

DELAWARE “ALTERNATIVE ENTITY” STATUTES AMENDED¹

In its latest session, the Delaware legislature enacted several significant amendments to three of Delaware’s four “alternative entity” statutes—the Delaware Limited Liability Company Act (“DLLCA”), the Delaware Revised Uniform Limited Partnership Act (“DRULPA”) and the Delaware Revised Uniform Partnership Act (“DRUPA”).² Unless otherwise noted herein, the amendments will become effective on Aug. 1, 2013.

The amendments include confirmation that default fiduciary duties apply to Delaware limited liability companies, that the provisions of the DLLCA apply whether a limited liability company has one member or more than one member, that a charging order is the sole remedy by which a judgment creditor of a member or partner may satisfy a judgment out of the judgment debtor’s interest in the entity and that in connection with a domestication, transfer, continuance or conversion, interests in an entity that is domesticating or converting to a partnership or limited liability company and interests in a partnership or limited liability company that is transferring to, domesticating or continuing in another jurisdiction or converting to a different type of entity or other jurisdiction, may remain outstanding in connection with such domestication, transfer, continuance or conversion.

Below are the principal changes to each statute:

AMENDMENTS TO THE DLLCA

Default Fiduciary Duties

[DLLCA § 18-1104]. In the case of *Gatz Properties, LLC v. Auriga Capital Corp.*, 59 A.3d 1206 (Del. 2012), the Delaware Supreme Court stated that the issue of whether the DLLCA imposed default fiduciary duties was one about which reasonable minds could differ and described the DLLCA

as “consciously ambiguous” on this point. Subsequently, the Delaware Court of Chancery in the case of *Feeley v. NHAOCG, LLC*, 62 A.3d 649 (Del. 2012), noting that the Supreme Court had not ruled on whether the managers of a Delaware limited liability company owe default fiduciary duties, found that they did under the circumstances at issue in that case. The Delaware legislature amended Section 18-1104 of the DLLCA to provide specifically that in any case not provided for in the DLLCA, the rules of law and equity, including the rules of law and equity relating to fiduciary duties and the law merchant, shall govern. It should be noted that this default rule does not diminish the power of the parties to a limited liability company agreement to restrict or eliminate members’, managers’, or other persons’ fiduciary duties pursuant to Section 18-1101(c) of the DLLCA. However, the amendment makes clear that, under appropriate circumstances, managers and managing members may owe fiduciary duties even in the absence of language in the limited liability company agreement expressly providing for them.

DLLCA Provisions Apply to Multi-Member and Single Member Limited Liability Companies

[DLLCA § 18-1101(j)]. The DLLCA was also amended to confirm that its provisions apply to limited liability companies whether a limited liability company has one member or more than one member. This provision should have the effect of negating any policy-based arguments that certain provisions of the DLLCA, such as the charging order or the assignment and admission provisions, should not apply to a single member limited liability company.

AMENDMENTS TO THE DRULPA

Limited Liability Limited Partnerships

[DRULPA §§ 17-104(d), 17-104(i)(4), 17-214]. Prior to the current amendments, most of the provisions in the DRULPA relating to limited liability limited partnerships cross-referenced the provisions in the DRUPA relating to limited liability partnerships. However, some of these cross-references could be ambiguous and some provisions of the DRUPA governing limited liability partnerships were not cross-referenced. The amendments relating to limited liability

¹ Reproduced with permission from Corporate Accountability Report, 11 CARE 764, 7/19/13. © 2013 The Bureau of National Affairs, Inc. 800-372-1033 www.bna.com

² No amendments were adopted to the Delaware Statutory Trust Act in this legislative session.

limited partnerships clarify and confirm the operation of these provisions by including a number of substantive provisions directly in the DRULPA and clarifying the application of other provisions that are included by reference to the DRUPA. The DRULPA amendments relating to limited liability limited partnerships will become effective April 1, 2014.

AMENDMENTS COMMON TO MULTIPLE ALTERNATIVE ENTITY STATUTES

Charging Order as Exclusive Remedy

[DLLCA § 18-703(d); DRULPA § 17-703(d); DRUPA § 15-504(d)]. Sections 18-703(d), 17-703(d), and 15-504(d) have been amended to provide expressly that “attachment, garnishment, foreclosure or other legal or equitable remedies are not available to [a] judgment creditor.” This language confirms existing language to the effect that the entry of a charging order is the exclusive remedy by which a judgment creditor of a partner or a member or a partner’s or a member’s transferee or assignee may satisfy a judgment out of the judgment debtor’s interest in the limited liability company or partnership.

Interests May Remain Outstanding in a Merger

[DLLCA § 18-209(b); DRULPA § 17-211(b); DRUPA § 15-902(b)]. Sections 18-209(b), 17-211(b), and 15-902(b) have been amended to confirm that in connection with a merger, rights or securities of, or interests in, a constituent party that is the surviving entity in the merger may remain outstanding rather than being exchanged for or converted into other property or being cancelled.

Interests May Remain Outstanding in Connection with a Domestication, Transfer, Continuance and Conversion

[DLLCA §§ 18-212(j), 18-213(f), 18-214(i), 18-216(d); DRULPA §§ 17-215(j), 17-216(f), 17-217(i), 17-219(d); DRUPA §§ 15-901(i), 15-903(d), 15-904(j), 15-905(f)]. Sections 18-212(j), 18-213(f), 18-214(i), 18-216(d), 17-215(j), 17-216(f), 17-217(i), 17-219(d), 15-901(i), 15-903(d), 15-904(j), and 15-905(f) have been amended to confirm that in connection with a domestication, transfer, continuance, or conversion, rights or securities of, or interests in, an entity that is domesticating or converting to a limited liability company or partnership and rights or securities of, or interests in, a limited liability company or partnership that is transferring to or domesticating or continuing in another jurisdiction or converting to a different type of entity or jurisdiction may remain outstanding in connection with such domestication, transfer, continuance, or conversion. These amendments confirm existing law and make clear, for example, that in connection with the conversion of a foreign limited liability company to a Delaware limited liability company, the interests in the foreign limited liability company can remain outstanding as interests in the Delaware limited liability company, which, pursuant to Section 18-214 of the DLLCA, is deemed to be the same entity as the converted limited liability company for all purposes of Delaware law.

* * *

For further information, please contact a member in Morris Nichols’ Delaware Alternative Entities Group.

Morris Nichols Delaware Alternative Entities Group

David A. Harris
(302) 351-9351
dharris@mnat.com

Tarik J. Haskins
(302) 351-9120
thaskins@mnat.com

Louis G. Hering
(302) 351-9213
lhering@mnat.com

Walter C. Tuthill
(302) 351-9204
wtuthill@mnat.com

Morris, Nichols, Arshat & Tunnell LLP combines a broad national practice of corporate, intellectual property, business reorganization and restructuring and commercial law and litigation with a general business, tax, estate planning and real estate practice within the State of Delaware. The firm’s clients include Fortune 500 companies, smaller firms and partnerships, financial institutions, government agencies, commercial law and litigation firms and not-for-profit organizations.