

A. Operating Agreement Controls; Default Provisions

The New LLC Act is a default statute and allows members to address most all substantive matters of the LLC in the operating agreement.[76] The New LLC Act provides additional insight as to what matters may be included in the operating agreement, and practitioners should structure operating agreements accordingly. Additionally, practitioners should also be aware that any matters on which the operating agreement is silent will be subject to the default provisions of the New LLC Act.[77]

B. Oral Operating Agreement

There is no requirement under the New LLC Act that the operating agreement be in writing. Thus, the New LLC Act allows the operating agreement to be very informal or even implied between the members of an LLC.[78] In practice, problems could arise in determining whether members have formed an oral or implied operating agreement if a written operating agreement is not provided. The best practice in all cases is obviously to put the operating agreement in writing.

C. Management

An LLC may continue to be manager-managed or member-managed under the New LLC Act.[79] If the operating agreement is silent as to whether the LLC is manager-managed or member-managed, the LLC will be member-managed by default.[80] By default rule, in a member-managed LLC, matters occurring in the ordinary course of business are decided by a majority of the members (with each member having one vote), while acts outside the ordinary course of business require the consent of all members.[81] In a manager-managed LLC, decisions concerning matters occurring in the ordinary course of business are made by a majority of the managers, while actions outside the ordinary course of business (e.g., sale of substantially all of the assets) must be approved by all of the members.[82] The management of the LLC and the procedures and approvals required are issues that should be expressly addressed in the operating agreement to the extent the default provisions of the New LLC Act are not desired.

---

76. NEB. REV. STAT. § 21-110 (Cum. Supp. 2010).
77. *Id.*
78. *Id.* § 21-102(14).
79. *Id.* § 21-136(a).
80. *Id.*
81. *Id.* § 21-136(b).
82. *Id.* § 21-136(c).

D. Voting

In the absence of a provision for alternative voting methods in the operating agreement, the New LLC Act provides by default rule that every member has an equal vote (i.e., each member has one vote regardless of the amount of capital contributed to the LLC).[83] A similar concept applies to manager voting.[84] In practice, the operating agreements of most LLCs usually provide for voting rights equal to the member's ownership interest in the LLC. However, under the default rules of the New LLC Act, an operating agreement that does not address voting could cause a member owning only a 10% interest in the LLC to have an equal vote with another member owning a 90% interest. This is an area that practitioners should expressly cover in the operating agreement.

E. Agency

The New LLC Act states that a member is not deemed an agent of the LLC on the basis of mere membership alone.[85] Therefore, the common law of agency will apply to determine who has apparent authority to bind the LLC.[86] However, the New LLC Act does provide that the LLC may file a statement of authority with the Secretary of State describing the authority or limitations on authority of all persons to enter into transactions on behalf of, or otherwise bind, the LLC.[87]

F. Admission of New Members

The New LLC Act generally provides that the admission of new members requires the consent of all members.[88] If a different approval requirement is desired for the admission of new members, this should be expressly addressed in the operating agreement.

G. Withdrawal/Dissociation

The New LLC Act has detailed default provisions governing the withdrawal or dissociation of a member and the resulting consequences.[89] Practitioners should review these provisions and modify them as desired in the operating agreement.

---

83. *Id.* § 21-136(b).
84. *Id.* § 21-136(c).
85. *Id.* § 21-126(a).
86. *Id.* § 21-126(b).
87. *Id.* § 21-127(a).
88. *Id.* § 21-130(b)(3).
89. *See, e.g.*, *id.* § 21-144.

H. Distributions

The default provisions of the New LLC Act provide that any non-liquidating distributions must be made in equal shares among members and dissociated members.[90] The New LLC Act's default provisions also provide that, after retiring all LLC debts, liquidating distributions are to be made to the members, first, in accordance with unreturned contributions and then, second, in equal shares among members and dissociated members.[91] Practitioners will want to expressly provide for the manner in which distributions will be made in the operating agreement to ensure that the economics desired by the members is appropriately reflected. It should also be noted that the New LLC Act does not address how profits and losses of an LLC are to be allocated among its members for tax purposes (as such allocations are governed by Subchapter K of the Internal Revenue Code). However, any operating agreement should expressly address such allocations.

I. Amendment of Operating Agreement

The New LLC Act provides that the operating agreement may only be amended with the consent of all members.[92] If a different approval requirement is desired for such amendments, this should be expressly addressed in the operating agreement.

J. Dissolution

The New LLC Act provides that the LLC may be dissolved by a vote of the members only if all members consent to the dissolution.[93] If a different approval requirement is desired for dissolution, this should be expressly addressed in the operating agreement. The New LLC Act also permits a member to apply to a court, on the grounds that the LLC or its management is acting improperly, to have the LLC dissolved,[94] and this right cannot be altered by the operating agreement.[95]

K. Transfer of LLC Interests

The New LLC Act defines a "transferable interest" as the right to receive distributions from the LLC pursuant to the operating agreement.[96] Under the New LLC Act, a transferable interest is personal

---

90. *Id.* § 21-133(a).
91. *Id.* § 21-154(b)(2).
92. *Id.* § 21-136(b)(5).
93. *Id.* § 21-147(a)(2).
94. *Id.* § 21-147(a)(4).
95. *Id.* § 21-110(b)(7).
96. *Id.* § 21-102(24).

property that may be transferred (although a transferee is generally only entitled to the economic rights of the interest and not any voting or management rights).[97] The New LLC Act also provides, however, that a "transfer of a transferable interest in violation of a restriction on transfer contained in the operating agreement is ineffective as to a person having notice of the restriction at the time of transfer."[98] Practitioners should address any desired restrictions on transferability in the operating agreement.

L. Access to LLC Records

The New LLC Act contains detailed provisions with respect to the members' rights to access the LLC's records which cannot be unreasonably restricted by the operating agreement.[99] Practitioners should review these requirements in detail and make sure the operating agreement does not unreasonably alter such rights.

M. Indemnification

The New LLC Act provides that an LLC shall indemnify a member of a member-managed LLC or a manager of a manager-managed LLC for liabilities incurred in the course of acting on behalf of the LLC, so long as the member or manager has complied with his or her duties under the New LLC Act.[100] The New LLC Act also provides, however, that the operating agreement may alter or eliminate such indemnification, or limit or eliminate a member's or manager's liability to the LLC or its members for money damages, except for (1) breach of the duty of loyalty, (2) receipt of a financial benefit to which such party was not entitled, (3) making or receiving an unlawful distribution, (4) intentional infliction of harm on the LLC or a member, or (5) an intentional violation of criminal law.[101] Practitioners should craft the indemnification provisions of their operating agreements with these provisions in mind.

N. Fiduciary Duties

The New LLC Act describes certain duties that are included in the fiduciary duties of loyalty and care, as well as the obligations of good faith and fair dealing.[102] Practitioners may structure operating agreements in order to alter fiduciary duties, including eliminating particular aspects of such duties, as long as such changes are not man-

97. *Id.* § 21-141.
98. *Id.* § 21-141(f).
99. *See, e.g.*, *id.* §§ 21-110(b)(i6), -139.
100. *Id.* § 21-137.
101. *Id.* § 21-110(f).
102. *Id.* §§ 21-138(b) to -138(c).

ifestly unreasonable.[103] Practitioners may also want to clarify that the only fiduciary duties that are owed by the members or managers are those required by the New LLC Act (although it remains to be seen how a Nebraska court would view such a limitation).

O. Charging Orders

The New LLC Act clarifies and simplifies the rules governing charging orders, which are the exclusive remedy for a creditor of a member to obtain a member's financial rights to distributions from the LLC.[104] A creditor may obtain a lien on the member's interest in the LLC which can be foreclosed and sold in a judicial sale.[105] The New LLC Act makes it clear that a purchaser of a foreclosed interest only obtains financial rights and does not become a member of the LLC by virtue of the foreclosure.[106]

P. Special Litigation Committees

If an LLC is named or otherwise made a party to a civil proceeding, the LLC "may appoint a special . . . committee to investigate the claims" and "determine whether pursuing the action is in the best interests of the LLC."[107] The court must "stay discovery for the time reasonably necessary to permit the committee to make its investigation."[108] In general, the objective of such an investigation is to determine if the litigation is for the benefit of the LLC. The special litigation committee will ultimately report to the court with a recommendation to continue with litigation, settle, or dismiss.[109]

Q. Consent of Member to Merger, Conversion or Domestication

The operating agreement may not restrict the right of "a member that will have personal liability with respect to a surviving, converted, or domesticated organization" to approve or disapprove "a merger, conversion or domestication."[110] However, the operating agreement may provide for the approval of a merger, conversion, or domestication with the consent of fewer than all the members of the LLC, as long as all the members have consented to the operating agreement provision.[111]

---

103. *Id.* § 21-110.
104. *Id.* § 21-142(g).
105. *Id.* § 21-142(c).
106. *Id.*
107. *Id.* § 21-168(a).
108. *Id.*
109. *Id.* § 21-168 (d)–(e).
110. *Id.* § 21-110(b)(10).
111. *Id.* § 21-183(a).

R. Series LLCs

Consistent with the *RULLCA*, the New LLC Act does *not* provide for a "series LLC." A series LLC divides an LLC's operations into multiple segments to create internal shields to protect assets associated with one aspect of the company from claims pertaining to other aspects. This concept originated in the sophisticated mutual fund and structured finance areas and has been adopted by a few states, including Delaware and Iowa. However, the series LLC was omitted from the New LLC Act due to concerns and uncertainty as to the treatment of the series LLC with respect to bankruptcy and taxation, as well as whether the internal shields would ultimately be respected by the courts of other states.

S. Elect in Advance

An LLC formed before January 1, 2011, may elect to be subject to the New LLC Act before the grace period's expiration on January 1, 2013.[112] An LLC making such an election may do so by amending its operating agreement to be subject to the New LLC Act and by delivering to the Secretary of State a statement of election to be subject to the New LLC Act.[113] Further, for an LLC formed prior to January 1, 2011, "the company's articles of organization are deemed to be the company's certificate of organization."[114]

V. CONCLUSION

Nebraska's recent adoption of the New LLC Act should bring about welcomed changes to practitioners forming new LLCs as well as to practitioners advising existing LLCs. Similarly, the New LLC Act should provide greater certainty to practitioners with respect to advising clients on LLC matters. This Article discussed the differences between the Current LLC Act and the New LLC Act. This Article then discussed certain provisions of the New LLC Act that may require judicial determination and provided a framework for such determination. Finally, it provided guidance to practioners forming new LLCs and interpreting LLC operating agreements under the New LLC Act. This Article highlighted the importance of carefully crafting an LLC's operating agreement under the New LLC Act to ensure that the members' desired arrangement is appropriately reflected.

112. *Id.* § 21-197.
113. *Id.* § 21-197(a)(2).
114. *Id.* § 21-197(c)(1).