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Sweeping changes made to the Illinois Limited Liability Company Act

by William R. Thomas

Effective July 1, 2017, the Illinois legislature has made numerous and wide-sweeping amendments to the Illinois Limited Liability Company Act (the "Act"). The changes to the Act should be of particular interest to businesses that are currently operating as LLCs or for entrepreneurs considering the formation of an LLC. Highlights of several important changes are as follows:

Default to Member Management

The Act now expressly provides that an LLC will be member-managed unless the operating agreement specifically provides for the alternative, namely, manager-management.

Valid Oral Operating Agreement

The Act eliminates the requirement of having a written operating agreement by expanding the definition of an operating agreement to include any agreement "whether or not referred to as an operating agreement and whether, oral, in a record, implied or in any combination thereof…." The Act also expressly exempts an operating agreement from the writing requirements provided in the Illinois Statute of Frauds.

Eliminating Fiduciary Duties

Through an operating agreement, the Act will allow LLC members to eliminate and/or waive the fiduciary duties owed by the members of the LLC, except for the duty of care, provided that this elimination and waiver are clearly and unambiguously stated in the operating agreement. This new amendment allows members to alter the duty of care with the exception of intentional misconduct or knowing violations of the law. The amendment also allows members to identify within the operating agreement certain types or categories of activities that do not constitute a violation of the member's fiduciary duty (see section 15-3 and 15-5 (c)). It is believed that this change provides protection from claims that would generally arise in disputes between LLC members. Based upon the requirement of an express disclaimer in the operating agreement, Ottosen Britz recommends that any existing operating agreements currently in effect be modified to specifically reference the elimination of fiduciary duties or to be contemplated in any future operating agreements.

Elimination of Assumed Agency Status

Prior to the amendment, the Act stated that a member was automatically an agent of its LLC, and therefore, the actions of the members on behalf of the LLC were considered to be acts of the LLC. The new amendment found at section 13-5 now expressly states that a member is not an agent of the LLC solely by being a member of the LLC. Further, the amendment has added a provision that allows the LLC to file a "Statement of Authority" with the Secretary of State's

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Selling your home is difficult, but it doesn't have to be

by Joshua B. Rosenzweig

Finally, after months of searching, you found the perfect home for your family. It has a big backyard for the kids to play. A fence to keep your dog from running away. An open floorplan conducive to hosting friends and family. And, a finished basement that will allow the kids to play for hours without trashing the rest of the house.

Then, you move into the house, and you realize the huge backyard is a pain to manage. The dog hates going into the yard. The open floorplan does not give you any privacy when, for example, your in-laws come to visit. And, that perfect finished basement? Well, the kids enjoy watching television in the family room instead.

After a few years, you begin searching again, and due to prosperity at your job, you realize the perfect house is just around the corner. But, what do you do with the first perfect house you found? It's time to call your realtor, and let her know you want to put the house up for sale. So, you get the house cleaned. Maybe you even put a fresh coat of paint on the walls and re-finish the wood floors that the dog has scratched over the years. Then, you list the house.

After a week of waiting, an offer comes in, and, a second offer comes in. Before you know it, your house is the subject of a major bidding war. Finally, the bidding reaches a price you can live with, and you sign the contract. The hard work is done, right?

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Selling your home

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What do you do next? Call your attorney. Your realtor is going to guide you on what will get your house sold, and, your realtor is familiar with the terms of the contract. However, even though your realtor has handled exponentially more transactions than you have, your realtor is not an attorney.

Once you accept an offer on your house, it is your attorney's responsibility to make sure the terms of the offer meet your needs. It is not only the purchase price that you need to be concerned with when selling your home. You need to make sure there is sufficient earnest money to keep the buyer's attention. You need to make sure the closing date works for your schedule. Remember, if you are buying a new house, and your new-home purchase is contingent upon you selling this house, make sure that your closing on the sale lines up with the closing on the purchase. Understand what other contingencies are applicable to the deal – does the buyer need to get a mortgage? If so, by when must that mortgage be obtained?

At the same time your contract details are being worked out, your buyer is performing an inspection. Within five business days of accepting the buyer's offer, and during your attorney's review of the contract, your attorney gets a letter from the buyer's attorney asking for 37 inspection repairs. For example, an outlet in the basement is not GFCI protected, so the buyer wants it replaced. The water-heater is showing its age, so the buyer wants it replaced. The roof has missing shingles, so the buyer wants them replaced. As if negotiating the contract itself does not impose enough stress on you, now you have to carefully respond to each request while keeping the following thought in mind – "If I say no, is the buyer going to walk away?"

Often, buyer inspection requests can seem like personal attacks. Nobody wants to be told that their house is "sub-par," and inspection requests feel like that. But, if you're selling your home, you have to remember that a buyer just wants the house to feel like "home" as well. Of course, getting the best deal is also an important consideration. Regardless, when the laundry list of requests come in, discuss them with your spouse or confidant, discuss them with your realtor and discuss them with your attorney. You have plenty of advisors that can help you respond accordingly.

So, you get through the contract negotiations. And, you find yourself giving the buyer a bigger credit than you wanted for inspection items. But, at least you know you will still walk away from this sale with sufficient funds to cover the closing costs on the purchase of your next real, perfect home. You're done worrying, right?

Wrong!!! If the buyer's purchase of your home is contingent on financing, then your buyer still has a mortgage to obtain. And, you still are obligated to make the inspection repairs agreed to and convey clear title to the buyer. Well, what can go wrong with that?

First, regarding inspection items, it is easy to forget to do something agreed-to. I have been to plenty of closings on behalf of buyers where the sellers' attorney has no proof of an agreed-upon repair. To make sure this does not happen to you when selling, follow-up with your attorney about the inspection repairs to make sure you have completed everything you agreed to do. And, keep receipts to show the work has been completed.

Second, concerning title, it is the seller's responsibility to convey clear title. Therefore, your attorney may ask you to produce evidence concerning payment of work done on the home. For example, you had the kitchen redone in the short time you owned the property. But, your general contractor did a poor job making payments to the supplier of your new granite counter-tops. As a result, a mechanic's lien was recorded against your home. Your attorney is going to need your assistance in getting this defect remedied before closing. After all, your buyer can walk away from the deal if you cannot convey clear title (i.e., title free of any liens or encumbrances) at closing.

Ok, so the contract is done. Inspection items are repaired, title has been cleared, and your buyer has received a firm commitment for a mortgage. You're done, right? Well, again, there is the small matter of the closing. At closing, as seller, you are relieved of appearing personally provided your attorney has had you pre-sign the seller's documents (usually, a deed, affidavit of title, bill of sale and transfer tax declaration) and you have given your attorney a power of attorney to execute documents on your behalf.

If your realtor, your attorney, the lender and the closer (i.e., the person at the title company in charge of collecting all of the documents and wiring out funds) are on the "same page," your closing should proceed smoothly. There is always the chance that the buyer does not show, however!

Stay involved in the sales process. As an individual with the largest stake in the transaction, you need to know how the process works and what to expect along the way. Ask questions of your realtor and your attorney. Both of them work for you. Selling your home can be scary, but it does not have to be. ■

Sweeping changes

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Office, which will either state the authority or the limitation of any member, manager, or person of the LLC to transfer real estate on behalf of the LLC or enter into any other transaction that would bind the LLC. A real-life example would allow this Statement of Authority to be recorded in the county in which the LLC-owned real estate is situated. By recording this document, constructive notice is provided on behalf of the LLC as to who has the authority to act on behalf of the LLC. Additionally, the amendment allows for the creation of a "Statement of Denial" where any manager or member listed in a Statement of Authority can deny any grant of authority limitation made on that member's or manager's authority.

Elimination of Buyout of Dissociated Member's Interest

Prior to the amendment, the remaining members of an LLC were required to purchase the membership interest held by a member who is dissociating from the LLC. The amendment has completely removed this requirement and has further added that the membership interest held by a dissociated member is to be treated the same as a transferee of a member (see section 35-55). Ottosen Britz counsels that a well-drafted operating agreement should always create a mechanism for the process to buyout a member's interest upon dissociation. If your operating agreement does not address this issue you should consider a modification to address this scenario.

Right to Information

The Act still requires the LLC to maintain the same information as before the amendment, however, the Act no longer requires the LLC to automatically give this information to a dissociated member unless that member submits a written demand to the LLC stating the records requested and the purpose. That request can be denied by the LLC if the purpose is improper, but does pose new time limits on the LLC's response to the dissociated member's request.

Alternatives to Dissolution

Even though the amendment does not eliminate the potential of dissolution of the LLC in the Act, the amendment allows the members to petition the court to allow the LLC to resolve issues causing the dissolution in a different method, including the purchase of a separating member's interest.

Conversion

The amendment expands the ability of a non-LLC to convert to an LLC. Prior to the amendment, only a partnership or a limited partnership could convert to an LLC. Now entities such as general partnerships, limited partnerships, business trusts, or corporations can be converted into an LLC. The amendment also permits a foreign LLC to become an LLC through the filings of Articles of Domestication with the Secretary of State's Office.

Enforcement of the Operating Agreement

The amendment now creates an automatic binding of the LLC to an operating agreement executed by its members regardless of whether the LLC assented to the operating agreement. This amendment assumes any individual who becomes a member of an LLC accepts the current operating agreement of the LLC.

Statement of Termination Filing

The amendment did not modify the member's obligation and duty to wind down the LLC's affairs. However, the amendment now calls for the filing of a "Statement of Termination" with the Secretary of State once the LLC has completed the wind down process. This Statement of Termination replaces the current document, entitled "Articles of Dissolution."

Administrative Dissolution

Upon an LLC's administrative dissolution, which may occur as a result of a failure to file an annual report, the name of the LLC cannot be claimed by any other entity for a period of three years after the dissolution. If the LLC is reinstated within that three-year period, it can reuse its name unless it seeks a change of name during the reinstatement process.

Authorized Signatures for State Filing

The Secretary of State will now accept documents for filing signed by any person authorized by the LLC, not limited just to a member or manager, provided that the name and title of the person signing are typed or printed on the necessary form. The Secretary of State will also now accept digital signatures.

The identification and list of amendments to the Act above are not exhaustive. However, these examples of the changes to the Act serve as examples of how LLCs in Illinois are becoming more closely linked to the model of limited liability company laws drafted by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). The limited liability company laws drafted by the NCCUSL have been adopted by 15 states and the District of Columbia. To effectively utilize the changes to the best of your LLC's ability, Ottosen Britz recommends contacting our office for further counsel. ■

Powerful powers

by Craig D. Hasenbalg

For all the talk these days about changes to the tax code, it is easy to lose sight of the fundamental goal of any estate plan: actually conveying assets to chosen beneficiaries. Taxes can certainly impact that conveyance. But, for estates not large enough to be subject to the estate tax system, transferring assets in the proper way to the proper people is the primary goal.

"Powers of appointment" are one of the effective means to accomplish this simple goal, while also taking into consideration future events. Unfortunately, powers of appointment are often overlooked.

One of the most attractive features of any power of appointment is that it is limited only by the creativity of the maker of the power. At its heart, every power has a "trigger", which, if pulled, allows a third party to alter an estate plan's disposition of assets. For example, assume Susan is married to Robert, and together they have two healthy and happy children, Jane and Steve. From a previous relationship, Susan has a son, Trevor, who has seen his fair share of trouble. Trevor has been arrested several times, spent time in jail and has unfortunately developed a seemingly unshakeable cocaine habit.

Despite Trevor's troubles, Susan loves all three of her children equally, and creates an estate plan so that at her death (assuming Susan dies first), Robert receives all of the income generated by Susan's assets for as long as he lives. When Robert dies, Susan's assets are distributed to Jane, Steve and Trevor, equally.

However, Susan is realistic about Trevor's prospects, and she inserts a power of appointment into her estate plan. The power provides that Robert can insert language into *his* Will that alters *Susan's* estate plan. If Trevor continues his downward spiral (Trevor's downward spiral is the "trigger" allowing Robert to exercise the power), then Robert can require Susan's assets to be distributed equally to Jane and Steve to the exclusion of Trevor. Susan's idea is that if Trevor recovers (which certainly is the hope), then he should receive his full one-third share of Susan's assets. If this happens, Susan is trusting Robert not to exercise the power. If, however, Trevor is unable to stay clean, then Susan's assets would go to Jane and Steve and would not help perpetuate Trevor's wayward lifestyle.

No other estate planning tool in the estate planner's "tool box" allows for a post-death reallocation of assets so simply and easily. In the example above, although Susan is dead, the ultimate disposition of her assets is not final until Robert chooses to exercise or not exercise the power. In this way, Robert can monitor events after Susan dies, so that Susan's assets are distributed as Susan would have intended. In appropriate situations, such a powerful device should not be ignored.

There are a variety of ways in which a power of appointment can be drafted to effectuate the ultimate goal of an estate plan. If you are preparing an estate plan, make sure you discuss with your estate planning attorney whether a power of appointment can help distribute, or re-distribute, your assets to those whom you intend. ■

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OTTOSEN BRITZ KELLY COOPER GILBERT & DINOLFO, LTD.

1804 North Naper Boulevard, Suite 350, Naperville, Illinois 60563
(630) 682-0085
www.ottosenbritz.com

Joshua B. Rosenzweig, Editor jrosenzweig@ottosenbritz.com