



Awaiting Case Law, Amendments a Decade Into NJ-RULLCA

By **Gianfranco A. Pietrafesa**

New Jersey adopted the New Jersey Revised Uniform Limited Liability Company Act (NJ-RULLCA) on Sept. 19, 2012.¹ It became effective on March 18, 2013, for new limited liability companies (LLC) formed on or after such date, and on March 1, 2014, for all LLCs, which was when the prior LLC statute was repealed.² So, in a sense, we can more or less say that March 1, 2024, is the 10th anniversary of NJ-RULLCA.



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NJ-RULLCA was based on the Revised Uniform Limited Liability Company Act (2006) (RULLCA) drafted by the National Conference of Commissioners on Uniform State Laws, which is the same organization that drafted the Uniform Commercial Code.³ RULLCA has been adopted by 20 states plus the District of Columbia.⁴ In New Jersey, a select committee of the Business Law Section of the New Jersey State Bar Association reviewed and modified RULLCA for adoption in New Jersey.⁵ One of the benefits of adopting RULLCA is that, as a “uniform” law, the Uniform Law Commissioners’ comments to RULLCA, case law from other jurisdictions, law review articles, and other sources can be used to understand NJ-RULLCA.

Popularity of LLCs

The LLC is the entity of choice. In New Jersey, approximately 88% of the entities formed in 2022 were LLCs. By comparison, only 8% were corporations.⁶

By now, we all know why LLCs are so popular. First, they provide owners with limited liability protection, identical to the protection of shareholders of corporations.⁷ Second, they provide owners with the one level of taxation of partnerships (for LLCs with two or more owners) or disregarded entities (for LLCs with one owner) where the LLC’s income passes through and is reported on the personal tax returns of its owners, as opposed to the double taxation of corporations.⁸ Third, they provide owners with freedom of contract.⁹ That is, although LLCs are creatures of statute, they are also creatures of contract giving owners the flexibility to structure the management, voting,

economics and other aspects of the LLC as they please through the LLC operating agreement. For example, an LLC may replicate the management structure of a general partnership, a limited partnership, a corporation, or any other type of management through its operating agreement. An owner's rights and obligations are set forth in NJ-RULLCA and the LLC's operating agreement, with NJ-RULLCA allowing the owners the flexibility to modify the statutory default provisions in the LLC's operating agreement.

Amendments of NJ-RULLCA

Delaware amends its LLC statute annually; New Jersey, not so much.¹⁰ NJ-RULLCA was an important update to New Jersey LLC law. Since its adoption, it has been amended a few times, but none of the amendments have made significant substantive changes in the law.¹¹

Sparse Case Law on NJ-RULLCA

Unfortunately, there has been little case law interpreting NJ-RULLCA. Most of the case law mentioning NJ-RULLCA does so in passing fashion, meaning that NJ-RULLCA was not central to the decision.¹²

In 2016, in *IE Test, LLC v. Carroll*,¹³ the Supreme Court addressed the expulsion (i.e., dissociation) of a member from an LLC on the grounds that it was not reasonably practicable to operate the LLC in light of the member's conduct. Although the case was decided under the repealed LLC statute, the Court reviewed the comparable provisions under NJ-RULLCA and noted that the result would have been the same.¹⁴ *IE Test* is the seminal case on expulsion / dissociation of a member from an LLC.¹⁵

In 2021, in *Premier Physician Network, LLC v. Maro*,¹⁶ the Appellate Division addressed when an agreement becomes the operating agreement of an LLC binding on all members.

Fortunately, as noted, decisions from other states interpreting statutory provisions comparable to those found in NJ-

RULLCA can be reviewed to understand NJ-RULLCA. For example, in 2021, the Iowa Supreme Court addressed judicial dissolution on the grounds of oppression and not being reasonably practicable to operate the LLC in light of a member's conduct.¹⁷ Also in 2021, the Connecticut Supreme Court addressed a member's right to inspect books and records of a manager-managed LLC.¹⁸

Proposed Amendments to NJ-RULLCA

NJ-RULLCA can be amended to improve it. If a state legislator expresses a *bona fide* interest in improving New Jersey's business entities statutes, there would be a number of business lawyers willing and able to draft such legislation. A *bona fide* interest means not simply introducing legislation, but actively working the legislation through the legislative process toward adoption.¹⁹

There are numerous amendments that could, and perhaps should, be made to NJ-RULLCA to make it a better statute. Among them, in my opinion, are the following:

1. Instead of equal distributions to all members and dissociated members,²⁰ require distributions to be made pro rata based on the agreed value of the contributions made by the members (and dissociated members) to the extent that the contributions have been received by the LLC. Distributions were made in this manner under New Jersey's repealed LLC statute,²¹ and are made in this manner in other states that have adopted RULLCA.²² This would also apply to voting rights. Although these items can be addressed in an operating agreement, many LLCs do not have written operating agreements. This change is the one most mentioned by practitioners.
2. When a member of an LLC dies, the member's estate has limited rights. It holds a transferable interest, which is an economic interest giving the estate

the right to receive distributions if and when made by the LLC, but no right to vote and limited rights to information. As such, unless there is an operating agreement giving the estate the right to compel the LLC and the surviving members to buy the estate's interest or giving the estate the right to be admitted as a member of the LLC, the estate is subject to the whims of the surviving members. For this reason, NJ-RULLCA should be amended to give the estate of a deceased member the right to compel the LLC and the surviving members to purchase the estate's interest in the LLC for fair value, to be paid over a period of years.²³

3. When dealing with charging orders and the rights of judgment creditors, NJ-RULLCA should distinguish between single-member LLCs and multi-member LLCs. NJ-RULLCA should be amended to allow the foreclosure and sale of a judgment debtor's interest in a single-member LLC. The Florida LLC statute, for example, makes this distinction.²⁴

Conclusion

LLCs will remain the entity of choice in New Jersey. There are over 900,000 domestic LLCs in New Jersey, which equates to 70% of all existing entities in New Jersey.²⁵ It is inevitable that sooner or later we will have more published opinions addressing NJ-RULLCA. It is important that the state Legislature propose legislation amending NJ-RULLCA to improve it in order to keep New Jersey relevant and competitive with Delaware and other states. ■

Endnotes

1. PL 2012, c.50, codified at *N.J.S.A.* 42:2C-1 et seq.
2. *N.J.S.A.* 42:2C-91.
3. The current version of RULLCA (dated August 19, 2015) is *available at* uniformlaws.org/committees/comm

- unity-home?communitykey=bbea059c-6853-4f45-b69b-7ca2e49cf740. NJ-RULLCA was based on the July 20, 2011, version of RULLCA, a copy of which is available from the author.
4. See Enactment History of RULLCA available at uniformlaws.org/committees/community-home?attachments=&communitykey=bbea059c-6853-4f45-b69b-7ca2e49cf740&libraryentry=df2ec88b-fcb0-4d18-b674-d498044e10f5&pageindex=0&pagesize=12&search=&sort=most_recent&viewtype=card. Among the states adopting RULLCA are California, Florida, Illinois, Pennsylvania, and Connecticut.
 5. I had the privilege of serving on the select committee, which modified RULLCA by adding certain provisions specific to New Jersey. For example, ensuring that indemnification for LLCs was similar to indemnification for corporations. In hindsight, the committee should have taken a more deliberate approach and modified more sections of RULLCA by using the best statutory provisions from New Jersey Limited Liability Company Act (repealed), the Delaware Limited Liability Company Act, etc. Such was the approach taken by other states, such as Florida. See Fla. Stat. 605.0101 *et seq.* available at flsenate.gov/Laws/Statutes/2023/Chapter605.
 6. These statistics are from the New Jersey Division of Revenue and Enterprise Services and are available from the author.
 7. See *N.J.S.A. 42:2C-30*. See also *N.J.S.A. 42:2C-6(b)*.
 8. See *N.J.S.A. 42:2C-92*; IRS page on LLCs is available at irs.gov/businesses/small-businesses-self-employed/limited-liability-company-llc. A corporation can elect to be taxed as a pass-through S corporation, but an S corporation has certain restrictions required to maintain its S corporation status and, as a result, does not provide its shareholders the flexibility provided to the members of an LLC.
 9. See *N.J.S.A. 42:2C-11(i), -11(a) & -11(b)*.
 10. For an editorial on how New Jersey could become more business friendly by consistently improving its LLC laws, see Gianfranco A. Pietrafesa, “Why New Jersey is Not Delaware,” 222 N.J.L.J. 91 (January 11, 2016; online version January 7, 2016) available at archerlaw.com/a/web/iFkjYAwGtGxRmqHaVHAUyN/pietrafesa20op-ed20in20nj20law20journal20-20why20new20jersey20is20not20delaware-c.pdf.
 11. See PL 2013, c. 276 (addressing creditor rights by amending charging order provisions and making technical (e.g., cross-referencing) corrections); PL 2019, c.149 (addressing reinstatement after revocation due to the failure to file annual reports). See also PL 2023, c. 38 (amending the New Jersey Business Corporation Act to allow corporations to convert to LLCs, and vice versa).
 12. For example, *State v. Ehrman*, 469 N.J. Super. 1 (App. Div. 2021) (filing complaints for housing code violations against the member of the LLC instead of the LLC owning the real property); *East Bay Drywall, LLC v. Dept. of Labor, etc.*, 467 N.J. Super. 131 (App. Div. 2021) (whether the member of a single-member LLC should be considered an employee of another LLC); *Namerow v. Pediatricare Associates, LLC*, 461 N.J. Super. 133 (Ch. Div. 2018) (whether the members’ course of conduct modified the terms of an operating agreement with regard to valuation in a minority member oppression case).
 13. 226 N.J. 166 (2016).
 14. See, e.g., *id.* at 183 and 184.
 15. The Court relied on a Colorado appellate court opinion addressing the dissolution of an LLC. See *id.* at 184 n.7 (citation omitted). As a result, it is reasonable to speculate that the *IE Test* opinion may also be used in cases involving the dissolution of an LLC on the grounds that it is not reasonably practicable to carry on the LLC’s activities in conformity with its operating agreement. See *N.J.S.A. 42:2C-48(a)(4)(b)*.
 16. 468 N.J. Super. 182 (App. Div. 2021).
 17. *Barkalow v. Clark*, 959 N.W.2d 410 (Iowa 2021).
 18. *Benjamin v. Island Management, LLC*, 267 A.3d 19 (Conn. 2021).
 19. It has taken 10 years for the adoption of amendments to the New Jersey Business Corporation Act to allow corporations to convert to LLCs, and vice versa. See PL 2023, c. 38. Companion legislation to amend the New Jersey Uniform Partnership Act, *N.J.S.A. 42:1A-1, et seq.*, and the New Jersey Uniform Limited Partnership Law, *N.J.S.A. 42:2A-1, et seq.*, to allow general and limited partnerships to convert to LLCs, and vice versa, has been languishing in the legislature for ten years.
 20. *N.J.S.A. 42:2C-34(a)*.
 21. See *N.J.S.A. 42:2B-35* (repealed).
 22. For example, see Fla. Stat. 605.0404(1). Distributions are made in this manner under the Delaware Limited Liability Company Act. See 6 Del. C. 18-504.
 23. This concept is comparable to a buyout of a resigning member under the repealed LLC statute. See *N.J.S.A. 42:2B-39* (repealed).
 24. See Fla. Stat. 605.0503.
 25. This information is from the New Jersey Division of Revenue and Enterprise Services and is available from the author.