

State of Alabama



Alabama Law Institute

Alabama Limited Liability Company

Law of 2014 Amendments (2015)

March 2015

ALABAMA LAW INSTITUTE

www.ali.state.al.us

Alabama State House
Suite 207
11 South Union Street
Montgomery, Alabama 36130
(334) 242-7411
FAX (334) 242-8411

Law Center
Room 326
Post Office Box 861425
Tuscaloosa, Alabama 35486
(205) 348-7411
FAX (205) 348-8411

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PREFACE

The Alabama Law Institute presents to the Bench and Bar of Alabama, for consideration and constructive criticism, the following proposed act.

This bill would amend the Alabama Limited Liability Company Law of 2014 to clarify three issues. First, the bill clarifies the law to make clear that the law of the state in which a foreign limited liability company is formed governs the internal affairs of that entity. Second, the bill clarifies that under normal circumstances the liability of a member of a limited liability company for wrongful distributions is limited to the amount of the distributions received. Third, the bill corrects some technical errors in cross references.

Jim Wilson serves as chair of the Standing Business Entities Committee and Scot Ludwig served as the principal reporter on this project.

Othni J. Lathram
Director

March 2015

**Alabama Limited Liability Company Law of 2014
Amendments (2015)**

§10A-5A-1.05. Governing law.

(a) The law of this state governs:

(1a) the organization and internal affairs of a limited liability company, or series thereof;

(2b) the liability of a member as a member for the debts, obligations, or other liabilities of a limited liability company, or series thereof;

(3e) the authority of the members and agents of a limited liability company, or series thereof; and

(4d) the availability and liability of the assets of a series or the limited liability company for the obligations of another series or the limited liability company.

(b) The law of the state or other jurisdiction under which a foreign limited liability company is formed governs:

(1) the organization and internal affairs of a foreign limited liability company, or series thereof;

(2) the liability of a member as a member for the debts, obligations, or other liabilities of a foreign limited liability company, or series thereof;

(3) the authority of the members and agents of a foreign limited liability company, or series thereof; and

(4) the availability and liability of the assets of a series or the foreign limited liability company for the obligations of another series or the foreign limited liability company.

Comment

~~This SubSection (a) was derived from RPLLC § 106. Subsection (a)(4d) clarifies the limitation on the liability of the assets of a series from the liability or assets of another series or from that of the limited liability company's commonly held assets.~~

Subsection (b) was derived from RPLLC § 801(a). Under general choice-of-law principles, a court must follow a statutory directive of its own state on choice of law. Restatement Second, Conflict of Laws § 6(1). Subsection (b) provides such a statutory directive. Consistent with limited liability company acts around the country, Subsection (b) specifies that the organization and internal affairs of a foreign limited liability company are governed by the laws of its jurisdiction of formation.

To avoid any uncertainty as to whether the "internal affairs" of a limited liability company include the liability of the members for the debts and obligations of the limited liability company and the authority of members and agents, these matters are specified as matters that are governed by the laws of the limited liability company's jurisdiction of formation. This section also specifically provides that the internal liability shields in a series limited liability company are governed by the laws of the jurisdiction of the limited liability company's formation.

~~The scope of the internal affairs doctrine is not free from doubt and, as a result, this Section was added.~~

§10A-5A-1.06. Rules of construction.

(a) It is the policy of this chapter and this state to give maximum effect to the principles of freedom of contract and to the enforceability of limited liability company agreements.

(b) Unless displaced by particular provisions of this chapter, the principles of law and equity supplement this chapter.

(c) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this chapter.

(d) The use of any gender shall be applicable to all genders. The captions contained in this chapter are for purposes of convenience only and shall not control or affect the construction of this chapter.

(e) Sections 7-9A-406 and 7-9A-408 of the Uniform Commercial Code, and all successor statutes thereto, do not apply to any interest in a limited liability company, including all rights, powers, and interests arising under a limited liability company agreement or this chapter. This provision prevails over Sections 7-9A-406 and 7-9A-408 of the Uniform Commercial Code, and all successor statutes thereto, and is expressly intended to permit the enforcement of the provisions of a limited liability company agreement that would otherwise be ineffective under Sections 7-

9A-406 and 7-9A-408 of the Uniform Commercial Code, and all successor statutes thereto.

(f) Division E of Article 3 of Chapter 1 shall have no application to this chapter.

(g) Sections 10A-1-1.03 (73), (81), (88) and (91) shall have no application to this chapter.

(h) Section 10A-1-2.13(c) shall have no application to this chapter.

Official Comments

Subsections (a) through (e) are derived from RPLLC § 107, but are similar to the Alabama Partnership Law § 10A-8-1.05 and the Alabama Limited Partnership Law §10A-1-1.07. In addition, Subsection (e) is derived from the Alabama Limited Partnership Law §10A-1-7.02(h). Subsection (f) was added to clarify that the provisions of Chapter 1 (§§10A-1-3.41 through 10A-1-3.45) regarding certificates shall not apply to limited liability companies. If the members of the limited liability company wish to issue certificates, such certificates may be issued in accordance with the limited liability company agreement and Section 5.02(c). In addition, to the extent that the members desire to have Article 8 of the UCC apply, Article 8 has specific requirements regarding such certificates. Subsection (g) was added to prevent the application of the definitions of “President,” “Vice-President,” “Secretary” and “Treasurer” to limited liability companies. If a limited liability company desires to designate a person’s title as “President,” “Vice-President,” “Secretary,” “Treasurer” or other title, that person will have the powers and authorities granted that person under the limited liability company agreement or as otherwise provided or determined under Section 3.02. Subsection (h) was added to avoid the creation of certain

presumptions and certain statutory causes of action regarding guarantees in the limited liability company context. These matters seem best left to current remedies and to the parties to the limited liability company agreement.

§10A-5A-4.06. Limitation on distributions and liability for improper distributions.

(a) (1) A limited liability company shall not make a distribution to a member to the extent that at the time of the distribution, after giving effect to the distribution, all liabilities of the limited liability company, other than liabilities to members on account of their transferable interests and liabilities for which the recourse of creditors is limited to specific property of the limited liability company, exceed the fair value of the assets of the limited liability company, except that the fair value of the property that is subject to a liability for which recourse of creditors is limited shall be included in the assets of the limited liability company only to the extent that the fair value of the property exceeds that liability.

(2) A member who receives a distribution in violation of Subsection (a)(1) or the limited liability company agreement, and who knew at the time of the distribution that the distribution violated Subsection (a)(1) or the limited liability company agreement, shall be liable to the limited liability company for the amount of the distribution received by that member. A

member who receives a distribution in violation of Subsection (a)(1) or the limited liability company agreement, and who did not know at the time of the distribution that the distribution violated Subsection (a)(1) or the limited liability company agreement, shall not be liable for the amount of the distribution.

(b) (1) A series shall not make a distribution to a member associated with the series to the extent that at the time of the distribution, after giving effect to the distribution, all liabilities of the series, other than liabilities to members associated with the series on account of their transferable interests and liabilities for which the recourse of creditors is limited to specific property of the series, exceed the fair value of the assets of the series, except that the fair value of the property that is subject to a liability for which recourse of creditors is limited shall be included in the assets of the series only to the extent that the fair value of the property exceeds that liability.

(2) A member associated with a series who receives a distribution in violation of Subsection (b)(1) or the limited liability company agreement, and who knew at the time of the distribution that the distribution violated Subsection (b)(1) or the limited liability company agreement, shall be liable to that series

for the amount of the distribution received by that member. A member associated with a series who receives a distribution in violation of Subsection (b)(1) or the limited liability company agreement, and who did not know at the time of the distribution that the distribution violated Subsection (b)(1) or the limited liability company agreement, shall not be liable for the amount of the distribution.

(3) Subsection (a) shall not apply to a distribution made by a series.

(c) Except as provided in Subsection (d), this section shall not affect any obligation or liability of a member under other applicable law for the amount of a distribution.

(d) An action under this section or other applicable law is barred if not commenced within two years after the distribution.

(e) For purposes of Sections 10A-5A-4.06(a) and 10A-5A-4.06(b), “distribution” does not include amounts constituting reasonable compensation for present or past services or reasonable payments made in the ordinary course of the limited liability company’s activities and affairs under a bona fide retirement plan or other benefits program.

(f) This section shall not apply to distributions made in accordance with Section 10A-5A-7.06 or Section 10A-5A-11.14.

Comment

This Section is derived from RPLLC § 405, which derived Subsections (a)(1) and (e) from Delaware, § 18-607(a); and Subsection (a)(2) from Delaware, § 18-607(b). Subsection 4.06(b) is new, but reflects Subsection 4.06(a).

Section 4.06 avoids imposing liability based on authorization or consent to a distribution. This Section (with the exception of Subsection (d)) does not alter fraudulent transfer statutes and other applicable laws.

*Subsection (d), like the limited liability company acts of a number of states, including Delaware, § 18-607, provides for a statute of limitations that applies to a claw-back under this Section or “other applicable law,” e.g., fraudulent transfer statutes. Conflict of laws principles may impact a court’s analysis of the applicable statute of limitations in a fraudulent transfer action. See *In re Heritage Org., LLC*, 413 B.R. 438 (Bankr. N.D. Tex. 2009).*

Subsection (f) is derived from RMBCA § 6.40(h).