Maine's New LLC Act: Authority, Dissociation, Assignments and Charging Orders

Article 3 in a Series of 3

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This is the final article in a series of three about Maine's new Limited Liability Company Act, 31 M.R.S.A. § 1501 et seq. (New Act). The first article discussed key definitions, formation and the primacy of the LLC agreement. The second discussed apparent and decisional authority, transfers of interests and membership in a limited liability company (LLC).

Of these topics, the primacy of the LLC agreement is paramount. In fact, it is the most important topic we discuss in the series. Its importance comes from the fact that the LLC agreement governs nearly every topic we discuss in these articles and those that attorneys will confront in practice. Most of the statutory provisions apply only if the LLC agreement[1] does not address them.

This article discusses fiduciary duties, exculpation, indemnification and advancement with respect to an LLC formed in Maine.[2] The article will address each of these topics under the Current Act and the New Act. As a general matter, there is no material difference in the nature and extent of fiduciary duties, exculpation, indemnification and expenses between the Current Act and the New Act, but the New Act allows the LLC members significantly more freedom to modify, expand, restrict or eliminate these concepts in the LLC agreement.

Fiduciary Duties

Generally & Current Maine Law

Fiduciary duty law among business owners first developed in the context of general partnerships and reflects the broader law of principal and agent, under which every agent is a fiduciary.[3] The New York Court of Appeals extended these partnership principles to a different but analogous form of business entity in *Meinhard v. Salmon*[4] when it held that "[j]oint adventurers, like co-partners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties... Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." Many courts have further extended fiduciary duty concepts from general partnerships to limited liability companies by imposing common law fiduciary duties on LLC members.[5]

There is, however, some confusion

in the courts generally with respect to the nature and types of fiduciary duties that apply in the case of limited liability companies. This is likely due to the fact that limited liability companies are relatively new entities, compared to corporations and partnerships and that limited liability companies have flexible and varying governance models; some LLCs operate more like partnerships and others like corporations.[6]

In an effort to avoid the uncertainty of the common law in interpreting the nature and scope of fiduciary duties in any instance, the National Conference of Commissioners on Uniform State Laws when drafting the Revised Uniform Limited Liability Company Act (RULLCA), attempt to preempt common law in this area, and include lengthy and detailed fiduciary duty provisions in RULLCA. As a result, fiduciary duties under RULLCA are intended to be governed by the LLC agreement and the statute, only, and not by the common law.

The Delaware Limited Liability Company Act (Delaware act) takes the opposite approach and is silent on fiduciary duties. Accordingly, the Delaware act defers to Delaware common law to establish fiduciary duties. However, the Delaware act expressly allows the members to alter and even eliminate any or all of those duties and/or liability for breach of the same in the LLC agreement. As a result, in Delaware, fiduciary duties are derived from the LLC agreement and from the common law, only, and not from statute.

In Maine, fiduciary duties are derived from the LLC agreement, from the common law and from statute. Under the Current Act, managers and managing members owe both the LLC and the members a duty of loyalty, a duty of care and a duty of good faith, all as derived from partnership and agency law.[7]

Duty of Loyalty

The duty of loyalty is expressed initially in Section 652 of the Current Act as follows: "managers and members of a limited liability company shall exercise their powers and discharge their duties... with a view to the interests of the limited liability company."[8] Despite this general treatment in the Current Act, when taken together with the common law, there are three rules that appear to comprise the duty of loyalty in Maine.

First, the managing parties must account to the LLC and must refrain from usurping any LLC property, including any LLC opportunity. A profit or benefit derived by the managing party from a transaction connected with the conduct or winding up of the LLC must be held in trust by such managing party for the LLC.[9] This rule is intended to prevent the managing parties from engaging in conduct which furthers a private interest at the expense of the LLC. For example, if an LLC owns a piece of real estate and the owner of the neighboring parcel offers a managing party the right to purchase the neighboring parcel, it would be a breach of the duty of loyalty for the managing party to purchase the parcel in her own name without first presenting the opportunity to the LLC. The managing party may not appropriate for herself a benefit arising from her position as a member of the LLC.[10] Under a constructive trust theory, the LLC can recover any money or property that can be traced to the LLC. As a result, the LLC's claim is greater than that of an ordinary creditor. [11] This first rule of the duty of loyalty is expressly set forth in the Current Act.[12]

Second, a managing party must refrain from dealing with the LLC as or on behalf of a party having an interest adverse to the LLC unless such transactions are entered into in good faith and under terms fair to the LLC.[13] This second rule is based on Sections 389 and 391 of the Restatement (Second) of Agency.[14] The comments to Section 389 explain that the rule is intended to avoid a conflict of opposing interests in the mind of an agent whose duty is to act for the principal.[15] For example, if a member of an LLC negotiated the sale of a parcel of real estate owned by such member to the LLC, such a transaction could be a conflict of interest transaction in violation of the duty of loyalty. The Maine Business Corporations Act addresses this issue directly and provides a statutory safe harbor that allows for so-called conflict of interest transactions to be approved by the corporation free of the threat of being later voided provided the conflict of interest is properly disclosed and the matter approved by the disinterested directors.[16] There are no statutory safe harbors in either the Current Act or the New Act that allow for conflict of interest transactions to be deemed to have been entered into in *good faith* and on terms *fair* to the LLC. Many LLC agreements include procedures for disclosing and approving such transactions which, if followed, ratify a transaction to be in *good faith* and *fair* to the LLC.

Third, a managing party is prohibited from competing with the LLC in the conduct of its business. This rule is based on Section 393 of the Restatement (Second) of Agency and is an application of the general duty of an agent to act solely on the principal's behalf.[17] If, for example, the managing party of an LLC which provides consulting services, using the contacts and know-how learned from his work at the LLC, establishes his own consulting firm which competes with the LLC, the managing party would have breached his duty of loyalty to the LLC.

Duty of Care

The duty of care is expressed in Section 652 of the Current Act as follows: "managers and members of a limited liability company shall exercise their powers and discharge their duties... with that degree of diligence, care and skill that ordinarily prudent persons would exercise under similar circumstances in like positions."[18] The duty of care is intended to prevent bungling by the management of the LLC and is rarely implicated in partnership and LLC cases involving fiduciary duties. Maine recognizes a common law duty of care with respect to partnerships very similar to the rule set forth in Section 652 which likely applies to LLCs by analogy.[19]

Duty of Good Faith

Maine recognizes the fiduciary duty of good faith as well, which is separate from the contractual covenant of good faith and fair dealing discussed below. Section 652 of the Current Act provides that, "managers and members of a limited liability company shall exercise their powers and discharge their duties in good faith...."[20] This duty is an obligation to act in good faith in the discharge of all duties the members or managers owe to the LLC, including the duties of loyalty and care, and those duties arising under the LLC agreement.

No Modification of Fiduciary Duties Under Current Act

The Current Act expressly provides that the nature, scope and applicability of fiduciary duties as set forth in Section 652 of the Current Act may not be modified or waived in the operating agreement or otherwise. This prohibition on modifying fiduciary duties restricts the flexibility of Maine LLCs and puts Maine squarely in the minority on this issue as most states allow the parties to the LLC agreement to either substantially modify and reduce the fiduciary duties owed by the members to each other and the LLC[21] or to eliminate fiduciary duties altogether.[22] The New Act eliminates this prohibition as explained below.

Comparison of the Current Act and the New Act

The New Act does not modify or change the default fiduciary duties owed to the LLC or its members. The duty of loyalty, the duty of care and the duty of good faith, all as addressed above, are carried over from the Current Act to the New Act. As a result, assuming that the operating agreement has not modified the duties set forth in Section 652 in contravention of the Current Act, Maine LLCs existing as of July 1, 2011, the effective date of the New Act, will not experience any change to the nature, scope or application of the fiduciary duties owed to the LLC and its members. LLCs formed under the New Act, however, will have significantly more freedom to define the duties owed to the members and the LLC.

Expansion, Restriction or Elimination of Fiduciary Duties

The most significant difference between the Current Act and the New Act with respect to fiduciary duties is that the New Act allows fiduciary duties to be expanded, restricted or eliminated by provisions in a written LLC agreement, except that the implied contractual covenant of good faith and fair dealing as set forth in Section 1522(2) may not be eliminated.[23]

Unlike the Current Act that expressly prohibits the modification or waiver of the duties set forth in Section 652 of the Current Act, the New Act grants maximum flexibility to the parties to an LLC agreement to define the agreement among them. These provisions are consistent with the stated policy of the New Act to give maximum effect to the principles of freedom of contract and the enforceability of LLC agreements. If the LLC agreement does not address fiduciary duties, the provisions of Section 1559 of the New Act and Maine common law apply.

In many cases, the default duties under Maine law are appropriate and will not need to be altered by the LLC agreement, but in those cases when the deal between the parties warrants a change from the default rules, the New Act authorizes the parties to expand, restrict or eliminate the fiduciary duties owed to the LLC and the members in accordance with the parties' understandings and the deal in question. For example, the fiduciary duty not to compete with the LLC may have unintended consequences for single purpose entities or in a start-up situation. If two real estate developers form a single-purpose LLC to develop an office building, it is likely that the parties do not intend for the members to be prevented from engaging in competing activities elsewhere, but the default fiduciary duties would prevent such competition. It also may be unnecessary to require the managing parties to account to the members for each and every transaction the LLC enters in order to prove that no improper benefit was derived by the managing parties, particularly where there is a degree of trust among the members and the managing parties. In each case, the LLC agreement may include express provisions that limit the duty of loyalty to allow the members to compete with the LLC or to define the circumstances when the managing parties need to account to the members for a transaction or transactions.

If practitioners wish to limit or eliminate fiduciary duties in an LLC agreement, the fiduciary provisions must be express, clear and unambiguous. As in Delaware, where the courts require explicit drafting in regard to waving fiduciary duties,[24] we anticipate Maine courts will be equally as stringent. For example, the following provision is likely not sufficient to eliminate the fiduciary duties owed to an LLC and its members in the case of a company managed by the members:

> Except for the duty of disclosure, set forth above, Members owe no duty to the LLC or the other Members. Members may engage in other business ventures without any duty to account for profits from such ventures.

To effectively eliminate the fiduciary duties, which in the vast majority of cases, is not appropriate, the LLC agreement would need to include a provision similar to the following:

> This agreement is not intended to, and does not, create or impose any fiduciary duties on any of the Members other than as expressly set forth herein. Each of the Members and the LLC hereby waives any and all fiduciary duties that, absent such a waiver, may be implied by law. Each of the Members and the Company acknowledges and agrees that whenever a Member makes a determination or takes or

declines to take any other action, then such Member is entitled to make such determination or to take or decline to take such other action free of the fiduciary duty of loyalty to the LLC and the other Members, free of the fiduciary duty of care to the LLC and the other Members, and such Member shall not be required to act in good faith, but may act in such Member's sole discretion. For purposes of this Agreement "sole discretion" with respect to a Member shall mean that such Member shall be entitled to consider only such interests and factors as it desires, including the best interests of such Member, and shall have no duty or obligation to give any consideration to any interest of, or factors affecting, the LLC or the other Members. Each of the Members and the LLC recognizes, acknowledges and agrees that the duties and obligations of each Member to the other Members and the LLC are only as expressly set forth in this Agreement.

Please note that this sample provision only addresses fiduciary duties that may be owed by the members and not the other potential managing parties of an LLC. If the LLC has managing members, non-managing members, managers, officers, etc., the provision should be tailored to include all of the positions and offices to which the elimination of fiduciary duties applies. Practitioners should also be prepared to demonstrate that all parties were aware of such a provision and that it was negotiated as part of the transaction or a court may not enforce the limiting language and may, instead, enforce the default duties set forth in the statute.

In most cases, the parties will not want to eliminate fiduciary duties, but may want to modify the duties that apply. For example, if the LLC is structured like a corporation with a board of managers and officers responsible for the management of the LLC, the parties may want to draft a provision that provides that the managers and officers of the LLC owe such duties to the LLC as is required of a director of a Maine corporation under applicable Maine law. Such a provision should reference the proper sections of the Maine Business Corporation Act, including the provisions related to conflict of interest transactions, and should address the applicability of the business judgment rule.[25]

Other Differences Between Section 652 of the Current Act and Section 1559 of the New Act

In addition to allowing the parties to an LLC agreement to expand, restrict or eliminate fiduciary duties, there are some other technical differences between Section 1559 of the New Act and Section 652 of the Current Act which are not intended to modify or change default fiduciary duties, but nevertheless are worth noting.

The drafting committee made some changes to the provisions in the statute to address the fact that LLCs under the New Act need not be defined as either manager-run or member-run.[26] For example, the first paragraph of Section 652(1) refers to "managers and members" while Section 1559(1) of the New Act refers to "persons."[27]

In addition, the provision in the second paragraph of Section 652(1) that allows managers and members, acting in good faith, to rely on certain financial statements in discharging their duties was not included in the New Act. This provision appears to be intended to set forth certain conduct that would not constitute a breach of the duty of care and, as a result, to excuse members and managers who rely on such statements from being held liable for errors or omissions in those reports and statements. The reason this provision is not included in the New Act is that, although it is true that in exercising the duty of care, members and other persons would be entitled to rely on financial statements of the LLC "certified in writing by an independent or certified public accountant or firm of such accountants fairly to reflect the [LLC's] financial condition," the members of the LLC are also entitled to rely on other reports, persons, committees, etc., in exercising the duty of care and the drafting committee did not want the statute to appear to limit the types of information that may properly be relied upon by the members. In exercising the duty of care, managing parties are entitled to rely on any information, opinions, reports, statements, including financial statements, and other data presented to them, as long as the information is such that an "ordinarily prudent person" in a "like position" would also rely upon.[28]

The drafting committee also elected not to include Section 652(2) of the Current Act in the New Act as it states only one of the three rules that make up the duty of loyalty in Maine. The Current Act expressly sets forth the requirement that the members and managers account to the LLC and hold as trustee for it any benefit derived by that person from any transaction involving the LLC, but does not address prohibitions against conflict of interest transactions and competing with the LLC.[29] The drafting committee did not want the statute to suggest that the rule addressed was the sole aspect of the duty of loyalty that applies to Maine LLCs, and, as a result, did not include the provision in the New Act.

Another difference between the Current Act and the New Act is that Section 1559(3) of the New Act explains in more detail the circumstances under which members would not owe fiduciary duties. The Current Act provides simply that a member who is not also a manager owes no fiduciary duties solely by reason of being a member. The New Act provides additional guidance in this area and provides that a member would not be considered to be involved in the management of the LLC, and therefore would not owe fiduciary duties to the LLC, as a result of such member having any of the following non-exclusive rights or powers:

- Having the right to vote or elect those persons that will manage the business of an LLC; or
- Having the power to vote on,

approve or veto certain material transactions or actions involving the LLC, including the sale, merger, conversion or dissolution of an LLC, the amendment of the LLC agreement or its certificate of formation, the issuance of additional interests or admission of new members, the incurrence of indebtedness or granting of liens, the acquisition of another business or any portion of another business, however effected, the timing and amount of distributions or the undertaking of any other action outside the ordinary course of the LLC's activities.[30]

Exculpation

Exculpation clauses in either a statute or the LLC agreement allow a member or manager of an LLC to avoid liability because the conduct alleged to be wrong is deemed to not be a valid basis to impose liability. Exculpation clauses in applicable statutes and LLC agreements are often included with fiduciary duty provisions, but represent separate rights. As with the fiduciary duty provisions discussed above, the most significant exculpation clause from the Current Act, as set forth in Section 652, was adopted in its entirety in the New Act.

The exculpation clause set forth in the third paragraph of Section 652(1) of the Current Act appears in the New Act in its entirety except that the terms "managers and members" was replaced with "persons."[31] The clause in the Current Act provides that "[a] manager or member may not be held personally liable for monetary damages for failure to discharge any duty as a manager or member unless the manager or member is found not to have acted honestly or in the reasonable belief that the action was in or not opposed to the best interests of the LLC or its members."[32] This statute clearly exculpates or excuses a person from personal liability provided the person is found to have acted honestly or in the reasonable belief that the action was in or not opposed to the best interests of the LLC or its members. This exculpation clause may be modified by the LLC agreement under the New Act, but absent express terms to the contrary in the LLC agreement, the clause applies.

The drafting committee did not include in the New Act the exculpation clause set forth in the second paragraph of Section 652(1) which allows the members and managers to rely on certain financial statements when discharging their duties.[33] As discussed previously, this clause was not included in the New Act as it appears to improperly limit the types of information on which a managing party of an LLC may rely. In exercising the duty of care, managing parties are entitled to rely on any information, opinions, reports, statements, including financial statements, and other data presented to them, as long as the information is such that an "ordinarily prudent person" in a "like position" would also rely upon.[34] Proper reliance on any of these information sources should shield a managing party from liability. Practitioners may also want to include an express exculpation clause in the LLC agreement related to reliance, if the circumstances warrant.[35]

The drafting committee also did not include the exculpation clause in Section 652(2) in the New Act. Section 652(2)(A) and (B) sets forth a procedure that if followed, excuses the managers or members from having to account to the LLC and hold as trustee for it any benefit derived by that person from any transaction involving the LLC.[36] As discussed in the previous section of this article, the drafting committee did not include any of Section 652(2) in the New Act as it did not want the statute to suggest that Section 652(2) was the sole aspect of the duty of loyalty that applies to LLCs. Exculpation clauses that allow a managing party to avoid liability for actions that might otherwise constitute breaches of the duty of loyalty, including conflict of interest transactions,[37] competition with the LLC or usurpation of corporate opportunities,[38] or otherwise should be included in the LLC agreement where appropriate.

The New Act includes an exculpation clause in Section 1551(4) not set forth in the Current Act in which provides that a person will not be held liable for breach of a fiduciary duty for good faith reliance on the provisions of the LLC agreement.[39] This clause is intended to make it clear that the fiduciary provisions in an LLC agreement trump the statute, consistent with the freedom of contract principles adopted by the New Act.

Any other exculpation clauses must be set forth clearly in the LLC agreement. Exculpation clauses in an LLC agreement often operate differently than provisions that limit fiduciary duties. While limitations on fiduciary duties are generally self-operating, exculpation clauses often require that the parties follow proper procedures in order to take full effect. For example, if an LLC agreement sets forth a procedure that allows conflict of interest transactions to be approved, the parties will only receive the benefit of the exculpation (and the contractual safe harbor) if the procedures are followed properly. Exculpation clauses included in the LLC agreement should clearly and simply include:

1. The party that decides if exculpation applies: (a) independent committee, (b) third party, (c) court, (d) other;

2. The standard that applies: (a) "reasonably believed... in the best interest of the LLC," (b) "had no reasonable cause to believe conduct was unlawful," (c) "fairly and reasonably entitled...", (d) other;

3. The procedures to be followed by the parties; and

4. The parties covered by the clause: (a) members, (b) managers, (c) officers and directors, (d) others.

In addition to the above considerations, when drafting exculpation clauses, practitioners will want to make certain that the exculpation clause in the LLC agreement corresponds to any fiduciary duty provision in the LLC

agreement since the two provisions tend to work together and any contradictory provisions will be interpreted to provide for the maximum effect of the default fiduciary duties and may limit exculpation protections the parties intend.

Indemnification and Advancement

Indemnification and advancement provisions in a statute or an LLC agreement set forth the instances when the LLC will hold certain persons harmless for actions taken on behalf of the LLC, in the person's capacity as an agent for the LLC, and the circumstances under which a person will have her litigation costs advanced to her by the LLC as the litigation progresses. The indemnification and advancement provisions of the New Act are substantially different in form than the provisions in the Current Act, but there is no significant difference in the scope and applicability of indemnification and advancement to LLCs and their members.

The Current Act sets forth a detailed indemnification/advancement provision, similar to the type of provision commonly found in corporate statutes, that provides for permissive indemnification in all cases, except that mandatory indemnification for all costs and damages associated with the litigation applies if (a) the operating agreement provides for such mandatory indemnification or (b) the party seeking indemnification is successful on the merits of an action where indemnification is proper.[40] An LLC is prohibited from indemnifying a person and the LLC must be reimbursed to the extent the LLC advanced litigation expenses to such person under the Current Act if it is finally adjudicated that such person (1) failed to act honestly or in the reasonable belief that that person's action was in or not opposed to the best interests of an LLC, (2) in the case of a criminal action, had reasonable cause to believe that that person's conduct was unlawful or (3) is liable to the LLC.[41]

The New Act does away with the formal, corporate style indemnification provisions and instead simply provides that "[a] limited liability company may indemnify and hold harmless a member or other person, pay in advance or reimburse expenses incurred by a member or other person and purchase and maintain insurance on behalf of a member or other person."[42] As a result, the New Act anticipates that any comprehensive indemnification provision be negotiated by the members and included in the LLC agreement. The drafting committee thought that this approach was more in keeping with the policy of the New Act to give maximum effect to the principles of freedom of contract in the LLC agreement.[43]

Although there is much less structure to the indemnification provision in the New Act, the practical effect of the change from the Current Act to the New Act does not appear to be significant. If the LLC agreement for an LLC in existence on the effective date of the New Act is silent on indemnification, indemnification is permissive unless the party seeking indemnification is finally adjudicated to be successful on the merits of an action where indemnification is proper, and in that case, indemnification will become mandatory. Under the New Act, indemnification would also be permissive for the LLC mentioned above. Although there is not an express provision in the New Act that requires mandatory indemnification if a person is finally adjudicated to be successful on the merits of an action where indemnification is proper, a court is empowered, and seems likely to, order the LLC to indemnify the person in question. If the LLC agreement for an LLC in existence on the effective date of the New Act includes an indemnification or advancement provision, that provision will continue to control under the New Act.

When drafting indemnification and advancement clauses in an LLC agreement, practitioners should consider:

1. The scope of the advancement right, including limiting advancement rights to litigation brought by reason of serving the LLC and not claims arising out of other circumstances like breach of contract claims.
2. The amount of any advancement, whether a fixed amount or a reasonableness standard for the expenses and whether the LLC has the right to approve counsel for the party in question.
3. Whether indemnification is mandatory or permissive, and even if mandatory, who decides if indemnification is required.
4. Set forth the standards to be applied for deciding whether indemnification is required and types of claims to be covered.[44]

Indemnification and advancement obligations are merely unsecured obligations of the LLC. To be certain that there will be sufficient capital to meet the LLC's indemnification obligations, an LLC should strongly consider purchasing insurance for such claims. Be aware that in such cases, the insurance coverage requirements may be more restrictive than the indemnification obligations as set forth in the LLC agreement.

Conclusion

The New Act gives maximum effect to the principles of freedom of contract in the LLC agreement. As a result, although the fiduciary duties owed to an LLC and the members and the effect of the statutory exculpation, indemnification and advancement clauses are not materially changed by the New Act, parties to an LLC agreement will have much greater flexibility to modify, expand, restrict or eliminate these provisions in the LLC agreement in order to more accurately reflect the business understandings of the parties.

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1. It is worth mentioning here that the definition of the limited liability company agreement includes oral agreements, as well as agreements made by course of conduct.

2. We use LLC and limited liability company interchangeably. We also use LLC agreement and operating agreement interchangeably, though, for consistency's sake, we use operating agreement when referring to the member's governing document to the extent its validity and interpretation is gov-

erned by the current LLC act (Chapter 13); otherwise, we use LLC agreement. When we refer to the New Act, we mean Chapter 15 of Title 31 – the law that will take effect on July 1, 2011.

3. Restatement (Second) of Agency § 13 (1957).

4. 249 N.Y. 458, 463 463 N.E. 545, 546 (1928) (Cardozo, J.)

5. *See e.g. Willoughby v. Webster,* 13 Misc. 3d 1230 - 2006 (N.Y. Sup. Ct. 2006) (The relationship among LLC members is analogous to that of partners, who, as fiduciaries of one another, owe a duty of undivided loyalty to the partnership's interests.)

6. There is also confusion among non-business practitioners and judges about the nature of LLCs. In a number of the cases involving LLCs there are references to stock, stockholders and close corporations rather than membership interests, members and LLCs, which adds to the confusion in this area.

7. Section 652(1) of the Current Act provides that both managers and members owe fiduciary duties to the LLC and the other members, but in a manager-run LLC, a member of the LLC owes no fiduciary duties to the limited liability company or to the other members thereof solely by virtue of being a member. A member must be involved in the management of the LLC to owe fiduciary duties to the other members and the LLC in a member-run LLC.

8. 31 MRSA §652(1).

9. 31 MRSA §1044; Uniform Partnership Act § 404 and related commentary.

10. *See Meinhard v. Salmon, supra.*

11. *Id.*

12. See 31 M.R.S.A. § 652(2).

13. 31 MRSA §1044(2)(B); Uniform Partnership Act § 404(b)(2) and related commentary (1997); *see also Vermeule v. Hover,* 113 Me. 74, 93 A. 37 (1915). *Vermeule* is a corporate law case in which the court determined that a transaction between a director and the corporation must be made in good faith. There do not appear to be any LLC cases in Maine on this point.

14. *See also,* Restatement (Third) of Agency § 803.

15. Restatement (Second) of Agency § 389, comment (c); see also Restatement (Third) of Agency § 803, comment (b).

16. 13-C MRSA §§ 871 et seq.

17. 31 MRSA §1044(2)(C); Uniform Partnership Act § 404(b)(3) and related commentary (1997). *See also* Restatement (Third) of Agency §8.04.

18. 31 MRSA § 652(1).

19. *Rosenthal v. Rosenthal,* 543 A.2d 348, 352 (Me. 1988).

20. 31 MRSA § 652(1).

21. Revised Uniform Limited Liability Company Act § 110 (2006)

22. 18 Del. Code Ann. §1101.

23. 31 MRSA §1521(3).

24. *See e.g. Kelly v. Blum,* 2010 WL 629850 (Del. Ch. Feb. 24, 2010)

25. The following is an example of a provision adopting corporate duties:

> Each member shall owe such duties to the LLC as is required of a director of a Maine corporation under applicable Maine law, shall discharge his duties in good faith with the care that a person in a like position would reasonably believe appropriate under similar circumstances and in a manner he reasonably believes to be in the best interests of the LLC, and in so acting shall enjoy each and every protection afforded to the directors of a Maine corporation under applicable Maine law, including without limitation those afforded by the business judgment rule, the presumptions afforded thereby, and the applicable limitation on personal liability to the maximum extent permitted by Maine law.

26. For example, rather than referring to the "managers and members" the New Act refers to "persons." For a detailed discussion on authority in the New Act, see Part 2 of this series in *Maine Bar Journal* Vol. 26, No. 1, Winter 2011.

27. The second sentence of Section 1559 of the New Act is specific to low profit LLCs, only and does not apply generally to LLCs that are not L3Cs.

28. 32 MRSA §1559(1).

29. *See* detailed discussion of the Duty of Loyalty, *Supra.*

30. 31 MRSA §1559(3)(A) and (B).

31. 31 MRSA §1559(2).

32. 31 MRSA §652(1).

33. 31 MRSA §652(1). See discussion Supra.

34. 31 MRSA §1559(1).

35. The following is an example of an exculpation clause that relates to when the managing parties may rely on certain information:

> A covered person (need to expressly define this term to include who is covered by the clause) shall incur no liability in acting upon any signature or writing reasonably believed by such covered person to be genuine, may rely on a certificate signed by an executive officer of any person in order to ascertain any fact with respect to such person or within such person's knowledge, and may rely on an opinion of counsel selected by such covered person with respect to legal matters. Each covered person may act directly or through its agents or attorneys. Each covered person may consult with counsel, appraisers, engineers, accountants and other skilled persons of its choosing, and shall not be liable for anything done, suffered or omitted in good faith and within the scope of this agreement in reasonable reliance upon the advice of any of such persons. No covered person shall be liable to the company or any member for any error of judgment made in good faith by such covered person or its officers or directors; provided that such error does not constitute prohibited conduct. Except as otherwise provided in this section, no covered person shall be liable to the company or any member for any mistake of fact or judgment by such covered person in conducting the affairs of the company or otherwise acting in respect of and within the scope of this agreement; provided that such mistake does not constitute prohibited conduct. "Prohibited conduct" means, with respect to any person, conduct that constitutes fraud, embezzlement or, if applicable, willful breach of fiduciary duty, by such person.

36. 31 MRSA §652(2)(A) and (B).

37. The following exculpation clause sets forth a procedure to address conflict of interest transactions:

> Whenever a potential conflict of interest exists or arises between a member or any of its affiliates, the LLC or another member, any resolution or course of action in respect of such conflict of interest shall be permitted and deemed approved by all members, and shall not constitute a breach of this agreement or of any duty stated or implied by law or equity, if the resolution or course of action is or, by operation of this agreement, is deemed to be, fair and reasonable to the LLC and its members. The member must seek approval by a majority of the members of the conflict committee (need to define this group) of a resolution of such conflict or course of action (special approval). Any conflict of interest and any resolution of such conflict of interest shall be conclusively deemed fair and reasonable to the LLC and its Members if such conflict of interest or resolution is (i) approved by special approval, (ii) on whole, on terms no less favorable to the LLC than those generally being provided to or available from unrelated third parties or (iii) fair to the LLC and its members, taking into account the totality of the relationships between the parties involved (including other transactions that may be particularly favorable or advantageous to the LLC). The member and the conflicts Committee shall be authorized in connection with its determination of the "fair and reasonable" nature of any transaction or arrangement and in its resolution of any conflict of interest to consider (i) the relative interests of any party to such conflict, agreement, transaction or situation and the benefits and burdens relating to such interest; (ii) any customary or accepted industry practices and any customary or historical dealings with a particular person; (iii) any applicable generally accepted accounting or engineering practices or principles; and (iv) such additional fac-

tors as the member or conflicts committee determines in its sole discretion to be relevant, reasonable or appropriate under the circumstances. Nothing contained in this agreement, however, is intended to nor shall it be construed to require the member or such conflicts committee to consider the interests of any person other than the LLC and its members. In the absence of bad faith by the member, the resolution, action or terms so made, taken or provided by the member with respect to such matter shall not constitute a breach of this agreement or any other agreement contemplated herein or a breach of any standard of care or duty imposed herein or therein or under the Maine act or any other law, rule or regulation.

38. The following exculpation clause allows the members to engage in certain competitive activities and to withhold business opportunities from the LLC and the other members.

Each member acknowledges that the other members and the affiliates of such members own and/or manage other businesses, including businesses that may compete with the LLC, the other members and the managers. Except as otherwise provided in this agreement, without any accountability to the LLC or any member by virtue of any applicable duty (including fiduciary duty) or this agreement:

(i) Each member and its affiliates, and their respective officers, directors, shareholders, partners, members, agents and employees [and each Manager designated by such Member] (collectively, a "corporate opportunities group"), shall not in any way be prohibited or restricted from engaging or investing in, independently or with others, any business opportunity of any type or description[, including, without limitation, those business opportunities that might be the same or similar to the LLC business];

(ii) Neither the LLC nor any member or such member's corporate opportunities group shall have any right in or to such other business opportunities of any other member or such other member's corporate opportunities group or to the income of proceeds derived therefrom;

(iii) No member or its corporate opportunities group shall be obligated to present any business opportunity to the LLC or any other member or such other member's corporate opportunities group, even if the opportunity is of the character that, if presented to the LLC, could be taken by the LLC, or if presented to any other member or other member's corporate opportunities group, could be taken by such persons; and

(iv) Each member and its corporate opportunities group shall have the right to hold any such business opportunity for its own account or to recommend such opportunity to persons other than the LLC, any other member or any person in such other member's corporate opportunities group.

39. 31 MRSA §1521(4).

40. 31 MRSA §654. Of course, in this case, there would be no damages and the person in question would be entitled to be indemnified for her costs associated with the litigation.

41. 31 MRSA §654(1) and (2).

42. 31 MRSA §1557.

43. 31 MRSA §1507.

44. The following is an example of a mandatory indemnification/advancement provision:

(a) To the fullest extent permitted by law, the LLC shall indemnify, hold harmless and defend each of the indemnified parties from and against all claims, costs, expenses, losses, liabilities and damages (including amounts paid in satisfaction of judgments, in compromises and settlements, as fines and penalties and legal or other costs and reasonable expenses of investigating or defending against any claim or alleged claim) of any nature whatsoever, known or unknown, liquidated or unliquidated, that are incurred by any indemnified party or its agents and arise out of or in connection with the affairs of the LLC or any alternative investment structure through which LLC investments are made or the performance by such indemnified party or its agents of any of the manager's responsibilities hereunder or otherwise in connection with the matters contemplated herein; provided that an indemnified party shall be entitled to indemnification hereunder only to the extent that such indemnified party's conduct did not constitute fraud, bad faith, intentional misconduct, a material and intentional violation of any applicable local, state or federal securities laws or an intentional and material breach of this agreement.

(b) Indemnification shall be made solely and entirely from the LLC property and, except as otherwise expressly set forth herein, no member shall be personally liable to the indemnitees hereunder. The indemnification rights and obligations discussed herein shall survive an event of withdrawal or resignation of the manager or the dissolution, termination, and liquidation of the LLC.

(c) Expenses, including legal fees and court costs, reasonably incurred by an indemnified party in defense or settlement of any claim that may be subject to a right of indemnification hereunder shall be advanced by the LLC prior to the final disposition thereof upon receipt of an undertaking by or on behalf of the indemnified party to repay such amount to the extent that it shall be determined ultimately that such indemnified party is not entitled to be indemnified hereunder. No advances shall be made by the LLC without the prior written approval of the manager.

(d) The indemnification rights contained herein shall be cumulative of and in addition to any and all rights, remedies, and recourse to which the indemnitee shall be entitled whether pursuant to the provisions of this agreement, at law, or in equity and shall extend to such indemnified party's successors, assigns and legal representatives.

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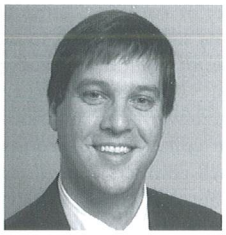

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