This article was originally published in the October 2014 issue of the New Jersey Lawyer Magazine, a publication of the New Jersey State Bar Association, and is reprinted here with permission.

Commentary

RULLCA Savings Clause Darkens the Fog of Standards Applicable to Business Litigation

by Eric A. Inglis

Transactional attorneys and litigators took notice when the New Jersey Legislature passed the Revised Uniform Limited Liability Company Act (RULLCA) on Sept. 12, 2012. Other authors in this edition of *New Jersey Lawyer Magazine* have commented on some of the wider ranging changes effected by the new law. This article concentrates on only one provision: the savings clause found at N.J.S.A. 42:2C-90.

The savings clause provides: "This act does not affect an action commenced, proceeding brought, or right accrued before this act takes effect." The RULLCA 'took effect' in a manner that the Administrative Office of the Courts described as "unique," when it alerted assignment judges to the change in the law. Prior to March 1, 2014, RULLCA governed only: 1) an LLC formed on or after the effective date of RULLCA; and 2) a limited liability company (LLC) formed before the effective date of RULLCA, which elected in its operating agreement to be subject to RULLCA. After March 1, 2014, RULLCA governs all LLCs.

Prior to March 1, 2014, some litigators had filed suits implicating the rights of LLC members, and some of those suits are still pending today. It seems clear that once the calendar turned to March 1, 2014, RULLCA governed the affairs of those LLCs. But what does this mean?

As of the date this article was authored, research did not reveal any published opinions interpreting the meaning of the effective date of RULLCA or the savings clause of the statute. Given the short time the statute has existed, this is not a surprise. The lack of case law is consistent with the general lack of authority available to practitioners seeking judicial interpretations of New Jersey's prior Limited Liability Company Act.[1] Even New Jersey's judges, including some on the Appellate Division, have puzzled over how to create law to govern LLCs. They have called for the creation of "new law" to govern these no-longer-new-but-not-yet-old business entities that are a hybrid of corporations and partnerships.[2] Given the lack of clear rules and standards, it is surprising more litigation has not been generated and has not resulted in more published authority interpreting LLCs.

The savings clause of RULLCA introduces yet more mud into the legal water in which LLCs exist, though it mandates that RULLCA "does not affect [a] right accrued before this act takes effect."[3] How will this be applied in the real world? The question will likely arise in a litigation centered on an issue that is treated differently under the original LLC act and RULLCA.

For example, RULLCA amended the rights of LLC members to seek information from the LLC, so that those rights are differentiated between member-managed LLCs and manager-managed LLCs. Under the LLC act, all members had a right to demand information from the LLC in writing, as long as the member sought the information for a purpose "reasonably related to [the member's] interest as a member of the limited liability company," subject to the limitation of a manager to keep trade secrets confidential.[4] Under RULLCA, those rights were altered. A member's right to information in a *member*-managed entity is substantially broadened and is not subject to a written demand.[5] However, RULLCA restricts those same rights in a *manager*-managed LLC.[6]

If parties in a manager-managed LLC litigate over the right to information regarding the LLC, then which law applies? Access to information is certainly a 'right,' and the LLC and the member contesting the access to information both possessed rights to obtain the information that accrued prior to the March 1, 2014, effective date of RULLCA. Although RULLCA became effective on March 1, 2014, it appears to leave undisturbed rights that 'accrued' before the effective date.

This same conundrum might face courts in the various other areas where RULLCA changed the law governing LLCs, such as rights upon dissociation,[7] rights to seek dissolution,[8] veil piercing,[9] and charging orders.[10]

RULLCA almost expressly recognizes the legal uncertainty into which it is launching the legal and business community. In a legislative statement the author believes to be equal parts unenlightening and obvious, the Legislature added to RULLCA the statement that: "Unless displaced by particular provisions of this act, the principles of law and equity supplement this act."[11] *Every* action submitted in the courts is decided subject to principles of law and equity.

Despite the various drastic and subtle changes wrought by RULLCA, litigators contesting issues related to LLCs will have to develop and try these cases in the same fashion they always have. Rather than relying upon an established statute or well-defined case law—luxuries that apply to certain areas of the law—business litigators will continue to lack the ability to guide and reliably predict the outcome of these kinds of cases. The legal uncertainty will continue leading litigators to 'pound the facts' to persuade the court that their client wears the 'white hat' while the adversary wears the 'black hat.'

LLCs are favored by businesspeople because of their flexibility. The legal standards governing LLCs are also flexible, and RULLCA accentuates that flexibility. The loose wording of RULLCA and the continued immaturity of case law governing LLCs will continue to feed the unique intensity of business litigation.

Endnotes

1. N.J.S.A. 42:2B-1 *et seq.* (repealed effective March 1, 2014).
2. *Mariner's Bank v. 4921 Bergenline Corp.*, 2014 N.J. Super. Unpub. LEXIS 120 *12 (App. Div. Jan. 13, 2014) (observing that some legal commentators have suggested, "courts should develop new doctrines where needed instead of adopting all corporate or all partnership common law rules").
3. N.J.S.A. 42:2C-90.
4. N.J.S.A. 42:2B-25.
5. N.J.S.A. 42:2C-40(a)(2).
6. N.J.S.A. 42:2C-40(b)(2).
7. N.J.S.A. 42:2C-46(e).
8. N.J.S.A. 42:2C-48(a)(4).
9. N.J.S.A. 42:2C-30(b).
10. N.J.S.A. 42:2C-43.
11. N.J.S.A. 42:2C-7.

Eric A. Inglis *is a partner with and head of the commercial litigation practice group at Schenck, Price, Smith & King, LLP, in Florham Park. He is a certified civil trial attorney, focusing on business and commercial real estate litigation matters, partnership disputes, oppressed minority shareholder suits, commercial fraud claims, and collection matters.*