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Carol R. Goforth

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WHY ARKANSAS SHOULD ADOPT THE REVISED UNIFORM LIMITED LIABILITY COMPANY ACT

*Carol R. Goforth**

I. INTRODUCTION

On April 12, 1993, then-Arkansas Governor Jim Guy Tucker signed into law “The Small Business Entity Tax Pass Through Act,”¹ which for the first time authorized the organization of limited liability companies (LLCs) in Arkansas. This Act, which will be referred to in this article as the “Arkansas LLC Act” notwithstanding its unique actual name, has been subsequently amended more than once to remove some of the ambiguities created by the initial legislation.²

In August 1994, the National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated a Uniform Limited Liability Company Act (ULLCA).³ A few states, including Alabama, Hawaii, Illinois, Montana, Oregon, South Carolina, South Dakota, Vermont, and West Virginia, enacted ULLCA-based LLC statutes, either initially or by replacing their original LLC statutes with the ULLCA. Unfortunately for proponents of uniformity, the ULLCA was introduced after most states (including Arkansas) had already enacted LLC legislation, and the statute never gained the prominence achieved by many other uniform business statutes promulgated by NCCUSL. In fact, no states enacted or, as far as on-line records indicate, seriously considered enacting, the ULLCA from 2003 to 2006.

In 2003, NCCUSL initiated a project to amend and update ULLCA, a project that has often been referred to as the ReULLCA or RULLCA.⁴ It is a mistake to view this process as a simple revision of the original ULLCA, however, as the project in fact involved the drafting of an entirely new act. It

* Carol Goforth is the Clayton N. Little Professor of Law at the University of Arkansas School of Law. The financial support of the Law School is gratefully acknowledged, as are helpful comments from Professor Frances Fendler of the UALR School of Law.

1. 1993 Ark. Acts 1003 (codified at ARK. CODE ANN. §§ 4-32-101 to -1401 (LEXIS Supp. 2001)).

2. *See, e.g.*, 1997 Ark. Acts 479 (amending multiple provisions within the Arkansas LLC Act); 1999 Ark. Acts 1528 (amending multiple provisions within the Arkansas LLC Act); and 2003 Ark. Acts 965 & 2003 Ark. Acts 1003 (amending ARK. CODE ANN. § 4-32-1313).

3. UNIF. LTD. LIAB. CO. ACT, 6A U.L.A. 429 (1996).

4. REV. UNIF. LTD. LIAB. CO. ACT (2006) (hereinafter “RULLCA”). The author was appointed as an official observer to the RULLCA project, but all views expressed herein are solely those of the author.

is the basic premise of this article that the resulting uniform proposal, referred to here as RULLCA, would provide a number of valuable improvements for Arkansas businesses.

This article will begin with a review of the current state of law relative to Arkansas LLCs, with a particular focus on potentially problematic provisions in our existing statute. It will then provide a general overview of RULLCA, with emphasis on points of similarity and incongruence with our existing LLC Act. Finally, it will offer reasons why RULLCA would offer advantages that justify the adoption of yet another new business statute in this state.

II. THE ARKANSAS LLC ACT

The Arkansas LLC Act consists of a number of provisions codified in Chapter 32 of Title 4 of the Arkansas Code.⁵ The Arkansas LLC Act was based primarily on a Draft Prototype LLC Act, contained in a report dated November 19, 1992, produced as a preliminary effort by an American Bar Association (ABA) working group.⁶ The Draft Prototype LLC Act was never finalized (the project being abandoned in favor of NCCUSL's work on a uniform statute), and as a result contained a number of provisions that were either downright confusing or at best less than perfectly clear. The Arkansas LLC Act, based on this draft, contained the same ambiguities, some of which have been cleared up with subsequent amendments and some of which remain.⁷

One of the continuing oddities of the Arkansas LLC Act is in fact the name of the statute. Technically called the Small Business Entity Tax Pass

5. ARK. CODE ANN. §§ 4-32-101 to -1401 (LEXIS Repl. 2001). This article will focus primarily on the Arkansas LLC Act as it currently exists. For a considerably more detailed look at the Arkansas LLC Act as originally enacted, see LONNIE R. BEARD & CAROL R. GOFORTH, *ARKANSAS LIMITED LIABILITY COMPANIES* (1993).

6. The ABA project was conducted under the auspices of a working group officially entitled the "Working Group on the Prototype Limited Liability Company Act, Subcommittee on Limited Liability Companies, Committee on Partnerships and Unincorporated Business Organizations, Section of Business Law, American Bar Association." This working group produced a Draft Prototype LLC Act in 1992, although the draft was abandoned while still in the preliminary stages and was never formally approved by the ABA or any of its standing sections or committees. See generally Mary Elizabeth Matthews, *The Arkansas Limited Liability Company: A New Business Entity Is Born*, 46 ARK. L. REV. 791 (1994).

7. In 1994, the new Arkansas LLC Act was the subject of a brief commentary by the author noting some of the ambiguities and potential problems created by the Act as originally enacted. Carol R. Goforth, *The Arkansas Limited Liability Company: A Call for Clarification*, 1994 ARK. L. NOTES 19. The statute has since been amended to address some of these concerns, although the discussion in the text of this article will highlight some remaining issues, and even some that have been created by the legislative solutions to the original problems.

Through Act,⁸ that cumbersome name is virtually never used. Moreover, the statute does not require that entities formed be small in terms of the numbers of owners, the amount of funds involved or income produced, or in any other sense. In addition, there is no requirement that Arkansas LLCs retain partnership tax status (which would gain them tax pass through benefits) or any suggestion that LLCs are the only entity eligible for such preferred status. Presumably included to give legislators an idea of what the original act was intended to accomplish, the name is in fact misleading and unnecessarily cumbersome. On the other hand, as virtually no one uses it, this is a small flaw indeed.

A. Subchapter 1: Definitions

Ironically, one of the most irritating and potentially troublesome requirements of the Arkansas LLC Act as currently written shows up in the most innocuous of sections, the definitions provision.⁹ Buried amidst the harmless and generally helpful definitions is the following language describing the LLC's "operating agreement": "'Operating agreement' means the written agreement which shall be entered into among all of the members as to the conduct of the business and affairs of a limited liability company."¹⁰ The problems with this provision are the inclusion of the word "written," and the apparent requirement that "all members" must enter into the agreement if it is one that governs "conduct of the business and affairs" of the LLC.

The suggestion in this definitions section that an LLC operating agreement must be in writing is problematic in a number of respects. First, when one looks at the other statutory provisions dealing with operating agreements, there is room for confusion about whether only written operating agreements are permissible. One section of the statute specifies that an LLC must maintain a copy of the operating agreement at the principal place of business.¹¹ Another section says, however, that "an operating agreement which is in writing" may limit liability of members or manager for monetary damages for breach of duty, or may provide for indemnification,¹² implying at least that it is also possible to have an operating agreement that is not in writing. In fact, some provisions in the Arkansas LLC Act refer only to "operating agreement" while others specifically refer to one which is written, as

8. ARK. CODE ANN. § 4-32-101 (LEXIS Repl. 2001).

9. *Id.* § 4-32-102 (LEXIS Repl. 2001).

10. *Id.* § 4-32-102(11).

11. *Id.* § 4-32-405(a)(4) (LEXIS Repl. 2001). In fact, the LLC must also keep at its principal place of business all outdated operating agreements as well.

12. *Id.* § 4-32-404 (LEXIS Repl. 2001).

if there was a valid distinction to be drawn.¹³ Presumably, if only written documents satisfy the definition of "operating agreement," this would not be the case.

Of course, it is possible that there may be agreements between or by the members and the LLC that are not technically operating agreements, but then one wonders what is it that must be included in an operating agreement, or what is it that makes such an agreement into one that satisfies the statutory definition, triggering such requirements as the obligation to maintain a copy at the LLC's registered office?¹⁴ The definitions section suggests that an operating agreement is one that deals with "conduct of the business and affairs" of the LLC.¹⁵ This could encompass a large number of documents.

One might wonder if this really matters. After all, what is the consequence of failing to maintain copies of such agreements in the LLC's registered office?¹⁶ Certainly, the statute itself provides no express penalty, and no reported case appears to have addressed this issue. That does not mean, however, that the potential consequences might not be very serious. One concern here is with the possibility of piercing the veil of limited liability.

Piercing the veil is a legal doctrine that allows courts to disregard statutorily authorized limited liability in business enterprises in order to allow business creditors to access assets of owners or sometimes related entities. Originally applied in the corporate context, the rule allowed courts to pierce the veil of limited liability offered to owners of a business when the owners themselves failed to respect the enterprise as a distinct legal entity.¹⁷ The traditional test for piercing in a corporate context has been formulated in a

13. Compare the introductory language in such sections as ARK. CODE ANN. § 4-32-402 and ARK. CODE ANN. § 4-32-403(a) & (b) ("Unless otherwise provided in an operating agreement . . .") with ARK. CODE ANN. § 4-32-404 ("An operating agreement which is in writing . . .") and ARK. CODE ANN. § 4-32-405 & 503 ("Unless otherwise provided in writing in an operating agreement . . .")

14. ARK. CODE ANN. § 4-32-105(a)(4) (LEXIS Repl. 2001).

15. *Id.* § 4-32-102(11) (LEXIS Repl. 2001).

16. Note that there is another section of the act that requires an Arkansas LLC to maintain copies of the current and all outdated operating agreements at the company's principal place of business. *Id.* § 4-32-405(a)(4) (LEXIS Repl. 2001). This section expressly provides, however, that failure to keep the required records "shall not be grounds for imposing liability on any member or manager for the debts and obligations of the limited liability company." *Id.* § 4-32-405(d).

17. Actually, it is almost impossible to articulate an accurate test for when the veil of limited liability will be pierced. Frank Easterbrook and Daniel Fischel declared in the mid-1980s that veil piercing "[s]eems to happen freakishly. Like lightning, it is rare, severe, and unprincipled." Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89 (1985). Stephen Bainbridge has complained that its use is "rare, unprincipled, and arbitrary," and completely lacking in "bright-line rules for deciding when courts will pierce the corporate veil." Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479, 535, 513 (2001).

variety of ways, often asking whether the business is so controlled by its owners that it has become the mere alter ego or instrumentality of the owners.¹⁸ One of the most often asked questions has been whether the owners have failed to observe statutory formalities;¹⁹ and if the courts find that the owners have treated the business entity less formally than the statutes require, creditors may also be allowed to disregard the entity and recover directly from the owners. Most states, when faced with the question of whether to allow members of an LLC to be held personally liable for the debts of the enterprise, have turned to the corporate law analysis.²⁰

This means that failure to observe the requirement of a written operating agreement and failure to keep a copy of such a document could indeed have very serious repercussions for business owners. Businesses that rely on (1) general treatises or materials or (2) the informality apparent in most of the other sections of the Arkansas LLC Act to guide the way they do business²¹ may well be misled about the need to maintain a written agreement, and this could be quite unfortunate.

One of the things that makes the Arkansas LLC Act misleading in this respect is that it is hard to discover, even from a careful reading of the entire statute, what exactly needs to be in a written operating agreement. One might think that such things as a list of members and agreed contributions and values assigned to any property that has been given to the business might qualify, because this is not the kind of issue as to which the statute can provide default rules and is certainly likely to be something as to which a writing would be advisable. There is, however, a specific provision in the

18. Eric Fox, *Piercing the Veil of Limited Liability Companies*, 62 GEO. WASH. L. REV. 1143, 1163–64 (1994).

19. Arkansas has been characterized as a state in which piercing is particularly likely, especially where formalities are not appropriately observed. STEPHEN B. PRESSER, *PIERCING THE CORPORATE VEIL*, § 2.4 (current through Mar. 2007 update), concluding that “Arkansas is a jurisdiction in which the veil is more easily pierced than others . . .”

20. Some states have done this by statute. *See, e.g.*, Karin Schwindt, Comment, *Limited Liability Companies: Issues in Member Liability*, 44 UCLA L. REV. 1541, 1553 n.55 (1997) (listing a number of statutes adopting this approach). Other jurisdictions have reached the same result as a result of litigation. *Kaycee Land and Livestock v. Flahive*, 46 P.3d 323 (Wyo. 2002); *Great Neck Plaza v. Le Peep Rests.*, 37 P.3d 485 (Colo. App. 2001); *Hamilton v. AAI Ventures*, 768 So. 2d 298 (La. Ct. App. 2000); *Hollowell v. Orleans Reg'l Hosp.*, 217 F.3d 379 (5th Cir. 2000). It has been suggested that Arkansas should adopt a similar approach. Emily Lackey, Comment, *Piercing the Veil of Limited Liability in the Non-Corporate Setting*, 55 ARK. L. REV. 553 (2002).

21. The risk here is that materials which deal with most state LLC laws will not recognize the requirement that an operating agreement be in writing, as this provision does not show up in the laws of most states. In fact, most materials rely heavily on the lack of formalities in promoting or explaining this form of business. “LLC statutes, however, require very few formalities; some states permit LLC’s to be formed and run without keeping any records whatsoever.” Jeffrey K. Vandervoort, *Piercing the Veil of Limited Liability Companies: The Need for a Better Standard*, 3 DEPAUL BUS. & COM. L.J. 51, 71 (2004).

Arkansas LLC Act making it clear that the written operating agreement can dispense with the need to keep these records,²² which would logically not be possible if they had to be in the operating agreement itself. Similarly, although an agreement to contribute is not enforceable under the statute unless in writing,²³ the Arkansas LLC Act includes no suggestion this promise must be the operating agreement. In fact, the statute requires absolutely nothing to be in a written operating agreement, except that there is apparently a requirement that something must be in a written operating agreement.²⁴

The least problematic situation would be if the members of the LLC wish to adopt all of the default rules embodied in the statute.²⁵ Then, presumably, an agreement encompassing only the default rules would suffice. Although this leaves open the issue of whether all members have to sign the agreement, at least one would have a simple written operating agreement. What if, however, the members wish to change one or more of the default rules? This might reasonably be construed as the kind of agreement that relates to the conduct of business and affairs of the LLC. Must it then be in writing? Must it then be entered into by all members? Signed by all of them?²⁶

The statutory requirement that an operating agreement be in writing, when there is no corresponding explanation of what must be in this document, raises all sorts of troubling issues. What exactly has to be in the writ-

22. ARK. CODE ANN. § 4-32-405(a)(1) & (5) (LEXIS Repl. 2001).

23. *Id.* § 4-32-502(a) (LEXIS Repl. 2001).

24. The so-called statute of frauds might provide an independent basis for requiring certain provisions of an operating agreement to be in writing, and indeed, might require that some operating agreements themselves be in writing in order to be enforceable. Certainly an agreement among the members of an LLC concerning conveyance of interests in land would need to be in writing in order to be enforceable. *See Id.* § 4-59-101(a)(4). Similarly, if the term of the LLC were to last more than one year, and this requirement was to be embodied in an operating agreement, the requirement that a contract "that is not to be performed within one (1) year from the making of the contract" must be in writing might come into play. *Id.* § 4-59-101(a)(6). On the other hand, if the dispute is only between the parties to the contract, it might be possible that they would be prevented from raising the statute of frauds on such grounds as promissory estoppel. *See generally* *Ralston Purina Co. v. McCollum*, 271 Ark. 840, 611 S.W.2d 201 (1981) (allowing one party to an oral contract for the sale of goods to raise promissory estoppel to prevent the other party from asserting the defense of the statute of frauds).

25. A "default rule" is a statutory presumption that may be changed by agreement of the parties. For example, a default rule applicable to manager-managed LLCs is that managers are to be selected and removed or replaced by approval or consent of more than one-half of the number of members, and managers so selected serve indefinitely. ARK. CODE ANN. § 4-32-401 (LEXIS Repl. 2001). There are all kinds of default rules in the statute, ranging from sharing of profits to management rights to ability of members to leave and economic consequences of such withdrawal.

26. *Id.* § 4-32-102(11) (LEXIS Rep. 2001). The definitions section appears to say that an operating agreement must be a writing entered into by all members.

ten agreement? Does it have to be a single unified document? Does it have to be signed? Does failure to comply with the statute significantly increase the risk of piercing? Most states deal with these issues by adopting the usual informal rule that has long governed partnerships, even LLPs and LLLPs: an agreement as to day to day operations and affairs need not be in writing. This does not mean written agreements are not advisable, of course, and it does not answer the question of whether the statute of frauds might apply to some types of agreements or provisions.²⁷ It merely recognizes the reality of informal business relations and does not impose a statutory formality that seems to have little real utility.

B. Subchapter 2: Formation of Domestic LLCs

Turning from the definitions section, the Arkansas LLC Act next addresses how domestic LLCs are to be formed. As with most LLC acts, the Arkansas statute permits formation of domestic LLCs by presentation of a document containing very limited information to the appropriate state official.²⁸ In Arkansas, “articles of organization” must be delivered (manually or electronically) to the Secretary of State for filing.²⁹ In addition, Arkansas is in line with the vast majority of American jurisdictions in presuming that an LLC will be managed by its members, a presumption embodied in the requirement that in order to have management by managers, a provision to that effect must be included in the articles of organization.³⁰

The next provision in the Arkansas LLC Act that seems to create significant potential for mischief appears in the section of the Act governing the date of formation for a domestic LLC.³¹ As currently written, “[u]nless a delayed effective date is recited . . . a limited liability company is formed when the articles of organization are delivered to the Secretary of State for filing, even if the Secretary of State is unable at the time of delivery to make the determination required for filing by [section] 4-32-1308.”³² The cross

27. See *supra* note 24.

28. ARK. CODE ANN. § 4-32-202 to -206 (LEXIS Supp. 2001). There are a number of sections that are included following the definitions provision and those sections, but they deal with very basic procedural matters. There is a provision dealing with the permitted names for an LLC, ARK. CODE ANN. § 4-32-103; a provision authorizing the reservation of a name, ARK. CODE ANN. § 4-32-104; a section that authorizes LLCs to conduct any lawful business, ARK. CODE ANN. § 4-32-106; a section on fictitious names, ARK. CODE ANN. § 4-32-108; and rules governing how foreign LLCs register names, ARK. CODE ANN. § 4-32-109.

29. *Id.* § 4-32-205.

30. *Id.* § 4-32-202(3).

31. *Id.* § 4-32-206(a). Preceding this section in Subchapter Two are rules governing execution of the articles, contents of the articles, amendment of the articles, and filing.

32. *Id.* § 4-32-206(a). The same rules about the effective date for formation also show up in ARK. CODE ANN. § 4-32-205(b) and ARK. CODE ANN. § 4-32-1308(f). While it seems

referenced provision includes very minor requirements for proper filing of documents, such as the specification that a document: (1) must be permitted under the chapter (clearly the case for articles of organization); (2) must contain required information (extremely minimal) and may contain other information; (3) must be printed or typed in English; (4) must be signed; and (5) must be accompanied by a copy or duplicate original.³³ That section goes on to provide that so long as a non-conforming document is corrected within twenty days after the Secretary of State provides notification of nonconformance, the documents are deemed to have been filed as of the date of delivery.³⁴

What is the problem with this approach? First consider the case of a perfectly acceptable filing first. Articles of organization arrive in the mail at the Secretary of State's office to be filed. The articles must be checked not only for compliance with the statute but cross referenced to make certain that there is no other entity with that name or one which would be confusingly similar. There may be a backlog of filings waiting to be checked. The delivery may come late in the day. Or, hard to imagine in these days of reliance on technology, the computers may be temporarily unavailable. For one or more of these reasons, it may not be possible to file the document on the date of delivery. Regardless, the statute says the document is deemed to have been filed upon delivery. How does one prove, however, when the document was delivered?³⁵

If you check the Secretary of State's convenient, online data base for entity formation, you can readily ascertain the filing date for new entities.³⁶ There is no such data for delivery date, and a lengthy phone conversation with staff members at the Secretary of State's office revealed only confusion when this information was requested.³⁷ In the event of litigation over the precise date of formation, this unavailability of information might prove difficult. A savvy business person might utilize certified mail, with a return receipt. Electronic filings might also show a date of delivery. But neither of these is required by the statute, nor, according to the Secretary of State's

silly to have the same rule stated multiple times in different statutory provisions, at least all of these sections are consistent.

33. *Id.* § 4-32-1308.

34. ARK. CODE ANN. § 4-32-1308(f)(2).

35. The time of formation could be important in the event of subsequent litigation involving liability arising from acts taken during this "gap" period, between the delivery of the articles and their actual filing.

36. Entity search option on the Arkansas Secretary of State's webpage, <http://www.sos.arkansas.gov/> and accessible by looking at the options under "online services."

37. Telephone conversation with Secretary of State's office in Little Rock, Arkansas (Mar. 13, 2007).

office staff, are they the only way in which such documents are presented for filing.³⁸

In addition, consider the even-more-confusing case of non-conforming documents. Suppose articles are mailed in, and in a day or two the Secretary of State determines that the requested name is unavailable or the articles are perhaps non-complying because they do not contain the required words or abbreviations indicating that the entity to be formed is an LLC. Notice is sent out that the articles are not accepted for filing. Within twenty days of that mailing, the organizers propose another name (hopefully in compliance with all statutory requirements).³⁹ The new LLC, with the new name, is deemed filed up to twenty days before the notice of non-compliance was sent out.

Persons doing business with the entity, perhaps under the non-compliant name, might well find themselves quite unexpectedly having done business with a limited liability enterprise. And their surprise would not be due to any negligence on their part, as they might have reasonably assumed that an inquiry to the Secretary of State would show a filing if they were dealing with such an entity.

The reality is that no other business entity in Arkansas has such a peculiar date of formation. Corporations are formed when articles of incorporation are filed.⁴⁰ Limited liability partnerships (LLPs) are formed when the statement of qualification as such is filed.⁴¹ Limited partnerships are formed upon filing of the certificate of limited partnership.⁴² Limited liability limited partnerships are subject to the same rules.⁴³ Nonetheless, the “date of

38. *Id.*

39. The problems are of course exacerbated if the proposed alternative is also non-compliant. Then one wonders how long organizers could continue to send in unacceptable articles. Would each relate back in time so that it was deemed to have been received and filed in time to make the original articles effective upon receipt? Hopefully, the courts will never have to determine the answer to that question.

40. ARK. CODE ANN. § 4-27-123(a)(1) (LEXIS Repl. 2001) (specifying that a document under the Business Corporation Act of 1987 is effective “at the time of filing on the date it is filed, as evidenced by the Secretary of State’s date and time endorsement . . .”)

41. *Id.* § 4-46-1001(e) (LEXIS Repl. 2001) (specifying that LLP status is achieved upon “filing of the statement . . .”). A general partnership, of course, does not require any written documentation at all, and so no filing is expected. On the other hand, partners in a general partnership do not get limited liability, either.

42. Prior to September 1, 2007, this rule was embodied in *id.* § 4-43-201(b) (LEXIS Repl. 2001). After that date, ARK. CODE ANN. § 4-47-201(a) and (c) provides that a limited partnership comes into existence upon filing of the certificate of limited partnership, as long as the filed document “substantially complies with the statutory requirements.”

43. Prior to September, 2007, the formation of LLLPs was governed by the limited partnership statute found in Title 4, Chapter 43. ARK. CODE ANN. § 4-43-1110 talked about the requirement to file an application under ARK. CODE ANN. § 4-42-703 in order to become and continue as a registered LLLP; it did not specifically address the effective date of the application, but there was certainly nothing to suggest any effective date other than upon

delivery” is the current rule for formation of LLCs under the Arkansas LLC Act.

C. Subchapters 3 and 4: Members and Managers of LLCs

The next two subchapters deal with authority and power of members and managers both internally and in dealing with third parties. As originally written, the Arkansas LLC Act included one section dealing with the “agency powers” of members and managers,⁴⁴ and another section dealing with management of the LLC.⁴⁵ There was a conflict between the two provisions that could have lead to unfortunate results, but this was essentially addressed by the 1997 amendments to the Arkansas LLC Act.⁴⁶

As currently written, the Arkansas LLC Act provides for a mutual agency among the members in language similar to that used in the Uniform Partnership Act:

Except as provided in subsection (b) [where managers are designated in the articles of organization], every member is an agent of the limited liability company for the purpose of its business or affairs, and the act of any member . . . for apparently carrying on in the usual way the business or affairs of the limited liability company of which he is a member, binds the limited liability company, unless the member so acting has, in fact, no authority to act for the limited liability company in the particular matter, and the person with whom the member is dealing has knowledge of the fact that the member has no such authority.⁴⁷

Although phrased in terms of agency authority, this language clearly creates a default rule of member management in which members of Arkansas LLCs have the legal power to bind the LLC by acts “apparently carrying on in the usual way the business or affairs” of the entity. Subsection (b) of this section permits articles of organization to provide for management by

filing or a later effective date if one is specified in the application. When Arkansas adopted re-RULPA, effective as of September 2007 (2007 Ark. Acts 15), the rules governing time of formation of LLLPs became the same as those applicable to limited partnerships. *See id.* § 4-47-102(9) (LEXIS Rep. 2001) (defining limited partnerships to include LLLPs).

44. *Id.* § 4-32-301 (LEXIS Repl. 2001).

45. *Id.* § 4-32-401 (LEXIS Rep. 1996).

46. 1997 Ark. Acts 479. The nature of the original problem was outlined in Carol R. Goforth, *The Arkansas Limited Liability Company: A Call for Clarification*, 1994 ARK. L. NOTES 19. A discussion of the solution appears in Carol R. Goforth, *An Update on Arkansas Limited Liability Companies: New Tax Regulations and New State Laws*, 1997 ARK. L. NOTES 11.

47. ARK. CODE ANN. § 4-32-301(a).

managers, in which case all agency powers are to be vested in the managers.⁴⁸

The legal effect of these provisions on members and other parties is addressed in a subsequent provision of the Arkansas LLC Act,⁴⁹ which specifies that “[w]ith respect to persons other than members, management of the affairs of the limited liability company shall be governed by [the section dealing with agency authority].”⁵⁰ It also provides that “[u]nless otherwise provided in an operating agreement, with respect to members, management of the affairs of the limited liability company shall be governed by [the section dealing with agency authority].”⁵¹

Thus, as to outsiders, the articles of organization should be conclusive as to apparent authority. As between members of the LLC, however, management rights are governed by the section on agency authority only if the operating agreement does not otherwise provide. Although this appears to be a rather cumbersome way to approach the issue, it does not appear to have created much difficulty for businesses, creditors, or the courts.

Subchapter 3 also includes provisions dealing with admissions of members and managers,⁵² circumstances under which an LLC is to be charged with knowledge or notice given to members or managers,⁵³ liability of members and the LLC itself,⁵⁴ appropriate parties in the event of litigation,⁵⁵ and various professional services that may be performed by LLCs and the professional relationships created in such instances.⁵⁶ None of these provisions is either controversial or inconsistent with typical rules applicable to business enterprises in this state.

Subchapter 4 deals with the rights and duties of members and managers. In addition to the provision relating to authority of members and man-

48. See *id.* § 4-32-301(b), which reads as follows:

If the articles of organization provide that management of the limited liability company is vested in a manager or managers:

(1) No member solely by reason of being a member is an agent of the limited liability company; and

(2) Every manager is an agent of the limited liability company for the purpose of its business or affairs, and the act of any manager . . . for apparently carrying on in the usual way the business or affairs of the limited liability company of which he is a manager binds the limited liability company, unless the manager so acting has, in fact, no authority to act for the limited liability company in the particular matter, and the person with whom the manager is dealing has knowledge of the fact that the manager has no such authority.

49. *Id.* § 4-32-401.

50. *Id.* § 4-32-401(a).

51. *Id.* § 4-32-401(b).

52. *Id.* § 4-32-302 (LEXIS Repl. 2001).

53. ARK. CODE ANN. § 4-32-303 (LEXIS Repl. 2001).

54. *Id.* § 4-32-304 (LEXIS Repl. 2001); *id.* § 4-34-309.

55. *Id.* § 4-32-305 (LEXIS Repl. 2001).

56. *Id.* §§ 4-32-306 to -308 (LEXIS Repl. 2001).

agers to bind the business, this subchapter sets out default rules concerning liability of managers and members who have management authority, and it provides generally that liability for breach of duty requires gross negligence or willful misconduct.⁵⁷ Members and managers must also account to the LLC for any profits derived from transactions connected with the business of the LLC or use of its property, unless consent is obtained from more than one-half of the disinterested managers or members.⁵⁸ Members who lack management authority are not liable to the LLC for merely acting as members.⁵⁹

Voting rights of members and managers are also addressed in Subchapter 4. The default rule is that "the affirmative vote, approval or consent of more than one-half (½) by number" of either the members or managers, depending on who has management authority, is "required to decide any matter connected with the business" of the LLC.⁶⁰ A written operating agreement is required to amend a written operating agreement or to contravene a provision in a written agreement.⁶¹

Subchapter 4 also authorizes a written operating agreement to limit liability of members or managers for monetary damages to the LLC, or to provide indemnification to such persons who do incur personal liability in connection with acting as a manager (with no limitation on the right to indemnify even for intentional misconduct).⁶² Finally, it includes a list of written records that must be kept at the LLC's principal place of business.⁶³ The list is not extensive, and includes only such basic information as: (1) list of members and managers; (2) their addresses; (3) a copy of the articles of organization with all amendments; (4) current and past written operating agreements; (5) three years of tax returns; (6) a list of property contributed or agreed to be contributed by each member and the agreed value of such property unless already included in the written operating agreement; and (7) the events upon which the LLC is to be dissolved and wound up.⁶⁴ The most confusing of these requirements is the one specifying that there must be a written record of the events upon which the LLC is to be dissolved and wound up,⁶⁵ because the statute itself provides default rules for this in the

57. *Id.* § 4-32-402(1) (LEXIS Repl. 2001).

58. *Id.* § 4-32-402(2).

59. ARK. CODE ANN. § 4-32-402(3).

60. *Id.* § 4-32-403(a) (LEXIS Repl. 2001).

61. *Id.* § 4-32-403(b). See *supra* notes 10–28 and accompanying text for a discussion of the special concerns created by references in places to operating agreements that are in writing and an apparent supposition in some places that such agreements need not always be in writing.

62. *Id.* § 4-32-404 (LEXIS Repl. 2001).

63. *Id.* § 4-32-405 (LEXIS Repl. 2001).

64. *Id.*

65. ARK. CODE ANN. § 4-32-405(5)(B).

event that there is no agreement to the contrary.⁶⁶ Interestingly, the section on records includes an express provision that failure to keep any of these records is not to be grounds for imposing personal liability on members or managers for the LLC's debts or obligations.⁶⁷

D. Subchapter 5: Finance

Subchapter 5 of the Arkansas LLC Act deals with finance. Membership interests may be issued for any property or promise to contribute property in the future.⁶⁸ Promises to make contributions in the future must be in a signed writing and, if so made, are enforceable even following a member's death or incapacity.⁶⁹ The LLC has the obligation of collecting the agreed-upon value of a contribution that is not made in cash, and unless otherwise provided in an operating agreement, it takes the unanimous consent of members (not managers) to compromise the obligation of another member to make an agreed-upon contribution.⁷⁰ Creditors who have relied upon an obligation to contribute may also enforce a valid agreement to contribute.⁷¹

The default rule for sharing of profits is that members are entitled to a repayment of the value of their contributions and then share equally in profits and assets.⁷² Although this may come as a surprise to some unsophisticated business people who might assume that profit sharing would be in accordance with the value of contributions, as is the normal case in corporations, this model tracks the traditional approach taken by general partnerships, in Arkansas and elsewhere.

E. Subchapter 6: Distributions and Withdrawal of Members

Subchapter 6 deals with distributions and withdrawal of members. Interim distributions (i.e., those that are made while the LLC's business in continuing) are made as provided in writing in an operating agreement and, unless otherwise provided, are to be shared equally among members and as declared by those persons having management powers in the LLC.⁷³ The default rule for dissociating members is that, "within a reasonable time after dissociation," they are to be paid the "fair value of the member's interest in

66. *Id.* § 4-32-901 (LEXIS Repl. 2001).

67. *Id.* § 4-32-405(d).

68. *Id.* § 4-32-501 (LEXIS Repl. 2001).

69. *Id.* § 4-32-502 (LEXIS Repl. 2001).

70. *Id.* § 4-32-502(c) & (d).

71. ARK. CODE ANN. § 4-32-502(e). There is a confusing cross-reference to subsection (d) here, which possibly was an error in drafting.

72. *Id.* § 4-32-503 (LEXIS Repl. 2001).

73. *Id.* § 4-32-601 (LEXIS Repl. 2001).

the [LLC] . . . as of the date of dissociation based upon the member's right to share in distributions."⁷⁴ Members are not presumed to be entitled to distributions in kind,⁷⁵ and once "a member becomes entitled to receive a distribution," he or she gains the status of a creditor of the LLC.⁷⁶

F. Subchapter 7: Ownership and Transfer of Property

Subchapter 7 governs ownership and transfer of property, and most of the rules in these provisions mirror those applicable to partnerships.⁷⁷ Property transferred to or acquired by the LLC belongs to the entity, and not its members, and may be held in the name of the LLC.⁷⁸ There are specific rules governing the transfer of real property, designed to provide guidance to those examining title records and wishing to make certain that title has been properly conveyed.⁷⁹ In member-managed LLCs, any member may transfer title;⁸⁰ in manager-managed LLCs, any manager has such power.⁸¹ There are also rules providing for the legal effect of transfers when the name of the LLC does not appear in the original deed or other document granting title.⁸² As with partnership interests, LLC membership interests are assignable, but absent agreement to the contrary or consent of the other owners, an assignee becomes entitled only to distributions to which the assignor would otherwise have been entitled.⁸³ Creditors of members who become assignees are entitled to charging orders, but do not ordinarily become members.⁸⁴ In the event a member dies or ceases to be competent, the executor, guardian, or other representative acquires only the rights of an assignee.⁸⁵

74. *Id.* § 4-32-602 (LEXIS Repl. 2001).

75. *Id.* § 4-32-603 (LEXIS Repl. 2001).

76. *Id.* § 4-32-604 (LEXIS Repl. 2001).

77. For similar rules applicable to general partnerships in Arkansas, see ARK. CODE ANN. § 4-46-302 (transfers of partnership property) and §§ 4-46-501-504 (assignment of partnership property). See ARK. CODE ANN. § 4-47-702 for current rules governing assignment of limited partnership interests.

78. ARK. CODE ANN. § 4-32-701 (LEXIS Repl. 2001).

79. *Id.* § 4-32-702 (LEXIS Repl. 2001).

80. *Id.* § 4-32-702(a).

81. *Id.* § 4-32-702(e).

82. *Id.* § 4-32-702(b) & (d).

83. *Id.* § 4-32-703 (LEXIS Repl. 2001); compare with ARK. CODE ANN. § 4-46-503 for similar rules applicable to general partnerships and ARK. CODE ANN. § 4-47-703 for the same rules as applied to limited partnerships.

84. ARK. CODE ANN. §§ 4-32-705-706 (LEXIS Repl. 2001).

85. *Id.* § 4-32-707 (LEXIS Repl. 2001).

G. Subchapter 8: Admission and Withdrawal of Members

Admission and withdrawal of members is dealt with in the next subchapter, and again many of these rules mirror those applicable to general partnerships.⁸⁶ New members are added to an LLC only as provided in writing in the operating agreement or upon written consent of all members.⁸⁷ Events of dissociation include (1) the substitution of an assignee of all of the member's ownership interest;⁸⁸ (2) the removal of the member in accordance with the operating agreement;⁸⁹ (3) the removal of the member by unanimous vote following the assignment of all of his or her membership interest;⁹⁰ (4) insolvency;⁹¹ (5) death or incapacity or termination of members that are not individuals;⁹² and (6) if the articles or operating agreement provides, by voluntary act.⁹³

The right of members in an LLC to withdraw by voluntary act has a convoluted history in Arkansas. Prior to the 1997 amendment, the section dealing with withdrawal rights read as follows:

Unless an operating agreement provides in writing that a Member has no power to withdraw by voluntary act from a Limited Liability Company, the Member may do so at any time by giving thirty (30) days' written notice to the other Members, or such other notice as is provided for in an Operating Agreement. If the Member has the power to withdraw but the withdrawal is a breach of an Operating Agreement, or the withdrawal occurs as a result of otherwise wrongful conduct of the Member, the Limited Liability Company may recover from the withdrawing Member damages for breach of the Operating Agreement or as a result of the wrongful conduct, including the reasonable costs of obtaining replacement of the services the withdrawn Member was obligated to perform and may offset the damages against the amount otherwise distributable to him, in addition to pursuing any remedies provided for in an Operating Agreement or otherwise available under applicable law. Unless oth-

86. For the provisions on dissociation applicable to general partnerships, see ARK. CODE ANN. § 4-46-601–603.

87. ARK. CODE ANN. § 4-32-801 (LEXIS Repl. 2001). It also takes unanimous consent of partners to add a new partner in a general partnership, although that there is no requirement that the agreement to admit new partners be in writing. ARK. CODE ANN. § 4-46-401(i).

88. *Id.* § 4-32-802(a)(2) (LEXIS Repl. 2001).

89. *Id.* § 4-32-802(a)(3)(A). The same rule applies in the case of general partnerships. ARK. CODE ANN. § 4-46-601(2) (LEXIS Repl. 2001).

90. *Id.* § 4-32-802(a)(3)(B). The same rule applies in the case of general partnerships. *Id.* § 4-46-601(4)(ii).

91. *Id.* § 4-32-802(a)(4)(c). The same rule applies in the case of general partnerships. *Id.* § 4-46-601(6)(i).

92. *Id.* § 4-32-802(a)(6) to (10). The same rules apply in the case of general partnerships. ARK. CODE ANN. § 4-46-601(7)–(10).

93. ARK. CODE ANN. § 4-32-802(a)(1).

erwise provided in an Operating Agreement, in the case of a Limited Liability Company for a definite term or particular undertaking, a withdrawal by a Member before the expiration of that term is a breach of the Operating Agreement.⁹⁴

As amended in 1997, the last sentence of this section was changed to read as follows: "Unless otherwise provided in an operating agreement, in the case of a limited liability company for a definite term or particular undertaking, a member may not withdraw from the limited liability company before the expiration of that term or undertaking."⁹⁵

The problems created by this language were commented on by this author at some length in a 1997 publication.⁹⁶ In 1999, the section was again amended, so that it currently provides that a member in an LLC may withdraw only as provided in the articles of organization, an operating agreement, or upon dissolution of the LLC.⁹⁷

The lack of a member's ability to get out of an LLC is somewhat problematic. A partner in a general partnership can quit at any time, although doing so may result in the imposition of damages caused by withdrawal in violation of an agreement.⁹⁸ A general partner in a general partnership can withdraw at any time,⁹⁹ and a limited partner may do so either as provided in the partnership agreement or upon six months notice.¹⁰⁰ In a corporation, of course, transfer of one's shares terminates one's status as shareholder.¹⁰¹

Because members in an LLC are not normally liable for debts of the enterprise, one might wonder why the inability of members to leave would be so significant. Aside from the slightly troubling inconsistency with the rules applicable to every other form of business association, what happens if the business is being conducted in such a way that the owners risk losing their protection under the doctrines of piercing?¹⁰² As the act is currently written, a member in an Arkansas LLC has no way to get out. Even transfer of all of his or her membership interest does not terminate the individual's

94. *Id.* § 4-32-802 (as originally enacted).

95. *Id.* § 4-32-802 (LEXIS Repl. 2001).

96. Goforth, *supra* note 46.

97. ARK. CODE ANN. § 4-32-802(c) (LEXIS Repl. 2001).

98. *See id.* § 4-46-602 (LEXIS Repl. 2001).

99. *See id.*

100. *See id.* § 4-47-604 (LEXIS Supp. 2007).

101. *Id.* § 4-27-140(21) (LEXIS Repl. 2001) (defining shareholder as one who owns shares).

102. Piercing is briefly discussed *supra* at notes 17-22 and accompanying text. For a more detailed discussion of piercing in the context of LLCs, see Vandervoort, *supra* note 21, at 71-72; Fox, *supra* note, 18 at 1163-64. For a discussion of the current law in Arkansas on this topic, see Lackey, *supra* note 20.

membership status.¹⁰³ Obviously, the problems of this section can be eliminated by careful drafting of either the articles or operating agreement, but it is troubling to have default rules that might well operate as a trap for the unwary or uninformed.

H. Subchapter 9: Dissolution of LLCs

Subchapter 9 of the LLC Act governs dissolution of Arkansas LLCs. Under the statutory default rules,¹⁰⁴ Arkansas LLCs are dissolved and wound up as provided in the articles or a written operating agreement upon the written consent of all members, if there are no remaining members,¹⁰⁵ or upon a decree of judicial dissolution on the grounds that “it is not reasonably practicable to carry on the business of the [LLC] . . . in conformity with the operating agreement.”¹⁰⁶ Winding up is conducted by persons with management authority or, in the event of wrongful conduct or other cause shown in court, by the circuit court.¹⁰⁷ The statute sets out authority of persons during the winding up process¹⁰⁸ and requires assets to be paid first to creditors, then to former members for distributions owed to them, and then to members as a return of contribution and finally in proportion to their respective rights to share in distributions.¹⁰⁹ The process mirrors typical corporate law provisions, calling for the filing of articles of dissolution¹¹⁰ and a statutory process for creditors with known and unknown claims that mirrors the corporate law rules.¹¹¹

103. ARK. CODE ANN. § 4-32-704(4) (LEXIS Repl. 2001). *See also id.* § 4-32-704(a)(6) (specifying that assignment of a membership interest does not terminate a member’s potential liability as member).

104. *Id.* § 4-32-901 (LEXIS Repl. 2001) (enumerating the default rules).

105. An interesting quirk in Arkansas law is that, if the articles or operating agreement so provide, an LLC may continue in existence for up to 90 days with no members whatsoever, so long as the personal representative of the last remaining member agrees to continue the LLC and to be admitted (or to have a designee admitted) as a member within that 90 day period. *Id.* § 4-32-901(3).

106. *Id.* § 4-32-902 (LEXIS Repl. 2001).

107. *Id.* § 4-32-903 (LEXIS Repl. 2001).

108. *Id.* § 4-32-904 (LEXIS Repl. 2001).

109. ARK. CODE ANN. § 4-32-905 (LEXIS Repl. 2001).

110. *Id.* § 4-32-906 (LEXIS Repl. 2001). The equivalent corporate law provision is found at ARK. CODE ANN. § 4-27-1403.

111. *Id.* § 4-32-907–908 (LEXIS Repl. 2001 & Supp. 2007). Comparable corporate law provisions are found at ARK. CODE ANN. § 4-27-1406–1407 (known and unknown claims).

I. Subchapter 10: Foreign LLCs

Subchapter 10 of the Arkansas LLC Act deals with foreign LLCs. The subchapter includes provisions specifying the applicable law,¹¹² the requirement that foreign LLCs register before doing business in Arkansas,¹¹³ a description of the registration process and requirements,¹¹⁴ consequences of non-compliance,¹¹⁵ and a list of transactions that will not be deemed to constitute doing business in Arkansas.¹¹⁶

J. Subchapters 11 and 12: Suits, Mergers, and Consolidations

The next two subchapters govern suits by and against LLCs and mergers and consolidation of LLCs; neither includes any real surprises or hidden traps for the unwary. Suits may be brought by or against an LLC in its own name,¹¹⁷ and persons with management authority normally are entitled to maintain such proceedings.¹¹⁸ There is no specific description of a member's right to institute derivative proceedings. LLCs can merge or consolidate with other business entities unless forbidden to do so in the written operating agreement,¹¹⁹ and the process described generally mirrors the types of filings and legal effect specified in corporate law.¹²⁰ Other kinds of reorganizations, however, are not dealt with in the Arkansas LLC Act.

K. Subchapters 13 and 14: Miscellaneous and Special Provisions

Subchapter 13 includes a variety of miscellaneous provisions, including the following: fees;¹²¹ the right to appeal the Secretary of State's refusal to file;¹²² a definition of knowledge;¹²³ rules of statutory construction;¹²⁴

112. *Id.* § 4-32-1001 (LEXIS Repl. 2001).

113. *Id.* § 4-32-1002 (LEXIS Supp. 2007).

114. *Id.* § 4-32-1002-1006 (LEXIS Repl. 2001 & Supp. 2007).

115. ARK. CODE ANN. § 4-32-1007 (LEXIS Repl. 2001).

116. *Id.* § 4-32-1008 (LEXIS Repl. 2001).

117. *Id.* § 4-32-1101 (LEXIS Repl. 2001).

118. *Id.* § 4-32-1102-1103 (LEXIS Repl. 2001).

119. *Id.* § 4-32-1201 (LEXIS Repl. 2001).

120. *Id.* § 4-32-1201-1204 (LEXIS Repl. 2001 & Supp. 2007) (describing approval process, articles of merger, and legal effect). For similar rules in the Arkansas corporate statutes, see ARK. CODE ANN. § 4-27-1105 (articles of merger) and -1106 (effect of merger). As might be expected in an entity with more statutory formalities, the approval process for corporations is more complex. *See id.* § 4-27-1103.

121. ARK. CODE ANN. § 4-32-1301 (LEXIS Supp. 2007).

122. *Id.* § 4-32-1302 (LEXIS Repl. 2001).

123. *Id.* § 4-32-1303 (LEXIS Repl. 2001) (which is both a little odd in both its content and placement). "Knowledge" in this provision is defined as "actual knowledge" and also when a person "has knowledge of such other facts as in the circumstances shows bad faith."

power of the Secretary of State;¹²⁵ severability of provisions;¹²⁶ interstate application;¹²⁷ filing requirements;¹²⁸ corrections to filed documents;¹²⁹ the evidentiary effect of copies of filed documents;¹³⁰ certificates of existence;¹³¹ penalties for signing false documents;¹³² tax status;¹³³ governing law;¹³⁴ full faith and credit requirements;¹³⁵ and a repealer for any inconsistent laws.¹³⁶ The final provision of the statute deals with a special certificate of registration for medical or dental LLCs¹³⁷ and merely incorporates by reference provisions applicable to Arkansas dental and medical corporations.

The majority of the provisions of the Arkansas LLC Act are relatively straight-forward and non-controversial. In fact, most of the rules adopted as default provisions in our current LLC Act are the majority rule. As described above, however, there are a few problematic provisions, and the statute is often inartfully worded, as one might expect from a committee proposal that was in the very early stages of drafting when borrowed. In addition, there are numerous places where it would make sense for the LLC statute to model the approach or language that appears in other business or commercial statutes, rather than striking out for new territory as our LLC Act currently does. The question then becomes, what would the Uniform LLC Act look like, and would it be a substantial improvement for this state?

This does not accord with the definition of knowledge in any other Arkansas statute. For example, in the Uniform Commercial Code, “knowledge” means “actual knowledge,” while “notice” is a broader concept. *See id.* § 4-1-202 (LEXIS Repl. 2001). This accords with rules embodied in other business statutes. *See, e.g., id.* § 4-46-102 (LEXIS Repl. 2001) (definition of knowledge and notice in the context of general partnerships).

124. *Id.* § 4-32-1304 (LEXIS Repl. 2001).

125. *Id.* § 4-32-1305 (LEXIS Repl. 2001).

126. *Id.* § 4-32-1306 (LEXIS Repl. 2001).

127. ARK. CODE ANN. § 4-32-1307 (LEXIS Repl. 2001).

128. *Id.* § 4-32-1308 (LEXIS Repl. 2001).

129. *Id.* § 4-32-1309 (LEXIS Repl. 2001).

130. *Id.* § 4-32-1310 (LEXIS Repl. 2001).

131. *Id.* § 4-32-1311 (LEXIS Repl. 2001).

132. *Id.* § 4-32-1312 (LEXIS Repl. 2001).

133. ARK. CODE ANN. § 4-32-1313 (LEXIS Supp. 2007). This provision originally assumed that all LLCs having at least two members would be taxed as partnerships under state law, regardless of its federal tax status. The 2003 amendments, however, rewrote this section so that it currently provides that state tax status of Arkansas LLCs will mirror the federal tax classification applicable to the entity.

134. *Id.* § 4-32-1314 (LEXIS Repl. 2001).

135. *Id.* § 4-32-1315 (LEXIS Repl. 2001).

136. *Id.* § 4-32-1316 (LEXIS Repl. 2001).

137. *Id.* § 4-32-1401 (LEXIS Repl. 2001).

III. THE REVISED UNIFORM LLC ACT

The National Conference of Commissioners on Uniform State Laws (NCCUSL) initiated drafting of the original Uniform LLC Act (ULLCA) in 1992, and the NCCUSL adopted a version of ULLCA in 1994.¹³⁸ Amended in 1996 in anticipation of the pending changes in the federal tax rules applicable to LLCs, the ULLCA was not as influential among the states as might have been hoped or expected, probably because most states had already enacted LLC legislation before the ULLCA was approved.¹³⁹

In the intervening years, there have been a number of significant developments relating to LLCs, in addition to the tax reform mentioned above.¹⁴⁰ Every state now has an LLC statute, and in a large majority of states, LLC filings outpace the formation of new corporations or at least approach the same levels as new corporate filings.¹⁴¹ The Revised Uniform Partnership Act (RUPA), upon which the ULLCA relied heavily, was amended to provide for limited liability partnerships (LLPs) with full shield limited liability,¹⁴² and became the law in Arkansas in 1999.¹⁴³ A new Revised Uniform

138. A description of the history of the uniform law process as relating to LLCs appears in the Prefatory Note to the Revised Uniform Limited Liability Company Act (RULLCA). At the time this article was written, the text was final, but the comments were being worked upon. The copy of the act relied upon in the writing of this article was located online at http://www.law.upenn.edu/bll/ulc/ullca/2006october_finaltextandcomments.htm. Throughout this article, citations to the RULLCA will be made to this version of uniform act.

139. *Id.*

140. Although given only brief attention in the text, the tax amendments were in fact of critical importance to the development of LLCs. For many years, the tax status of unincorporated businesses depended on the corporate resemblance test, which essentially required that unincorporated business associations be evaluated to determine whether or not they possessed certain, defined "corporate" characteristics. Treas. Reg. 301.7701-2(a)(1) (superseded). Under this approach, an organization was taxed as a corporation whenever it had more of four defined "corporate" characteristics than it lacked (continuity of life, centralization of management, limited liability, and free transferability of interests). *Id.* New regulations, which involve a simplified, elective regime, took effect on January 1, 1997. Treas. Reg. §§ 301.7701-1-3, 61 Fed. Reg. 66588 (Dec. 18, 1996), codified at 26 C.F.R. 301 (1997). Widely known as the "check-the-box" rules, the current regulations provide that most unincorporated business forms will be taxed as partnerships unless a specific election is made to have them taxed as corporations. See Goforth, *supra* note 46, at 11. For a more detailed explanation of these regulations, and their impact on the then-current Arkansas law relating to LLCs, see Goforth, *supra* note 46.

141. See *supra* note 140. See also Howard M. Friedman, *The Silent LLC Revolution—The Social Cost of Academic Neglect*, 38 CREIGHTON L. REV. 35 (2004) (observing that the LLC "has become the dominant form for newly-created small businesses in a clear majority of the states, and is rivaling corporations for that distinction in several more.").

142. "Full shield limited liability" means that a general partner in an LLP will be exposed to no more liability than a member in an LLC or shareholder in a corporation, rather than being at risk for all enterprise debts, as was the case for general partners in traditional partnerships. This represented a change from the law in many states, including Arkansas, which

Limited Partnership Act (often called re-RULPA) was promulgated by NCCUSL and adopted in Arkansas, effective September 2007.¹⁴⁴ Series LLCs, an innovation pioneered in Delaware, have been spreading to other states.¹⁴⁵

RULLCA was drafted with these developments in mind. It therefore stands to reason that the proposed Act deserves careful attention in this state, as we strive to be a modern jurisdiction offering convenient and up-to-date choices to businesses wishing to operate here. In very general terms, RULLCA is more detailed and more up-to-date than the Arkansas statute. It is also drafted in terms that are consistent with other commercial law statutes, such as RUPA and re-RULPA. In the Prefatory Note to RULLCA, the drafters note that among the noteworthy provisions of the uniform proposal are detailed provisions governing the content and effect of the operating agreement, fiduciary duties of persons with management power, charging orders, remedies for oppressive conduct, and derivative claims.¹⁴⁶

As this article did with the Arkansas LLC Act, the following material will proceed through the RULLCA. This article will note significant provisions, pay special attention to rules that differ significantly from those currently in effect in Arkansas, and focus on any provisions that may appear give reason for pause when considering the suitability of RULLCA for this state.

A. Article 1: Introduction, Definitions, and Basic Provisions Regarding LLCs

The initial section of RULLCA provides that the official name of the Act shall be the “Revised Uniform Limited Liability Company Act.”¹⁴⁷ Setting aside any slight confusion that might be caused in Arkansas because we never adopted the original Uniform Limited Liability Company Act, the choice to go with “Revised” in the title is an interesting one. Most other uniform acts have given up on “Revised” because of the predictable chaos when one starts contemplating “Revised Revised” uniform acts. Thus, for

had adopted “partial shield” protections, meaning that the partners in an LLP were potentially liable to entity debts other than those arising out of the misconduct of other partners. *See, e.g.,* ARK. CODE ANN. § 4-42-307 (repealed effective Jan. 1, 2005).

143. 1999 Ark. Act 1518 (codified at ARK. CODE ANN. §§ 4-46-101 et seq. (LEXIS Repl. 2001 & Supp. 2007)).

144. 2007 Ark. Act 15 (codified at ARK. CODE ANN. §§ 4-47-101 et seq. (LEXIS Repl. 2001 & Supp. 2007)).

145. Carol R. Goforth, *The Series LLC, and Series of Difficult Questions*, 60 ARK. L. REV. (2007) (forthcoming).

146. RULLCA, *supra* note 4, Prefatory Note.

147. *Id.* § 101.

example, the recently promulgated Uniform Partnership Act (1996)¹⁴⁸ (although itself a revision of the original Uniform Partnership Act)¹⁴⁹ does not utilize the word “Revised” in its title. However, popular usage suggests that practitioners and academics continue to think of this as RUPA (the “Revised Uniform Partnership Act”), so the choice to stay with RULLCA is certainly defensible.

The next section¹⁵⁰ includes definitions, and although most of them are straightforward and pretty much what one would expect to find, there are a few things about this section worth mentioning. First is the definition of “certificate of organization.” The comments indicate that this was a completely deliberate deviation from the more common terminology in state LLC statutes (and the original ULLCA) that generally talks in terms of “articles of organization.” The change was designed to emphasize that the certificate is intended only to be the document reflecting creation of the entity and is not expected to include terms relating to the operation of the business.¹⁵¹

Subsection 10 of the definitions section defines manager-management, and makes it clear that RULLCA departs from the original ULLCA model and majority rule that requires that the public document establish the LLC’s status as manager-managed rather than the private operating agreement.¹⁵² This approach is defended on the grounds that RULLCA creates no statutory power to bind the entity, so that there is no need for a public record of the type of management structure utilized by the enterprise. There are specific rules applicable to pre-existing LLCs that become subject to RULLCA, and they provide that the language in the filed document designating management structure is to be treated as if it is part of the operating agreement.¹⁵³

Subsection 13 defines operating agreement, and, as is the rule in most states, there is no requirement that the agreement be in writing.¹⁵⁴ This is a significant departure from existing Arkansas law, which requires operating agreements to be written.¹⁵⁵ The reporters note, however, that the Act “states no rule as to whether the statute of frauds applies to an oral operating agreement.”¹⁵⁶ The comment cites case law that “suggests that an oral

148. This statute, with this title, has been adopted in Arkansas and is codified at Ark. Code. Ann. §§ 4-46-101 et seq.

149. Arkansas had also adopted the original Uniform Partnership. It was codified at ARK. CODE ANN. §§ 4-42-101 et seq. (repealed).

150. RULLCA, *supra* note 4, § 102.

151. *Id.* § 102, comment to Paragraph (1). Arkansas also uses the “articles of organization terminology.” ARK. CODE ANN. § 4-32-202 (2006).

152. RULLCA, *supra* note 4, § 102, comment to Paragraph (10).

153. *Id.*

154. *Id.* § 102(13).

155. See *supra* notes 10–28 and accompanying text.

156. RULLCA, *supra* note 4, § 102, comment to Paragraph (13).

agreement to form a partnership or joint venture with a term exceeding one year is within the statute,”¹⁵⁷ confirming the common sense notion that at the very least it is good practice to have a written operating agreement, whatever the statute requires.

Following the definitions section is a provision that defines knowledge and notice.¹⁵⁸ These definitions track those generally found in other commercial and business statutes,¹⁵⁹ with “knowledge” referring to actual knowledge—or knowledge imputed by the statute—as to limitations on authority to transfer real estate, dissolution, termination, merger, conversion, or domestication.¹⁶⁰ It is worth noting that there are no rules governing attribution of knowledge to the LLC when possessed by or communicated to a member or manager. The reason for this omission, as explained in the comment, is that RULLCA does not give such persons any statutory authority, and therefore there is no need for special rules on attribution.¹⁶¹ Similarly, the question of when the LLC is to be charged with knowledge or notice is itself left for the principles discussed in the new Restatement (Third) of Agency.¹⁶²

Section 104 of RULLCA governs the nature, purpose, and duration of LLCs formed under the act,¹⁶³ and there is really nothing surprising or unique here. An LLC is defined as an entity distinct from its members, it may have any lawful purpose (including those that are not for a profit), and it will (as a default rule) have perpetual duration.¹⁶⁴ Section 105 gives LLCs the capacity to sue and be sued in its own name and legal power to do acts necessary or convenient for its activities,¹⁶⁵ while section 106 adopts the conventional internal affairs doctrine to provide that the laws of the state of formation (“this state”) govern the internal affairs of an LLC and the liability of members and managers for debts of the LLC.¹⁶⁶ Section 107 adopts the normal rules that, unless supplanted by particular statutory provisions, principles of law and equity “supplement” the statute.¹⁶⁷

157. *Id.* (citing *Abbott v. Hurst*, 643 So.2d 589, 592 (Ala. 1994); *Pemberton v. Ladue Realty & Const. Co.*, 362 Mo. 768, 770–71, 244 S.W.2d 62, 64 (Mo. 1951); *Ebker v. Tan Jay Int'l, Ltd.* 739 F.2d 812, 827-28 (2d Cir. 1984)).

158. RULLCA, *supra* note 4, § 103.

159. The comment to this section specifically notes consistency with the UCC, and general rules of agency. *Id.* § 103, comment.

160. *Id.* § 103(d)(2)(C).

161. *Id.* § 103, comment.

162. *Id.*

163. *Id.* § 104(a)–(c).

164. RULLCA, *supra* note 4, § 104(a)–(c).

165. *Id.* § 105.

166. *Id.* § 106.

167. *Id.* § 107.

There are detailed provisions governing the permissible names for an LLC,¹⁶⁸ but the rules embodied in this provision appear generally consistent with the rules in the current Arkansas LLC Act. The name of the LLC must contain specified words or initials designating the entity as an LLC¹⁶⁹ and must be distinguishable from names of other businesses as filed with the Secretary of State¹⁷⁰ unless the current owner consents.¹⁷¹ Unlike current law, however, there is no requirement that the language be in English.¹⁷² Section 109 allows for advance reservation of a proposed name, for a 120-day period.¹⁷³

The next section of RULLCA governs the scope, function, and limitations on what may be included in an LLC's operating agreement, and it is both considerably more detailed and different from current Arkansas law.¹⁷⁴ The first difference is that under RULLCA, an operating agreement need not be in writing; the significance of this difference has already been discussed in the preceding section of this article addressing the Arkansas LLC Act.¹⁷⁵ As for the substantive provisions that may be included in an operating agreement, RULLCA is far more precise. RULLCA grants very broad but general authority to the operating agreement to govern relations between the members and the LLC, as well as their relative rights and obligations.¹⁷⁶ To the extent that the operating agreement does not address matters governed by RULLCA, the act itself will provide default rules for the company.¹⁷⁷ These rules should match those that already exist in Arkansas, although the Arkansas LLC Act does not spell this out quite as clearly. The first place that RULLCA takes a different direction is in subsection (c) of section 110, which specifies that an operating agreement may not include some kinds of provisions, primarily excessive limitations on fiduciary obligations or the contractual obligation of good faith.¹⁷⁸ Subsection (d) gives back some au-

168. *Id.* § 108.

169. *Id.* § 108(a).

170. RULLCA, *supra* note 4, § 108(b).

171. *Id.* § 108(c)(1).

172. Compare *id.* § 108 with ARK. CODE ANN. § 4-32-1308 (LEXIS Repl. 2001).

173. RULLCA, *supra* note 4, § 109.

174. *Id.* § 110.

175. See *supra* notes 10-28 and accompanying text.

176. RULLCA, *supra* note 4, § 110(a).

177. *Id.* § 110(b).

178. *Id.* § 110(c). While this language would represent a departure from the current LLC statute, Arkansas did adopt similar language as part of its current uniform partnership act. See ARK. CODE ANN. § 4-46-103 (LEXIS Repl. 2001) (providing limitations on what may be included in a partnership agreement). Note also that the drafters of RULLCA expressly considered the recent Delaware innovation that permits operating agreements to fully eliminate fiduciary duties, and rejected this "ultra-contractarian" notion. See RULLCA, *supra* note 4, § 110(d), comment.

thority to define and limit such obligations, albeit not unreasonably.¹⁷⁹ Subsections (e) through (g) also include additional details concerning how far an operating agreement may go to permit ratification of otherwise impermissible conduct, authority to divest persons of responsibility and authority, indemnification, and additional definitions relating to these issues.¹⁸⁰

The following sections also deal with operating agreements and set out rules designed to clarify the effect of the operating agreement on the company, members, and third parties.¹⁸¹ The first of these provisions establishes that the company itself may enforce an operating agreement whether or not it is a named party to the agreement, that all members are deemed to consent to an operating agreement, and that an operating agreement may be written in advance of legal formation of the company, even by a sole member.¹⁸² The next section deals primarily with the effect of the operating agreement on third parties and also includes a number of rules designed to clarify the way in which an operating agreement may impact persons other than members or managers.¹⁸³ For example, an operating agreement may specify that amendments require the approval of one or more non-members, and RULLCA also spells out the effect of amendments on transferees and dissociated members.¹⁸⁴ There is language reaffirming the limitations on the right of parties to eliminate or reduce fiduciary duties of persons with management authority,¹⁸⁵ and there is a provision that, if an operating agreement conflicts with a filed document or record, the operating agreement prevails as to “members, dissociated members, transferees, and managers,” whereas the filed record prevails as to persons “to the extent they reasonably rely on the record.”¹⁸⁶ This latter provision essentially mirrors existing Arkansas law, but does so a little more cleanly, covering dissociated members and transferees as well as members and managers.¹⁸⁷ One difference is that RULLCA provides that a filed record in conflict with the operating agree-

179. RULLCA, *supra* note 4, § 110(d).

180. *Id.* § 110(e)–(h).

181. *Id.* §§ 111, 112.

182. *Id.* § 111.

183. *Id.* § 112.

184. *Id.* § 112(a)–(b).

185. RULLCA, *supra* note 4, § 112(c).

186. *Id.* § 112(d).

187. The fact that RULLCA deals with transferees is a potentially significant benefit to this statute, as the problem of transferees in closely held businesses such as LLC has yet to be cleanly resolved by the courts. Transferees include not only creditors, but heirs and purchasers who have not been accepted as members, and it is easy to see how the interests of current owners and managers might diverge from those of transferees. Rules that protect transferees to some extent are clearly important, but it is equally important to recognize the need of current owners to operate their business without undue interference. For a further discussion of this issue, see RULLCA § 112(b), cmt.

ment controls only to the extent that third parties have reasonably relied upon it. Otherwise, the agreement controls.

The next four sections all deal with the company's office and agent for service of process and how process is to be served on an LLC.¹⁸⁸ The first obligates LLCs (both domestic and foreign) to designate an in-state office and agent for service of process.¹⁸⁹ The next explains how an office or agent may be changed by filing of a statement of change,¹⁹⁰ and the one after that explains how an agent may resign.¹⁹¹ The details of how process is to be served and what happens when an office or agent has not been properly maintained are spelled out in the final section of the first article of RULLCA.¹⁹²

B. Article 2: Formation of LLCs and Accompanying Filings

Article 2 of RULLCA deals with formation of the company and various filings associated with formation.¹⁹³ The first section in this article deals with the formation and certificate of organization and was actually among the provisions that received the most discussion and comment during meetings.¹⁹⁴ As drafted, one or more persons may form an LLC by acting as organizer(s) and filing a certificate of organization.¹⁹⁵ The certificate of organization is required to contain very minimal information, not even a statement as to how the LLC is to be managed,¹⁹⁶ although additional information may be included if desired by the organizers.¹⁹⁷ The LLC is formed upon filing unless a delayed effective date is specified,¹⁹⁸ as is the usual case for new entities, albeit not under current Arkansas Law.

Article 2 also includes another very significant change from existing Arkansas law governing LLCs: express permission to form a "shelf LLC" that exists before there are any members.¹⁹⁹ The concept of the "shelf LLC" was the portion of this provision that received by far the most attention, both in committee and when drafts of RULLCA were presented to NCCUSL.²⁰⁰

188. RULLCA, *supra* note 4, §§ 113–116.

189. *Id.* § 113.

190. *Id.* § 114. Another option is clearly available, if the managers decide to amend their certificate of organization instead of a distinct filing.

191. *Id.* § 115.

192. *Id.* § 116.

193. *Id.* §§ 201–209.

194. RULLCA, *supra* note 4, § 201, cmt.

195. *Id.* § 201(a).

196. *Id.* § 201(b).

197. *Id.* § 201(c).

198. *Id.* § 201(d).

199. Goforth, *supra* note 145.

200. RULLCA, *supra* note 4, § 201, cmt.

In essence, the draft represents a compromise between those who were in favor of and those who were opposed to permitting organizers to form an LLC prior to the admission of any members. As drafted and recommended, the act allows a certificate of organization to be filed before there are any members, *but* (1) the certificate itself must explicitly acknowledge this,²⁰¹ (2) the LLC exists only in “embryonic” form unless and until the organizer delivers for filing a notice that there is at least one member and this is done within the statutory time frame of ninety days,²⁰² and (3) if this filing is not made in a timely fashion, the certificate lapses and is legally void.²⁰³ This approach seemed to satisfy most persons concerned about whether shelf registrations were necessary and appropriate to accommodate modern business practices, without inappropriately ignoring the essential nature of the LLC as an amalgamation of partnership and corporate law.²⁰⁴ At this time, there is no provision for shelf LLCs in Arkansas.

The next section of RULLCA deals with amended and restated certificates of organization and sets out very typical rules for this process.²⁰⁵ There is a provision allowing courts to order company officials to sign and file documents,²⁰⁶ and RULLCA also adopts the usual rule that documents are effective upon filing unless a later date is specified.²⁰⁷ While this would be a change from the current Arkansas LLC Act,²⁰⁸ this rule accords with the requirements embodied in every other business statute in the state and is, therefore, not only familiar but also makes a great deal more sense for businesses. The next subsection explains the process for correction of filed records.²⁰⁹ A statement of correction is a relatively straightforward document, and although it might be slightly more complete than most statutes dealing with correcting errors,²¹⁰ there is nothing unusual in its terms.

201. *Id.* § 201(b)(3).

202. *Id.* § 201(e)(1).

203. *Id.*

204. *See id.* § 201 cmt.

205. *Id.* § 202. Nothing in this provision significantly differs from existing Arkansas law. *See supra* notes 35–44 and accompanying text. Given the current confusion possible as a result of the provision that allows formation of an Arkansas LLC upon delivery of the articles rather than upon filing, it might be helpful that this provision explicitly notes an amendment is effective upon filing.

206. RULLCA, *supra* note 4, § 204(a).

207. *Id.* § 205. RULLCA has very precise rules for what happens when a delayed date is mentioned without sufficient specificity. For example, if a delayed date is specified with no time, the time is assumed to be 12:01 am. *Id.* § 205(c)(3). The statute here acts only as a gap filler, but in the event of a dispute, it would be nice to have such clarity in the legislation.

208. *See supra* notes 35–44 and accompanying text.

209. RULLCA, *supra* note 4, § 206.

210. This section explicitly states, for example, that no delayed effective date is permissible. *Id.* § 206(b). For comparison purposes, the Arkansas LLC Act currently permits corrections to be made, ARK. CODE ANN. § 4-32-1309, also by filing of articles of correction, that

The following section, which provides for personal liability for inaccurate information in filed documents,²¹¹ is considerably more complete than the existing Arkansas LLC Act.²¹² RULLCA specifies not only that filings are made under penalty of perjury,²¹³ but also that third parties who suffer loss by relying on inaccurate information may recover from specified persons, including the individuals who signed the document and those having management responsibilities so long as they had notice of the error.²¹⁴ The current Arkansas LLC Act specifies criminal penalties for inaccurate information in filed documents, but it does not specify personal liability to third parties who rely on the misinformation.²¹⁵

The next section explains how a certificate of existence or authorization (in the case of a foreign LLC) may be obtained and what it is to include.²¹⁶ Although more specific than current Arkansas law,²¹⁷ there is nothing particularly remarkable about this provision.

The final section of Article 2 of RULLCA establishes an annual reporting requirement for LLCs.²¹⁸ The annual report is to include basic information such as: (1) the name of the company; (2) the address for its current registered office and for its agent for service of process; and (3) in the case of foreign LLCs, the state or jurisdiction under which the LLC was

must describe the inaccurate document, the reason it was inaccurate, and how it is to be corrected. ARK. CODE ANN. § 4-32-1309 (LEXIS Repl. 2001). Similarly, the Arkansas LLC Act does specify that the certificate is effective retroactively to the effective date of the document being corrected, except as to persons who have relied on the incorrect information. *Id.* One small way in which this provision of RULLCA is less specific than the Arkansas LLC Act is that existing Arkansas law provides that the penalty in Arkansas for signing false documents is a Class C misdemeanor. ARK. CODE ANN. § 4-32-1312 (LEXIS Repl. 2001). RULLCA does not specify the penalties other than to say that statements are signed under penalty of perjury. RULLCA, *supra* note 4, § 207 (c).

211. RULLCA, *supra* note 4, § 207.

212. As explained in note 207, *supra*, the Arkansas LLC Act does specify criminal penalties for false filings. ARK. CODE ANN. § 4-32-1312. This is in accord with some other Arkansas business statutes, *see, e.g.*, ARK. CODE ANN. § 4-27-129 (corporations), but Arkansas has also used the penalties of perjury in other business statutes, *e.g.*, ARK. CODE ANN. § 4-43-204 (limited partnerships) (repealed effective September, 2007).

213. RULLCA, *supra* note 4, § 207(c).

214. *Id.* § 207(a).

215. Although the Arkansas LLC Act has no provision imposing personal liability on those who rely on misinformation, such language is not completely new to the state. The Arkansas Limited Partnership Act that was in effect until September, 2007 did include this kind of specificity, and in fact RULLCA tracks very closely with the language from the Limited Partnership Act. *See* ARK. CODE ANN. § 4-43-207 (repealed), and the new limited partnership statute also includes this language. ARK. CODE ANN. § 4-47-208 (LEXIS Supp. 2007).

216. RULLCA, *supra* note 4, § 208

217. Compare with ARK. CODE ANN. § 4-32-1311 (LEXIS Repl. 2001).

218. RULLCA, *supra* note 4, § 209.

formed.²¹⁹ There is no equivalent requirement of an annual report for LLCs under the current Arkansas LLC Act, but there are certainly other business forms that are required to make annual filings in this state.²²⁰ The purpose of this provision is somewhat unclear, as there are other sections of the statute that explain how to update the registered office and agent, and it is unclear whether the Secretary of State is supposed to take notice of changes in information included in the annual report. Under RULLCA, however, failure to make the required annual filing is grounds for administrative dissolution,²²¹ so this may be one way to increase the likelihood of having accurate information for such things as the annual franchise tax forms.

C. Article 3: LLC Members and Managers

Article 3 of RULLCA deals with relations of members and managers to persons who deal with the LLC. It includes topics like agency power of members and managers,²²² optional statements of authority and denial,²²³ and general rules about the liability of members and managers.²²⁴ One of the more significant provisions in Article 3 is also one of the shortest: it provides that members of an LLC do not, by reason of that status, have any agency powers.²²⁵ The relatively extensive comments to this section indicate that the reporters were quite aware that this approach departs from both the majority rule and the position taken by the original uniform LLC Act.²²⁶ Although acknowledging that statutory apparent authority continues to make sense in the context of general and limited partnerships, the reporters and the Conference ultimately concluded that the virtually limitless set of options for management structure made it inappropriate and potentially misleading to include statutory authority in the case of LLCs.²²⁷ This is, however, one place where RULLCA diverges fairly significantly in its approach from the Arkansas LLC Act.²²⁸

219. *Id.* § 209(a)(1)–(4).

220. *See, e.g.*, ARK. CODE ANN. § 4-47-210 (LEXIS Supp. 2007) (for limited partnerships, including LLPs).

221. RULLCA, *supra* note 4, § 705(a)(2).

222. *Id.* § 301.

223. *Id.* §§ 302–303.

224. *Id.* § 304.

225. *Id.* § 301.

226. *Id.* § 301(a) cmt.

227. *Id.*

228. Current Arkansas law follows the majority approach in requiring the Articles to specify member or manager management and in establishing default agency power to those with the authority in the members unless management authority is provided for in the articles. ARK. CODE ANN. § 4-32-301 (LEXIS Repl. 2001) (setting out statutory agency power of members and managers).

RULLCA also provides for both a statement of authority and statement of denial,²²⁹ both derived from the provisions of RUPA (the Revised Uniform Partnership Act).²³⁰ Statements of authority are allowed to deal with authority to transfer interests in real property and other matters, but as to the latter, only persons with knowledge of the statement are bound.²³¹ In addition, the statement only applies to non-members, who presumably are bound by agency rules applicable to actual authority.²³² The section lists specific information that must appear in a statement of authority and also covers the amendment and cancellation of grants of authority.²³³ In addition, for authority relative to real estate, the provision requires a double filing, both with the secretary of state and in the appropriate land records.²³⁴ If a person named in a statement of authority wishes to disclaim any such responsibility or liability that might accompany a filed statement of authority, the statement of denial authorized in the following section accomplishes this.²³⁵

The final section of Article 3 sets out the usual rule that neither members nor managers are liable for entity-level debts solely as a result of their status as member or manager.²³⁶ As this is one of the primary hallmarks of the LLC form of business, it offers no surprise at all, nor does it differ from existing Arkansas law.²³⁷ Buried in this section, however, is a potentially more controversial provision, which specifies that failure of the LLC "to observe any particular formalities relating to [its existence] is not a ground for imposing liability on the members or managers" for such debts.²³⁸ This is a very helpful rule for clarifying the consequences of failure to observe formalities, vis-a-vis piercing the veil for the LLC,²³⁹ but it may or may not be the rule that Arkansas wants to adopt.²⁴⁰

229. RULLCA, *supra* note 4, §§ 302–303.

230. *Id.* § 302 cmt. Given that Arkansas has adopted RUPA, in-state practitioners should therefore be somewhat familiar with these concepts. See ARK. CODE ANN. § 4-46-303 (LEXIS Repl. 2001) (statement of partnership authority); *id.* § 4-46-304 (LEXIS Repl. 2001) (statement of denial).

231. RULLCA, *supra* note 4, § 302 cmt.

232. *Id.* § 302(c).

233. RULLCA § 302(a) deals with the contents of a statement, and § 302(b) governs its amendment or cancellation. *Id.* §§ 302(a)–(b).

234. *Id.* § 302(a), (g).

235. *Id.* § 303.

236. *Id.* § 304(a).

237. See ARK. CODE ANN. § 4-32-402(3), specifying that members in an LLC have no personal liability as such.

238. RULLCA, *supra* note 4, § 304(b).

239. For an additional discussion of piercing the veil, see *supra* notes 17–22 and accompanying text.

240. The Arkansas LLC Act does specify that failure to keep records at the company's principal place of business, as required by ARK. CODE ANN. § 4-32-405, "shall not be grounds for imposing liability on any member or manager for the debts and obligations" of the com-

The comments to this section suggest that although it is usual to consider “disregard of corporate formalities” in the context of piercing the veil for corporations, “[i]n the realm of LLCs, that factor is inappropriate, because informality of organization and operation is both common and desired.”²⁴¹ The comment also opines that the statutory language “does not preclude consideration of another key piercing factor—disregard by an entity’s owners of the entity’s economic separateness from the owners.”²⁴²

Assuming that the courts concur with this interpretation of the applicable language in the statute, which is not certain as some of the statutorily provided formalities appear to relate to the economic separation, it is still not entirely clear that it is wise to include a statutory pronouncement that failure to observe formalities shall not be grounds for piercing. There are relatively few statutory formalities, and many of them appeared geared toward protecting members and third parties who deal with LLCs. Failure to keep a registered office and agent, for example, is a statutory formality. Although it alone should not suffice to pierce the veil, if it evidences a pattern of failure to treat the LLC as a separate entity, there seems to be little reason not to consider it as evidence in the context of a piercing claim. Because there are so few statutorily imposed formalities, however, it is certainly true that this factor should be considerably less important than in the corporate context.

D. Article 4: Relations Between Members and the LLC

Article 4 of the RULLCA deals with relations of members to each other and to the LLC. Logically, the first section in this article deals with becoming a member.²⁴³ The section is detailed and provides specific information about single member LLCs and multi-member LLCs, becoming an initial member upon filing of the certificate, and joining as an additional member subsequent to formation.²⁴⁴ There are two specific provisions in this section designed to avoid potential disputes that might arise under less detailed statutes: (1) there are specific rules governing what happens in the event that an LLC ceases to have members;²⁴⁵ and (2) there is an explicit authorization

pany, but this limitation is less broad than specifying that a complete disregard of all statutory formalities would have no impact on the liability of participants. ARK. CODE ANN. § 4-32-405 (LEXIS Repl. 2001).

241. RULLCA, *supra* note 4, § 304(b) cmt.

242. *Id.*

243. *Id.* § 401.

244. *Id.* § 401(a)–(d).

245. *See id.* § 401(d)(4) (authorizing the last person to have been a member or his or her legal representative to designate a replacement member within 90 days after ceasing to be a member).

for the LLC to have members who either make no contribution or who acquire no transferable interest in the company, or a combination of the two.²⁴⁶

The following section deals with the form of contributions²⁴⁷ and tracks the usual rule for contributions to business entities. Under this provision, a contribution to an LLC may be in the form of tangible or intangible property, services, or a promise to provide or perform such in the future. This accords with the majority rules and is the rule embodied in the current Arkansas LLC Act.²⁴⁸ It is also consistent with the rules applicable to most other business entities available in Arkansas,²⁴⁹ albeit not the corporation.²⁵⁰

The next section makes persons who agree to make a contribution to the LLC personally liable to the LLC²⁵¹ and to creditors who rely upon any such obligation.²⁵² These rules are generally in accord with existing Arkansas law applicable to domestic LLCs,²⁵³ except that the current statute expressly requires an agreement to contribute to be in a signed writing in order to be enforceable.²⁵⁴ RULLCA includes no requirement of a signed writing, although it is conceivable that in some instances promises to make certain

246. *Id.* § 401(e). The comment to this section notes that this provision recognizes that in reality not all LLCs need to be organized for the purpose of making a profit, and that “non-economic” members may be especially likely in this circumstance. *Id.* § 401(e) cmt. The comment recognizes, however, that usual business practices today may also result in non-economic members.

247. RULLCA, *supra* note 4, § 402.

248. ARK. CODE ANN. § 4-32-501 (LEXIS Repl. 2001) (authorizing contributions of tangible and intangible property, services, and promised to provide or perform such in the future).

249. *See, e.g.*, ARK. CODE ANN. § 4-47-101 (LEXIS Supp. 2007); *id.* § 4-47-501 (LEXIS Supp. 2007) (defining contribution broadly in the context of limited partnerships and LLPs). As to general partnerships and LLPs, the statute obliquely refers to contributions that include money plus any other property and also talks about default rules applicable to partners who have agreed to provide services. ARK. CODE ANN. § 4-46-401(a)(1), (h) (LEXIS Repl. 2001). In addition, contributions subsequent to the formation of the partnership are expressly contemplated and are referenced in other portions of the Arkansas general partnership statute. *See, e.g.*, ARK. CODE ANN. § 4-46-807(b) (LEXIS Repl. 2001) (discussing the contributions required as part of the settlement of accounts upon winding up of a partnership).

250. ARK. CODE ANN. § 4-27-621(b) (LEXIS Repl. 2001) (authorizing directors to issue shares in Arkansas corporations only in exchange for “money paid, labor done, or property actually received”). Neither promissory notes nor the promise of future services are legally sufficient. *Id.* This restrictive approach, which is out of step with the modern trend in business associations, is due to a restrictive requirement applicable to the issuance of corporate stock (but not ownership interests in other forms of business) in the Arkansas state constitution. Ark. Const. art. 12, § 8.

251. RULLCA, *supra* note 4, § 403(a).

252. *Id.* § 403(b).

253. ARK. CODE ANN. § 4-32-502 (LEXIS Repl. 2001).

254. *Id.* § 4-32-502(a).

kinds of contributions may be subject to the statute of frauds requirement of a writing.²⁵⁵

The next sections of RULLCA deal with distributions.²⁵⁶ Speaking generally, the statute provides default rules governing the payment, timing, and nature of distributions, which members are free to change in most respects.²⁵⁷ Absent agreement to the contrary, distributions are to be shared equally among members and dissociated members.²⁵⁸ There is no right to a distribution upon dissociation.²⁵⁹ There is no right to in-kind distributions,²⁶⁰ and a member or transferee who becomes entitled to a distribution gains the status and rights of a creditor as to such amounts.²⁶¹ These rules are very similar to those in the existing Arkansas LLC Act²⁶² and so should be familiar in Arkansas. Arkansas's existing LLC Act, however, does not contain anything like the specificity of RULLCA on these subjects.

The next two provisions deal with limitations on distributions and liability for improper distributions.²⁶³ Although there is no equivalent language in the current Arkansas LLC Act, the rules here appear to follow very closely the rules governing corporate distributions,²⁶⁴ and this approach should

255. A promise to contribute an interest in real estate, for example, would clearly need to be in writing, regardless of whether the LLC statute included a requirement to this effect. *See* ARK. CODE ANN. § 4-59-101(a)(4) (LEXIS Supp. 2001). Similarly, if the promised contribution was an agreement to provide services for a period of time in excess of one year, the requirement that a contract "that is not to be performed within one (1) year from the making of the contract" must be in writing might come into play. *Id.* § 4-59-101(a)(6).

256. RULLCA, *supra* note 4, §§ 404–406.

257. *Id.*

258. *Id.* § 404(a). Note that the inclusion of dissociated members in this right is different from existing law, which does not talk about dissociated members at all. ARK. CODE ANN. § 4-32-601 (LEXIS Repl. 2001) (sharing of interim distributions). RULLCA is like the existing Arkansas LLC Act, however, in failing to provide any default rule for the sharing of losses, assuming that applicable tax rules will be more relevant to LLCs in their structuring of loss sharing arrangements.

259. RULLCA, *supra* note 4, § 404(b). This is another major difference between RULLCA and the existing Arkansas LLC Act, which provides that, as a default rule, dissociating members are to be paid the fair value of their interest within a reasonable time. ARK. CODE ANN. § 4-32-602 (LEXIS Repl. 2001).

260. RULLCA, *supra* note 4, § 404(c).

261. *Id.* § 404(d).

262. Current Arkansas law provides that distributions are to be made as provided by the operating agreement, or if not specified there, equally. ARK. CODE ANN. § 4-32-601 (LEXIS Repl. 2001). There is no right to in-kind distributions. ARK. CODE ANN. § 4-32-603 (LEXIS Repl. 2001). Once a member becomes entitled to a distribution, as to that amount the member has the status and rights of a creditor of the LLC. ARK. CODE ANN. § 4-32-604 (LEXIS Repl. 2001). Current Arkansas law does not, however, specifically address the rights of transferees in this context, as does RULLCA. RULLCA, *supra* note 4, § 404(d).

263. RULLCA, *supra* note 4, §§ 405–406.

264. *See* ARK. CODE ANN. § 4-27-640 (LEXIS Supp. 2007) (dealing with limits on corporate distributions), -833 (dealing with liability for unlawful distributions).

therefore be generally familiar in Arkansas. In very general terms, distributions are impermissible if they would render the company insolvent,²⁶⁵ and distributions made in violation of this limitation may result in liability on the part of those declaring the distribution or knowingly receiving payments from the LLC.²⁶⁶ These provisions make sense in the context of an entity in which creditors might well be treated unfairly if distributions are permitted at a time when the entity is insolvent. In both the general and limited partnership context, there was always at least one general partner who would have been personally liable if they rendered the partnership insolvent through payments to other partners. Of course, the failure of the existing LLC Act to address this issue is not completely irresponsible, as the Uniform Fraudulent Transfer Act would also apply in most of these situations.²⁶⁷

Following the provisions dealing with distributions, RULLCA addresses management and various related subjects such as standards of care and indemnification.²⁶⁸ The section on management²⁶⁹ follows the approach taken by the overwhelming majority of American jurisdictions (including Arkansas) in providing member management as the default rule.²⁷⁰ RULLCA differs from the typical approach, however, in that it provides that it is the operating agreement alone that controls management structure²⁷¹ and not the articles or certificate. RULLCA follows most of the default rules that already apply in Arkansas: (1) all persons with management authority are presumed to have an equal voice; (2) significant changes in operations or amendments to the operating agreement require unanimous approval; (3) no particular formality for such approval is imposed; and (4) a manager's term is perpetual, until a replacement is chosen by a majority of the members.²⁷² There are several rules that are spelled out more clearly by RULLCA than the Arkansas LLC Act, such as a specific note that managers may be removed without notice or cause,²⁷³ and that when a member is serving as manager, dissociation as a member will also automatically end that person's term as manager.²⁷⁴

265. RULLCA, *supra* note 4, § 405.

266. *Id.* § 406(a).

267. ARK. CODE ANN. § 4-59-201-213 (LEXIS Repl. 2001 & Supp. 2007).

268. RULLCA, *supra* note 4, §§ 407-09.

269. *Id.* § 407.

270. ARK. CODE ANN. § 4-32-202 requires that in order for an Arkansas LLC to elect to be managed by managers, a statement to that effect must appear in the articles of organization. ARK. CODE ANN. § 4-32-202 (LEXIS Supp. 2007).

271. RULLCA, *supra* note 4, § 407(a).

272. *Id.* § 407(b)(2), (c)(4)-(5).

273. *Id.* § 407(c)(5).

274. *Id.* § 407(c)(6).

RULLCA also includes specific provisions governing indemnification and insurance, specifying that as a default rule the company shall reimburse members or managers who incur expenses or liability in the course of their management responsibilities.²⁷⁵ The comment notes that while the drafted language itself does not talk about an obligation to advance expenses, this might be read in by the courts in some jurisdictions.²⁷⁶ Although the current Arkansas LLC Act authorizes an LLC to elect to provide indemnification, there is no equivalent default rule presuming it in existing Arkansas law.²⁷⁷ RULLCA also specifically authorizes an LLC to maintain insurance on behalf of its members and managers.²⁷⁸ Although the current Arkansas LLC Act is silent on this issue, it would be surprising if the courts decided to impose any limitation on an LLC's right to do so.

The next section of RULLCA sets out "standards of conduct for members and managers."²⁷⁹ The statutory language here strikes new ground, departing from the rules of the current Arkansas LLC Act and deviating from the approaches taken in RUPA and re-RUPA as well. The provision first sets out the duties of members in member-managed companies (the usual default management structure)²⁸⁰ and then contains a rule shifting those duties to managers in the case of manager-managed operations.²⁸¹

At first glance, some of the language appears to be mirror portions of the fiduciary duties provisions in RUPA,²⁸² and other parts appear to be based on the language that shows up in corporate law.²⁸³ In fact, RULLCA is unique. Prior to the promulgation of RUPA, it was accepted without question that courts would define the boundaries of fiduciary duties and that this was not within the realm of legislation. RUPA, however, changed this in the interests of promoting certainty and freedom of contract and expressly set forth the "only" fiduciary duties owed (in the absence of contractual expansion of such obligations).²⁸⁴ This approach was followed by NCCUSL when it promulgated the original ULLCA and re-RULPA. After substantial discussion during the approval process for RULLCA,²⁸⁵ NCCUSL declined to

275. *Id.* § 408.

276. *Id.* § 408(a) cmt.

277. ARK. CODE ANN. § 4-32-404(2) (LEXIS Repl. 2001).

278. RULLCA, *supra* note 4, § 408(b).

279. *Id.* § 409.

280. *Id.* § 409(a)–(f).

281. *Id.* § 409(g).

282. Compare *id.* § 409(b) with ARK. CODE ANN. § 4-46-404 (LEXIS Repl. 2001) (the Arkansas Uniform Partnership Act).

283. Compare RULLCA, *supra* note 4, § 409(c)–(e) with ARK. CODE ANN. § 4-27-830 (LEXIS Supp. 2007) (the Arkansas Business Corporation Act).

284. Thus, Arkansas general partnership law purports to list "[t]he only fiduciary duties a partner owes to the partnership and the other partners . . ." ARK. CODE ANN. § 4-46-404(a).

285. RULLCA, *supra* note 4, § 409(a)–(b) cmt.

list the “only” fiduciary duties for members and managers in LLCs and instead adopted language which omits any notion that the statutory duties are the only ones owed.²⁸⁶

In addition, RULLCA declined to adopt a gross negligence standard of care, choosing instead to impose a standard of ordinary care (akin to that imposed on corporate directors)²⁸⁷ with the express notation that the business judgment rule applies to test the validity of such a person’s conduct.²⁸⁸ There are other parallels to the corporate duty of care, such as the right to rely in good faith on the reports of others,²⁸⁹ and the ability to defend against claims of a breach of duty of loyalty by proving that the challenged transaction was fair to the company.²⁹⁰

It is also worth noting that RULLCA intentionally omitted a provision that appeared in RUPA, the ULLCA, and ULPA, to the effect that a member “does not violat[e] a duty or obligation . . . merely because the member’s conduct furthers the member’s own interest.”²⁹¹ Again, the fact that the LLC has such flexibility and may be managed in so many different ways was enough to persuade NCCUSL that a uniform provision of this sort was not desirable.

The last section in Article 4 deals with the rights of members, managers, and dissociated members to receive and obtain information.²⁹² The language in this section is borrowed from ULPA,²⁹³ and it is far more extensive and detailed than the provisions that appear in the existing Arkansas LLC Act.²⁹⁴ RULLCA first describes the rights of members in member-managed

286. *Id.*

287. ARK. CODE ANN. § 4-27-830(a) imposes upon corporate directors the duty to act “in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, in a manner he reasonably believes to be in the best interests of the corporation.” ARK. CODE ANN. § 4-27-830(a) (LEXIS Supp. 2007). RULLCA imposes on persons in an LLC who act with management authority, the duty to act with the care an ordinarily prudent person in a like position would exercise in similar circumstances, in a manner he believes to be in the best interests of the corporation. RULLCA § 409(c)

288. Although the duty of care language in RULLCA is expressly made subject to the standards of the business judgment rule, by case law this is also the approach taken with regard to decisions by directors of Arkansas corporations. *See, e.g.,* Long v. Lampton, 324 Ark. 511, 522, 922 S.W.2d 692, 699 (1996); Smith v. Leonard, 317 Ark. 182, 190, 876 S.W.2d 266, 270 (1994); and Hall v. Staha, 303 Ark. 673, 678, 800 S.W.2d 396, 399 (1990).

289. Compare RULLCA, *supra* note 4, § 409(d) with ARK. CODE ANN. § 4-27-830(b) (LEXIS Supp. 2007).

290. Compare RULLCA, *supra* note 4, § 409(e) with ARK. CODE ANN. § 4-27-831(a)(3) (LEXIS Repl. 2001).

291. RULLCA, *supra* note 4, § 409(e) cmt.

292. *Id.* § 410.

293. *Id.* § 410, comment.

294. See ARK. CODE ANN. § 4-32-405 (LEXIS Repl. 2001) (enumerating categories of information that must be kept at the LLC’s principal place of business and giving a right to members to copy company records, wherever kept).

LLCs, and not only gives the members in such companies very broad rights to access financial information and other data relevant to their rights and obligations,²⁹⁵ but also imposes upon the company an affirmative obligation to provide information that it knows to be material to the member's rights and obligations.²⁹⁶ In the event that the LLC is manager managed, these informational rights apply to the managers and not members,²⁹⁷ and members obtain the right to demand information regarding the activities, financial condition, and other circumstances, so long as the demand is just and reasonable, the member's purpose is material to the member's interest as member, and the information is directly connected with the member's purpose.²⁹⁸ RULLCA also includes specific information about the procedures for a demand and how the company should respond,²⁹⁹ including an authorization for the company to impose reasonable charges for labor and materials.³⁰⁰ In addition, it clearly establishes that dissociated members continue to have informational rights,³⁰¹ whereas mere transferees do not.³⁰² Finally, the operating agreement can impose only "reasonable restrictions and conditions" on these informational rights as a matter within the ordinary course of activities.³⁰³

E. Article 5: Transferable Interests and Rights of Transferees and Creditors

Article 5 of RULLCA governs the transferable interests in an LLC and the rights of transferees and creditors.³⁰⁴ Although the reporters credit the recently revised re-RULPA as the source of the language in these provi-

295. RULLCA, *supra* note 4, § 410(a)(1), (2)(B).

296. *Id.* § 410(a)(2)(A).

297. *Id.* § 410(b)(1).

298. *Id.* § 410(b)(2). While there is none of this specificity in the existing Arkansas LLC Act, this language should be familiar to Arkansas legal practitioners and business persons, as it reflects the approach taken in the Arkansas Business Corporation Act. ARK. CODE ANN. § 4-27-1602(c) (LEXIS Repl. 2001).

299. RULLCA, *supra* note 4, § 410(b)(3).

300. *Id.* § 410(d).

301. *Id.* § 410(e). Rights of members who dissociate by reason of death are actually governed by RULLCA § 504.

302. *Id.* § 410(f).

303. *Id.* § 410(g). This specificity makes it clear that no unreasonable restrictions are permissible, but that so long as the restriction or conditions are in the ordinary course of the company's business, unanimous consent to impose such limitations is not required.

304. *Id.* § 501-504.

sions,³⁰⁵ the substance of these rules is derived from RUPA, which Arkansas enacted in 1999.³⁰⁶

The first section in this article follows the lead of traditional partnership law in specifying that an owner's transferable interest in an LLC is personal property.³⁰⁷ Under RULLCA, this interest is transferable, and even a transfer of 100% of the economic interest does not result in the transferring member's dissociation as member.³⁰⁸ In addition, the transferee obtains only the economic rights (i.e., the right to distributions) and no right to participate in management of the company.³⁰⁹ RULLCA specifically allows the company to restrict the right to transfer the economic interests, so long as the transferee has notice of the restriction at the time of transfer.³¹⁰ If the transferee does become a member, the obligations of the transferring member that were known to the transferee at the time of transfer apply to the transferee.³¹¹

The rights of creditors are set forward in the next section, which establishes the procedures, rights, and limitations applicable to charging orders.³¹² "On application by a judgment creditor of a member or transferee, a court may enter a charging order against the transferable interest of the judgment debtor."³¹³ This charging order acts as a lien and entitles the creditor to receive any distributions that would otherwise be paid to the debtor.³¹⁴ The court is given authority to appoint a receiver of distributions (not a receiver for the company) and to make other orders "necessary to give effect to the charging order."³¹⁵ A charging interest may be foreclosed only if it can be shown that distributions will not pay off the debt "within a reasonable time,"³¹⁶ with the purchaser at a foreclosure sale also obtaining the status of transferee.³¹⁷ Prior to foreclosure, the debtor, the LLC, or another member of the LLC may extinguish the charging order by satisfying the debt; if the

305. RULLCA, *supra* note 4, § 501 cmt.

306. See, e.g., ARK. CODE ANN. § 4-46-502-504 (LEXIS Repl. 2001). Arkansas also adopted re-RULPA in 2007. 2007 Ark. Act 15, codified at Ark. Code Ann. § 4-47-101 et seq.

307. RULLCA, *supra* note 4, § 501. Accord ARK. CODE ANN. § 4-46-502.

308. RULLCA, *supra* note 4, § 502(a)(1)-(2). Accord ARK. CODE ANN. § 4-46-503(a)(1)-(2) (LEXIS Repl. 2001).

309. RULLCA, *supra* note 4, § 502(a)(3) & (b). Accord ARK. CODE ANN. § 4-46-503(a)(3) & (b).

310. RULLCA, *supra* note 4, § 502(f). Accord ARK. CODE ANN. § 4-46-503(f).

311. RULLCA, *supra* note 4, § 502(h). This language did not appear in RUPA.

312. Compare RULLCA § 503 with ARK. CODE ANN. § 4-46-504 (LEXIS Supp. 2007) (charging orders in the partnership context).

313. RULLCA, *supra* note 4, § 503(a).

314. *Id.*

315. *Id.* § 503(b). The comment to this section indicates a very deliberate attempt to provide guidelines as to the extent of a court's authority in this area.

316. *Id.* § 503(c). This limitation on the right of a creditor to obtain foreclosure did not appear in RUPA.

317. *Id.* § 503(c). Accord ARK. CODE ANN. § 4-46-504(b).

LLC or another member does so, they succeed to the rights of the creditor.³¹⁸ This charging order is statutorily defined as the “exclusive remedy” by which a person seeking to enforce a debt against a member may satisfy the debt from a transferable interest in the LLC.³¹⁹

The Arkansas LLC Act, which was enacted prior to the promulgation and adoption of RUPA in this state, also relies on charging orders to enforce the rights of judgment creditors of members.³²⁰ The Arkansas statute, however, lacks the detail and specificity of RULLCA,³²¹ although it also provides that a judgment creditor with a charging order becomes only an assignee, with no management rights or right to become a member.³²²

The last section in Article 5 gives special rights to the personal representative of deceased members, including informational rights for the purposes of settling the estate that would have been accorded to the deceased member.³²³

F. Article 6: Dissociation

Article 6 is very short, containing only three sections: one dealing with a member’s power to dissociate and wrongful dissociation,³²⁴ the second setting out all the events that can cause dissociation and whether or not such dissociation is wrongful,³²⁵ and the last listing the consequences of dissociation.³²⁶ Given the fact that the LLC has been linked to the partnership form of business, it is not surprising that many earlier LLC statutes continued the partnership tradition of speaking about companies formed for a specific term or undertaking, as was common in partnership law.³²⁷ RULLCA abandons

318. RULLCA, *supra* note 4, § 503(d)–(e). *Accord* ARK. CODE ANN. § 4-46-504(c).

319. RULLCA, *supra* note 4, § 503(g). *Accord* ARK. CODE ANN. § 4-46-504(e).

320. ARK. CODE ANN. § 4-32-705, -706 (LEXIS Repl. 2001).

321. RULLCA, *supra* note 4, § 503.

322. *Id.*

323. *Id.* § 504.

324. *Id.* § 601.

325. *Id.* § 602.

326. *Id.* § 603.

327. The Uniform Partnership Act made withdrawal of a general partner from a general partnership wrongful if it was prior to the expiration of a “definite term or particular undertaking . . .” UPA § 603, enacted in Arkansas and codified at ARK. CODE ANN. § 4-42-603 (repealed). RUPA continues to rely on this concept as an integral part of general partnership law. RUPA § 602(b). As originally enacted, the Arkansas LLC Act provided that a member’s withdrawal before expiration of the LLC’s term would be wrongful. 1993 Ark. Act 1003, § 802, codified at ARK. CODE ANN. § 4-32-802(c) (amended). In 1997, Arkansas amended its LLC Act to include a specific reference to “a withdrawal of a member before the expiration of that term or undertaking,” 1997 Ark. Acts 479, § 10, codified at ARK. CODE ANN. § 4-32-802(c) (amended). Arkansas was of course not alone in utilizing this concept as part of its LLC statute. The original ULLCA also referred to LLCs for a term. ULLCA § 602.

reliance on this concept as unnecessary and confusing in the LLC context. It retains the majority approach of allowing members to have the power to withdraw, even in violation of the agreement of the parties.³²⁸ RULLCA, however, presumes that withdrawal by a member's express will before termination of the LLC is wrongful.³²⁹ Breach of an express provision of the operating agreement; expulsion by judicial order for wrongful conduct; willful dissolution of a member other than a non-business trust, estate, or individual; and dissociation on account of bankruptcy are also presumed to be wrongful,³³⁰ and such wrongful dissociation gives rise to a cause of action to "other members for damages caused by the dissociation."³³¹

Arkansas has struggled with how to handle withdrawal rights of members,³³² finally settling on removing the ability of members to withdraw before "dissolution and winding up" of the LLC.³³³ This is a rather unusual and somewhat awkward solution, as it at least creates the possibility of a "member" who has renounced all economic interest, and declines to participate in any way, shape, or form in management or operations of the enterprise. This would be awkward for both the company and its managers, who sometimes might desperately need the participation or acquiescence of this "member," and for the member, too, who might face the risk of liability in the event of piercing of the veil. Moreover, this approach puts Arkansas out of step with other states, almost all of which continue to allow members the power to withdraw even if limits and restrictions are placed upon that right.³³⁴

The next section of RULLCA merely identifies all of the potential causes of a member's dissociation from the company.³³⁵ Most of these provisions are very typical and should be somewhat familiar to those used to the current Arkansas LLC Act, although there are a number of differences between the two statutes.³³⁶ The first identified event of dissociation in both statutes is a member's express will,³³⁷ but Arkansas has modified this so that the only time that express will is effective is if the right is given in the ar-

328. RULLCA, *supra* note 4, § 601.

329. *Id.* § 601(b)(2)(A).

330. *Id.* § 601(b).

331. *Id.* § 601(c).

332. For a description of the rather convoluted history of this issue in Arkansas, see Carol R. Goforth, *An Update on Arkansas Limited Liability Companies: New Tax Regulations and New State Laws*, 1997 ARK. L. NOTES 11.

333. ARK. CODE ANN. § 4-32-802(c) (LEXIS Repl. 2001).

334. Many states, for example, provide that withdrawal does not garner a member any rights to an immediate distribution. This is the approach that RULLCA takes as well. RULLCA, *supra* note 4, § 603(b).

335. *Id.* § 602.

336. Dissociation is dealt with in section 802 of the current Arkansas LLC Act. ARK. CODE ANN. § 4-32-802.

337. Compare RULLCA, *supra* note 4, § 602(1) with ARK. CODE ANN. § 4-32-802(a)(1).

ticles of organization or the operating agreement.³³⁸ In both statutes, events specified in the operating agreement will also trigger dissociation.³³⁹ Similarly, expulsion pursuant to the operating agreement also operates as an event of dissociation under both acts.³⁴⁰ Both acts also give members the right to expel someone by unanimous consent, with such expulsion being another event of dissociation.³⁴¹ Under RULLCA such a right exists (1) if it would be unlawful to carry on the company's business with such person as a member;³⁴² (2) if all of that person's transferable interest has been transferred other than as security for a debt;³⁴³ (3) in the case of a corporate member, if the corporation has filed a certificate of dissolution or had its corporate charter revoked and has not restored its status to good standing within ninety days;³⁴⁴ or (4) in the case of a member that is an LLC, if it "has been dissolved and its business is being wound up."³⁴⁵ Under existing Arkansas law, the transfer of all of a member's transferable interest gives the other members the right to expel the transferee by majority vote,³⁴⁶ but the other provisions of RULLCA that create a right to expel someone either automatically trigger dissociation under the Arkansas LLC Act, without the need for a vote to expel, or are not listed as grounds for dissociation.³⁴⁷ Under RULLCA, judicial intervention ordering dissociation is permissible if a member engages in conduct that materially and adversely affects the company, willfully and persistently breaches the operating agreement, or engages in activities that "makes it not reasonably practicable to carry on the business with such person."³⁴⁸ RULLCA also provides that death is an event of dissociation,³⁴⁹ as does the Arkansas LLC Act.³⁵⁰

338. ARK. CODE ANN. § 4-32-802(c).

339. Compare RULLCA, *supra* note 4, § 602(2) with ARK. CODE ANN. § 4-32-802(b).

340. Compare RULLCA, *supra* note 4, § 602(3) with ARK. CODE ANN. § 4-32-802(a)(3)(A).

341. Compare RULLCA, *supra* note 4, § 602(4) with ARK. CODE ANN. § 4-32-802(a)(3)(B).

342. RULLCA, *supra* note 4, § 602(4)(A).

343. *Id.* § 602(4)(B).

344. *Id.* § 602(4)(C).

345. *Id.* § 602(4)(D).

346. ARK. CODE ANN. § 4-32-802(a)(3)(B) (LEXIS Repl. 2001).

347. Termination of a corporate member's existence results in dissociation under ARK. CODE ANN. § 4-32-802(a)(9) unless corrected within 90 days. Winding up of an LLC that is a member results in dissociation under ARK. CODE ANN. § 4-32-802(a)(8). There is no right to expel someone under the Arkansas LLC Act merely because it would be illegal to carry on the company's business, although this would be grounds to initiate judicial dissolution of the company. ARK. CODE ANN. § 4-32-902 (LEXIS Repl. 2001).

348. RULLCA, *supra* note 4, § 602(5). Although this language does not appear in the Arkansas LLC Act, RUPA relies on the same provisions. ARK. CODE ANN. § 4-46-601(5) (LEXIS Repl. 2001). The Arkansas LLC Act allows the last of these to be used as ground for a judicial order of dissolution. ARK. CODE ANN. § 4-32-902 (LEXIS Repl. 2001).

349. RULLCA, *supra* note 4, § 602(6)(A).

After having followed traditional partnership rules applicable to dissociation relatively closely, RULLCA then limits some traditional events of dissociation from the partnership context to member-managed LLCs. Both bankruptcy and incapacity are retained as events of dissociation under RULLCA but only for member-managed LLCs.³⁵¹ The Arkansas LLC Act, on the other hand, continues to stay with the traditional partnership approach, making bankruptcy and incapacity automatic events of dissociation regardless of whether the member in question also has a management role.³⁵²

Under both RULLCA and the existing Arkansas LLC Act, termination of a trust that is a member results in automatic dissociation.³⁵³ RULLCA also makes final distribution from an estate that is a member an automatic event of dissociation,³⁵⁴ this is not referenced in the Arkansas statute. Finally, RULLCA also permits dissociation to occur as part of an organic change in the life of the LLC, such as a merger, conversion, domestication, or termination.³⁵⁵ These are not addressed in the Arkansas statute, although dissociation of members upon termination of the company is probably implicit.

The final section in Article 6 of RULLCA deals with the effect of dissociation upon a member, and the rules here are generally quite straightforward.³⁵⁶ Upon dissociation, a member loses any rights to participate in management of the company,³⁵⁷ and fiduciary duties end with regard to matters and events arising after such dissociation.³⁵⁸ The transferable interest owned by a dissociating member immediately prior to dissociation converts from a membership interest to an interest owned "solely as a transferee."³⁵⁹ Finally, dissociation does not discharge any pre-existing debts or obligations to the company or other members.³⁶⁰

The Arkansas LLC Act does not gather these rules into one neat provision and, indeed, does not explicitly address all of these issues. The most significant difference between RULLCA and the Arkansas statute relative to dissociation is the right of members who dissociate to receive payment for the fair value of their membership interests. Although RULLCA provides

350. ARK. CODE ANN. § 4-32-802(a)(6)(i) (LEXIS Repl. 2001).

351. RULLCA, *supra* note 4, §§ 602(6)(B) (incapacity), 602(7) (insolvency).

352. ARK. CODE ANN. § 4-32-802(a)(4)–(5) (insolvency); *id.* § 4-32-802(a)(6)(ii) (incapacity).

353. Compare RULLCA, *supra* note 4, § 602(8) with ARK. CODE ANN. § 4-32-802(a)(7).

354. RULLCA, *supra* note 4, § 602(9).

355. *Id.* § 602(11)–(14).

356. *Id.* § 603.

357. *Id.* § 603(a)(1).

358. *Id.* § 603(a)(2). This would only apply in a member-managed LLC because, as the comment to this section notes, such duties do not exist in the case of manager-managed LLCs. *Id.* § 603(a)(2) cmt.

359. *Id.* § 603(a)(3).

360. RULLCA, *supra* note 4, § 603(b).

for no immediate pay-out and instead converts a dissociated member to transferee, the Arkansas LLC Act provides that upon dissociation that does not trigger dissolution and winding up, the dissociating member is entitled to “receive within a reasonable time after dissociation the fair value of the member’s interest in the [LLC] . . . as of the date of the dissociation.”³⁶¹ Although this is of course subject to contrary agreement, in the event of poor planning it is easy to see how an otherwise profitable LLC might be held hostage to the unreasonable demands of a member willing to threaten dissociation in order to obtain immediate payment. This is not the default rule under RULLCA.

G. Article 7: Dissolution and Winding Up

Article 7 of RULLCA governs dissolution and winding up of an LLC.³⁶² The events causing dissolution are listed in the first section of this article and are quite conventional, generally mirroring the rules of the existing Arkansas LLC Act rather closely.³⁶³ Under both statutes, dissolution happens upon the occurrence of an event or of circumstances as stated in the operating agreement,³⁶⁴ the consent of all members,³⁶⁵ or the passage of a ninety day period in which the LLC has no members.³⁶⁶ In addition, under both statutes a court may order dissolution, although the grounds are more extensive under RULLCA.³⁶⁷ RULLCA authorizes judicial dissolution if the company’s business becomes unlawful, if it is not practicable to carry on the business, or if members or managers are acting illegally, fraudulently, or oppressively.³⁶⁸ The Arkansas LLC Act allows judicial dissolution only if it can be shown that it is not reasonably practicable to carry on the LLC’s business as provided in the operating agreement.³⁶⁹ RULLCA also specifies that a court from which judicial dissolution is sought may choose other remedies.³⁷⁰

361. ARK. CODE ANN. § 4-32-602 (LEXIS Repl. 2001).

362. RULLCA, *supra* note 4, §§ 701–708.

363. *Compare id.* § 701 with ARK. CODE ANN. § 4-32-901 (LEXIS Repl. 2001).

364. RULLCA, *supra* note 4, § 701(a)(1). *Accord* ARK. CODE ANN. § 4-32-901(1), which also specifies that in the absence of such a provision in the operating agreement, duration is perpetual. This language was apparently added when Arkansas amended its LLC Act to get rid of a requirement that duration be stated. *See* 1999 Ark. Acts 1528, § 2.

365. RULLCA, *supra* note 4, § 701(a)(2). *Accord* ARK. CODE ANN. § 4-32-901(2), which also specifies that such consent must be in writing.

366. RULLCA, *supra* note 4, § 701(a)(3). *Accord* ARK. CODE ANN. § 4-32-901(3).

367. *Compare* RULLCA, *supra* note 4, § 701(a)(4)–(5) with ARK. CODE ANN. § 4-32-901(4), -902.

368. RULLCA, *supra* note 4, § 701(a)(4)–(5).

369. ARK. CODE ANN. § 4-32-902.

370. RULLCA, *supra* note 4, § 701(b). While the Arkansas LLC Act does not include this language, it has been very common, at least in the corporate contexts, for courts to read

The next three sections of RULLCA deal with winding up of the business upon dissolution³⁷¹ and how to handle claims against a dissolving LLC.³⁷² RULLCA continues reliance upon the traditional partnership terminology that differentiates between dissolution and termination. Dissolution of an LLC initiates the winding up process, and only when that is complete does the LLC terminate; an LLC in dissolution, however, continues only for the purposes of winding up.³⁷³ The winding up process under RULLCA is described in some detail³⁷⁴ and is generally similar to practices under the current Arkansas LLC Act.³⁷⁵ Winding up involves the discharge of the company's debts and liability, settling and closing activities, and distributing assets.³⁷⁶ A statement of dissolution is permitted,³⁷⁷ and if filed, it triggers the same kinds of limitations on claims against the LLC that have long applied in the corporate context.³⁷⁸ RULLCA also permits a statement of termination,³⁷⁹ which is not used in the existing Arkansas process, and clears up questions that might arise if the LLC dissolves when there are no members remaining.³⁸⁰

RULLCA also addresses administrative dissolution, reinstatement following such dissolution, and appeal from a denial of administrative reinstatement.³⁸¹ Although these provisions are not found in the existing Arkansas LLC Act, the provisions mirror those in the Arkansas Business Corporation Act.³⁸²

The final section of Article 7 deals with distribution of assets in the winding up process.³⁸³ The rules here are conventional, and as is the case

in broad equitable powers when judicial dissolution is ordered. *See generally*, In re Tufts Oil and Gas-III, 871 So. 2d 476 (La. Ct. App. 5th Cir. 2004); Scott v. Trans-System, Inc., 148 Wash. 2d 701, 64 P.3d 1 (2003); Woodward v. Andersen, 261 Neb. 980, 627 N.W.2d 742 (2001); State ex rel. Heitkamp v. Family Life Services, Inc., 2000 ND 166, 616 N.W.2d 826 (2000); and Ruzicka v. Hart Printing Co., 21 S.W.3d 67 (Mo. Ct. App. E.D. 2000).

371. RULLCA, *supra* note 4, § 702.

372. *Id.* §§ 703 to 704.

373. *Id.* § 702(a), using language similar to that which appears in the existing Arkansas LLC statute in ARK. CODE ANN. § 4-32-901.

374. *Id.* § 702(b).

375. See ARK. CODE ANN. § 4-32-903(2) (LEXIS Repl. 2001).

376. RULLCA, *supra* note 4, § 702(b)(1).

377. *Id.* § 702(b)(2)(A). Accord ARK. CODE ANN. § 4-32-906 (LEXIS Repl. 2001).

378. RULLCA relies on a very short period of limitations for known claims against an LLC that has filed a statement of dissolution (RULLCA § 703), and a longer period for other claims to be filed (RULLCA § 704). This has long been the approach taken for corporations that are being wound up in this state (ARK. CODE ANN. § 4-27-1406-1407), and is also the approach taken by the existing Arkansas LLC Act (ARK. CODE ANN. § 4-32-907-908).

379. RULLCA, *supra* note 4, § 702(b)(2)(F).

380. *Id.* § 702(c)-(e). This is not addressed in the existing Arkansas LLC Act.

381. *Id.* § 705-707.

382. ARK. CODE ANN. §§ 4-27-1422 to -1424 (LEXIS Supp. 2007).

383. RULLCA, *supra* note 4, § 708.

under existing Arkansas law, an LLC's assets must be used first to pay creditors (including members who are creditors) and then to pay members.³⁸⁴ The requirement that creditors must be paid first is not subject to contrary agreement in the operating agreement, although the creditors may agree to different payment arrangements.³⁸⁵ Any excess is then returned to the members as per their agreement, or in the absence of an agreement, payment is made first to return the value of contributions and then any remainder is shared equally.³⁸⁶ This matches the default rule under the existing Arkansas LLC Act.³⁸⁷ RULLCA also specifies that all distributions are to be paid in money,³⁸⁸ a requirement that is implicit under the Arkansas LLC Act's winding up provisions.³⁸⁹

H. Article 8: Foreign LLCs

Article 8 of RULLCA governs foreign limited liability companies³⁹⁰ and for the most part is quite similar to existing Arkansas law. As is currently the case, under RULLCA the law of the state of formation governs the internal affairs of the LLC and the liability of members and managers as such for debts of the business.³⁹¹ RULLCA is a little more complete in its treatment of foreign LLCs, specifying not only that the fact that the foreign jurisdiction has different rules shall not be grounds for denying a certificate of authority, but also that such a certificate does not authorize a foreign LLC to engage in any business not permitted to LLCs in this state.³⁹²

Under RULLCA, a foreign LLC wishing to transact business must apply for a certificate of authority;³⁹³ current Arkansas law additionally requires registration.³⁹⁴ Both statutes include a relatively extensive list of activities that will not constitute doing business in this state for the purposes of

384. *Id.* § 708(a)–(b).

385. *Id.* § 110(c)(11) provides that the operating agreement may not restrict the rights of persons other than members or managers.

386. *Id.* § 708(b).

387. ARK. CODE ANN. § 4-32-905(2)–(3) (LEXIS Repl. 2001) (which cross references the default rule on interim distributions, which is equal under ARK. CODE ANN. § 4-32-503, -601).

388. RULLCA, *supra* note 4, § 708(d).

389. The Arkansas LLC Act does specify in the general distributions provision that a member has no right to demand any distribution in a form other than cash. ARK. CODE ANN. § 4-32-603(1) (LEXIS Repl. 2001).

390. RULLCA, *supra* note 4, § 801–809.

391. Compare *id.* § 801 with ARK. CODE ANN. § 4-32-1001 (LEXIS Repl. 2001).

392. RULLCA, *supra* note 4, § 801(b) & (c).

393. *Id.* § 802.

394. ARK. CODE ANN. § 4-32-1002 (LEXIS Supp. 2007).

requiring a foreign LLC to register here.³⁹⁵ Both statutes also cover the filing process for applying for a certificate of authority³⁹⁶ and what happens if the name of the foreign LLC does not comply with the requirements in this state.³⁹⁷ Both statutes provide for the cancellation of a certificate of authority,³⁹⁸ but RULLCA is more specific in allowing the Secretary of State to revoke certificates of authority under specified circumstances.³⁹⁹ Both statutes specify that failure of a foreign LLC to properly register limits the LLC's ability to bring legal actions in this state, but that failure does not impair the validity of contracts entered into or prevent the LLC from defending actions brought here.⁴⁰⁰ A foreign LLC that has not registered appoints the Secretary of State as agent for service of process under both acts.⁴⁰¹

One difference is that RULLCA permits the state attorney general to enjoin foreign LLCs from transacting business without registration,⁴⁰² whereas the existing Arkansas LLC Act imposes civil penalties for improperly transacting business here.⁴⁰³ As there are no reported cases indicating that the Arkansas Attorney General has ever invoked this provision, the significance of this distinction might be minimal.

I. Article 9: Direct and Derivative Actions

Article 9 of RULLCA deals with the right of members to bring direct and derivative actions,⁴⁰⁴ and in general it is a topic that the current Arkansas LLC Act fails to address. This does not mean that the provisions of this article will be unfamiliar in Arkansas, as the rules approximate those applicable in the corporate context in which shareholders have rights to bring direct and derivative claims.⁴⁰⁵ They are not, however, identical to the corporate rules, and significant differences will be highlighted.

395. Compare RULLCA, *supra* note 4, § 803 with ARK. CODE ANN. § 4-32-1008 (LEXIS Repl. 2001).

396. See RULLCA, *supra* note 4, § 804; ARK. CODE ANN. § 4-32-1003 (LEXIS Repl. 2001).

397. RULLCA, *supra* note 4, § 805; ARK. CODE ANN. § 4-32-1004 (LEXIS Repl. 2001).

398. RULLCA, *supra* note 4, § 807; ARK. CODE ANN. § 4-32-1006 (LEXIS Repl. 2001).

399. RULLCA, *supra* note 4, § 806. These circumstances would include things like failure to pay fees or taxes, failure to deliver required reports, and failure to maintain an agent for service of process.

400. See *id.* § 808; ARK. CODE ANN. § 4-32-1007 (LEXIS Repl. 2001).

401. RULLCA, *supra* note 4, § 808; ARK. CODE ANN. § 4-32-1007.

402. RULLCA, *supra* note 4, § 809.

403. ARK. CODE ANN. § 4-32-1007(d)-(f).

404. RULLCA, *supra* note 4, §§ 901-906.

405. See ARK. CODE ANN. § 4-27-740 (LEXIS Supp. 2007).

The first section of this article deals with a member's right to maintain a direct action against other members, managers, or the companies to enforce that member's rights.⁴⁰⁶ Although not addressed in the current Arkansas LLC Act, it might be presumed that this section is unnecessary as the right of injured parties to redress under the law is implicit.

The next sections deal with derivative rights of members and borrows heavily from corporate law. A member may bring a derivative action in the right of the LLC, but demand on the other members (in the case of a member-managed LLC) or managers (if the LLC is manager-managed) is required unless futile.⁴⁰⁷ The person must be a member when the action is commenced and must continue to be a member while the action continues, but the traditional "contemporaneous ownership" rule applicable to corporate shareholders has been abandoned.⁴⁰⁸ The complaint in a derivative action must state with specificity the demand and response or why demand was not made.⁴⁰⁹

RULLCA includes a detailed provision governing special litigation committees⁴¹⁰ that borrows from corporate jurisprudence dealing with derivative actions.⁴¹¹ In general, this provision authorizes an LLC to establish a special litigation committee to determine whether the derivative action should be maintained.⁴¹² A court's role in reviewing a recommendation from a special litigation committee is modeled on the majority rule that such a recommendation should be respected if it is made in good faith, independently and with reasonable care, by disinterested and independent committee members.⁴¹³ Finally, also borrowing from corporate law, RULLCA makes it clear that any proceeds or benefits of a derivative action belong to the LLC rather than the individual plaintiff.⁴¹⁴

406. RULLCA, *supra* note 4, § 901.

407. *Id.* § 902.

408. *Id.* § 903. Contrast this with ARK. CODE ANN. § 4-27-740(a), which specifies that a shareholder wishing to bring a derivative action must have been a shareholder at the time the harm occurred, or have acquired the shares by operation of law from someone who was such a shareholder. ARK. CODE ANN. § 4-27-740(a).

409. RULLCA, *supra* note 4, § 904. *Accord* ARK. CODE ANN. § 4-27-740(b) (which also requires that the complaint be verified).

410. RULLCA, *supra* note 4, § 905.

411. RULLCA, *supra* note 4, § 905, cmt. For a detailed consideration of special litigation committees in corporate derivative actions, see Kenneth B. Davis, *Structural Bias, Special Litigation Committees, and the Vagaries of Director Independence*, 90 IOWA L. REV. 1305 (2005).

412. RULLCA, *supra* note 4, § 905(a).

413. *Id.* (borrowing from *Auerbach v. Bennett*, 47 N.Y.2d 619, 419 N.Y.S.2d 920 (N.Y. 1979)). See *id.* § 905(d), cmt.

414. *Id.* § 906.

J. Article 10: Merger, Conversion, and Domestication

Article 10 of RULLCA governs merger, conversion, and domestication of LLCs,⁴¹⁵ and generally covers topics addressed in Subchapter 12 of the Arkansas LLC Act,⁴¹⁶ as well as combinations not specifically dealt with in the current Arkansas statute. RULLCA gathers together in one place definitions applicable to mergers, conversions, and domestication,⁴¹⁷ a drafting choice that may make the following provisions somewhat easier to follow for those unfamiliar with corporate reorganizations.

The next few sections in this article (following the definitions provision) deal with mergers.⁴¹⁸ There are provisions specifying when mergers may happen,⁴¹⁹ the required contents of a plan of merger,⁴²⁰ how such a plan is to be approved,⁴²¹ what must be filed and when the merger becomes effective,⁴²² and the legal effect of the merger.⁴²³ Mergers and consolidations are also provided for in the existing Arkansas LLC Act, and the rules that exist now are very similar to those that appear in RULLCA.⁴²⁴

RULLCA, however, also includes similar provisions for conversions of LLCs⁴²⁵ and for domestication of foreign LLCs.⁴²⁶ Spelling out the separate procedures for these types of reorganizations should make it easier for businesses to maintain an optimal organizational format.

There are two additional provisions at the end of this article of RULLCA. One grants voting rights to any member who would have personal liability as a result of the reorganization and further requires that all members must consent unless the operating agreement provides for approval of such reorganizations with consent of fewer than all members.⁴²⁷ The last provision notes that this article is not exclusive and is not to "preclude an entity from being merged, converted, or domesticated" under other applica-

415. *Id.* §§ 1001–1015.

416. ARK. CODE ANN. § 4-32-1201–1204 (LEXIS Repl. 2001 & Supp. 2007).

417. RULLCA, *supra* note 4, § 1001.

418. *Id.* §§ 1002–1005.

419. *Id.* § 1002(a).

420. *Id.* § 1002(b).

421. *Id.* § 1003.

422. *Id.* § 1004.

423. RULLCA, *supra* note 4, § 1005.

424. ARK. CODE ANN. §§ 4-32-1201–1204 (LEXIS Repl. 2001 & Supp. 2007).

425. RULLCA, *supra* note 4, §§ 1006–1009 (with provisions governing when conversions may happen, the required contents of a plan of conversion, how such a plan is to be approved, what must be filed and when the conversion becomes effective, and the legal effect of the conversion).

426. *Id.* §§ 4-32-1010–1013. The same topics that are covered in mergers and conversions are also addressed specifically to domestications.

427. *Id.* § 1014.

ble laws.⁴²⁸ There is no equivalent for either of these two statutory provisions in the current Arkansas LLC Act.

K. Article 11: Miscellaneous Topics

The final article in RULLCA covers miscellaneous topics not addressed elsewhere in the act.⁴²⁹ It includes a provision on uniformity of application and construction that also shows up in various other uniform acts adopted in Arkansas,⁴³⁰ but it has not been used in other business statutes in this jurisdiction. Whether Arkansas would wish to promote uniformity of interpretation over state interests in the realm of business organizations is something that might be the subject of some debate.

There is a provision in the RULLCA on electronic signatures designed to make sure that the statute coordinates with existing federal statutes.⁴³¹ Although this language does not appear in the current LLC or other business organizations statutes, it is part of the Arkansas Uniform Commercial Code⁴³² and various other uniform act provisions adopted in Arkansas.⁴³³ There is a savings clause, which makes it clear that the act does not affect pending actions or proceedings, or rights that accrue prior to the RULLCA's effective date.⁴³⁴ There is a section providing for a phase-in period, left up to the states to choose, with the recommendation that a period of at least one year be chosen in which RULLCA applies only to new companies and pre-existing companies that elect to be subject to its provisions, and thereafter to all LLCs.⁴³⁵ There is a repealer⁴³⁶ and a final provision specifying the effective date.⁴³⁷

428. *Id.* § 1015.

429. *Id.* §§ 1101–1106.

430. *Id.* § 1101. Compare with ARK. CODE ANN. § 17-16-118 (LEXIS Repl. 2001) (athletic agents); *id.* § 28-2-218 (LEXIS Supp. 2007) (disclaimer of property interests); *id.* § 28-70-601 (LEXIS Repl. 2001) (principal and income).

431. RULLCA, *supra* note 4, § 1102.

432. ARK. CODE ANN. § 4-1-108 (LEXIS Supp. 2007).

433. See ARK. CODE ANN. § 17-16-119 (LEXIS Repl. 2001) (athletic agents); *id.* § 25-32-103 (LEXIS Repl. 2001) (electronic transactions); *id.* § 28-2-217 (LEXIS Repl. 2001) (disclaimer of property interests).

434. RULLCA, *supra* note 4, § 1103.

435. *Id.* § 1104, and Legislative Note. This same process was followed when Arkansas adopted its current general partnership statute, although there was a five year phase in period provided under that statute. 1999 Ark. Acts 1518, § 1204. On the other hand, when Arkansas adopted re-RULPA early in the 2007 legislative session, it went effective the following September. See 2007 Ark. Acts. 15, § 1, codified at ARK. CODE ANN. § 4-47-1204.

436. RULLCA, *supra* note 4, § 1105.

437. *Id.* § 1106.

IV. COMPARATIVE ADVANTAGES TO RULLCA OVER THE ARKANSAS LLC ACT

The careful reader has probably gained a fairly good idea of how RULLCA compares to the existing Arkansas LLC Act. The following sections will recap the major advantages of the uniform act.

A. The Advantage of Uniformity Between Jurisdictions

As interstate business transactions become ever more prevalent, the advantages of consistency and uniformity in state business laws becomes ever more important. Although ULLCA was not as successful as might have been hoped, and although every state already has its own LLC statute, RULLCA is an up-to-date modern statute likely to receive relatively widespread acceptance. In general, it builds upon the majority rules that have developed in the past few years, and it represents the best thinking of experts in the field⁴³⁸ as to where LLC law currently stands and where as a matter of good practice it should go in the future.

B. A Statute that Has Been Drafted with Recent Developments in Mind

As previously noted, RULLCA was drafted after the changes in federal tax rules that necessitated piece-meal amendments to many existing LLC statutes, including the initial ULLCA and the Arkansas LLC Act.⁴³⁹ In addition, it was drafted after the promulgation of RUPA and re-RULPA by NCCUSL, after the adoption of both of these statutes in Arkansas, and after the recent advent of series LLCs in some jurisdictions. These topics were all considered and played a role in the drafting process of this Uniform Act.

C. Consistency with Other Modern Business and Commercial Statutes

Another potential benefit of RULLCA is that it employs terminology and concepts that appear in other modern business and commercial statutes. Thus, the definition of knowledge in RULLCA mirrors that in other com-

438. The reporters for the project were two law professors, Professor Carter G. Bishop (Suffolk University Law School) and Professor Daniel S. Kleinberger (William Mitchell College of Law) who have extensive experience and publications in agency law, closely held businesses, and tax law. Also on the drafting committee were other nationally known academics, practitioners, and judges. The American Bar Association Advisor, Robert Keatinge, is also very widely published on a variety of topics relating to LLCs. The ABA Section advisors included experts from the Business Law; Real Property, Probate and Trust Law; and Tax Law sections.

439. See *supra* note 140.

mercial statutes.⁴⁴⁰ The language used to describe things like fiduciary obligations,⁴⁴¹ charging orders,⁴⁴² or derivative proceedings⁴⁴³ are all borrowed from and appear in other current uniform statutes.

D. Clear and Helpful Provisions Governing Operating Agreements

A particularly nice feature of RULLCA is that it offers a clear set of rules applicable to operating agreements. There are provisions that expressly address the scope, function, and limitations on this kind of arrangement;⁴⁴⁴ the effect of an operating agreement on members and persons who are to become members;⁴⁴⁵ and the effect on third parties.⁴⁴⁶ RULLCA also gets rid of the persistent and annoying problem inherent in the Arkansas LLC Act's decision to require that an operating agreement be in writing.⁴⁴⁷

E. Rules Governing Creditors, Transferees, and Dissociated Members

RULLCA also contains clearer and more efficient rules governing the rights of creditors, transferees, and dissociated members.⁴⁴⁸ By clearly delineating the rights of persons with these various kinds of interests, and by using modern language to do so, RULLCA makes these more readily comprehensible and fairer as well.

F. Reasonable Rules Governing Withdrawal

RULLCA adopts the majority approach to allowing members the power to withdraw⁴⁴⁹ but presumes that such withdrawal is wrongful unless permitted by agreement among the parties.⁴⁵⁰ Consistent with the choice to make voluntary withdrawal prior to termination of the LLC wrongful absent agreement to the contrary, RULLCA also presumes that such withdrawal gives rise to a cause of action for damages. In addition, unlike the default

440. See *supra* notes 158–59 and accompanying text.

441. RULLCA, *supra* note 4, § 409.

442. *Id.* § 503.

443. *Id.* § 902.

444. *Id.* § 110.

445. *Id.* § 111.

446. *Id.* § 112.

447. For a discussion of this, see *supra* notes 10–28 and accompanying text.

448. See, e.g., RULLCA, *supra* note 4, § 410 (special informational rights for dissociated members); *id.* §§ 501–502 (transferable interests); *id.* § 503 (charging orders as a method to protect the rights of creditors); *id.* § 603 (effect of dissociation).

449. RULLCA, *supra* note 4, § 601.

450. See *supra* notes 316–17 & 320–22 and accompanying text for a discussion of this issue.

Arkansas rule, there is no presumptive right to be paid off in the event of withdrawal,⁴⁵¹ a default rule which is likely to be advantageous for most small businesses.

G. A Remedy for Oppressive Conduct

A seventh relative advantage to RULLCA is that it provides participants with a remedy for oppressive conduct.⁴⁵² Completely missing from the Arkansas LLC Act, this provision is likely to minimize abuses of power and authority while providing a fairer arrangement for persons who do not carefully include remedies in their operating agreement for potential disputes.

H. Provision for Derivative Claims

RULLCA also establishes clear rules for derivative proceedings.⁴⁵³ While presumably less necessary in member-managed LLCs than in traditional closely held corporations, the right of members to seek redress for harm to their companies is potentially valuable (especially in manager-managed companies) and something that the Arkansas LLC Act simply did not cover. RULLCA strikes a balance between the need of members to be able to protect their economic rights and the right of managers to control business operations under ordinary circumstances. By relying on traditional corporate doctrines such as demand, demand futility, and special litigation committees, RULLCA not only sets out rules that balance competing interests, but also uses concepts and procedures that should not be unfamiliar.

I. More Comprehensive Rules Governing Organic Changes

RULLCA also includes more comprehensive rules governing organizational changes such as mergers,⁴⁵⁴ which are addressed in the Arkansas LLC Act,⁴⁵⁵ but also conversions and domestications,⁴⁵⁶ which are not. While not every LLC will benefit from these provisions, they may be very helpful for companies that wish to combine, restructure, or domesticate in Arkansas.

451. Compare RULLCA, *supra* note 4, § 601 (power to dissociate) & *id.* § 404(b) (no right to distribution) with ARK. CODE ANN. § 4-32-802(c) (LEXIS Repl. 2001) (no power to dissociate) & 602 (payment upon dissociation).

452. RULLCA, *supra* note 4, § 701(a)(5)(B).

453. *Id.* §§ 902–906.

454. *Id.* §§ 1002–1005.

455. ARK. CODE ANN. §§ 4-27-1201–1204 (LEXIS Repl. 2001).

456. RULLCA, *supra* note 4, §§ 1006–1013.

J. Simpler Rules on Apparent Authority

RULLCA also uses the choice of not providing for apparent authority of members or managers as a way to simplify the filing requirements and the rules governing who has power to bind.⁴⁵⁷ Traditional rules applicable to actual and apparent authority will govern relationships by and among the various parties, including the members, the LLC itself, and third parties. Given the myriad of management structures available to LLCs, this seems a logical choice rather than relying on statutory law to presume authority where none may be intended and reliance may not be justifiable.

K. Miscellaneous Provisions

Finally, there are a number of minor changes that RULLCA would make in Arkansas law which should be advantageous. The ability to pre-file certificates of organization to create shelf LLCs⁴⁵⁸ may be advantageous for some businesses. The distinctions between member-managed and manager-managed LLCs in such provisions as those dealing with fiduciary obligations⁴⁵⁹ and informational rights⁴⁶⁰ make sense and should be better default rules in many instances. Although it might be used rarely, the possibility of administrative dissolution under RULLCA is also a comparative advantage.⁴⁶¹ RULLCA's clear choice to abandon reliance on the concepts of an LLC for a term or particular undertaking⁴⁶² might also reduce the risk of confusion, as such terms were never clearly defined in the Arkansas LLC Act.

In fact, scattered throughout the uniform act are minor changes that may make the act slightly easier to use, or less likely to promote confusion or surprise. While many of these provisions may be irrelevant to most LLCs, and of minor significance to even those that are affected, in total, they help to make the uniform act a very desirable innovation that Arkansas should very carefully consider.

V. CONCLUSION

RULLCA offers a number of comparative advantages for Arkansas. The current Arkansas LLC statute contains a number of provisions that were

457. *See id.*, Prefatory Note, *Noteworthy Provisions*, The Power of a Member or Manager to Bind the Limited Liability Company.

458. RULLCA, *supra* note 4, § 201.

459. *Id.* § 409.

460. *Id.* § 410.

461. *Id.* § 705.

462. *Id.* § 601, cmt.

never fully thought out and that do not mesh well with our other business and commercial statutes. Although the Arkansas legislature has done well in the past few years in amending the Arkansas LLC Act to alleviate the most glaring problems, it is hard to argue with the wisdom of enacting a statute that (1) represents the best thinking of some of the nation's foremost leaders in the subject, (2) offers the potential benefits of uniformity and consistency, (3) was drafted with recent developments and national trends in mind, and (4) conveys the message that Arkansas is actively seeking to keep its business statutes current and efficient for companies that wish to operate here.