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# THE 2010 WYOMING LIMITED LIABILITY COMPANY ACT: A UNIFORM RECIPE WITH WYOMING "HOME COOKING"

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> *It has been twenty-two years since the IRS issued Revenue Ruling 88-76, granting favorable partnership tax status to Wyoming LLCs. It has been over ten years since the IRS adopted even more favorable "check the box" regulations granting yet greater tax flexibility to LLCs. With its adoption of the 2010 Wyoming Limited Liability Company Act, the Wyoming legislature has chosen an "opportune moment to identify the best elements of the myriad 'first generation' LLC statutes and to infuse those elements into a new, 'second-generation' uniform act."*[1]

## I. INTRODUCTION

It is well known that in 1977 Wyoming became the first state to authorize the limited liability company (LLC).[2] Other states followed suit by adopting LLC acts of their own, especially after the Internal Revenue Service (IRS) granted LLCs formed pursuant to Wyoming's original LLC Act (Original LLC Act or Original Act) favorable partnership tax status in 1988.[3] As time went on, the business entity known as the LLC matured and became preferred over other entities in most situations.[4] Because the Original LLC Act remained substantially unchanged since its enactment in 1977, and because the sophistication and needs of businesses increased, the Original LLC Act became quite outdated after more than three decades.[5] That outdated status changed on March 5, 2010, when Governor Dave

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[1] REVISED UNIF. LTD. LIAB. CO. ACT preparatory note (2006), *available at* http://www.law.upenn.edu/bll/archives/ulc/ullca/2006act_final.htm#_Toc147562675.

[2] 1 LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES 1–7 (2d ed. 2010). By definition, a Limited Liability Company is "[a] company—statutorily authorized in certain states—that is characterized by limited liability, management by members or managers, and limitations on ownership transfer." BLACK'S LAW DICTIONARY 120 (3d pocket ed. 2006).

[3] 1 RIBSTEIN & KEATINGE, *supra* note 2, at 1–7; Rev. Rul. 88-76, 1988-1 C.B. 360. If an LLC achieves or elects partnership tax status, then its earnings are passed through to the members based upon each member's ownership interest in the LLC or otherwise according to the operating agreement. Members then pay tax on these earnings individually. Unlike a corporation, an LLC is not a separate tax paying entity. Partnership tax status is often preferred because it avoids the double taxation associated with "C" corporations where both the corporation pays tax on its earnings and the shareholders then pay tax on corporate dividends. *See* Catherine M. Rogers, Note, *Business Organizations—Staying Afloat with a Hole in the Wyoming LLC Act: Default Rules in a Contractual LLC World.* Lieberman v. Wyoming.com LLC*, 82 P.3d 274 (Wyo. 2004)*, 5 WYO. L. REV. 351, 358 & nn.37–46 (2005).

[4] 1 RIBSTEIN & KEATINGE, *supra* note 2, at 1–7.

[5] Daniel S. Kleinberger & Carter G. Bishop, *The Next Generation: The Revised Uniform Limited Liability Company Act*, 62 BUS. LAW. 515, 516, 520 (2007). The Revised Uniform Limited

Freudenthal signed into law the 2010 Wyoming Limited Liability Company Act (2010 LLC Act or New Act), a comprehensive update to Wyoming's LLC laws.[6] Among other accomplishments, the 2010 LLC Act represents a significant milestone in Wyoming's LLC history by completely repealing Wyoming's Original LLC Act and replacing it with a version of the Revised Uniform Limited Liability Company Act (Re-ULLCA).[7] Despite being based on a uniform law, the New Act contains several unique provisions representing Wyoming's "home cooking."[8] In the authors' view, the 2010 LLC Act will serve as a valuable tool for legal practitioners, judges, and other states. Below are many of the innovative provisions and implications of the New Act:

- Multiple and broad-ranging default rules plug gaps that existed in the Original LLC Act.
- LLCs can achieve increased privacy regarding matters such as the number and names of members and managers, amount and nature of capital contributions, and similar information.
- The New Act allows increased flexibility regarding operating agreements which are now more contractual in nature, including the ability to enforce an oral operating agreement and the ability to waive certain fiduciary duties of members and managers.

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Liability Company Act, upon which the new Wyoming LLC Act is based, provides several needed "major innovations" including: broader scope and flexibility of the operating agreement; "un-cabining" of fiduciary duty; obligation of good faith and fair dealing among managers and members; remedies for oppressive conduct; availability of statements of authority; more complete default rules on management structure; comprehensive law regarding the charging order remedy; and allowance of derivative claims. *Id.*

[6] The 2010 Wyoming Limited Liability Company Act originated as Senate File 18 and was identified as Senate Enrolled Act 51 when signed into law on March 5, 2010.

[7] REVISED UNIF. LTD. LIAB. CO. ACT (2006), *available at* http://www.law.upenn.edu/bll/archives/ulc/ullca/2006act_final.htm#_Toc147562675 (as of this writing, versions of Re-ULLCA have been adopted in Idaho, Iowa, Nebraska, and Wyoming).

[8] The term "Wyoming Home Cooking" was a popular label for Wyoming-specific variations to the 1989 and 2009 versions of the Model Business Corporations Act adopted by the Wyoming Legislature. This tradition was carried forward by the LLC Working Group advising the Joint Interim Corporations Committee of the 2010 Wyoming Legislature. Active members of the LLC Working Group included the co-authors of this article, several Wyoming State Senators and Representatives, and the following individuals: Patricia O'Brien Arp, Ph.D., Deputy Wyoming Secretary of State; William D. Bagley of Bagley Law Office; J. Kenneth Barbe of Brown, Drew & Massey, LLP; James R. Belcher of Schultz & Belcher, LLP; Barbara L. Boyer, Project Administrator/Lawyer for the Wyoming Secretary of State; Cathryn Brodie of Levy Coleman LLP; James A. Coleman of Levy Coleman LLP; Lynda Cook of the Wyoming Legislative Service Office; Walter F. Eggers of Holland & Hart, LLP; Steven F. Freudenthal of Freudenthal & Bonds, P.C.; Harvey Gelb, Professor of Law, University of Wyoming; Harry J. Haynsworth of Briggs and Morgan; Dale G. Higer, general counsel for Investors Financial Corporation; Thomas G. Kelly of Riske, Salisbury and Kelly, P.C.; Jeri Melsness, Production Manager of the Business Division of the Secretary of State's Office; Mario M. Rampulla of Prehoda, Leonard & Edwards, LLC; John B. Rogers of Rogers & Rogers; and D. Jeanne Sawyer, Business Division Director of the Secretary of State's Office.

- More than one person may act as an organizer of an LLC.
- The New Act authorizes LLCs to file a "statement of authority" with the Secretary of State's office, identifying who may act on behalf of the LLC and in what capacity.
- Unless provided otherwise in the operating agreement, management rights and distributions to the members are determined per capita on an equal basis, instead of on the basis of capital contributions.
- A creditor's sole remedy against an LLC member's interest is the charging order, which only allows the creditor to intercept any distributions that are otherwise destined to be made by the LLC to the member.
- A dissociating member retains only his or her non-voting, economic interest, and no longer maintains his or her right to participate in management and obtain information.
- LLC managers owe a duty of good faith and fair dealing to minority LLC members, who now have a remedy for oppressive conduct.
- Direct and derivative actions by LLC members are allowed.
- Tradenames for LLCs are allowed.
- LLC members have the right to obtain certain documents and information from LLCs and their managers.
- The filing of articles of dissolution for an LLC wishing to dissolve is optional.

This article seeks to provide a working roadmap to the New Act by identifying differences between it and the Original LLC Act and by explaining the more innovative provisions of the New Act. The New Act is organized within eleven articles, each of which will be addressed separately and in order of appearance in the New Act.

## II. ARTICLE ONE: GENERAL PROVISIONS

### *A. Comprehensive Definitional Section*

The Original Act contained a mere nine defined terms.[9] By comparison, the definition section of the 2010 LLC Act contains a robust twenty-three defined terms.[10] In adding additional definitions, the 2010 LLC Act becomes much clearer than the Original Act, reducing ambiguities that may have previously existed. Specifically, the 2010 LLC Act defines the following terms: "articles of organization," "contribution," "debtor in bankruptcy," "designated office,"

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[9] WYO. STAT. ANN. § 17-15-102 (repealed 2010).

[10] WYO. STAT. ANN. § 17-29-102 (2010).

"distribution," "effective," "foreign limited liability company," "manager," "manager-managed limited liability company," "member," "member-managed limited liability company," "operating agreement," "organizer," "principal office," "record," "sign," "signature," "state," "transfer," "transferable interest," and "transferee."[11] The Act deletes the definitions of "bankrupt," "court," "real property," "flexible limited liability company," "this act," and "registered agent."[12] Finally, the definition section retained but amended the following terms: "limited liability company" and "person."[13] The only defined term the New Act did not amend or delete is "low profit limited liability company."[14] Finally, the 2010 LLC Act provides a separate section defining knowledge and notice, a provision the Original Act did not contain.[15]

### *B. Purposes, Powers, and Duration*

Regarding purposes, the 2010 LLC Act retained the existing law, providing that a Wyoming LLC may have any lawful purpose, except acting as an insurer or financial institution.[16] As a further pinch of "home cooking," the New Act also retained the right of licensed professionals to practice within an LLC, although certain restrictions still apply, such as the necessary licensing board approval and the retention of personal liability for professional negligence.[17]

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[11] *Id.*

[12] WYO. STAT. ANN. § 17-15-102 (repealed 2010). These terms were deleted primarily because they were either not used in the 2010 LLC Act (i.e., flexible limited liability company) or were addressed in other areas.

[13] *Compare id.*, *with* WYO. STAT. ANN. § 17-29-102 (2010).

[14] *Compare* WYO. STAT. ANN. § 17-15-102 (repealed 2010), *with* WYO. STAT. ANN. § 17-29-102 (2010).

[15] WYO. STAT. ANN. § 17-29-103 (2010). The section is titled "Knowledge; notice."

[16] *Compare* WYO. STAT. ANN. § 17-15-103(a) (repealed 2010), *with* WYO. STAT. ANN. § 17-29-104(d) (2010).

[17] *Compare* WYO. STAT. ANN. § 17-15-103(b) (repealed 2010), *with* WYO. STAT. ANN. § 17-29-104(e) (2010). The New Act reads:

> Nothing in this chapter shall be interpreted as precluding an individual whose occupation requires licensure under Wyoming law from forming a limited liability company if the applicable licensing statutes do not prohibit it and the licensing body does not prohibit it by rule or regulation adopted consistent with the appropriate licensing statute. No limited liability company may offer professional services or practice a profession except by and through its licensed members or licensed employees, each of whom shall retain his professional license in good standing and shall remain as fully liable and responsible for his professional activities, and subject to all rules, regulations, standards and requirements pertaining thereto, as though practicing individually rather than in a limited liability company.

WYO. STAT. ANN. § 17-29-104(e) (2010).

Regarding powers, the Original Act listed the powers an LLC could exercise.[18] These included the power to deal in real or personal property, make contracts, incur liabilities, and cease activities and surrender its certificate of organization.[19] By comparison, the 2010 LLC Act simply states, "A limited liability company has the capacity to sue and be sued in its own name and the power to do all things necessary or convenient to carry on its activities."[20] Accordingly, this new section eliminates the listed powers enumerated in the prior law and replaces them with an all-encompassing statutory powers provision.[21]

Regarding duration, the default rule under the Original Act provided for a term of thirty years for the life of LLCs unless otherwise stated. The default rule under the 2010 LLC Act provides that an LLC "has perpetual duration."[22]

### *C. Governing Law*

The 2010 LLC Act provides for the "Governing law" and "Supplemental principles of law" in sections 17-29-106 and 17-29-107 of the Wyoming Statutes, respectively. The Original Act did not have corresponding sections. Section 17-29-106 requires the law of Wyoming to govern not only the internal affairs of the LLC, but also the liability of members and managers for the liabilities of the company. Section 17-29-107 specifies that principles of law and equity supplement the LLC statute, unless specific provisions of this chapter displace the principles.

### *D. Name Restrictions, Reservations, and Flexibility*

Regarding name restrictions, section 17-29-108 of the New Act retains almost all of the wording of section 17-15-105 in the Original Act. Specifically, section 17-29-108(a) requires "limited liability company," corresponding abbreviations, or other variations listed in subsection (a) to be included in the name of the LLC. Additionally, a name may not include a word or phrase indicating a purpose not contained in the articles of organization or indicating it is organized under the Wyoming Business Corporation Act, the Wyoming Statutory Close Corporation Supplement, or the Nonprofit Corporation Act.[23] An LLC name or tradename may not be similar or the same as any trademark or service mark.[24]

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[18] WYO. STAT. ANN. § 17-15-104 (repealed 2010).

[19] *See id.*

[20] WYO. STAT. ANN. § 17-29-105 (2010).

[21] This change eliminates the need for the organizer to state the limited liability company's purpose altogether.

[22] WYO. STAT. ANN. § 17-29-104(a), (c); *see* WYO. STAT. ANN. § 17-15-107 (repealed 2010) ("The period of duration, which shall be thirty (30) years from the date of filing with the Secretary of State if no period of duration is specifically set forth in the articles of organization . . . .").

[23] WYO. STAT. ANN. § 17-29-108(a)(i)–(ii) (2010).

[24] *Id.* § 17-29-108(a)(ii).

A person may reserve a name for the exclusive use of an LLC. The Original Act stated, "A limited liability company may reserve a name in accordance with rules promulgated under this act."[25] The 2010 LLC Act allows a person to reserve an available name for a 120-day period after filing an application with the Secretary of State. Furthermore, section 17-29-109 permits an owner of a reserved name to transfer the reservation to another person.

The 2010 Act also contains two specific "home cooking" modifications to the Original Act, allowing the use of tradenames by Wyoming LLCs. First, the 2010 LLC Act eliminates personal liability for one who participates or knowingly acquiesces to omitting "limited liability company" or a derivative thereof from the LLC's name. Second, section 17-29-108(b) provides "[n]othing in this article shall prohibit the use of a tradename in accordance with applicable law."[26] This section, when considered together with the provisions of section 40-2-101 through 40-2-109 governing the use of tradenames in Wyoming, makes it clear that LLCs may register and transact business using tradenames.[27] If practitioners wish to continue the use of "LLC" or similar letters in connection with the tradename, at least two options are available. First, where the tradename is used, a notation can be included indicating that it is the registered tradename of the LLC. Second, the letters "LLC" may be included as part of the tradename.

### *E. The Operating Agreement*

The 2010 LLC Act makes two important matters regarding the operating agreement much clearer than they were under the Original Act. First, the operating agreement governs virtually everything with respect to the LLC, including its management and the rights of its members.[28] Second, in the event an LLC lacks an operating agreement, or to the extent the operating agreement does not otherwise provide for a matter, the provisions of the 2010 LLC Act govern as the "default rules."[29] The Original Act was not so specific, as evidenced by the numerous court cases filed to clarify the terms of the operating agreement.[30] Despite the broad scope of matters that may be addressed in the operating agreement, limitations still exist.[31] Specifically, an LLC may not vary its capacity to sue and be sued,

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[25] WYO. STAT. ANN. § 17-15-105(d) (repealed 2010).

[26] WYO. STAT. ANN. § 17-29-108(b) (2010).

[27] "Biffie's Window Washers," owned by KidWorks Enterprises, LLC, was the first tradename to be registered by a Wyoming LLC following the effective date of the 2010 LLC Act.

[28] WYO. STAT. ANN. § 17-29-110(a).

[29] *Id.* § 17-29-110(b).

[30] *See infra* note 122.

[31] WYO. STAT. ANN. § 17-29-110(c).

change the governing law of Wyoming, alter the power of the court, or eliminate the contractual obligation of good faith and fair dealing.[32]

Finally, the 2010 LLC Act contains a provision allowing third parties to have control over amendments and, furthermore, that amendments made under certain circumstances have limited or no effect. For example, an amendment to an operating agreement may be restricted by specifying the amendment requires approval of a person not a party to the agreement or satisfaction of a certain condition.[33] If an adopted amendment fails to include the required approval or satisfy the condition, it is ineffective.[34] According to the official comments to this section, lenders may require of the LLC such "veto rights."[35]

## III. ARTICLE TWO: ARTICLES OF ORGANIZATION, FORMATION, AND OTHER FILINGS

### A. *Articles of Organization*

Under the 2010 LLC Act, "[o]ne or more persons may act as organizers to form a limited liability company by signing and delivering to the Secretary of State for filing articles of organization."[36] Once filed, the articles become "conclusive proof that the organizer satisfied all conditions to the formation of a limited liability company."[37] By comparison, the Original Act required two or more members to file articles, although it did allow flexible LLCs to be formed with only one member.[38] The Original Act added complexity and confusion while the 2010 LLC Act clarifies and adds flexibility. Furthermore, now articles must merely state the name of the LLC, the street address of the registered office, and the name of registered agent at that office.[39] The Original Act required significantly more information to be set forth in the articles.[40] Notably absent are the requirements under the Original Act to set forth the total amount of cash contributed, whether the LLC will be manager-managed or member-managed, and if member-managed, the names of the members.[41] This does not mean an

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[32] *Id.* § 17-29-110(c)(i)–(iii), (v) (listing all restrictions an operating agreement shall not contain).

[33] *Id.* § 17-29-112(a).

[34] *Id.*

[35] *Id.*

[36] *Id.* § 17-29-201(a).

[37] *Id.* § 17-29-201(e)(iii).

[38] WYO. STAT. ANN. § 17-15-106 (repealed 2010); *see id.* § 17-15-144.

[39] WYO. STAT. ANN. § 17-29-201(b) (2010). The first LLC organized pursuant to the 2010 LLC Act, whose articles included only the three items of information, was KidWorks Enterprises, LLC.

[40] WYO. STAT. ANN. § 17-15-107(a) (repealed 2010).

[41] *See id.*

organizer is prohibited from including additional information, only that such additional information is not required. Additionally, the 2010 LLC Act provides flexibility to the organizer by allowing the ability to provide for a delayed effective date.[42] In the event the organizer chooses not to go forward with the LLC before its effective date, he or she may file a statement of cancellation to prevent the official formation of the LLC.[43] Finally, an LLC may now restate its articles to include past amendments and current amendments.[44]

Under the New Act, articles of organization must be amended only when the name of the LLC changes or the articles of organization contain a false or erroneous statement.[45] By comparison, the Original Act required an amendment when a change in name occurred, the character of the contributions to capital varied, the stated purpose of business changed, the articles of organization contained a false or erroneous statement, the time of dissolution varied from that stated in the articles, a time became fixed for dissolution, or the members wanted to make a change to more accurately represent the agreement between or among them.[46]

To properly amend articles under the New Act, the LLC must specify within the amendment the name of the LLC, the initial filing date of the LLC's articles, and the changes to the articles by the amendment.[47] An amendment or restatement only becomes effective when delivered to the Secretary of State for filing.[48] Regarding corrections to articles, the 2010 LLC Act requires a member of a member-managed or a manager of a manager-managed LLC to amend the articles or to file a statement of correction if the member or manager becomes aware of inaccurate information contained in the articles.[49] The statement of correction must "[d]escribe the record to be corrected, including its filing date, or attach a copy of the record as filed; . . . [s]pecify the inaccurate information and the reason it is inaccurate or the manner in which the signing was defective; . . . [and] [c]orrect the defective signature or inaccurate information."[50]

The 2010 LLC Act also mandates that a person authorized by the company sign any record filed with the Secretary of State.[51] An authorized person may include: a person winding up a dissolved LLC with no members or at least one

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[42] WYO. STAT. ANN. § 17-15-201(e)(i) (2010).

[43] *Id.* § 17-29-201(e)(ii).

[44] *Id.* § 17-29-202(a).

[45] *Id.*

[46] WYO. STAT. ANN. § 17-15-129(b) (repealed 2010).

[47] WYO. STAT. ANN. § 17-29-202(b) (2010).

[48] *Id.* § 17-29-202(d).

[49] *Id.* § 17-29-202(e).

[50] *Id.* § 17-29-206(b).

[51] *Id.* § 17-29-203.

organizer for the initial articles of organization.[52] Each organizer who signed the initial articles of organization must sign a statement of cancellation.[53] If, under the New Act, a person required to sign or deliver a record for filing with the Secretary of State fails to do so, then an aggrieved person may petition a court to order such person to take the required action or require the Secretary of State to file an unsigned version of the record.[54] If the petitioner is not the LLC, the petitioner must make the LLC a party to the action.[55]

An individual who signs a record authorized or required to be filed under the 2010 LLC Act affirms—under penalty of perjury—that the information stated in the record is accurate.[56] If a filed record contains inaccurate information and a person relies on the inaccurate information, thereby suffering a loss, liability may result in at least two ways.[57] First, a person who signed or caused another to sign the record knowing it contained inaccurate information at the time it was filed may be held liable.[58] Second, a member of a member-managed or manager of a manager-managed LLC may be held liable if the record was delivered on behalf of the company and the member or manager had notice of the inaccuracy in a reasonable time to prevent the reliance by amending the record, petitioning the court, or filing a statement of correction.[59] An operating agreement may, however, relieve a member of a member-managed liability company from responsibility for inaccurate records and impose the responsibility on other members.[60] Finally, if a person signs a document knowing of its falsity, that person "is guilty of a misdemeanor punishable by a fine of not more than one thousand dollars ($1,000.00), by imprisonment for not more than six (6) months, or both."[61]

### *B. Certificates*

The Secretary of State may provide a certificate of existence (commonly known as a "certificate of good standing") if such a certificate is requested, the fee is paid, and the filed records indicate the LLC has been formed and no articles of dissolution have been filed.[62] The certificate of existence will include: (1) the name of the company; (2) the formation date; (3) a statement that the company

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[52] *Id.* § 17-29-203(a).

[53] *Id.*

[54] *Id.* § 17-29-204(a).

[55] *Id.* § 17-29-204(b).

[56] *Id.* § 17-29-207(c).

[57] *Id.* § 17-29-207(a).

[58] *Id.* § 17-29-207(a)(i).

[59] *Id.* § 17-29-207(a)(ii).

[60] *Id.* § 17-29-207(b).

[61] *Id.* § 17-29-210(b).

[62] *Id.* § 17-29-208(a).

was formed under the laws of Wyoming; (4) whether all fees, taxes, and penalties owed to the Secretary of State have been paid; (5) whether the company filed its most recent annual report; (6) whether the company has been administratively dissolved by the Secretary of State; (7) whether articles of dissolution have been delivered to the Secretary of State for filing; and (8) any other facts of record the person requested.[63] Subject to any qualification stated in the certificate, a certificate of existence or certificate of authorization issued by the Secretary of State is conclusive evidence that the LLC is in existence.[64]

### *C. Fees and Taxes*

For simplicity's sake, the 2010 LLC Act closely follows the Original Act regarding fees and annual taxes. Every year, on or before the first day of the month in which an LLC is organized, the LLC or foreign LLC must file with the Secretary of State a statement "setting forth its capital, property and assets located and employed in the state of Wyoming."[65] On the same date, the LLC or foreign LLC must pay "a license fee based upon the sum of its capital, property and assets reported, of fifty dollars or two-tenths of one mill on the dollar, whichever is greater."[66] Financial information provided by the LLC or foreign LLC in the annual report must be current as of the end of the company's fiscal year.[67] Any other information contained in the report must be as current as of the date of the annual report.[68] If the LLC fails to meet the annual report requirements, the Secretary of State will inform the company in writing and return the report to the company for correction.[69] A company must maintain books and records for three years and allow the Secretary of State or his designee to examine those books and records.[70]

As of the date of publication, the Secretary of State will charge an LLC or foreign LLC the following fees: (1) $100 for filing the original articles of organization; (2) $50 for amending the articles of organization; (3) an annual fee due with the annual report; and (4) filing, service, and copying fees.[71]

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[63] *Id.*

[64] *Id.* § 17-29-208(b).

[65] *Id.* § 17-29-209(a).

[66] *Id.* Additionally, the LLC or foreign LLC must pay all other statutory taxes and fees. *Id.* Exceptions to the annual report exist. *See id.* § 17-29-209(b).

[67] *Id.* § 17-29-209(c).

[68] *Id.*

[69] *Id.* § 17-29-209(d).

[70] *Id.* § 17-29-209(e).

[71] *Id.* § 17-29-210(a). See, however, section 17-29-705(b) concerning the normal filing fee to reinstate instead of double the fee as previously required.

## IV. ARTICLE THREE: RELATIONS OF MEMBERS AND MANAGERS TO PERSONS DEALING WITH THE LIMITED LIABILITY COMPANY

### A. *The New Authority System*

The 2010 LLC Act modifies the provisions under which authority is granted to members, managers, and other agents to act on behalf of the LLC, the benefits of which will be discussed later in this section. When considering agency and authority, properly defining the terms is of import. Agency is a "fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."[72] Authority "describes the scope of an agent's power."[73] Further, it is "the power of an agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him."[74]

The New Act's sections 17-29-301 through 17-29-303 of the Wyoming Statutes specify how an LLC deals with agency and authority. Section 17-29-301 is perhaps the most innovative yet controversial part of the new authority system because it specifies "a member is not an agent solely by reason of being a member." As described below, section 17-29-302 allows an LLC to file a statement of authority identifying those that have authority to act on behalf of an LLC. Similarly, section 17-29-303 permits a statement of denial to be filed by a person named in a previously filed statement of authority denying such purported authority. These sections combine to provide an authority system that is unique to Wyoming and the other states which have adopted some version of Re-ULLCA.

Under the Original LLC Act, if an LLC was member-managed, a member was granted authority by default to act on behalf of the LLC.[75] In other words, the statute granted a member or a manager agency authority by virtue of that person's position, which has been referred to as "positional agency power."[76] Under this

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[72] RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006); *see* RESTATEMENT (SECOND) OF AGENCY § 1 (1958).

[73] Thomas E. Rutledge & Steven G. Frost, *Re-ULLCA Section 301—The Fortunate Consequences (and Continuing Questions) of Distinguishing Apparent Agency and Decisional Authority*, 64 BUS. LAW. 37, 39 (2008).

[74] RESTATEMENT (SECOND) OF AGENCY § 7; *see* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c.

[75] WYO. STAT. ANN. § 17-15-116 (repealed 2010) (providing that management of an LLC was vested in members if a member-managed LLC and in the managers if a manager-managed LLC (as stated in the articles of organization)); *id.* §§ 17-15-117, -118 (permitting a member or manager, depending on the provision in the articles of organization, to contract debts for the LLC and hold and convey property for the LLC).

[76] Larry E. Ribstein, *An Analysis of the Revised Uniform Limited Liability Company Act*, 3 VA. L. & BUS. REV. 35, 59 (2008).

approach, the LLC was required to make clear, in its articles of organization, whether the LLC was member-managed or manager-managed so that persons dealing with the LLC could look at the public records to verify whether the person claiming to act for the LLC had such authority.

Under the 2010 LLC Act, a member is not an agent of an LLC solely by reason of being a member.[77] The drafters of Re-ULLCA intended section 301 to eliminate statutory apparent authority for two reasons: (1) an LLC needs to maintain flexibility; and (2) unlike a partnership, an LLC's name and the person's position does not signal the extent of any authority.[78] In place of statutory apparent authority, section 301(b) imports the general law of agency as a means for determining whether a person has authority to bind the LLC.[79] An LLC may still hold out a person as having authority, but the "holding out must be something other than the simply conferring of a title."[80] One method is through a "statement of authority," filed with the Secretary of State, the county real estate records, or both. The statement of authority may specify either the authority those in particular positions hold, or the person who holds the specified authority.[81] Because statutory apparent authority no longer exists when dealing with Wyoming LLCs, the filing of a statement of authority makes it easier to determine an individual's authority.[82] In fact, a statement of authority is probably desirable to alleviate possible confusion that could result from the elimination of positional authority under the 2010 Act.[83] This has usually been the case for significant commercial transactions, where positional authority is generally considered insufficient and some sort of affirmative statement of authority from the LLC is required.[84]

Statements of authority provide new advantages for Wyoming LLCs. Unlike the Original LLC Act, which only allowed members or managers to hold the power to convey property or contract debts for the LLC, the 2010 LLC Act allows

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[77] WYO. STAT. ANN. § 17-29-301(a) (2010).

[78] REVISED UNIF. LTD. LIAB. CO. ACT § 301 cmt. to subsec. (a) (2006) (stating statutory apparent authority can "easily function as a trap for the unwary"). It could also be inferred this was part of the attempt by the National Conference of Commissioners on Uniform State Laws (NCCUSL) to eliminate the need to refer to the articles of organization after the LLC was established. *See id.*

[79] *Id.* § 301 cmt. to subsec. (b). Note that this statute does not eliminate apparent agency; this concept is still viable when dealing with Wyoming LLCs.

[80] Winston Beard, *Critique of the Idaho Revised Uniform Limited Liability Company Act*, THE ADVOCATE, Sept. 2009, at 23–24.

[81] WYO. STAT. ANN. § 17-29-302 (noting a statement of denial can also be filed by a person who does not wish to have the authority granted to him or her by the LLC); *id.* § 17-20-303.

[82] Beard, *supra* note 80, at 24.

[83] Rutledge & Frost, *supra* note 73, at 56.

[84] *See id.*

a statement of authority to grant this power to any person.[85] The statute, however, does not specify that this person must be a member or a manager. An LLC may grant authority to persons who are employees of the LLC in order to protect the members and managers from public disclosure, but this power is limited in that it can only be used to "bind a limited liability company to persons that are not members."[86] Specifically, the comments to this section of Re-ULLCA indicate that the statement of authority concerns only the authority of the LLC to bind itself to third persons. As among the members, the power to take certain action is governed by the operating agreement or the provisions of Re-ULLCA that govern the relations among members.[87]

Finally, it should be noted that the 2010 LLC Act authority regime may have certain disadvantages. One commentator has indicated that under the Re-ULLCA authority regime, LLCs no longer have an easy way of notifying third parties of the default authority members hold in a member-managed LLC. Therefore, the costs to LLCs of dealing with third parties may be increased.[88] The costs to third parties may be increased as well because the new authority regime can be unpredictable.[89]

### *B. Liability Under Wyoming Statute Section 17-29-304(b)*

Section 17-29-304(b) of the 2010 LLC Act states, "The failure of a limited liability company to observe any particular formalities relating to the exercise of its powers or management of its activities is not a ground for imposing liability on the members or managers for the debts, obligations or other liabilities of the company."[90] This principle is not new to Wyoming. The Wyoming Statutory Close Corporation Supplement section 17-17-125 provides "[t]he failure of a statutory close corporation to observe the usual corporate formalities or requirements relating to the exercise of its corporate powers or management of its business and affairs is not a ground for imposing personal liability on the shareholders for liabilities of the corporation."[91] Section 17-29-304(b) of the 2010 LLC Act and its comments provide courts with needed direction in cases where "piercing the LLC veil" is an issue.[92] Specifically, the drafters of Re-ULLCA note that the "disregard of corporate formalities" is not an appropriate factor to consider in veil piercing

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[85] *Compare* WYO. STAT. ANN. § 17-29-302(a)(iii) (2010), *with* WYO. STAT. ANN. §§ 17-15-117, -118 (repealed 2010).

[86] WYO. STAT. ANN. § 17-29-302(c) (2010).

[87] REVISED UNIF. LTD. LIAB. CO. ACT § 302 cmt. to subsec. (c) (2006).

[88] Ribstein, *supra* note 76, at 61.

[89] *Id.*

[90] WYO. STAT. ANN. § 17-29-304(b).

[91] *Id.* § 17-17-125.

[92] "Piercing the veil" describes a legal decision to treat the liabilities of a business entity as those of its owners.

arguments because informality is "common and desirable" in an LLC.[93] They also note, however, that this section is not meant to eliminate the use of a factor such as "disregard of the entity's economic separateness" from consideration.[94] As discussed below, the Wyoming Supreme Court has mentioned other factors it may still consider in the context of a "piercing" analysis.

In *Kaycee Land & Livestock v. Flahive*, the Wyoming Supreme Court held it is possible to pierce the LLC veil.[95] The court stated, albeit in dicta, the factors for piercing the veil of an LLC would not be identical to those used for a corporate veil piercing because the Original LLC Act intended for LLCs to be more flexible.[96] More recently, in *Gasstop Two, LLC v. Seatwo, LLC*, the Wyoming Supreme Court listed "failure to observe company formalities" as one of the four categories of piercing factors that may be used to determine whether to pierce the LLC veil.[97] Section 17-29-304(b) of the 2010 LLC Act makes clear that such a failure is no longer grounds for liability. The other categories mentioned in *Gasstop Two*, including fraud, inadequate capitalization, and intermingling the business and finances of a company and its members, remain as grounds for piercing the LLC veil.[98]

## V. ARTICLE FOUR: RELATIONS OF MEMBERS TO EACH OTHER AND TO THE LIMITED LIABILITY COMPANY

### A. *Single Member LLCs*

The Original LLC Act required that an LLC have at least two members unless the organizer elected "flexible limited liability company" status.[99] The 2010 LLC Act eliminates the provisions dealing with a "flexible limited liability company" and provides that an LLC may have a single member upon formation.[100] If the organizer of the LLC is not the single member, then the organizer "determines" who the initial member will be and acts on the single member's behalf.[101]

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[93] REVISED UNIF. LTD. LIAB. CO. ACT § 304 cmt. to subsec. (b) (2006).

[94] *Id.*

[95] 46 P.3d 323, 329 (Wyo. 2002).

[96] *Id.* at 328.

[97] 225 P.3d 1072, 1077 (Wyo. 2010).

[98] *Id.*

[99] WYO. STAT. ANN. § 17-15-106 (repealed 2010) (providing that an LLC could only be formed with two or more members); *id.* § 17-15-144(d) (allowing an LLC that elected to be a flexible LLC to be owned by one member).

[100] WYO. STAT. ANN. § 17-29-401(a) (2010).

[101] *Id.*

### B. *Contributions*

The 2010 LLC Act specifically permits a person to become a member even though the person does not make, or is not obliged to make, a contribution to the LLC.[102] The Wyoming Supreme Court recently held the Original LLC Act allowed a person to become a member without making a contribution.[103] This conclusion was reached, however, in a case where the articles of organization identified certain persons as members and stated that cash contributions were being made "at this time."[104] Under these circumstances the court held that such persons were members even though they had not actually made the capital contributions.[105] The court's holding is not as definitive as the language contained in the 2010 LLC Act.[106]

Both the 2010 LLC Act and the Original LLC Act allow a contribution to be made of almost anything, including services rendered to the LLC.[107] The Original LLC Act specified that a contribution may be made in "cash or other property, promissory notes or services," but it did not specifically state, as the 2010 LLC Act does, that a contribution may consist of "intangible property or other benefit" to the LLC.[108] As a result, the New Act provides more flexibility regarding the types of contributions that a member can make to an LLC.

Further, the New Act specifically states if a person has an obligation to contribute to the LLC, that obligation is not "excused by the person's death, disability or other inability to perform personally."[109] If the person does not perform, the "person or the person's estate is obligated to contribute money equal to the value of the part of the contribution which has not been made, at the option of the company."[110] The obligations under the 2010 LLC Act are similar to those found in the Original LLC Act, which provided that a member was liable for "the difference between his or its contributions to capital as actually made and that stated" in the company documents.[111]

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[102] *Id.* § 17-29-401(e).

[103] *In re* Kite Ranch, LLC, 234 P.3d 351, 356–57 (Wyo. 2010).

[104] *Id.* at 356.

[105] *Id.* at 356–57.

[106] *Compare id.* at 356, *with* WYO. STAT. ANN. § 17-29-401(e).

[107] *Compare* WYO. STAT. ANN. § 17-29-402 (2010), *with* WYO. STAT. ANN. § 17-15-115 (repealed 2010).

[108] *Compare* WYO. STAT. ANN. § 17-29-402 (2010), *with* WYO. STAT. ANN. § 17-15-115 (repealed 2010).

[109] WYO. STAT. ANN. § 17-29-403 (2010).

[110] *Id.*

[111] WYO. STAT. ANN. § 17-15-121(a)(i) (repealed 2010).

Additionally, a difference between the 2010 LLC Act and the Original LLC Act is the manner in which unpaid contributions are handled. Under the Original LLC Act, liability for unpaid contributions could be "waived or compromised only by the consent of all members."[112] Under the 2010 LLC Act, the obligation to pay a contribution can be waived at "the option of the company," indicating that approval by the members or by the managers may be acceptable.[113] The votes required for such an action depend on whether the action is considered in the ordinary course of business.[114] The 2010 LLC Act gives an LLC the option to require money equal to the value of the unpaid contribution.[115]

### *C. Distributions*

The most significant change made by the 2010 LLC Act regarding distributions is set forth in Wyoming Statute section 17-29-404. Unless the operating agreement provides otherwise, interim distributions are to be made "in equal shares" to members, rather than upon the comparative value of the contributions made by members.[116] In addition to this fundamental change, which was part of Re-ULLCA, two provisions of Wyoming "home cooking" were added to section 17-29-404. First, the legislature wished to make clear that the operating agreement could provide for distributions other than in equal shares.[117] Second, if no verbal or written operating agreement exists, then the members' relative rights to distributions will be determined by the LLC's tax filings with the IRS.[118]

Like the Original LLC Act, distributions under the New Act can only be made if the assets of the LLC are in excess of the liabilities.[119] However, a second difference between the two acts is found within the default provisions on interim distributions to dissociated members.[120] Under the New Act, a member who withdraws, is expelled, or dies is not entitled to a distribution, except where the operating agreement provides for such a distribution, the LLC elects to make an interim distribution, or the LLC dissolves.[121] In *Lieberman v. Wyoming.com LLC*,

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[112] *Id.* § 17-15-121(c).

[113] WYO. STAT. ANN. § 17-29-403 (2010).

[114] *Id.* § 17-29-407.

[115] *Id.* § 17-29-403.

[116] *Compare id.* § 17-29-404(a), *with* WYO. STAT. ANN. § 17-15-119 (repealed 2010).

[117] Senator Charles Scott was the main proponent of the two Wyoming "home cooking" provisions contained in section 17-29-404.

[118] WYO. STAT. ANN. § 17-29-404(a)(iii) (2010).

[119] *Compare id.* § 17-29-405(a)(ii), *with* WYO. STAT. ANN. § 17-15-119 (repealed 2010).

[120] *Compare* WYO. STAT. ANN. § 17-29-404(b) (2010), *with* WYO. STAT. ANN. § 17-15-119 (repealed 2010).

[121] WYO. STAT. ANN. §§ 17-29-404(b), -603, -708(b) (2010).

a case decided under the Original LLC Act, the Wyoming Supreme Court held if a member withdraws, is expelled, or dies, that member may receive a return of his or her capital contribution under certain circumstances.[122] By contrast, the New Act specifies that unless the operating agreement provides otherwise, "[a] person's dissociation does not entitle the person to a distribution."[123]

A third difference between the Original LLC Act and the New Act relates to in kind distributions.[124] The Original LLC Act allowed for a distribution in kind of any amount as long as the operating agreement so provided.[125] The 2010 LLC Act only allows distributions in kind if "each part of the asset is fungible with each other part and each person receives a percentage of the asset equal in value to the person's share of distributions."[126] This section strikes a compromise between "forcing the firm to sell assets in order to make distributions in cash and forcing the firm to value illiquid assets in order to ensure price equitable in kind distributions."[127] One problem with this provision may be its limited utility because few assets fit its description.[128]

A fourth difference between the 2010 LLC Act and the Original LLC Act is that under the New Act a person may be held liable for taking a distribution.[129] The Original LLC Act was silent regarding liability for members who receive improper distributions. Under the New Act, if a manager of a manager-managed LLC or a member of a member-managed LLC consents to a distribution and thereby violates one of the standards of conduct contained in section 17-29-409, such person will be held "personally liable to the LLC for the amount of the distribution that exceeds the amount that could have been distributed without the violation."[130] This, of course, encourages managers and members to be aware of both the rules regarding distributions and their own fiduciary duties in order to avoid personal liability. If a member receives a distribution "knowing that the

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[122] 82 P.3d 274, 278–79 (Wyo. 2004) [hereinafter *Lieberman II*]. *Lieberman II* was part of a triumvirate of cases which will be discussed in more detail as a part of the discussion regarding Article Six of the 2010 LLC Act in this article. *See infra* Part VII.A. A later *Lieberman* case held that a member is entitled to a portion of the member's equity interest as well. Lieberman v. Mossbrook, 208 P.3d 1296, 1311 (Wyo. 2009) [hereinafter *Mossbrook*].

[123] WYO. STAT. ANN. § 17-29-404(b).

[124] An "in kind" distribution is a distribution of property as opposed to the sale of property and the distribution of proceeds from the sale.

[125] WYO. STAT. ANN. § 17-15-119 (repealed 2010) ("Distributions of cash or other assets of a limited liability company shall be allocated among the members and among classes of members in the manner provided in the operating agreement.").

[126] WYO. STAT. ANN. § 17-29-404(c) (2010).

[127] Ribstein, *supra* note 76, at 54.

[128] *Id.* at 59.

[129] WYO. STAT. ANN. § 17-29-406(a).

[130] *Id.*

distribution . . . was made in violation of W.S. 17-29-405," the member will be held liable to the LLC for the amount of the distribution over the amount that should have been paid.[131] A member or a manager may implead others who should be held liable for the same offense.[132]

The final difference between the 2010 LLC Act and the Original LLC Act regarding distributions is the New Act makes it clear that a distribution does not include "amounts constituting reasonable compensation for present or past services or reasonable payments made in the ordinary course of business under a bona fide retirement plan or other benefits program."[133] This provision serves to protect the salaries of managers or other employees of the LLC from creditors.[134]

### *D. Management*

Similar to the fundamental change made by the new LLC Act to members' rights to distributions, management rights under the 2010 LLC Act are now equally shared by the LLC members in a member-managed LLC.[135] Under the Original LLC Act, management rights were shared in proportion to the member's contribution to the LLC.[136] Unless there is a contrary provision in the articles of organization or the operating agreement, managers have equal rights in the management and conduct of company activities in a manager-managed LLC.[137]

The 2010 LLC Act addresses a number of other matters relating to management that were not addressed in the Original LLC Act[138] For example, the Original LLC Act contained no specific provisions regarding the number of votes needed for various types of decisions. Unless the articles of organization or the operating agreement provide otherwise, the 2010 LLC Act specifies that differences regarding a matter in the ordinary course of business can be decided by a majority of the members (or managers in the case of a manager-managed LLC).[139] If the nature of a decision or certain action lies outside the ordinary course of the company's activities, a vote from all of the members (or managers in the case of a manager-managed LLC) is required.[140]

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[131] *Id.* § 17-29-406(c).

[132] *Id.* § 17-29-406(d).

[133] *Id.* § 17-29-405(g).

[134] REVISED UNIF. LTD. LIAB. CO. ACT § 405 cmt. to subsec. (g) (2006).

[135] WYO. STAT. ANN. § 17-29-407(b)(ii).

[136] *Compare id.* § 17-29-407(b)(ii), *with* WYO. STAT. ANN. § 17-15-116 (repealed 2010).

[137] WYO. STAT. ANN. § 17-29-407(c)(ii) (2010).

[138] *Compare id.* § 17-29-407, *with* WYO. STAT. ANN. § 17-15-116 (repealed 2010).

[139] WYO. STAT. ANN. § 17-29-407(b)(iii), (c)(iii) (2010).

[140] *Id.* § 17-29-407(b)(iv), (c)(iv).

Another added provision is that a single manager in a multi-manager LLC may act individually without referring every matter "in the ordinary course" for a vote.[141] Instead, as each manager has "equal rights" in the management, if the manager reasonably believes the matter is an "ordinary matter" that will not be controversial, the manager can act individually as long as he or she does not exceed the authority he or she has been given.[142] In this way, managers do not function as a board of directors but more like partners in a partnership.[143]

Although the 2010 LLC Act describes how a manager should manage, the actual authority held by a manager depends on agency law, manager contracts, and the operating agreement.[144] In order for a manager to know his or her authority, the manager can also look to the past course of dealings between the LLC and the manager.[145] If there is a conflict between a manager's contract (or other communications to the manager) and the provisions of the operating agreement, the operating agreement prevails.[146]

The 2010 LLC Act contains protective provisions regarding managers or members who wrongfully cause the dissolution of the LLC.[147] Under the New Act, if a person wrongfully causes the dissolution of the company, that person "loses the right to participate in management as a member and a manager."[148] No comparable provision existed in the Original LLC Act.

Finally, the 2010 LLC Act provides if an LLC has no members for a period of at least ninety days, the last person to be a member, or that person's legal representative, may designate a person to become a member.[149] A person's legal representative can appoint himself or herself as a member.[150]

### *E. "Uncabining" Fiduciary Duties and Setting Standards of Conduct*

Section 17-29-409 represents a significant departure from the former Wyoming approach regarding fiduciary duties with respect to an LLC and its members. Until this section was adopted, there was neither case nor statutory law specifying the fiduciary duties members or managers owed to the LLC or

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[141] REVISED UNIF. LTD. LIAB. CO. ACT § 407 cmt. to subsec. (c) (2006).

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.* §§ 407 cmt. to subsec. (c), 111(a)(2) cmt. to para. (a)(2).

[147] WYO. STAT. ANN. § 17-29-407(e) (2010).

[148] *Id.*

[149] *Id.* § 17-20-401(d)(vi)(A).

[150] REVISED UNIF. LTD. LIAB. CO. ACT § 401 cmt. to subsec. (d).

to other members or managers.[151] Because of the contractual nature of the LLC, there is no inherent expectation that members or managers have any fiduciary duties by default.[152] In *Lieberman v. Mossbrook*, a member of an LLC (that had since become a corporation) claimed that the majority shareholders breached a fiduciary duty by not providing him with certain company documents.[153] The Wyoming Supreme Court, without further explanation, held the shareholders had not breached a fiduciary duty.[154] In the only other case in which there was a claim of breach of fiduciary duties in the LLC context, the court did not reach the question of what fiduciary duties exist among members, managers, and the LLC.[155]

Essentially, Re-ULLCA codifies the fiduciary duties previously found in other statutory or case law applicable to corporations or partnerships.[156] Commentator Ribstein calls the method of delineating fiduciary duties in the Re-ULLCA an "uncabining" of fiduciary duties because it leaves open to the courts the possibility of creating duties besides those specified in the New Act.[157] Ribstein is critical of the Re-ULLCA approach because, in his opinion, it "opens a Pandora's box of potential uncertainty about what other duties members and managers may have."[158] However, Wyoming's method of delineating the fiduciary duties in the LLC context addresses some of his concerns. The duties listed in the 2010 LLC Act include a duty of loyalty, a duty of care, and a contractual obligation of good faith and fair dealing.[159] Other duties might exist under the 2010 LLC Act as well, as will be discussed later.[160]

### *1. Good Faith and Fair Dealing*

Section 17-29-409(d) of the New Act specifies that members and managers are subject to the "contractual obligation of good faith and fair dealing" when discharging their duties and exercising their rights. Arguably, this section confirms the prior law established in *Wilder v. Cody County Chamber of Commerce*, where

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[151] Rogers, *supra* note 3, at 383 (noting Wyoming has "no statutorily imposed fiduciary duty requirements" for LLCs).

[152] *Id.* at 369.

[153] 208 P.3d 1296, 1311–12 (Wyo. 2009).

[154] *Id.* at 1312.

[155] *See* Belden v. Thorkildsen, 156 P.3d 320, 323 (Wyo. 2007).

[156] Nicole C. Trammel, *Fiduciary Duties in Limited Liability Companies*, THE ADVOCATE, Sept. 2009, at 20.

[157] Ribstein, *supra* note 76, at 62; *see* Kleinberger & Bishop, *supra* note 5, at 522 ("[T]he underlying idea [in RUPA] was to 'cabin in' fiduciary duty so as to protect partnership agreements from judicial second-guessing.").

[158] Ribstein, *supra* note 76, at 62.

[159] WYO. STAT. ANN. § 17-29-409 (2010).

[160] *See infra* Part V.E.4.

the Wyoming Supreme Court adopted the standard of good faith and fair dealing in contractual dealings.[161] As an LLC is a contractual entity, it is axiomatic that the obligation of good faith and fair dealing already existed with respect to LLCs. However, specific statutory recognition of an obligation of good faith and fair dealing in the new LLC Act may prevent members from being "squeezed out" of membership.[162] Further guidance regarding the scope of the duty of good faith and fair dealing is found in the comment to subsection 409(d) of the Re-ULLCA:

> [T]he obligation [of good faith and fair dealing] 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. . . . [T]he purpose of the obligation of good faith and fair dealing is to protect the arrangement the [members] have chosen for themselves, not to restructure that arranged under the guise of safeguarding it.[163]

As this comment makes clear, the duty of good faith is not meant to create new obligations but merely to protect those that have already been agreed upon. The boundary for good faith is "the intent of the parties expressed in the operating agreement as supplemented by the duties created by the new act."[164]

### 2. *Duty of Loyalty*

While section 17-29-409(b) describes what the duty of loyalty includes, it does not set forth an all-inclusive description and thus allows the duty to "roam according to circumstances."[165] In that spirit, the New Act includes the following within the duty of loyalty: (1) fiduciaries cannot profit from the conduct of the LLC; (2) fiduciaries cannot usurp for their own benefit an opportunity available to the LLC; (3) fiduciaries cannot deal with the LLC as a party with an interest adverse to the interests of the LLC during the winding up of the company; and (4) fiduciaries are not to compete with the LLC.[166]

Because these duties are nonexclusive, the courts can interpret a fiduciary's duty using the common law rather than being limited to the language contained

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[161] 868 P.2d 211, 220 (Wyo. 1994); Rogers, *supra* note 3, at 369.

[162] Rogers, *supra* note 3, at 368.

[163] REVISED UNIF. LTD. LIAB. CO. ACT § 409 cmt. to subsec. (d) (2006).

[164] Carter G. Bishop, *A Good Faith Revival of Duty of Care Liability in Business Organization Law*, 41 TULSA L. REV. 477, 510 (2006).

[165] *Id.* at 508 (citing REVISED UNIF. LTD. LIAB. CO. ACT § 409(b)).

[166] WYO. STAT. ANN. § 17-29-409(b)(i)(A), (b)(i)(C), (b)(ii), (b)(iii) (2010).

in the statute.[167] Section 17-29-409(b) imposes fiduciary duties upon "member[s] in a member-managed limited liability company."[168] Section 17-29-409(g)(i) also imposes these duties upon managers, and not the members, in a manager-managed LLC. Choosing a manager-managed LLC will protect investors who do not want to participate in management and do not want to be subject to a duty of loyalty.[169]

As further "home cooking," the 2010 LLC Act improves upon the Re-ULLCA approach regarding the defense available to members under section 17-29-409(e); member ratification under section 17-29-409(f); and fiduciary duties imposed upon members under section 17-29-409(g)(v). According to the Re-ULLCA, "it is a defense to a claim [under section 17-29-409(b)(ii) that a fiduciary has acted in his or her self interest] that the transaction was fair to the limited liability company."[170] Ribstein previously criticized the use of the "fair" standard because parties need to know "what the rules are at the time of the relevant conduct rather than having to wait until the conduct is litigated."[171] The 2010 LLC Act may not answer his concerns, but it does enlarge a fiduciary's allowable defense if the transaction is "fair to or at least not opposed to the limited liability company."[172] Wyoming's approach makes it possible for a member or manager to deal with those who have an interest adverse to an LLC as long as the resulting transaction is at least not opposed to the best interests of the LLC. This gives the members or managers more leeway in deciding which transactions to enter into without worrying so much about the definition of "fair," thus allowing them to rely on the fact that they can enter into transactions as long as they are "not opposed to" the LLC.

### 3. *Duty of Care*

The duty of care in the 2010 LLC Act is found in section 17-29-409(c), which states:

> Subject to the business judgment rule, the duty of care of a member of a member-managed limited liability company in the conduct and winding up of the company'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

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[167] Rutherford B. Campbell, Jr., *The "New" Fiduciary Standards Under the Revised Uniform Limited Liability Company Act: More Bottom Bumping from NCCUSL*, 61 ME. L. REV. 27, 48 (2009).

[168] WYO. STAT. ANN. § 17-29-409(b).

[169] Bishop, *supra* note 164, at 504 (citing REVISED UNIF. LTD. LIAB. CO. ACT § 409(b)).

[170] REVISED UNIF. LTD. LIAB. CO. ACT § 409(e).

[171] Ribstein, *supra* note 76, at 64.

[172] WYO. STAT. ANN. § 17-29-409(e).

> reasonably believes to be in the best interests or at least not opposed to the best interests of the company. In discharging this duty, a member may rely in good faith upon opinions, reports, statements or other information provided by another person that the member reasonably believes is a competent and reliable source for the information.[173]

This section applies to managers, and not to members, in manager-managed LLCs.[174] Again, choosing a manager-managed style will protect investors who do not want to participate in management and do not want to be subject to a duty of care.[175] According to the drafters of the Re-ULLCA, this was meant to be the "best of both worlds."[176] It provides a standard of ordinary care but "subject[s] that standard to the business judgment rule to the extent circumstances warrant."[177] Because the business judgment rule varies from jurisdiction to jurisdiction, the meaning of this subsection varies as well.[178] While subjecting the duty of care to the business judgment rule may allow for differences in interpretation from one jurisdiction to another, the use of the business judgment has lead to criticism of the duty of care provision under the Re-ULLCA.[179]

One criticism of the duty of care is that it is "circular" and confusing.[180] The prefatory language claims that it will apply an ordinary negligence standard, but the business judgment rule usually incorporates a gross negligence standard that the Re-ULLCA has supposedly eliminated.[181] In addition, commentator Ribstein believes that the business judgment rule introduces a "corporate concept that is inappropriate" for LLCs because they more closely resemble partnerships and closely held corporations.[182] Members in LLCs are motivated more by their own interests than they would be by a duty of care.[183]

The Wyoming Supreme Court, in *Mueller v. Zimmer*, embraced the following explanation of the business judgment rule:

> The business judgment rule is a standard of judicial review for director conduct, not a standard of conduct. The rule

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[173] *Id.* § 17-29-409(c).

[174] *Id.* § 17-29-409(g)(i).

[175] Bishop, *supra* note 164, at 504.

[176] REVISED UNIF. LTD. LIAB. CO. ACT § 409 cmt. to subsec. (c) (2006).

[177] *Id.*

[178] *Id.*

[179] Ribstein, *supra* note 76, at 65.

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] *Id.*

> presumes that business decisions are made by disinterested and independent directors on an informed basis and with a good faith belief that the decision will serve the best interests of the corporation. If directors are sued with respect to a decision they have made . . . , the court will examine the decision only to the extent necessary to determine whether the plaintiff has alleged and proven facts that overcome the business judgment rule presumption that business decisions are made by disinterested and independent directors on an informed basis and with a good faith belief that the decisions will serve the best interests of the corporation. If the presumption has not been overcome, "then the business judgment rule prohibits the court from going further and examining the merits of the underlying business decision" and "prevent[s] a factfinder, in hindsight, from second-guessing the decisions of directors." . . .
>
> . . . .
>
> . . . A court does not "substitute its own notion of what is or is not sound business judgment" in place of the board's judgment.[184]

Whether the Wyoming Supreme Court will apply this formulation of the business judgment rule to section 17-29-409(c) remains uncertain.

### *4. Other Duties*

The duties of care and loyalty are not the only fiduciary duties available under the 2010 LLC Act. They are meant to be "examples but not exclusive expressions."[185] One example of an additional fiduciary duty is a member-to-member duty inferred from the oppression remedy as found in section 17-29-701(a)(v)(B).[186] Commentator Ribstein states, however, any fiduciary duty implied for non-managing members would be inappropriate and, in fact, has criticized the Re-ULLCA because such duties may be implied from its language.[187] Therefore, as long as the duties that are read into the statute by the court do not include duties based on the status of the member, per section 17-29-409(g)(v), any other fiduciary duties are possible by statute.

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[184] 124 P.3d 340, 351–52 (Wyo. 2005) (quoting DENNIS J. BLOCK, NANCY E. BARTON & STEPHEN A. RADIN, THE BUSINESS JUDGMENT RULE: FIDUCIARY DUTIES OF CORPORATE DIRECTORS 4–5, 21–22, 25–27 (5th ed. 1998)).

[185] Bishop, *supra* note 164, at 508.

[186] Ribstein, *supra* note 76, at 62.

[187] *Id.*

### *F. The Right to Receive Information*

Section 17-29-410 provides a right to members, managers, and dissociated members that they never had under the Original LLC Act: a right to information. This section allows a member in a member-managed LLC to copy, upon reasonable notice, any record regarding the "company's activities, financial condition and other circumstances" if it is "material to the member's rights and duties."[188] This information must be provided by the LLC unless the LLC can establish it "reasonably believes the member already knows the information."[189] However, unlike the Re-ULLCA, which requires this information to be furnished without demand, the 2010 LLC Act provides this information must only be given if the member demands it.[190] Even if the information does not pertain to the member's duties, the member has access to the information unless the information demanded is "unreasonable or otherwise improper under the circumstances."[191] A member must also provide this information to other members "to the extent the member knows it."[192]

If the LLC is manager-managed, the manager has the same informational rights as mentioned above, and the manager has the duty to provide information that is known to the manager.[193] The member in a manager-managed LLC retains the right to obtain full information regarding the "activities, financial condition and other circumstances of the company" at a reasonable location and during regular business hours.[194] However, the member only has access to this information if: (1) the member "seeks the information for a purpose material to the member's interest as a member;" (2) the member "makes a demand in a record received by the company" that describes the information the member desires and the purpose for it; and (3) the information the member wants is "directly connected to the member's purpose."[195] The LLC must provide this information within ten days or give reasons for declining to provide it.[196]

A dissociated member also has a right to information, but it is more limited than that provided to current members or managers. A dissociated member may have access to information he or she was entitled to while a member if it "pertains to the period during which the person was a member, the person seeks the

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[188] WYO. STAT. ANN. § 17-29-410(a)(i) (2010).

[189] *Id.* § 17-29-410(a)(ii)(A).

[190] *Compare id.*, *with* REVISED UNIF. LTD. LIAB. CO. ACT § 410(a)(2)(A) (2006).

[191] WYO. STAT. ANN. § 17-29-410(a)(ii)(B).

[192] *Id.* § 17-29-410(a)(iii).

[193] *Id.* § 17-29-410(b)(i).

[194] *Id.* § 17-29-410(b)(ii).

[195] *Id.*

[196] *Id.* § 17-29-410(b)(iii).

information in good faith and the persons satisfies the requirements" of a member requesting information while it was manager-managed.[197] The LLC must respond within ten days and provide a reason if it will not provide the information.[198] A transferee has no rights to information provided by this section.[199]

In general, in addition to stating restrictions and conditions in the operating agreement, the LLC may "impose any reasonable restrictions and conditions on access to and use of information."[200] If a dispute arises regarding the LLC's behavior, the LLC has the burden of proving reasonableness.[201]

## VI. ARTICLE FIVE: TRANSFERABLE INTERESTS AND RIGHTS OF TRANSFEREES AND CREDITORS

### A. *Nature of Interest*

By definition, a "transferable interest" in an LLC is "the right, as originally associated with a person's capacity as a member, to receive distributions from a limited liability company in accordance with the operating agreement."[202] According to Wyoming Statute section 17-29-501, a transferable interest in an LLC is deemed to be personal property. This is the modern approach for ownership interests in nearly all business entities, whether taxable as corporations or as partnerships.[203] Under the initial "aggregate" notion of the law of general partnerships, a partner was in effect a co-tenant as to partnership property. However, under the Re-ULLCA and the 2010 LLC Act, the owner of a transferable interest in an LLC only owns the economic rights associated with that membership interest and has no management rights or ownership interest in the assets of the LLC itself.[204] A modern example of the aggregate approach can be found in the Wyoming Statutory Trust Act, which expressly provides that the owner of beneficial interests in a statutory trust has an undivided beneficial interest in the property of the statutory trust.[205] This distinction can be meaningful in certain contexts.[206]

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[197] *Id.* § 17-29-410(c).

[198] *Id.*

[199] *Id.* § 17-49-410(f).

[200] *Id.* § 17-49-410(g).

[201] *Id.*

[202] *Id.* § 17-29-102(a)(xxii).

[203] *See, e.g.*, *id.* § 17-14-801 (limited partnerships); *id.* §§ 17-21-501, -502 (general partnerships).

[204] *Id.* § 17-29-502(a)(iii)(A), (g); *see* REVISED UNIF. LTD. LIAB. CO. ACT § 502 cmt. (2006).

[205] WYO. STAT. ANN. § 17-23-107(a).

[206] For example, Wyoming Statute section 9-4-831 does not expressly authorize a Wyoming governmental entity to invest in shares of a statutory trust, but if one hundred percent of the assets of the statutory trust are themselves permissible investments under that statute, the acquisition of a beneficial interest in a statutory trust should be permissible.

### B. *Transfer of Transferable Interest*

The transfer of ownership interests in an LLC is restricted to reflect the partnership-like nature of the entity and its fidelity to the right of owners to pick their own partners.[207] Unless the operating agreement provides otherwise, a member of an LLC cannot single-handedly transfer management and governance rights otherwise inherent in a membership interest to a non-member.[208] Only the economic rights of a member, i.e., the transferable interest, can be transferred without the consent of the other members.[209] One significant change in Wyoming law, as embodied in section 17-29-502, is the ability to transfer non-economic rights to a party who is already a member of the LLC.[210] If the transferor was a member having both economic rights and non-economic management rights, the transfer of the transferable interest does not cause the transferor to cease to be a member.[211] Following the transfer of a member's entire transferable interest, the member can be expelled and would thereby cease to continue holding the management and other non-economic rights of a member.[212]

### C. *Charging Order*

LLCs were initially promoted as a superior alternative to a general partnership because they were taxed in the same manner but afforded limited liability to the members with respect to the liabilities of the company.[213] In addition to this classic form of limited liability, which is comparable to the liability protection corporate shareholders have from the debts and obligations of a corporation, there is a potentially significant additional benefit available to the members of an LLC because the assets inside the company can be protected from the member's creditors.[214] It is this latter form of liability protection that is often desired in estate planning contexts.

The asset protection advantages that occur through use of an LLC in an estate plan are somewhat limited in most jurisdictions. First, use of an LLC to protect assets of the LLC and its members may only represent a short term solution. The assets are only protected until a distribution from the LLC to the owner of a

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[207] REVISED UNIF. LTD. LIAB. CO. ACT § 502 cmt.

[208] *Id.*; *see* WYO. STAT. ANN. § 17-29-401(d).

[209] WYO. STAT. ANN. § 17-29-502(a)(i), (ii).

[210] The drafting committee's comments to the Re-ULLCA indicate that "a member may transfer governance rights to another member without obtaining consent from the other members." REVISED UNIF. LTD. LIAB. CO. ACT § 502 cmt.

[211] WYO. STAT. ANN. §§ 17-29-502(g), -602(a)(iv)(B).

[212] *Id.* § 17-29-602(a)(iv)(B).

[213] 1 RIBSTEIN & KEATINGE, *supra* note 2, at 1–7.

[214] WYO. STAT. ANN. § 17-29-503(g).

transferable interest occurs.[215] Second, the law in most jurisdictions allows judicial foreclosure sales.[216] Third, this form of business organization is still relatively new, and there is not much direct case law to provide guidance on the ideal way to structure an LLC to protect assets. Of course, the final frailty of this or any other asset protection device is the impact of the local jurisdiction's fraudulent conveyance laws. The 2010 LLC Act nevertheless promotes the ability of an owner of property to enjoy protection from claims of creditors to a greater extent than permitted in most jurisdictions and to a greater extent than was permitted under prior Wyoming law.[217]

Under both Re-ULLCA and the Uniform Limited Liability Company Act (ULLCA) before it, a "charging order" is described as a creditor's exclusive means of satisfying a judgment by allowing a creditor to attach a debtor's interest in an LLC.[218] The charging order under both Re-ULLCA and ULLCA acts as a lien on the debtor's transferable interest in the LLC.[219] As further "home cooking," the 2010 LLC Act eliminates the lien rights and ability to foreclose contained in Re-ULLCA.[220] As a result, the ability to intercept LLC distributions pursuant to a charging order is a judgment creditor's exclusive remedy with respect to the transferable interest that the judgment debtor may have in an LLC.[221] A charging

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[215] *Id.* § 17-29-708(b)(i), (ii)(B).

[216] *See, e.g.*, UNIF. LTD. LIAB. CO. ACT § 504(b) (1996) (allowing the court to order foreclosure of a lien on a distributional interest); REVISED UNIF. LTD. LIAB. CO. ACT § 503(c) (2006) (allowing the court to order a foreclosure on a lien or order the sale of the transferable interest upon a showing that distributions will not pay the judgment within a reasonable period of time).

[217] In addition to the changes noted elsewhere in this article regarding (1) express application of the exclusive charging order remedy to single member LLCs, (2) denial of a foreclosure right, and (3) restriction against "reverse veil-piercing" remedies against LLC assets, the new statutory provisions clarify a potential ambiguity in Wyoming Statute section 17-15-145 as initially enacted in 2002. That provision applied a charging order to the judgment debtor's "distributional interest" without defining the meaning of that term. The term "distributional interest" was apparently taken from the ULLCA, but the ULLCA definition was not included in the 2002 Wyoming legislation, nor was any provision included indicating that guidance or definition should be sought from the ULLCA. 2002 Wyo. Sess. Laws 71–72. Under section 503(e)(3) of the ULLCA, the "distributional interest" of a member or a transferee included not only the right to receive distributions but also the right to seek judicial liquidation of the LLC, whereas a "transferable interest" under the 2010 LLC Act does not include this right to seek judicial liquidation.

[218] UNIF. LTD. LIAB. CO. ACT § 504(a), (e); REVISED UNIF. LTD. LIAB. CO. ACT § 503(a), (g).

[219] UNIF. LTD. LIAB. CO. ACT § 504(b); REVISED UNIF. LTD. LIAB. CO. ACT § 503(c).

[220] *Compare* WYO. STAT. ANN. § 17-29-503 (2010), *with* REVISED UNIF. LTD. LIAB. CO. ACT § 503.

[221] WYO. STAT. ANN. § 17-29-503(g). The Uniform Acts contemplated that a creditor with a charging order would be entitled to any distributions that otherwise would be made to the judgment debtor but would not become a transferee in the sense of being a full and permanent owner of the debtor's transferable interest in the LLC unless there was a foreclosure of the lien represented by the charging order. Under the prior Wyoming Statute section 17-15-145, Wyoming appeared to allow a creditor to become a full transferee of the debtor's LLC ownership interest. The new provision at Wyoming Statute section 17-29-503(g) will not permit this permanent shift of ownership to occur.

order requires the LLC to pay to the judgment creditor any distribution that would otherwise be paid to the judgment debtor.[222] However, nowhere in the 2010 LLC Act is there a requirement for an LLC to make distributions. Instead, distributions are discretionary. Further, unlike the Re-ULLCA, the 2010 LLC Act provides no additional remedy to a creditor if an LLC's discretionary distributions do not fully satisfy the judgment within a reasonable period of time.[223] Case law from other jurisdictions has focused upon whether a charging order that captures only the amounts voluntarily distributed by the LLC will provide a reasonable source of payment for the creditor and has fashioned additional remedies accordingly.[224]

A significant issue with respect to LLCs is whether single member LLCs can protect assets of the LLC from creditors of the member and limit a creditor solely to a charging order remedy. The original rationale of the charging order remedy was to protect the non-debtor members of an LLC from having their business relationships and organization disrupted by the creditors of one of the members.[225] This type of protection is unnecessary when an LLC is owned by a single individual and there are no other innocent LLC members whose interests can be infringed upon by allowing a creditor to be substituted for a co-owner or by allowing a creditor to reach into the LLC and remove assets from it. As written, most LLC statutes do not alter or enhance a creditor's rights based on how many persons hold membership interests in an LLC.[226] In *In re Albright*, however, the absence of differentiation for single member LLCs did not stop a bankruptcy court in Colorado from holding that the Colorado Limited Liability Act permitted different treatment of a single-member LLC.[227] This decision was troubling for those who use single member LLCs as asset protection vehicles, even outside the bankruptcy context, because the court reasoned that the policy justifications behind charging orders do not apply to single member LLCs.[228]

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[222] WYO. STAT. ANN. § 17-29-503(a).

[223] *See* REVISED UNIF. LTD. LIAB. CO. ACT § 503(c).

[224] *See, e.g.*, Nigri v. Lotz, 453 S.E.2d 780, 783 (Ga. Ct. App. 1995).

[225] REVISED UNIF. LTD. LIAB. CO. ACT § 503 cmt.

[226] *See, e.g.*, *id.* § 503.

[227] *In re* Albright, 291 B.R. 538, 540–41 (Bankr. D. Colo. 2003); *see* COLO. REV. STAT. §§ 7-80-101 to -1011 (2010). Albright was the sole member of an LLC who filed for bankruptcy and argued the bankruptcy trustee could only get a charging order, rather than satisfy the debtor's obligations with the underlying assets of the LLC. *Albright*, 291 B.R. at 540. The Chapter Seven trustee argued because Albright was the sole member of the LLC, the trustee controlled the LLC and could sell real property and distribute the proceeds to the bankruptcy estate. *Id.* The court interpreted Colorado's LLC statute and agreed with the trustee, holding the property of the LLC, rather than merely the membership interest in the LLC, became part of the bankruptcy estate. *Id.* Thus, the trustee could reach that property without piercing the veil of the LLC. *Id.* at 541. Because the LLC had no other members, the bankruptcy trustee did not require the unanimous consent of other members to take possession of Albright's membership interests. *Id.*

[228] *See Albright*, 291 B.R. at 541 ("The charging order limitation serves no purpose in a single member limited liability company, because there are no other parties' interests affected.").

The decision in *Albright* has been heavily criticized by commentators who argue its reasoning is confusing and strains the meaning of Colorado Revised Statute section 7-80-703, which, on its face, does not provide for separate remedies against single member LLCs.[229] However, other bankruptcy courts have agreed that the reasoning of *Albright* is appropriate.[230]

To date, only one case outside the bankruptcy context has addressed the issue of the applicability of charging orders to single member LLCs.[231] The non-bankruptcy case involved a question certified to the Florida Supreme Court by the United States Court of Appeals for the Eleventh Circuit.[232] The Florida Supreme Court seized upon the absence of language in the Florida statute expressly stating that the charging order was the exclusive remedy of the creditor.[233] By comparison, the court noted Florida's partnership and limited partnership acts contained such an "exclusive remedy."[234] As a result, the court interpreted the absence of such language in Florida's LLC act to mean that the general levy and execution statutes of Florida were also applicable to provide a further remedy.[235]

The 2010 LLC Act not only states the charging order is the exclusive remedy but also indicates that it is the exclusive remedy even for "any judgment debtor who may be the sole member, dissociated member or transferee."[236] The additional language in the New Act expressly extending the exclusivity of the charging order remedy to LLCs having a "sole member" leaves no question that a Wyoming court need not follow decisions that ignored the statutory exclusive remedy admonition of other state statutes, such as occurred in one case involving the exclusive remedy restriction contained in Delaware's statute.[237]

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[229] *See, e.g.*, Larry E. Ribstein, *Reverse Limited Liability and the Design of Business Associations*, 30 DEL. J. CORP. L. 199, 221–24 (2005).

[230] *See In re* A-Z Elecs., LLC, 350 B.R. 886, 890–91 (Bankr. D. Idaho 2006); *In re* Modanlo, 412 B.R. 715, 727–28 (Bankr. D. Md. 2006) (finding a debtor's membership interest is personal property; therefore, it becomes property of the estate upon the filing of a petition); *In re* Desmond, 316 B.R. 593, 595–96 (Bankr. D. N.H. 2004) (reasoning that "on the date of the bankruptcy filing, the Debtor's membership interests were personal property under Delaware law and property of the Chapter 11 estate"); First Mid-Illinois Bank & Trust N.A. v. Parker, 933 N.E.2d 1215, 1224–25 (Ill. App. Ct. 2010) (holding that the prejudgment attachment procedures in the code are available to a potential judgment creditor to preserve a debtor-member's distributional interest in an LLC).

[231] *See generally* Olmstead v. FTC, 44 So. 3d 76 (Fla. 2010).

[232] F.T.C. v. Olmstead, 528 F.3d 1310, 1311 (11th Cir. 2008).

[233] *Olmstead*, 44 So. 3d at *13–14.

[234] *Id.* at *14–15.

[235] *See id.* at *17–18.

[236] WYO. STAT. ANN. § 17-29-503(g) (2010).

[237] *See In re* Modanlo, 412 B.R. 715, 727–28 (Bankr. D. Md. 2006). In *Modanlo*, the U.S. Bankruptcy Court for the District of Maryland determined that the charging order did not provide the sole remedy of a creditor against a Delaware single-member LLC. *See id.* It did so in spite of Delaware's statute providing that "the entry of a charging order is the exclusive remedy by which

Under the Re-ULLCA, the same "exclusive remedy" language appears in section 503, but the drafting committee's comments indicate that the National Conference of Commissioners on Uniform State Laws believes a judgment creditor has an additional remedy based upon the judicially created concept of "reverse veil-piercing."[238] As it suggests, a "reverse pierce" involves a determination that an entity should be liable for its owner's debts and appears to be based on similar facts and circumstances surrounding the traditional principles applied to the piercing of a corporate veil.[239]

The Wyoming Supreme Court has extended the veil-piercing doctrine to LLCs, allowing their veil of limited liability to be pierced in the same manner as that of a corporation, even in the absence of fraud.[240] The 2010 LLC Act limits any such circumvention of the "exclusive remedy" provisions of the New Act by expressly stating that the charging order is the only method by which a judgment creditor may satisfy a judgment, either from the debtor's transferable interest "or from the assets of the limited liability company."[241] The reverse veil-piercing doctrine is distinct from attacks based upon a fraudulent transfer analysis, and a judgment creditor should in all cases remain entitled to claim that the initial transfer of assets into the LLC was a fraudulent transfer giving rise to the remedies available against the transferee of fraudulently transferred assets.[242] The presentation material prepared by the 2010 LLC Act working group drafting committee and delivered to the Wyoming Legislature expressly states the belief of the draftsmen that the only remedies available to a judgment creditor would be a charging order and an ability to pursue remedies under the Wyoming Uniform Fraudulent Transfer Act.[243]

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a judgment creditor of a member . . . may satisfy a judgment out of the judgment debtor's limited liability company interest." *See* DEL. CODE ANN. tit. 6, § 18-703(d) (2010). Since the LLC had no members other than the debtor, the court held that Delaware's statute requiring unanimous consent of the LLC's remaining members to assign the debtor's management interest was inapplicable and allowed the bankruptcy trustee to step into the debtor's shoes and place the LLC in bankruptcy. *Modanlo*, 412 B.R. at 731. The court stated, "The Court finds this concern to be applicable only in the context of a multi-member LLC, not single member LLCs." *Id.*

[238] REVISED UNIF. LTD. LIAB. CO. ACT § 503(g) (2006). The drafting committee's comments, as approved by NCCUSL at its annual conference on July 7–14, 2006, say: "This subsection is not intended to prevent a court from effecting a 'reverse pierce' where appropriate." *Id.* § 503 cmt. to subsec. (g).

[239] *See, e.g.*, Litchfield Asset Mgmt. Corp. v. Howell, 799 A.2d 298, 312 (Conn. App. Ct. 2002); C.F. Trust, Inc. v. First Flight Ltd. P'ship, 580 S.E.2d 806, 810 (Va. 2003). The former case relies exclusively on corporate case law, applying the corporate "instrumentality" and "identity" rules of veil piercing. Factors considered include exercise of control, disrespect for company formalities, commingling of funds, etc. For a discussion of reverse veil piercing, see Ribstein, *supra* note 229, at 221–24.

[240] Kaycee Land & Livestock v. Flahive, 46 P.3d 323, 324–29 (Wyo. 2002).

[241] WYO. STAT. ANN. § 17-29-503(g).

[242] *Id.* §§ 34-14-205, -206.

[243] LLC WORKING GROUP, 2010 LEGISLATIVE SUMMARY FOR SENATE FILE SF0018, at 12.

## VII. ARTICLE SIX: MEMBER DISSOCIATION

Article Six of the 2010 LLC Act delineates the causes and consequences of a person's dissociation as a member of an LLC.[244] Wyoming's Original LLC Act left gaps in this area. Under prior law, and without the comprehensive default rules that now exist in the New Act, a dispute arose between a Wyoming LLC and its withdrawing member regarding the former member's rights upon withdrawal. The now infamous dispute was litigated and ultimately appealed to the Wyoming Supreme Court four separate times.[245]

### *A. The* Lieberman *Cases*

Wyoming.com LLC (Wyoming.com), an internet service provider, was initially created with three members.[246] Michael Lieberman, a founding member, contributed $20,000 in initial capital in exchange for a forty-percent interest.[247] The other initial members contributed $30,000 in exchange for a sixty-percent interest.[248] Later, two additional members contributed $25,000 each.[249] As a result of the new members' contributions, the articles of organization were amended to reflect an increase in capitalization to $100,000.[250] Despite the additional capital, however, Lieberman's ownership interest and stated capital contribution remained the same.[251]

In February of 1998, Wyoming.com terminated Lieberman as its vice president.[252] Shortly after his termination, Lieberman served Wyoming.com with a document entitled "Notice of Withdrawal of Member Upon Expulsion: Demand for Return of Contributions to Capital."[253] In the Notice, Lieberman

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[244] WYO. STAT. ANN. §§ 17-29-601 to -603. The concept of "dissociation" is well-developed within Article Six of the Re-ULLCA and the 2010 LLC Act. By contrast, the word did not appear in the Original LLC Act, nor did the Original LLC Act address the events causing the dissociation of an LLC member. The Original LLC Act did contain, however, a provision allowing for the withdrawal of a member's capital contribution and a provision allowing a member to "resign." WYO. STAT. ANN. § 17-15-120 (repealed 2010) (allowing for withdrawal of capital); *id.* § 17-15-123 (allowing a member to resign).

[245] *Mossbrook*, 208 P.3d 1296 (Wyo. 2009); Wyoming.com v. Lieberman, 109 P.3d 883 (Wyo. 2005) [hereinafter *Lieberman III*]; *Lieberman II*, 82 P.3d 274 (Wyo. 2004); Lieberman v. Wyoming.com, 11 P.3d 353 (Wyo. 2000) [hereinafter *Lieberman I*].

[246] *Lieberman I*, 11 P.3d at 355. The total initial capital contributions amounted to $50,000. *Id.*

[247] *Id.*

[248] *Id.* The other members were a married couple. *Id.*

[249] *Id.*

[250] *Id.*

[251] *Id.*

[252] *Id.*

[253] *Id.*

demanded his share of the current value of the company, which he estimated at $400,000.[254] In response to the "Notice of Withdrawal," the members held a special meeting and decided to accept the withdrawal, continue with Wyoming.com rather than dissolve it, and return Lieberman's initial capital contribution of $20,000.[255] Lieberman refused to accept the $20,000 and filed suit.[256]

In his suit, Lieberman sought judicial dissolution of Wyoming.com in order to obtain the return of his entire interest.[257] Wyoming.com counter-claimed and sought declaratory judgment regarding its rights against Lieberman.[258] The actions were consolidated, and the Fremont County District Court held Wyoming.com was not in a state of dissolution because the members agreed to continue the business and Lieberman had the right to demand the return of his initial capital contribution.[259] Lieberman appealed.[260]

In *Lieberman I*, the Wyoming Supreme Court affirmed Wyoming.com was not in a state of dissolution and Lieberman was entitled to the return of his initial capital contribution.[261] However, the court noted a gap in Wyoming's LLC Act regarding a withdrawing member's equity or ownership interest.[262] Because Wyoming.com's Operating Agreement did not restrict or prohibit it, Lieberman had a right to demand the return of his capital contribution, but the court was unsure as to what right Lieberman had to his equity interest.[263] Under Wyoming.com's Operating Agreement, a member's equity interest was to be represented by a membership certificate; however, the record never indicated what became of Lieberman's membership certificate, and therefore the case was remanded.[264]

On remand, the district court ordered liquidation of Lieberman's equity interest after Wyoming.com successfully argued that the Operating Agreement limited Lieberman's equity interest to his capital contribution.[265] The district court also determined Lieberman's equity interest should be valued as of the date

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[254] *Id.*

[255] *Id.* at 356.

[256] *Id.*

[257] *Id.*

[258] *Id.*

[259] *Id.*

[260] *Id.*

[261] *Id.* at 358.

[262] *See* WYO. STAT. ANN. §17-15-120(b)(ii) (repealed 2010); *Lieberman I*, 11 P.3d at 359 (allowing a member to demand the return of his or her capital so long as the operating agreement does not restrict it; however, this does not govern a member's rights upon dissociation).

[263] *Lieberman I*, 11 P.3d at 359.

[264] *Id.* at 361.

[265] *See Lieberman II*, 82 P.3d 274, 277 (Wyo. 2004).

of his withdrawal.[266] This calculation left Lieberman with a negative balance, and he again appealed.[267]

The Wyoming Supreme Court reversed, reasoning because Wyoming's LLC Act contained no provision relating to a dissociating member's equity interest, it was entirely up to the members of Wyoming.com to contractually provide for the terms of dissociation.[268] The court then determined Wyoming.com's Operating Agreement and Articles of Organization had no provisions regarding the fate of a dissociating member's equity interest; therefore, the court reasoned Lieberman retained an equity interest and had no obligation to sell the interest.[269] However, the court also reasoned Wyoming.com had no obligation to buy Lieberman's equity interest.[270] As a result, Lieberman maintained his forty percent equity interest while no longer being a member.[271]

In the *Lieberman* cases, the Wyoming Supreme Court applied a strict, plain language contractual approach rather than looking to partnership law, corporation law, other state law, or fiduciary duties to determine a withdrawing member's equity interest.[272] By upholding the public policy interest of freedom of contract, the court declined to create a solution to a situation not provided for in either Wyoming.com's Operating Agreement or Articles of Organization, or the Original LLC Act: specifically, the fate of a dissociating member's equity interest.[273]

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[266] *Id.*

[267] *Id.*

[268] *Id.* at 282. It was clear from Lieberman's notice of withdrawal that he had no intention of forfeiting his economic or equity interest. *Id.* at 281. Lieberman's withdrawal only affected his non-economic interest. *Id.* Wyoming.com's Operating Agreement allowed for a person to be an equity owner but not a member. *Id.* Because the members "failed to contractually provide for mandatory liquidation or buyouts, the parties are left in status quo." *Id.* at 282.

[269] *Id.*

[270] *Id.*

[271] *Id.* After *Lieberman II* was published, both parties submitted final orders to the district court. *See Lieberman III*, 109 P.3d 883, 884 (Wyo. 2005). The district court ultimately decided to adopt Lieberman's order, and Wyoming.com appealed to the Wyoming Supreme Court. *Id.* In *Lieberman III*, Wyoming.com argued that the order adopted did not substantially comply with the decision in *Lieberman II*. *Id.* at 885. Agreeing with Wyoming.com, the Wyoming Supreme Court reversed and remanded with directions for the district court to dismiss the declaratory judgment action that had given rise to *Lieberman I*, *II*, and *III*. *Id.* at 884.

[272] Rogers, *supra* note 3, at 371. *Lieberman I* exposed two holes in Wyoming's Original Act. The decision identified two interests: economic and non-economic. Economic interests include the right to receive profits and obtain capital contributions whereas non-economic interests include the right to participate in management. The court also noted the distinction between a member withdrawing his capital contribution and withdrawing his membership (dissociation) and, as to the latter, Wyoming's Original Act is silent. *See id.* at 371–73; *Lieberman I*, 11 P.3d 353, 359 (Wyo. 2000).

[273] Rogers, *supra* note 3, at 373. The court inferred from a provision in Wyoming.com's Operating Agreement that allowed someone buying into the LLC to have an equity interest without becoming a member that a member could similarly withdraw and maintain his equity interest. *Id.*

Additionally, the court "legitimized a power shift to the remaining members" while oppressing Lieberman.[274] Lieberman lost his salary and control but not his obligation to pay taxes.[275] However, after the conclusion of *Lieberman I*, *II*, and *III*, the court had another opportunity to remedy the inequities of the earlier cases.

In 2009, Lieberman again brought suit against Wyoming.com.[276] Lieberman alleged, in addition to other claims, that Wyoming.com had converted his equity interest.[277] The district court, relying on the earlier *Lieberman* cases and the newly discovered membership certificate, concluded that after Lieberman's withdrawal, he retained a right to his proportionate equity share and, further, Lieberman was entitled to payment of his share on the date Wyoming.com was merged into a corporation.[278] Nevertheless, the district court reasoned that nonpayment was justified in light of *Lieberman I*; however, *Lieberman II* required the remaining members [hereinafter referred to as the Mossbrooks] of Wyoming.com to account to Lieberman for his equity interest.[279] The district court found for Lieberman on the conversion; however, he appealed.[280]

In reconciling this decision with the earlier *Lieberman* cases, the Wyoming Supreme Court emphasized the additional evidence present in this case.[281] Once the court had the new evidence, it concluded that on April 16, 1998, the date Wyoming.com cancelled Lieberman's membership and returned his capital, Wyoming.com was also required to make liquidating distributions.[282] Its failure to do so resulted in conversion.[283] Rather than remanding the case and risking

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[274] *Id.* at 377.

[275] *Id.*

[276] *See Mossbrook*, 208 P.3d 1296, 1301 (Wyo. 2009). When Lieberman brought suit, the owners of Wyoming.com had merged the LLC into a corporation. *Id.*

[277] *Id.* A membership certificate stated that Lieberman's capital contributions and proportionate equity interest were subject to change and were reflected in the company's books and records. *Id.* At a meeting shortly before Lieberman's termination, the minutes stated Lieberman had a thirty-seven percent ownership interest. *Id.*

[278] *Id.* at 1303.

[279] *Id.* at 1303–04. The district court decided that *Lieberman I* left the door open regarding the question of whether Lieberman was entitled to anything more than his initial capital contribution. *Id.*

[280] *Id.* at 1304. Judgment was entered against the Mossbrooks for $958,475.44. *Id.* Lieberman appealed the forced buyout because of the court's decision in *Lieberman II* that found Lieberman had no obligation to sell and Wyoming.com had no obligation to buy his equity interest. *Id.*

[281] *Id.* at 1306. The additional evidence allowed the court to conclude that Wyoming.com cancelled Lieberman's membership certificate and returned his capital contribution. *Id.*

[282] *Id.* at 1311. On April 16, 1998, Lieberman had no remaining capital contribution and, consequently, Lieberman was neither a member nor investor and, to be consistent with the Operating Agreement, Lieberman's interest had to be liquidated on this day. *Id.* at 1309–10.

[283] *Id.*; *see* WYO. STAT. ANN. § 17-15-142 (repealed 2010).

yet another legal battle, the Wyoming Supreme Court determined Lieberman's damages in the amount of $72,035.[284]

### B. *The New Act's Provisions After* Lieberman

Understandably, the shortcomings in the Original LLC Act giving rise to the *Lieberman* cases provided incentive for the legislature to adopt the more comprehensive 2010 LLC Act. Under the New Act, at least two specific gaps underlying the *Lieberman* cases were addressed. The first gap involves the rights (or non-rights) of a member upon dissociation. The second gap involves a remedy for oppressive conduct.[285]

If a dispute similar to *Lieberman* arose under the 2010 LLC Act, it is now clear that unless the operating agreement otherwise provides, a dissociating member *does not* have the right to demand a return of his or her capital contribution or other payment in exchange for his or her LLC interest.[286] Such a right is conspicuously absent from Article Six of the New Act. By contrast, the Wyoming Uniform Partnership Act provides that "a dissociated partner's interest in the partnership shall be purchased pursuant to article seven of this chapter unless the partner's dissociation results in a dissolution and winding up of the partnership business under article eight of this chapter."[287] By choosing not to grant a dissociating LLC member the right to force the LLC to refund his or her capital contribution or purchase his or her equity interest, the legislature placed the continued existence of the LLC above the interest of the LLC members.

Instead of enjoying a right to demand a return of his or her capital contribution or value of his or her equity interest, a dissociated member becomes a "transferee" under the New Act.[288] Transferees have very limited rights, one of which is to receive distributions from the LLC only if they would be otherwise entitled to receive them.[289]

The remaining provisions of Article Six address dissociation and its effects in a much broader scope than did the Original LLC Act. For example, the New Act not only expressly includes the right of a member to dissociate at any time by expressly withdrawing,[290] but also lists numerous events that will result in

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[284] *Mossbrook*, 208 P.3d at 1311. Based on an appraisal of Lieberman's equity interest, the court determined that Wyoming.com owed Lieberman $72,035 together with interest at the rate of seven percent per year from the date of his withdrawal. *Id.*

[285] *See infra* notes 298–303 and accompanying text.

[286] REVISED UNIF. LTD. LIAB. CO. ACT § 603 cmt. to subsec. (a)(3) (2006) (stating that "dissociation does not entitle a person to any distribution").

[287] WYO. STAT. ANN. § 17-21-603 (2010) (providing the effect of partner's dissociation).

[288] *Id.* § 17-29-603(a)(iii).

[289] *Id.* § 17-29-502(b).

[290] *Id.* § 17-29-601.

a member's automatic dissociation.[291] Further, a member's dissociation is not wrongful unless it breaches an express provision of the operating agreement or it occurs before termination of the LLC under limited circumstances.[292] Once a member dissociates, the dissociating member loses his or her right to participate in the management and conduct of the LLC's activities; however, the member does not lose his or her equity interest.[293] Finally, a member's fiduciary duties end with regard to matters that arise after the dissociation, and any transferable interest is now owned by the person as a transferee.[294]

## VIII. ARTICLE SEVEN: DISSOLUTION AND WINDING UP

Article Seven of the 2010 LLC Act lists the events that will cause an LLC to dissolve; provides direction on how to wind up an LLC; describes how to pay claims against the LLC; and specifies how to distribute its assets.[295] Several events will cause an LLC to dissolve under the New Act by default.[296] Like many of the default rules in the New Act, an operating agreement may provide that most of these events will not cause dissolution.[297] However, an operating agreement may not override the dissolution remedy for oppression provided in sections 17-29-701(a)(iv) and (v) of the Wyoming Statutes, which allow a court to dissolve an LLC if either the company's activities are unlawful, or if the manager or those members in control of the LLC are engaging in oppressive conduct.[298] The "oppression remedy" was absent from the Original Act but was a major topic of discussion during the drafting of Re-ULLCA,[299] because many LLC minority owners face oppression by those in control.[300] Had this statutory oppression remedy been

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[291] *Id.* § 17-29-602. The events causing dissociation include: any event requiring dissociation according to the operating agreement; the member being expelled by the other members under certain circumstances or by court order; death or incompetency in the case of an individual member; and transfer of the member's entire transferrable interest in the case of a member that is a trust. *Id.*

[292] *Id.* § 17-29-601.

[293] *Id.* § 17-29-603. The legislature, like the court in the *Lieberman* cases, recognized the difference between an economic and non-economic interest. *See* Rogers, *supra* note 3, at 377 (explaining economic and non-economic interests).

[294] WYO. STAT. ANN. § 17-29-603.

[295] *Id.* §§ 17-29-701 to -708.

[296] *Id.* § 17-29-701.

[297] *See id.* §§ 17-29-701(a)(i) to (iii), -110(c)(vii).

[298] *Id.* § 17-29-701(a)(iv), (v).

[299] Kleinberger & Bishop, *supra* note 5, at 535.

[300] *Id.* at 522 (citing *Lieberman III*, 109 P.3d 883, 886 (Wyo. 2005)) (Kite, J., concurring). The court stated,

> We have not had the occasion to address Mr. Lieberman's rights as a minority owner in the LLC nor the obligations of the LLC to him as a minority interest owner. Those rights and responsibilities in the context of other forms of business organizations are well developed and may provide guidance in the realm of the LLC.

*Lieberman III,* 109 P.3d 883, 886 (Wyo. 2005).

available to Mr. Lieberman, it may have made a difference in the outcome of at least one of his cases.[301] In any event, it should be noted that the New Act does not enumerate specific factors to be used in determining whether conduct is oppressive.[302] Instead, the legislature has left it to the drafters of the operating agreement or, in the absence of specific provisions in the operating agreement, to the courts to decide when conduct is oppressive.[303]

One final note regarding dissolution is that filing articles of dissolution are now optional for an LLC that wishes to dissolve.[304] Instead of filing articles of dissolution and paying the required filing fee, an LLC may voluntarily fail to file its annual report with the Secretary of State. This will result in the LLC being administratively dissolved within sixty days after notice by the Secretary of State.[305] One advantage to dissolving in this manner is that it avoids the filing fee and cost of preparing articles of dissolution.

Upon dissolution, a dissolved LLC may deal with and bar known claims in a manner similar to the procedure followed by dissolving corporations.[306] Unknown claims can be dealt with and barred by publishing the prescribed notice, again in a manner similar to that of dissolving corporations.[307] Once notice is published, liability is extended to persons who have received distributions under a charging order regardless of their knowledge.[308]

Finally, there is a significant difference between the New Act and the Original Act regarding how assets are distributed to an LLC's former members after all other creditors are paid. Under the Original Act, assets were distributed to the former members pro rata "in respect," (or according to), the relative value of their capital contributions.[309] Under the New Act, assets are distributed to the members in equal shares, unless one of two exceptions applies.[310] The first exception,

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[301] Kleinberger & Bishop, *supra* note 5, at 522.

[302] *See* WYO. STAT. ANN. § 17-29-701(a)(5) (failing to list specific factors).

[303] Kleinberger & Bishop, *supra* note 5, at 522. The lesser remedy provided for in subsection (b) of Wyoming Statute section 17-29-701 will prevent courts and litigants from reinventing the wheel in the LLC context because, in the close corporation context, many courts have already reached this position without express statutory authority. However, subsection (b) may be overridden in an operating agreement, thus limiting the court to the all or nothing remedy of dissolution.

[304] WYO. STAT. ANN. § 17-29-702(b)(ii).

[305] *Id.* § 17-29-705(b).

[306] *Id.* § 17-29-703. A dissolved LLC may notify claimants of the dissolution and specify the information required in a claim, a mailing address to make the claim, the deadline for the claim, and that the claim will be barred if it is not received by the deadline. *Id.*

[307] *Id.* § 17-29-704.

[308] *Id.*

[309] WYO. STAT. ANN. § 17-15-126(b) (repealed 2010).

[310] WYO. STAT. ANN. § 17-29-708(b)(ii) (2010).

which is part of the Re-ULLCA structure, is if an operating agreement provides otherwise.[311] The second exception, which is Wyoming "home cooking," is if the LLC's tax filings with the IRS indicate a disproportionate percentage of LLC ownership interest among the members.[312] Like the similar provision in section 17-29-404 dealing with distributions, the legislature wished to make clear that the operating agreement could provide for distributions other than in equal shares.[313] However, if no verbal or written operating agreement exists, then the members' relative rights to distributions will be determined by the LLC's tax filings with the IRS.[314]

## IX. ARTICLE EIGHT: FOREIGN LIMITED LIABILITY COMPANIES (RESERVED)

Article Eight of the Re-ULLCA addresses foreign LLCs. These provisions were not included in the 2010 LLC Act because statutory provisions found at Wyoming Statute section 17-16-1533 already specified that Wyoming's law with respect to foreign corporations also applies to foreign LLCs. As a result, Article Eight of the 2010 LLC Act was "reserved."[315]

## X. ARTICLE NINE: ACTIONS BY MEMBERS

Article Nine provides for direct and derivative claims by members and for the establishment, conduct, and judicial review of special litigation committees. The Original Act did not contain a corresponding section.

Under the 2010 Act, a member may bring a direct action to enforce the member's rights or protect the member's interests.[316] A member may also bring an action arising independently of the membership relationship against another member, a manager, or an LLC.[317] To maintain such an action, the member must plead and prove an actual or threatened injury to the member, as opposed to an injury suffered or threatened to be suffered by the LLC.[318]

A member may also bring a derivative action to enforce an LLC's right. A member may only take this action if (1) the member first demands of the other members of a member-managed company, or of the managers of a manager-managed company, to cause the LLC to maintain an action to enforce the

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[311] *Id.*

[312] *Id.* § 17-29-704(b)(ii)(C).

[313] Senator Charles Scott was again the main proponent of the two Wyoming "home cooking" provisions contained in section 17-29-708.

[314] *Id.* § 17-29-708(b)(ii)(C).

[315] *See* 2010 Wyo. Sess. Laws 471.

[316] WYO. STAT. ANN. § 17-29-901(a).

[317] *Id.*

[318] *Id.* § 17-29-901(b).

company's right and (2) the members or managers fail to act within a reasonable time.[319] A member may also take this action if such a demand to the LLC would have been futile.[320] The member bringing a derivative action must be a member at the commencement of the action and must remain a member while the action continues.[321] A complaint for a derivative action must state the date, content of the plaintiff's demand or, in the alternative, the reasons a demand would have been futile.[322]

An LLC named or made a party in a derivative proceeding may appoint a special litigation committee to investigate whether the proceeding is in the best interests of the company.[323] The appointment of a special litigation committee stays the discovery associated with the litigation and all further court action.

"A special litigation committee may be composed of one or more disinterested and independent individuals, who may be members."[324] The appointment of a special litigation committee in a member-managed LLC is made by a majority of the members not named as defendants or plaintiffs.[325] If all of the members are plaintiffs and defendants, the appointment of the committee should be by a majority of the named defendants.[326] In a manager-managed LLC, the appointment of the committee is made by a majority of managers not named as defendants or plaintiffs.[327] If all managers are named to the action, the majority of named defendants must appoint the special litigation committee.[328]

The special litigation committee, after its investigation, may conclude the best interests of the LLC are to "(i) [c]ontinue under the control of the plaintiff; (ii) [c]ontinue under the control of the committee; (iii) [b]e settled on terms approved by the committee; or (iv) [b]e dismissed."[329] Once the committee

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[319] *Id.*

[320] *Id.* § 17-29-902(a)(i).

[321] *See id.* § 17-29-903 ("If the sole plaintiff in a derivative action dies while the action is pending, the court may permit another member of the limited liability company to be substituted as plaintiff.").

[322] *Id.* § 17-29-904.

[323] Upon a motion by the special litigation committee on behalf of the company, a court must stay discovery for a reasonable time to allow the committee to investigate unless good cause is shown. *Id.* § 17-29-905. "This subsection does not prevent the court from enforcing a person's right to information under W.S. 17-29-410 or, for good cause shown, granting extraordinary relief in the form of a temporary restraining order or preliminary injunction." *Id.* § 17-29-905(a).

[324] *Id.* § 17-29-905(b).

[325] *Id.* § 17-29-905(c)(i)(A).

[326] *Id.* § 17-29-905(c)(i)(B).

[327] *Id.* § 17-29-905(c)(ii)(A).

[328] *Id.* § 17-29-905(c)(ii)(B).

[329] *Id.* § 17-29-905(d).

reaches its conclusion, it must file a statement of its determination accompanied by a supporting report with the court and notify the plaintiff.[330] The special litigation committee bears the burden to prove "the committee conducted its investigation and made its recommendation in good faith, independently and with reasonable care."[331] A court must enforce the conclusion of the committee if the special litigation committee surmounts this burden.[332] If, however, the special litigation committee fails to meet this burden, the court must terminate the stay of discovery and proceed with the action under the control of the plaintiff.[333]

"Any proceeds or other benefits of a derivative action . . . whether by judgment, compromise or settlement, belong to the limited liability company and not to the plaintiff."[334] A plaintiff must immediately remit any proceeds received to the company.[335] Upon a successful derivative action, however, a plaintiff may be awarded reasonable expenses including attorney's fees and costs from the limited liability company's recovery.[336]

## XI. ARTICLE TEN: MERGER, CONVERSION, DOMESTICATION, CONTINUANCE, AND TRANSFER

### *A. Merger*

Overall, the merger concepts of the Original LLC Act are represented in the 2010 LLC Act.[337] For example, both acts allow for mergers of LLCs with other LLCs, limited partnerships, and corporations.[338] However, the 2010 LLC Act expands the parties eligible for merger to include "constituent organizations" such as general partnerships, business trusts, statutory trusts, "or any other person having a governing statute."[339] This last category includes foreign organizations equivalent to the LLC such as a Limitada in South America and a GmbH in Europe.

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[330] *Id.* § 17-29-905(e).

[331] *Id.*

[332] *Id.*

[333] *Id.*

[334] *Id.* § 17-29-906(a)(i).

[335] *Id.* § 17-29-906(a)(ii).

[336] *Id.* § 17-29-906(b).

[337] A "merger" is the combination of two or more business entities in a manner that results in a single entity surviving the completion of the merger, possessing all assets, liabilities and other attributes of the other entity or entities whose separate existence ceased as a result of the merger.

[338] C*ompare* WYO. STAT. ANN. § 17-15-139 (repealed 2010), *with* WYO. STAT. ANN. § 17-29-1002 (2010).

[339] WYO. STAT. ANN. § 17-29-1001(a)(vii) (2010).

Two notable provisions of the Original LLC Act were retained as Wyoming "home cooking." First, the 2010 LLC Act continues to protect against the personal liability of LLC members by providing that

> no member of a domestic limited liability company that is a party to the merger will, as a result of the merger, become personally liable for the liabilities or obligations of any other person or entity unless that member approves the plan of merger and otherwise consents to becoming personally liable.[340]

Second, the Secretary of State is specifically authorized to issue a certificate of merger if the articles of merger filed with his office comply with law.[341]

### *B. Conversion*

The Re-ULLCA contained four sections allowing the "conversion" of an LLC into another entity and vice versa.[342] Under the Re-ULLCA, the requirements and procedures for conversions are similar to those for mergers.[343] Only two of the Re-ULLCA sections, modified to refer to and apply existing Wyoming statutory procedures, however, were included in the 2010 LLC Act because Wyoming Statute section 17-26-101, with its more expansive provisions, already provides for such conversions.[344]

### *C. Domestication, Continuance, and Transfer*

As in the case of mergers, the 2010 LLC Act carries forward concepts of the Original LLC Act regarding an LLC's domicile and change of domicile.[345] These concepts originally appeared in the Wyoming Business Corporation Act and at one time were unique to Wyoming among the laws of the many states.[346]

The concept of "domestication" under Re-ULLCA section 1010 is the change of domicile of an LLC from a non-Wyoming jurisdiction to a

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[340] *Compare* WYO. STAT. ANN. § 17-29-1002(a)(iv), *with* WYO. STAT. ANN. § 17-15-139(a)(v) (repealed 2010).

[341] *Compare* WYO. STAT. ANN. § 17-29-1004(e) (2010), *with* WYO. STAT. ANN. § 17-15-141(c) (repealed 2010).

[342] REVISED UNIF. LTD. LIAB. CO. ACT §§ 1006–1009 (2006).

[343] *Cf. id.* §§ 1002–1005.

[344] WYO. STAT. ANN. § 17-29-1006 (2010) (authorizing an LLC to convert to another type of entity); *id.* § 17-29-1009 (describing the effect of a conversion).

[345] *Id.* §§ 17-29-1010 to -1013.

[346] For a general discussion of the history and origins in British Commonwealth jurisdictions of the laws permitting "continuance" and "transfer" of company domicile, see Thomas N. Long, *Continuance and Transfer: Transnational Change of Corporate Domicile Under Wyoming Law*, 23 LAND & WATER L. REV. 445 (1988).

Wyoming jurisdiction. Under the Original LLC Act, this process was known as a "continuance," and the prior provisions were carried forward in the 2010 LLC Act as "home cooking."[347] The 2010 LLC Act retains the meaning of "domestication" as found under prior Wyoming law.[348] In Wyoming, a company that "domesticates" is granted dual citizenship and is not obligated to renounce its domicile in the other jurisdiction.[349] Finally, the drafters of the 2010 LLC Act took the opportunity to include provisions for "transfer" of a Wyoming LLC to another jurisdiction.[350]

## XII. ARTICLE ELEVEN: MISCELLANEOUS PROVISIONS AND TRANSITION PROVISIONS

Article Eleven of the 2010 LLC Act presents miscellaneous provisions. Wyoming Statute section 17-29-1101 mandates consideration must be given to uniformity among the states in application and construction of this uniform statute.

In both the prior and 2010 LLC Act, the statutes grant the Secretary of State the power reasonably necessary to perform the duties outlined in the statute.[351] Furthermore, the Secretary of State is required to promulgate reasonable rules and regulations.[352]

Section 17-29-1103 outlines the application of the New Act to any existing LLC. Section 17-29-1103(a) provides "this chapter applies to domestic limited liability companies in existence on its effective date that were organized under any general statute of this state providing for organization of limited liability companies if power to amend or repeal the statute under which the limited liability company was organized was reserved." If an LLC was organized in Wyoming before the effective date of the 2010 LLC Act, the management provisions under section 17-15-116, division of profits under section 17-15-119, distribution of assets upon dissolution under section 17-15-126, and the stated term provisions under section 17-15-107(a)(ii) continue for four years from the effective date of the 2010 LLC Act.[353] Additionally, a foreign LLC authorized to transact business on the effective date of the 2010 LLC Act is subject to the 2010 Act but need not obtain a new certificate of authority.[354]

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[347] WYO. STAT. ANN. § 17-29-1010.

[348] *Id.* §§ 17-29-1012, -1013.

[349] For a discussion of the general concepts involved in change of domicile and creation of dual domicile, see Long, *supra* note 346.

[350] WYO. STAT. ANN. § 17-29-1011.

[351] *Id.* § 17-29-1102.

[352] *Id.*

[353] *Id.* § 17-29-1103(b).

[354] *Id.* § 17-29-1104.

Lastly, section 17-29-1105 states:

(a) Except as provided in subsection (b) of this section, the repeal of a statute by this act does not affect:

(i) The operation of the statute or any action taken under it before its repeal;

(ii) Any ratification, right, remedy, privilege, obligation or liability acquired, accrued or incurred under the statute before its repeal;

(iii) Any violation of the statute, or any penalty, forfeiture or punishment incurred because of the violation, before its repeal; or

(iv) Any proceeding or dissolution commenced under the statute before its repeal, and the proceeding or dissolution may be completed in accordance with the statute as if it had not been repealed.

(b) If a penalty or punishment imposed for violation of a statute repealed by this act is reduced by this act, the penalty or punishment if not already imposed shall be imposed in accordance with this act.[355]

Among the myriad of miscellaneous provisions, practitioners will likely find section 17-29-1103(a) the most significant. That section preserves the prior distribution and management structure—based on contributions, not per capita—for four years after the effective date of the New Act.

## XIII. SOME PRACTICAL IMPLICATIONS

Now that the 2010 LLC Act is effective, what does it mean for existing LLCs and for attorneys and individuals wishing to form new ones? Below are a few practical implications of the New Act.

### *A. Articles of Organization and Other Initial Documents*

Because of the minimal information now required in articles of organization, practitioners and their client LLCs may choose to keep private all that they can. However, in cases where LLCs choose to include additional information in the articles, care should be taken to ensure that the information does not conflict with that contained in the operating agreement or in any filed statement of authority.

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[355] *Id.* § 17-29-1105(b).

Further, when information in the articles becomes outdated, amended articles should be promptly filed. Practitioners should also remember that articles are not statements of authority and disclosure of the identity of managers or members in the articles does not give notice that the named persons have authority to bind the LLC; only a statement of authority gives notice of binding authority.[356]

When forming single member LLCs under the Original LLC Act, many attorneys signed articles as the organizer of their client LLCs, and the articles often identified the single member. Under the new Act, the articles need not specify the single member. Instead, the single member is "determined" by the organizer.[357] As a result, practitioners should act quickly to finalize either the operating agreement or organizational meeting minutes which designate the single member.

Under the Original Act, a client desiring to maintain privacy and avoid disclosing the client's ownership or control of an LLC typically would create a second entity to act as manager of the LLC, and similar steps would be required to limit disclosure of identity in connection with the second entity. Such steps are no longer necessary.

### *B. Statements of Authority*

Statements of authority will probably be most utilized by LLCs owning and dealing in real estate and likely will be filed in the county real estate records as often as they are filed with the Secretary of State. LLCs and their attorneys should be mindful that statements of authority must be re-filed every five years to keep them from expiring.[358] As indicated above, care should be taken to ensure that information in statements of authority does not conflict with information contained in the LLC's articles of organization.

### *C. The Operating Agreement*

Because the New Act expressly authorizes oral operating agreements and establishes several default rules that apply in the absence of an agreement, it is more important than ever for LLCs and their members to quickly finalize and sign an operating agreement.[359] Otherwise, the members invite litigation to determine whether there is an operating agreement among them and, if so, the scope of its terms. The changes to the default rules applicable to allocation of management and distribution rights also elevate the importance of the quick adoption of a

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[356] REVISED UNIF. LTD. LIAB. CO. ACT § 302 cmt. to subsec. (e)(1) (2006).

[357] WYO. STAT. ANN. § 17-29-401.

[358] *Id.* § 17-29-302(k).

[359] *See id.* § 17-29-102(a)(xiv) (defining "Operating Agreement" as "the agreement, whether or not referred to as an operating agreement, and whether oral, in record, implied, or any combination thereof, of all the members of a limited liability company. . . .").

written operating agreement. Another reason to quickly adopt an operating agreement is to properly waive certain fiduciary duties from the outset if desired. Although Wyoming Statute section 17-29-409(f) allows duties to be waived after the fact, it may be difficult, if not impossible, to obtain the necessary ratification from all the members. Now that the New Act expressly provides for the transfer of both economic and non-economic rights, operating agreements should contain detailed provisions addressing restrictions on their transfer to both members and non-members and provisions defining the treatment of non-economic rights when a transfer of economic rights occurs. As banks become aware of the New Act, LLCs should not be surprised if they require that operating agreements may not be amended without their consent for so long as a lending relationship exists. Finally, practitioners should remember that the New Act serves as a pattern for drafting an operating agreement in addition to providing default rules when no operating agreement exists.

### *D. Management and Distributions*

The New Act changes management and distribution rights from being vested in the same proportion as contributions under the Original LLC Act to being vested equally among members unless the operating agreement provides otherwise.[360] For existing LLCs wishing to preserve the old management and distribution scheme, amended articles or operating agreements should be adopted within the applicable transition period of section 17-29-1103. If fiduciary duties are to be waived, a manager-managed LLC is probably the most conducive. Choosing a manager-managed style will best protect investor-type members who do not wish to participate in management or be subject to a duty of care.[361] Finally, if LLCs wish to provide some level of protection against managers being removed, the operating agreement must contain such a provision. Otherwise, a majority of the members can remove a manager at any time without notice or cause.[362]

### *E. Courts*

One of the biggest advantages of the New Act to the judicial process will be the comments accompanying Re-ULLCA, case law decided under provisions of Re-ULLCA patterned after other uniform acts, and, eventually, decisions from other states which have adopted or will adopt some form of Re-ULLCA. Another likely advantage is that many disputes will be resolved by simply referring to the more complete provisions of the New Act, rather than proceeding directly to

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[360] *Id.* §§ 17-29-404(a), -407(b).

[361] Bishop, *supra* note 164, at 504.

[362] WYO. STAT. ANN. § 17-29-407(c)(v).

court. A member's extensive right to information is one example. When matters such as expulsion of a member or dissolution are before the court, the New Act provides direction that was absent under the Original LLC Act.

### *F. Close LLCs*

The distinctions between an LLC formed under the 2010 LLC Act and an LLC formed under the Close LLC Supplement should be reviewed because they have now changed.[363] A member of a Close LLC making an unequal contribution to capital will not have the equal rights of management and distribution in the absence of a provision in the operating agreement stating such.[364] The interests of a member in a Close LLC, including the transferable interest, are not transferable without the consent of all members.[365] These new distinctions alter the utility of a Close LLC for estate planning purposes because they may enhance or detract from a member's goal to reduce asset values for estate tax or probate purposes.[366]

## XIV. CONCLUSION

As can be seen, the New Act contains comprehensive provisions that not only address the obvious shortcomings of the Original LLC Act but also provide major innovations. These new benefits make the Act a useful, forward-looking piece of legislation for Wyoming practitioners and LLCs who may choose to conduct business in any corner of the world. Although the New Act is based upon a uniform law, there are many provisions of "home cooking" catering to Wyoming's unique tastes and needs. With the New Act, Wyoming is again a pioneer in developing a new frontier of comprehensive LLC law.

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[363] *Id.* §§ 17-25-101 to -111.

[364] *Id.* §§ 17-25-106, -110.

[365] *Id.* § 17-25-111.

[366] For example, enhancement is possible through greater "lack of transferability" valuation discounts available to all Close LLC members; conversely, detraction is possible through lesser "lack of control" valuation discounts available to the contributor of a majority of capital in a multi-member Close LLC.