

## BUSINESS LITIGATION

MARCH 2017

### IN THIS ISSUE

*Mark Hansen and Tyler Pratt discuss recent amendments to the Illinois Limited Liability Company Act that are set to take effect on July 1, 2017.*

## What You Should Know About the New Illinois Limited Liability Company Act

### ABOUT THE AUTHORS



**Mark D. Hansen** is a shareholder in the Peoria, Illinois office of Heyl, Royster, Voelker and Allen. He has extensive experience in complex litigation, with an emphasis in business and commercial litigation and professional liability. He can be reached at [mhansen@heyloyster.com](mailto:mhansen@heyloyster.com).



**Tyler J. Pratt** is an associate in the Peoria, Illinois office of Heyl, Royster, Voelker & Allen. He focuses his practice in the areas of commercial litigation and professional liability. He can be reached at [tpratt@heyloyster.com](mailto:tpratt@heyloyster.com).

### ABOUT THE COMMITTEE

The Business Litigation Committee consists of members involved in business and commercial litigation including business torts, contract and other commercial disputes, e-commerce, antitrust issues, trade secrets and intellectual property, unfair competition and business defamation and disparagement. The Business Litigation Committee helps connect members involved in these areas around the world through networking and referral opportunities; developing and keeping current in the substantive, strategic and procedural aspects of business litigation; and affords members an international forum for sharing current developments and strategies with colleagues. Among the committee's planned activities are newsletters, publications, sponsorship of internal CLEs, and Webinars. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



**Mark Hansen**  
**Vice Chair of Publications**  
**Heyl, Royster, Voelker & Allen**  
[mhansen@heyloyster.com](mailto:mhansen@heyloyster.com)

*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

The Illinois Limited Liability Company Act (Act) (805 ILCS 180/1-1, *et seq.*) recently underwent a significant overhaul. Although these changes do not take effect until July 1, 2017, their magnitude warrants an early review. The ten most substantial changes to the Act are below.

**1. Oral and implied operating agreements are now recognized.**

Previously, oral and implied operating agreements were not explicitly recognized by the Act. The best practice is still to have a written operating agreement. This revision may not always protect members, since courts may not always find that an oral operating agreement exists, but it gives those who have failed to draft an operating agreement an alternative avenue for asserting their rights.

**2. LLCs are now member-managed unless the operating agreement specifies otherwise.**

Both member-managed and manager-managed LLCs are still recognized, but unless the operating agreement expressly provides that an LLC is manager-managed, or that the management of the company is vested in its managers, the default is to treat the LLC as member-managed.

**3. The Act clarifies procedures governing member requests to inspect and copy records.**

Under the Act, a company shall furnish information concerning the company's activities, financial condition, or other circumstances of the company's business necessary to properly exercise a member's rights under the operating agreement or the Act upon member demand. If the company knows, however, that a member already has knowledge of the information, the company does not need to honor the demand. Under the Act, when a written demand is made, the company shall provide the information within ten days of receipt of the demand. If the company cannot comply with the deadline, it must provide a description of the information the company will provide and state the time and location for when it will be provided. If the demand is denied, the denial must be in writing. The company may still charge the person the reasonable costs associated with copying the information. The Act also clarifies that a member or dissociated member can exercise these rights. Whenever a dispute arises concerning the reasonableness of a restriction or designation, the company bears the burden of proving reasonableness. A transferee is not entitled to inspect records.

**4. A member is no longer an agent of the LLC solely by reason of being a member.**

This new provision does not prevent or restrict a member from acting as the LLC's agent, but limits the impact. Previously, each member was an agent of the LLC for purposes of the company's business. Additionally, an LLC may deliver to the

Secretary of State a statement of authority which identifies the member or manager of the company authorized to execute instruments transferring real property or for other transactions on behalf of the company.

**5. Except for the duty of care, fiduciary duties can be eliminated and altered.**

The operating agreement may now eliminate or reduce a member's fiduciary duties. Previously, the LLC Act did not allow the operating agreement to eliminate or reduce a member's fiduciary duties. That provision has been removed, allowing a member's fiduciary duties to be eliminated or reduced. The operating agreement may not, however, eliminate or reduce the obligation of good faith and fair dealing and it may not restrict or eliminate the duty of care. The operating agreement can establish the standards by which a member's duties or rights are to be measured. The elimination of any other fiduciary duties must be clear and unambiguous within the operating agreement. The operating agreement may not authorize intentional misconduct or a knowing violation of the law. The operating agreement may identify specific types or categories of activities that do not violate any fiduciary duty and may specify the method by which a specific act or transaction that would otherwise violate the duty of loyalty may be authorized or ratified after full disclosure of all material facts.

**6. The operating agreement may provide for remedies and consequences for a member's failure to make contributions.**

The Act now allows an operating agreement to specify the consequences for a member's failure to make required contributions. Those consequences include, without limitation: the loss of voting rights, the loss of the right to participate in the management or operation of the LLC, liquidated damages, the reduction or dilution of a member's proportionate interest, the subordination of the member's right to receive distributions, a forced sale of the member's interest, the adjustment of the interest rates for non-defaulting members, and the ability to set the value of a defaulting member's interest by an appraisal or other formula.

**7. A creditor's charging order now constitutes a lien on distributional interests and transfer of distributional interests.**

A charging order by a creditor now constitutes a lien on the judgment debtor's distributional interest and requires the LLC to pay over the debtor's distributional interest to the creditor. No other rights, however, are granted to the creditor. Consequently, the Act also provides that the transfer of a distributional interest alone does not require dissolution.

**8. Dissolution is not always necessary.**

The Act now specifically provides that a court may order the buyout of an applicant's

membership interest when the applicant has petitioned for relief due to alleged illegal, oppressive, or fraudulent conduct by the LLC's managers or controlling members. Additionally, even if there are no members, an LLC may now continue to exist, so long as the legal representative of the last remaining member files an agreement to continue the LLC within one year after the event that caused the dissociation of the last member. In that instance, the legal representative is admitted as a member and the company will not be dissolved until a future event of dissolution occurs.

**9. Dissociation does not relieve or discharge a member's obligations.**

Under the Act, a member's dissociation alone does not discharge the member from any debt, obligation, or other liability owed to the company which the member incurred while a member.

**10. The Act now provides a detailed procedure for converting and domesticating an LLC.**

The Act now provides procedures for conversion and domestication. When a company is converted, the structure changes from either a non-LLC to an LLC or vice versa. On the other hand, domestication occurs when an LLC established under another state's laws becomes an LLC under Illinois' laws and vice versa. In general, conversion and domestication are permitted so long as the applicable statutes permit such action

and such action is not prohibited by the laws of the U.S., Illinois, or other governing states.

**Conclusion**

In sum, recent changes to the Illinois Limited Liability Company Act are significant. The changes will become effective on July 1, 2017. A review of these changes in the meantime would be time well spent, especially given the potential impact upon both well-established LLCs and those still being conceived.

## Past Committee Newsletters

Visit the Committee's newsletter archive online at [www.iadclaw.org](http://www.iadclaw.org) to read other articles published by the Committee. Prior articles include:

### JANUARY 2017

Consideration and Non-Compete Agreements: The State of the Law in Illinois  
Mark D. Hansen and Brett M. Mares

### OCTOBER 2016

The Canadian Judicial Takeover Law Landscape  
Éric Azran, Stéphane Rousseau and Patrick Desalliers

### SEPTEMBER 2016

The Rise of Litigation Funding  
Chase Bryan

### AUGUST 2016

The Reinsurance Market in Brazil  
Diógenes Gonçalves and Raíssa Lilavati B. Abbas Campelo

### APRIL 2016

A Limited Survey of Best Practices for Enforcement of Noncompete Agreements and Restrictive Covenants  
Kristin Olson

Using Bankruptcy as a Sword Rather than a Shield: Protecting Intellectual Property Rights When a Licensor Files Bankruptcy  
Steven M. Sitek and Lauren E. Richie

Proportionality and Reasonableness: Using the 2015 FRCP Amendments to Rein in Discovery  
Martin J. Healy and Joseph D. Fanning

### JANUARY 2016

Recognition of Foreign Civil Judgement in Switzerland  
Dr. Jodok Wicki

"Patent Troll" Saga in Vermont Continues  
Walter E. Judge, Jr.

### OCTOBER 2015

Arbitration: A Comparison of the Pros and Cons  
Jonathan A. Berkelhammer

Disclaiming an Agency Relationship – Can it be done?  
Sharon Luarde and Anastasia Wade

### SEPTEMBER 2015

North Carolina State Board of Dental Examiners v. FTC—The Spawning of Confusion  
Mark R. Beebe and Thomas Kimball