

**UTAH'S PROPOSED ADOPTION OF THE RULLCA -
WHAT LAWYERS SHOULD KNOW!**

PRESENTED TO BUSINESS LAW SECTION, UTAH STATE BAR

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Introduction:

In 1991, Utah enacted its first LLC statute. By 1997, each of the 50 states and the District of Columbia had adopted an LLC statute utilizing a variety of formats and content. In most cases, each vintage of LLC statute brought some improvements and expanded the utility of LLCs for business and financial transactions. Although most statutes adopted one of several drafting templates, there was no uniformity. To date, it is still unclear whether, and to what extent, the lack of uniformity has adversely affected the use and utility of LLCs.

In 1995, the National Conference of Commissioners on Uniform State Laws ("NCCULA") proposed the first "Uniform Limited Liability Company Act" ("ULLCA").

Once the "Check-the-Box" regulations were adopted by the U.S. Treasury in 1997, the Business Law Section of the Utah State Bar formed a committee to study ULLCA for the purpose of considering its adoption in Utah. After about 9 months of effort, the committee stopped its work after concluding that, although the ULLCA contains many useful concepts, it also contains too many unworkable provisions to warrant its adoption in Utah. So far, ULLCA has been adopted in only 8 states, including only one major commercial jurisdiction—Illinois.¹

Through some renewed efforts in 2000 and 2001, a new, re-codified Utah LLC statute (the "LLC Act") was adopted in Utah in early 2001, effective July 1, 2001. Since then, the LLC Act has been amended several times.

In December 2006, NCCUSL proposed a Revised Uniform Limited Liability Company Act ("RULLCA")—a second attempt at a uniform LLC statute. To date, only 2 states have adopted RULLCA: Iowa and Idaho. A copy of the RULLCA and NCCUSL's official comments are being distributed with this outline.

Proponents and critics of RULLCA agree that RULLCA incorporates several developments which deviate significantly from existing LLC statutes.

¹ States adopting ULLCA (as listed by NCCUSL) are as follows: Alabama, Illinois, Montana, South Carolina, South Dakota, Vermont, and West Virginia.

Senator Lyle Hillyard and Reed Martineau, Esq., two of Utah's Uniform Law Commissioners, are directing an effort to review and prepare legislation for the possible adoption of RULLCA in Utah. If adopted, RULLCA will supersede Utah's existing LLC Act.

I. Some of RULLCA's Significant Developments

- A. Shelf Registration
- B. Definition and rules regarding Operating Agreements
- C. Transferee Rights
- D. Definition and Waiver of Fiduciary Duties
- E. Statutory Apparent Authority
- F. Judicial Dissolution for Oppression
- G. Eschew Series LLCs

II. Shelf Registration - Permits filing of LLC charter without any LLC member

- A. Would require two filings (1) the "certificate of formation" by organizer, and (2) a second filing when there is a member.
- B. The second filing to be made no later than 90-days after the first filing. LLC is not "formed" until the second filing.

III. Operating Agreement

- A. RULLCA §102(13) defines the operating agreement as "the agreement, whether or not referred to as an operating agreement and whether oral, in a record, implied, or in any combination thereof, of all the members of the limited liability company, including a sole member, concerning [(1) relations among the members as members and between members and the limited liability company, (2) the rights and duties under this [act] of a person in the capacity of manager, (3) the activities of the company and the conduct of those activities; and (4) the means and conditions for amending the operating agreement]. The term includes the agreement as amended and restated."
- B. RULLCA does not use the term "writing" – instead uses broader term "record", which is defined as information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceived form.
- C. Permits an oral operating agreement. May be subject to statutes of fraud (i.e., a contract that with a term exceeding one year or a transfer of land).
- D. Reverses hierarchy of governing docs---operating agreement is supreme.

E. Certainty vs. Business Deal

IV. Transferee Rights

- A. Person who ceases to be a member – has no “pay out” right
- B. No right to become member, has no governance rights and virtually no information rights
- C. Members may alter operating agreement and affect a transferee’s rights without the consent of the transferee
- D. Transferee has no right to seek dissolution – locked in

V. Fiduciary Duties

- A. “Un-Cabining” Fiduciary Duties
- B. Duty of Loyalty
 - 1. Self Interest
 - 2. Good Faith and Fair Dealing
- C. Duty of Care
 - 1. Replaces “gross negligence” standard with “ordinary care” standard subject to the business judgment rule
- D. Waiver and Limitation on Fiduciary Duties
 - 1. Waiver – RULLCA includes intricate restrictions on the extent to which the LLC operating agreement can effectively waive fiduciary provisions of the statute
 - 2. Duty of Loyalty – may not eliminate it entirely – however, may eliminate specific aspects subject to not “manifestly unreasonable” standard. May not limit money damages for breach of duty.
 - 3. Duty of Care – may alter but not eliminate subject to not “manifestly unreasonable” standard
 - 4. Other Fiduciary Duties – explicitly prohibits eliminating “any other fiduciary duty” (whatever they are) – however, may alter or eliminate particular aspects of these duties
 - 5. Manifesting Unreasonable – determined by court “as of the time” the challenged term become part of operating agreement AND by considering only circumstances existing “at that time”. Furthermore, may only

invalidate IF, in light of purposes and activities of the LLC, it is “readily apparent” that: (a) the objective term is “unreasonable”; or (b) the term is an “unreasonable means” to achieve the provision’s objective.

VI. Apparent Authority

- A. Eliminates statutory apparent authority by position (e.g., manager of manager-managed LLC has power to bind; member of member-managed LLC has power to bind)
- B. No requirement to disclose in formation document type of management structure (i.e., manager-managed or member-managed), or identity of managers.
- C. Separate filing (and recording) permitted to state the authority or limitations on authority of persons permitted to transact business on behalf of LLC

VII. Judicial Dissolution for Oppression

- A. Provides for judicial dissolution on new ground that the managers or members in control “have acted or are acting in a manner that is oppressive and was, is, or will be directly harmful to the applicant.”
- B. Also authorizes court to “order a remedy other than dissolution”
- C. Cannot alter judicial dissolution remedy – however, may limit or eliminate “other” remedies available to court

VIII. Series LLCs – not included in RULLCA

IX. Professional LLCs –not included in RULLCA

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Law Review Articles of Interest:

Daniel S. Kleinberger & Carter G. Bishop, *The Next Generation: The Revised Uniform Limited Liability Company Act*, 62 BUS. LAW. 515 (2007). – **Analysis by drafters**

Larry E. Ribstein, *An Analysis of the Revised Uniform Limited Liability Company Act*, 3 VIR. L. & BUS. REV. 35 (2008). – **Against adoption**

Carol R. Goforth, *Why Arkansas Should Adopt the Revised Uniform Limited Liability Company Act*, 30 UALR L. REV. 31 (2007). – **For adoption**