

# State Law & State Taxation Corner

## Let's Stop Describing LLCs as "Hybrids"

By Thomas E. Rutledge

In *Turner v. Andrews*, the Kentucky Supreme Court wrote that "A limited liability company is a 'hybrid business entity having attributes of both a corporation and a partnership.'"<sup>1</sup> Similar descriptions can be found in decisions of other courts.<sup>2</sup> While a description of an LLC as "a hybrid business entity having attributes of both a corporation and a partnership" may have been substantially correct in the early days of the LLC,<sup>3</sup> today this formula is misleading and impoverished in that it indicates that partnership and corporate law are in some manner melded in the LLC and that when considering a dispute involving LLCs, the question is whether to apply one or the other to a particular question.

In a realm in which limited liability is available in not only the LLC but also in general and limited partnerships,<sup>4</sup> as well as other unincorporated forms such as the limited cooperative association<sup>5</sup> and the statutory trust,<sup>6</sup> citing the corporation as the archetype for limited liability is misleading, especially as that characteristic is not intrinsic to the corporate form.<sup>7</sup> As to tax classification, many LLCs are not taxed as partnerships but rather as either associations taxable as corporations or as disregarded entities.<sup>8</sup> Furthermore, many LLCs otherwise classified as disregarded entities are required to be treated as corporations for certain employment tax purposes.<sup>9</sup> In today's environment, the LLC, like each other form of business organization, must be understood as a unique construct of formulae and characteristics that may or may not be shared with other organizational forms.<sup>10</sup>

First and foremost, an LLC is an organizational form that is based on a contract identified as the "operating agreement."<sup>11</sup> Where an LLC does not adopt a particular agreement as its operating agreement, the LLC Act will itself constitute the operating agreement.<sup>12</sup> An LLC may supplement the Act with oral agreements as to particular points,<sup>13</sup> but under the laws of certain states oral agreements will not be effective when the LLC requires that any departure from its terms be in writing.<sup>14</sup> Assuming the operating agreement is in writing, there is almost complete flexibility to structure the internal affairs of the LLC. It is the express public policy of many states to give maximum effect to the freedom of contract in operating agreements.<sup>15</sup> This organizational flexibility sets the LLC off from the corporation, a form in which there is limited opportunity in the articles of incorporation or



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the by-laws for modification of the standard form as set forth in the business corporation act.<sup>16</sup>

Second, the LLC is entirely a statutory construct. Partnerships, limited partnerships and corporations predate the law governing each being reduced to statute.<sup>17</sup> In contrast, LLCs are entire strangers to the common law; there was no LLC before there was an LLC Act. The Kentucky Supreme Court, in *Pannell v. Shannon*, observed:

In fact, “limited liability companies are creatures of statute,” controlled by Kentucky Revised Statutes (KRS) Chapter 275, not primarily by the common law. To the extent that common law doctrines could arguably govern limited liability companies, the Kentucky Limited Liability Company Act “is in derogation of common law,” and the traditional rule of statutory construction that “require[s] strict construction of statutes that are in derogation of common law shall not apply to its provision.” Thus, to the extent the statutes conflict with common law, the common law is displaced.<sup>18</sup>

*In today’s environment, the LLC, like each other form of business organization, must be understood as a unique construct of formulae and characteristics that may or may not be shared with other organizational forms.*

While aspects of the laws of other business organizations were utilized as models in drafting certain aspects of the various LLC acts, they were simply models. LLCs have certain characteristics because those characteristics are embodied in the governing statute, not because an LLC is a “different flavor” of one of the older organizational forms. Therefore, instead of analogizing an LLC to one of the older organizational forms, the LLC needs to be understood as a separate business organization that has characteristics that may be similar to those of other organizational forms. The point is subtle but important; by way of example:

- LLCs are not similar to partnerships because both embody the rule of *in personam delectus*, but rather LLCs and partnerships are similar to one another because they both embody the rule of *in personam delectus*; and

- LLCs are not similar to corporations because both afford limited liability to the owners (members and shareholders), but rather LLCs and corporations are similar to one another because they both provide limited liability to the owners.

Third, an LLC is not a species of partnership, and it is not a species of corporation. LLCs are formed under and governed by an LLC act.<sup>19</sup> LLCs are not as a default governed by the law of corporations. The law of corporations is not a general “gap filler” for the law of other business organizations. Corporate law governs corporations, and that is all it governs.<sup>20</sup> LLCs are not as a default governed by the law of partnerships. In fact, partnership law expressly provides that it does not apply in business organizations formed under other organizational statutes.<sup>21</sup> Rather, an individual LLC is governed by its operating agreement (incorporating as it does the LLC Act) and then by law and equity.<sup>22</sup>

Fourth, treating an LLC as a hybrid dependent for its characteristics to analogies to a previously existing form deprives the LLC of any independent functionality. As eloquently described by Professor (now Dean) Tom Geu, the LLC exists to fill a gap that otherwise exists in the law of business organizations.<sup>23</sup> The LLC is intended to provide a different answer to certain questions, to provide an alternative organizational paradigm that was not available under the previously available forms such as the partnership and the corporation. For that reason, it both packages pre-existing concepts in a unique manner and as well provides rules with no antecedent. In that manner, the LLC provides a unique set of rules different from the prior forms, a uniqueness lost if it is treated as a mere hybrid.

In the end, an LLC is simply that—it is an LLC in the same way that a corporation is a corporation and a partnership is a partnership. Each of those labels is simply the identifier of a unique combination of characteristics. Addressing only some of those characteristics:

LLCs share certain characteristics with corporations such as limited liability and “entity” characterization. That said, even as none of the statutes actually define what it means to be an “entity,”<sup>24</sup> LLCs share those same characteristics of limited liability and entity characterization with RUPA limited liability partnerships.<sup>25</sup> Some LLCs share with partnerships a management structure in which the owners, as owners, control the operations of the venture even as there are other LLCs that have separated management control from ownership, vesting control of at least the day-to-day operations of the LLC in persons other than in their capacity as members and even persons who are not members at all.<sup>26</sup> While the former of these models is akin to a partnership management structure and

**FIGURE 1.**

	Corporation	Partnership	LLC
Limited Liability:	Shareholders enjoy limited liability from the corporation's debts and obligations <sup>1</sup>	Partners are personally liable for all of the partnership's debts and obligations <sup>2</sup>	Not only does the LLC Act provide that each member enjoys limited liability from the LLC's debts and obligations, but that same rule applies to its managers, employees and agents <sup>3</sup>
Free Transferability of Interests:	Corporate shares are freely and unilaterally transferable <sup>4</sup>	Right to participate in management not freely transferable <sup>5</sup>	Right to participate in management not freely transferable <sup>6</sup>
Centralized Management:	Control of the corporation is vested in the board of directors; directors need not be shareholders <sup>7</sup>	Control of the partnership is vested in the partners <sup>8</sup>	LLC elects whether to be manager-managed or member-managed <sup>9</sup>
Capital Lock-In:	A shareholder may not withdraw from and thereby liquidate the investment in the corporation <sup>10</sup>	A partner may unilaterally withdraw from the partnership and liquidate interest in the partnership <sup>11</sup>	A member has no right to withdraw and liquidate the investment in the LLC <sup>12</sup>
Agency:	A shareholder is not an agent for the corporation <sup>13</sup>	A partner is an agent for the partnership <sup>14</sup>	<ul style="list-style-type: none"> <li>• If the LLC elects to be member-managed, then each member is an agent of the LLC<sup>15</sup></li> <li>• If the LLC elects to be manager-managed, then each manager is an agent of the LLC and each member, <i>qua</i> a member, is not an agent<sup>16</sup></li> </ul>
Major Decisions:	Major decisions require approval of the board of directors and a majority of the shareholders <sup>17</sup>	Major decisions require unanimous approval of the partners <sup>18</sup>	Major decisions require the approval of a majority-in-interest of the members <sup>19</sup>
Voting Rights:	Shareholders vote in proportion to share ownership <sup>20</sup>	Partners vote on a per capita basis <sup>21</sup>	Members vote in proportion to capital contributed to the LLC <sup>22</sup>
Voluntary Dissolution:	Requires the approval of the board of directors and a majority of the shareholders <sup>23</sup>	Automatic upon the resignation of any partner <sup>24</sup>	Requires the approval of all of the members <sup>25</sup>
Treatment under Federal Securities Laws	"Stock" is a definitional security <sup>26</sup>	Partnership interest may be a "investment contract," but there is a contrary presumption <sup>27</sup>	Interest in an LLC may be an "investment contract" <sup>28</sup>
Default Treatment under UCC	Stock is an Article 8 certificated security <sup>29</sup>	Interest in a partnership is an Article 9 general intangible <sup>30</sup>	LLC interest is an Article 9 general intangible <sup>31</sup>

**ENDNOTES**

- <sup>1</sup> See, e.g., Del Code Ann. tit. 8, §102(b)(6); Ind. Code §23-1-26-3(b); Ky. Rev. Stat. Ann. §271B.6-220(2). The statute is silent as to the limited liability of directors, officers, employees and agents.
- <sup>2</sup> See Unif. Part. Act §15, 6 (pt. 1) U.L.A. 613 (2001); Rev. Unif. Part. Act §306(a), 6 (pt. 1) U.L.A. 117; Ky. Rev. Stat. Ann. §362.175(2); *id.* §362.1-306(1).
- <sup>3</sup> See, e.g., Ky. Rev. Stat. Ann. §275.150(1). See also Rev. Unif. Ltd. Liab. Co. Act §304(a)(2), 6B U.L.A. 475 (2008) (including "manager" within grant of limited liability); S.D. Codified Laws §47-34A-303 (same). For a complete listing of the limited liability provisions of the various LLC acts, see 2 LARRY E. RIBSTEIN AND ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES, Appendix 12-2.
- <sup>4</sup> See, e.g., 12 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS §5452 (2012) ("The owner of the shares, as in the case of other personal property, has an absolute and inherent right, as an incident of his or her ownership, to sell or transfer the shares at will, except insofar as the right may be restricted by the articles of incorporation, bylaws, an agreement among shareholders, or between shareholders and the corporation. In the absence of such restrictions, a transfer of shares does not require the consent of the corporation and cannot be prohibited.") (citations omitted); CHARLES B. ELLIOTT, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS §427 (3d ed. 1900) ("A transferee of shares acquires the rights of the transferrer..."). Still, shares of a professional corporation are typically transferable only to members of the profession practiced by the PSC. See, e.g., Ky. Rev. Stat. Ann. §274.017.
- <sup>5</sup> See, e.g., Unif. Part. Act §27(1), 6 (pt. II) U.L.A. 332 (2001); Rev. Unif. Part. Act §503(a)(3), 6 (pt. 1) U.L.A. 157 (2001); Ky. Rev. Stat. Ann. §362.1-202(2); *id.* §362.175(2); *id.* §362.280(1); *id.* §362.1-503(1)(c).
- <sup>6</sup> See, e.g., Rev. Prototype Limited Liability Company Act §502(a)(4)(19), 67 Bus. Law 117, 163 (Nov. 2011); Del. Code Ann. tit. 6, §18-702(b)(1); Ind. Code §23-18-6-3.1(b)(3); S.D. Codified Laws §47-1A-801; Ky. Rev. Stat. Ann. §275.255(1)(c).
- <sup>7</sup> See, e.g., Del. Code Ann. tit. 8 §141 (a), (b); Ind. Code §§23-1-33-1(a)-(b); Ky. Rev. Stat. Ann. §271B.8-010(2); *id.* §271B.8-020. See also *Allied Ready Mix Co., Inc. v. Mattingly*, 994 SW2d 4, 8 (Ky. 1998).
- <sup>8</sup> See, e.g., Unif. Part. Act §18(e), 6 (pt. II) U.L.A. 110 (2001); Rev. Unif. Part. Act §401(f), 6 U.L.A. 133 (2001); Ky. Rev. Stat. Ann. §362.235(5); *id.* §362.1-401(6).
- <sup>9</sup> See, e.g., Ind. Code §23-18-2-4(b)(4); *id.* §23-18-4-1; Ky. Rev. Stat. Ann. §275.025(1)(d); *id.* §275.165. See also Ribstein and Keatinge, *supra* note 3, volume 1 at Appendix 8-2.

- <sup>10</sup> See, e.g., *Nixon v. Blackwell*, 626 A2d 1366 (Del. 1993) (shareholder has no right to have corporation repurchase shares absent a contract to that effect); *Blaustein v. Lord Baltimore Capital*, 84 A3d 954 (Del. 2014) (same). A different rule applies under certain professional corporation statutes, they providing a default right to put the shares in the absence of a contrary agreement. See, e.g., Ky. Rev. Stat. Ann. §274.095. This rule is not however universal. See, e.g., *Corlett, Killian, Hardeman, McIntosh and Levi, P.A. v. Merritt*, 478 So2d 828 (Fla. 2nd DCA 1985) (no right of shareholder to compel redemption).
- <sup>11</sup> See, e.g., Ky. Rev. Stat. Ann. §362.335(1); *id.* §362.1-701(1).
- <sup>12</sup> See, e.g., Del. Code Ann. tit. 6, §18-603; Ind. Code §23-18-6-6.1(b); Ky. Rev. Stat. Ann. §275.280(4). Admittedly there are LLC acts that embody different rules. See, e.g., Del. Code Ann. tit. 6, §18-604 (if member is afforded the right to withdraw from LLC, absent contrary private ordering, the member is upon resignation entitled to the "fair value" of his interest therein).
- <sup>13</sup> 1 WILLIAM MEADE FLETCHER, *FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS* §30 (2012) ("The mere fact that one is a shareholder or a majority or principal shareholder gives the individual no authority to represent the corporation as its agent in dealing with third persons.") (citations omitted); WILLIAM L. CLARK, *HANDBOOK OF THE LAW OF PRIVATE CORPORATIONS* 38 (2nd ed. 1907) ("The mere fact that he is a stockholder does not make him an agent to contract for it or bind it by his acts.") (citation omitted); II WILLIAM W. COOK, *A TREATISE ON THE LAW OF CORPORATIONS HAVING A CAPITAL STOCK* §709 (5th ed. 1903) ("The stockholders cannot enter into contracts with third persons. Contracts between the corporation and third persons must be entered into by the directors and not by the stockholders. The corporation, in such matters, is represented by the former and not by the latter. Such is one of the main objects of corporate existence. To the directors are given the management and formation of corporate contracts. The shareholders cannot, in a meeting assembled, bind the corporation by their contracts in its behalf.") (citation omitted).
- <sup>14</sup> See, e.g., Ky. Rev. Stat. Ann. §362.190(1); *id.* §362.1-301(1) (each partner is an agent of the partnership); *id.* §362.220(1); *id.* §362.1-306(1) (partner liability for partnership debts). Under the Revised Uniform Partnership Act (1997), while each partner is an agent of the partnership, a partner is not an agent of any other partner. See Rev. Unif. Part. Act §301, 6 (pt. I) U.L.A. 101 (2001); see also Ky. Rev. Stat. Ann. §362.1-301(1).
- <sup>15</sup> See, e.g., Ark. Stat. §4-32-301(a); Ind. Code §23-18-3-1.1(b); Ky. Rev. Stat. Ann. §275.135(1).
- <sup>16</sup> See, e.g., Ark. Stat. §4-32-301(a); Ind. Code §23-18-3-1.1(c); Ky. Rev. Stat. Ann. §275.135(2). It needs to be acknowledged that none of the Revised Prototype LLC Act, the Revised Uniform LLC Act nor the Delaware LLC Act utilize this distinction. See also Thomas E. Rutledge and Steven G. Frost, *RULLCA Section 301—The Fortunate Consequences (and Continuing Questions) of Distinguishing Apparent Agency and Decisional Authority*, 64 Bus. Law. 37 (Nov. 2008).
- <sup>17</sup> See, e.g., Ky. Rev. Stat. Ann. §271B.10-030 (amendment of articles of incorporation requires approval of both board of directors and shareholders); *id.* §271B.11-030 (approval of merger requires approval of both board of directors and shareholders); *id.* §271B.12-020(2) (approval of sale of substantially all assets outside the ordinary course of business requires approval of both board of directors and shareholders).
- <sup>18</sup> See, e.g., Ind. Code §23-4-1-18(h) ("Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners."); Ky. Rev. Stat. Ann. §362.235(8); *id.* §362.1-401(10) ("An act outside the ordinary course of business of a partnership and an amendment to the partnership agreement may be undertaken only with the consent of all of the partners.").
- <sup>19</sup> See, e.g., Ky. Rev. Stat. Ann. §275.175(2)(c) (amendment of articles of organization approved by majority-in-interest of the members); *id.* §275.350(1) (merger approved by majority-in-interest of the members); *id.* §275.247 (sale of substantially all assets outside the ordinary course approved by majority-in-interest of the members). Certain LLC acts default to unanimous approval of major decisions. See, e.g., S.D. Codified Laws §47-34A-903(a) (unanimous consent to a merger).
- <sup>20</sup> See, e.g., Ind. Code §23-1-30-2(b); Ky. Rev. Stat. Ann. §271B.7-210(1).
- <sup>21</sup> See, e.g., Ind. Code §23-4-1-18(e); Ky. Rev. Stat. Ann. §362.235(5); *id.* §362.1-401(6).
- <sup>22</sup> See, e.g., Ind. Code §23-18-1-13; *id.* §23-18-4-3(a); Ky. Rev. Stat. Ann. §275.175(1); *id.* §275.015(14); *id.* §275.175(3).
- <sup>23</sup> See, e.g., Ind. Code §23-1-45-2; Ky. Rev. Stat. Ann. §271B.14-020(2), (5).
- <sup>24</sup> See, e.g., Ind. Code §23-4-1-31(1)(b); Ky. Rev. Stat. Ann. §362.300(1)(b); Unif. Part. Act §31(1)(b), 6 (pt. I) U.L.A. 370 (2001).
- <sup>25</sup> See, e.g., Ark. Code Ann. §4-32-901(3); Ky. Rev. Stat. Ann. §275.285(3); Ohio Rev. Code Ann. §1705.43(A). Under the Indiana Business Flexibility Act, voluntary dissolution of an LLC requires the approval of two-thirds of the members. See Ind. Code §23-18-9-1.1(b)(2).
- <sup>26</sup> See Securities Act of 1933, §2(a)(1) (definition of a "security" includes "stock").
- <sup>27</sup> *Williamson v. Tucker*, CA-5, 645 F2d 404 (1981).
- <sup>28</sup> See, e.g., *U.S. v. Leonard*, CA-2, 529 F.3d 83, FED. SEC. L. REP. (CCH) ¶94,746 (June 11, 2008); *U.S. SEC v. Radial Bunny, LLC*, CA-9, 532 Fed. Appx. 775, FED. SEC. L. REP. (CCH) ¶ 97,553 (2013). See also *Great Lakes Chemical Corp. v. Monsanto Co.*, DC-DE, 96 FSupp2d 376 (2000) ("As such, the grounds for creating a per se rule, or at least a presumption, that interests in general partnerships are not securities are lacking in the context of LLCs."). But see *Rossi v. Quarmley*, DC-PA, Dkt. No. 12-cv-07270, 2014 U.S. Dist. LEXIS 39705, FED. SEC. L. REP. (CCH) ¶97,871 (Mar. 25, 2014) (interest in LLC not a security consequent to member's right to participate in management).
- <sup>29</sup> See UCC §8-102(a)(15) ("Incorporating by reference definition of 'security' from UCC §9-102(b); UCC 8-103(a) ("A share or similar equity interest issued by a corporation, business trust, joint stock company or similar entity is a security."). See also Official Comment 2 to UCC §8-103 ("Subsection [8-103](a) establishes an unconditional rule that ordinary corporate stock is a security.") See generally Lynn Soukup, *Equity Interests as Collateral* at 3, in SECURED TRANSACTIONS 2012: WHAT A LAWYER NEEDS TO KNOW ABOUT UCC ARTICLE 9 (PLI 2012, No. A-944).
- <sup>30</sup> See UCC §8-103.
- <sup>31</sup> See UCC §8-103; *In re Dreiling*, Case No. 05-64189, 2007 Bankr. LEXIS 191 (Bankr. W.D. Mo. 2007); *In re Weiss*, 376 BR 867 (Bankr. N.D. Ill. 2007); see also Soukup, *supra* note 29 at 3, fn 5.

the latter perhaps akin to that of a corporation, (i) the LLC is unique in its capacity to make that election and (ii) the centralized management of a manager-managed LLC does not carry with it the “two-house” rule of corporate law. While under no corporation act is a shareholder as a shareholder an agent of the corporation and under every partnership act each partner is an agent for the partnership, some LLCs elect to have the members *qua* members as agents, while others elect the exact opposite result.<sup>27</sup> The suggestion of hybridization fails when a review of characteristics shows the supposed hybrid to lack characteristics of either predecessor form.<sup>28</sup>

Returning to the early guidance of Professor Geu is perhaps the best direction:

The Limited Liability Company (“LLC”) is a unique and relatively new form of business organization created by statute.<sup>29</sup>

Therefore, consideration of an LLC must begin by a careful analysis of its operating agreement and the underlying LLC Act. These two sources collectively embody the law of that particular LLC. Only in the rarest of instances will there be a need to reference law other than general contract law in applying that combination of private agreement and statute to assess the rights of the members, the managers and even third-parties dealing with the LLC. While recourse to the law of other organizations may be appropriate to understand particular statutory language,<sup>30</sup> that reference is appropriate because of the similarity of statutory formula employed and not because those other organizational forms are normative standards against which the LLC is to be measured. Where, in contrast, the statutory formulae are different,<sup>31</sup> cross-reference is misleading and inappropriate.

An LLC is just that: it is not a form of corporation, and it is not a species of partnership. An LLC is not a hybridization of those other forms. In resolving disputes involving LLCs, each LLC needs to be considered as a unique construct.

## ENDNOTE

<sup>1</sup> *Turner v. Andrews*, 413 SW3d 272, 275 (Ky. 2013), quoting *Patmon v. Hobbs*, 280 SW3d 589, 593 (Ky. App. 2009).

<sup>2</sup> See, e.g., *Montgomery v. eTrepid Technologies, LLC*, DC-NV, 548 FSupp2d 1175, 1180 (2008) (“While LLCs offer members the same protection from personal liability as corporations offer their shareholders, unless otherwise indicated, LLCs are generally treated as partnerships for tax purposes.” (citations omitted.)); *Weber v. U.S. Sterling Securities, Inc.*, 924 A2d 816, 822 (Conn. 2007) (“[Limited liability companies] are hybrid entities that combine desirable characteristics of corporations, limited partnerships, and general partnerships.” (Internal quotation marks omitted.)); *Purcell v. S. Hills Invs., LLC*, 847 NE2d 991, 996 (Ind. Ct. App. 2006) (“Reviewing the issue of whether an LLC’s member violated a common law fiduciary duty owed to other member, the district court in its analysis focused on the LLCs hybrid

nature between a corporation and a partnership and found that Indiana LLCs impose a common law fiduciary duty on their officers and members in the absence of contrary provisions in the LLC operating agreements.”). See also Carter G. Bishop & Daniel S. Kleinberger, *Limited Liability Companies: Tax And Business Law* ¶ 1.01 (2012) (“The limited liability company (LLC) is a relatively new, hybrid form of business entity that combines the liability shield of a corporation with the federal tax classification of a partnership.... The essence of an LLC is the co-existence of partnership tax status with corporate-like limited liability.”).

<sup>3</sup> See, e.g., Thomas Earl Geu, *Understanding the Limited Liability Company: A Basic Comparative Primer (Part One)*, 37 S.D. L. REV. 44, 45 (1991-1992) (“[The LLC] is a hybrid form of business created by combining the organizational and tax attributes of partnerships and corporations, much like its organizational cousin the limited partnership.”); Thomas E. Rutledge & Lady E. Booth, *The Limited Liability Company Act: Understanding Kentucky’s New Organization Option*, 83 Ky. L.J. 1, 6-8 (1994-95); Robert R. Keatinge et al., *The Limited Liability Company: A Study of the Emerging Entity*, 47 Bus. Law. 375, 380 (Feb. 1992).

<sup>4</sup> See Rev. Unif. Part. Act §306(c), 6 (pt. 1) U.L.A. 117 (2001); Ky. Rev. Stat. Ann. §362.1-306(3) (eliminating partners’ liability when partnership elects to be a limited liability partnership); Unif. Ltd. Part. Act §303, 6A U.L.A. 418 (2008); Ky. Rev. Stat. Ann. §362.2-303 (eliminating liability for limited partners in a KyULPA limited partnership); Unif. Ltd. Part. Act §404(c), 6A U 432 (2008); Ky. Rev. Stat. Ann. §362.2-404(3) (eliminating general partner’s liability in an LLLP).

<sup>5</sup> Unif. Ltd. Coop. Ass’n. Act §504, 6A U.L.A. 210 (2008); Ky. Rev. Stat. Ann. §272A.5-030(1); S.D. Codified Laws §47-16-30.

<sup>6</sup> Unif. Stat. Trust Entity Act §304(a); 6B U.L.A. (2013 supp.) 215; Ky. Rev. Stat. Ann. §386A.3-040(3); Del. Code Ann. tit. 12, §3803.

<sup>7</sup> See, e.g., WILLIAM L. CLARK, JR., *HANDBOOK OF THE LAW OF PRIVATE CORPORATIONS* 16 (Francis B. Tiffany ed., 2d ed. 1907) (stating that limited liability is “not an essential attribute” of the private corporation).

<sup>8</sup> See Reg. §301.7701-3.

<sup>9</sup> See Reg. §301.7701-2(c)(2)(iv)(A).

<sup>10</sup> See also Thomas E. Rutledge, *State Law & State Taxation Corner, Vampires and the Law of Business Organizations: The Fruitless Search for Authenticity*, J. PASSTHROUGH ENTITIES, Nov.–Dec. 2011, at 51; Thomas E. Rutledge, *State Law & State Taxation Corner, Putting the Shepherds and the Magi in the Manger—The Problem of False Isomorphism*, J. PASSTHROUGH ENTITIES, Nov.–Dec. 2012, at 49.

<sup>11</sup> See, e.g., Ind. Code §23-18-1-16 (definition of “operating agreement”); Ky. Rev. Stat. Ann. §275.015(20) (same). Under some laws, the equivalent agreement is defined as the “limited liability company agreement.” See, e.g., Del. Code Ann. tit. 6, §18-101(7); Rev. Prototype Limited Liability Company Act §102(14), 67 Bus. Law. 117, 129 (Nov. 2011).

<sup>12</sup> See, e.g., Ky. Rev. Stat. Ann. §275.003(8) (“To the extent the articles of organization and the operating agreement do not otherwise provide, the Kentucky Limited Liability Company Act shall govern relations among the limited liability company, the members, the managers, and the assignees.”); Rev. Prototype Limited Liability Company Act §110(a)(1)-(2), 67 Bus. Law. 117, 136 (Nov. 2011) (“[T]he [LLC] agreement governs relations among the members as members and between the members and the [LLC]. To the extent the [LLC] agreement does not otherwise provide for a matter described in subsection (a)(1), this Act governs the matter.”).

<sup>13</sup> See, e.g., Del. Code Ann. tit. 6, §18-101(7) (limited liability company agreement may be oral); Ky. Rev. Stat. Ann. §275.015(20) (operating agreement may be oral); Rev. Prototype Limited Liability Company Act, §102(14), 67 Bus. Law. 117, 129 (Nov. 2011) (limited liability company agreement may be oral).

<sup>14</sup> See, e.g., Ky. Rev. Stat. Ann. §275.170; *id.* §275.180; *id.* §275.220 (each requiring that departure from statutory rule be in a “written operating agreement”).

<sup>15</sup> See Del. Code Ann. tit. 6§18-1101(b) (“It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of [LLC] agreements.”); Ky. Rev. Stat. Ann. §275.003(1) (“It shall be the policy of the General Assembly through this chapter to give

maximum effect to the principles of freedom of contract and the enforceability of operating agreements.”); Rev. Prototype Limited Liability Company Act §107(a), 67 Bus. Law. 117, 134 (Nov. 2011).

<sup>16</sup> By way of example, a corporation must have an officer charged with control of the corporation’s records, and that officer must be identified as the “secretary.” See, e.g., Ind. Code §23-1-20-22; *id.* §23-1-36-1; Ky. Rev. Stat. Ann. §271B.8-400(3); *id.* §271B.1-400(23). The relative rights of the classes of shares in the corporation must be set forth in the publicly filed articles of incorporation, and the shareholders have cumulative voting only if that right is recited in the articles of incorporation. See, e.g., Ind. Code §23-1-25-1(a); Ky. Rev. Stat. Ann. §271B.6-010; *id.* §271B.7-280(1). The fiduciary standards of a director are not subject to modification by agreement, and a committee of directors charged to review and pass upon a conflict transaction must have at least two directors. See Ky. Rev. Stat. Ann. §271B.8-300(1); *id.* §271B.8-310(3).

<sup>17</sup> See, e.g., KARL MOORE AND DAVID LEWIS, FOUNDATIONS OF CORPORATE EMPIRE, 32-33 (Prentice Hall 2000) (discussing the terms of an investment partnership dated to 1900 B.C.).

<sup>18</sup> *Pannell v. Shannon*, 425 SW3d 58, 68 (Ky. 2014) (citations omitted).

<sup>19</sup> See, e.g., Ky. Rev. Stat. Ann. §275.015(11); *id.* §275.003(8).

<sup>20</sup> See, e.g., *KNC Investments, LLC v. Lane’s End Stallions, Inc.*, DC-KY, Dkt. No. 11-107-JBC, 2011 U.S. Dist. LEXIS 130555, \*12-\*13 (Nov. 10, 2011) (“No justification exists to extend Kentucky law that by its own terms is strictly limited to corporations to non-corporate entities such as the LDK Syndicate.”); *Casella v. Home Depot USA, Inc.*, DC-NJ, Dkt. No.: 09-0421 (JAP), 2010 U.S. Dist. LEXIS 75894 (Jul. 28, 2010) (“As a former member of [an LLC], Plaintiff clearly does not fall within the plain meaning of the minority oppression statute which reserves the right solely for ‘corporations with 25 or less shareholders.’”); *Oolman v. ICONAG Solutions, LLC*, DC-IA, 2011 WL 6737095 (July 14, 2011) (in that claim for shareholder oppression is under Iowa law based upon statute, and as the applicable Iowa LLC Act did not provide a remedy for oppression, no claim exists for oppression of an LLC member); *Denike v. Cupo*, 394 N.J. Super. 357, 378, 926 A2d 869 (App. Div. 2007) (in the context of choosing a valuation date of an LLC, the standard set out in the business corporation act could not be used because LLCs are governed by the limited liability company act).

<sup>21</sup> See, e.g., Unif. Part. Act §6(2), 6 (pt. I) U.L.A. 393 (2001); Rev. Unif. Part. Act §202(b), 6 (pt. I) U.L.A. 92 (2001); Ind. Code §23-4-1-6(2); Ky. Rev. Stat. Ann. §362.1-202(2); *id.* §362.175(2); see also *Born to Build LLC v. Saleh*, 2014 N.Y. Slip Op. 50594(U) (S.Ct. Nassau Cty. Feb. 28, 2014) (“The plaintiff’s

reliance upon comparisons to the Partnership Law to justify a levy and sale of a membership interest in a limited liability company is unavailing as limited liability companies do not fall within the ambit of the Partnership Law and the existence and character of partnerships and limited liability companies are statutorily dissimilar.”) (citation omitted).

<sup>22</sup> See Ky. Rev. Stat. Ann. §275.003(8) (“To the extent the articles of organization and the operating agreement do not otherwise provide, the Kentucky [LLC] Act shall govern relations among the limited liability company, the members, the managers, and the assignees.”); *id.* §275.003(1) (“Unless displaced by particular provisions of this chapter, the principles of law and equity shall supplement this chapter.”); Rev. Prototype Limited Liability Company Act §107(b), 67 Bus. Law. 117, 134 (Nov. 2011) (“Unless displaced by particular provisions of this Act, the principles of law and equity supplement this Act.”).

<sup>23</sup> See Thomas Earl Geu, *A Single Theory of Limited Liability Companies: An Evolutionary Analysis*, XLII SUFFOLK U. L. REV. 507 (2009).

<sup>24</sup> See also Thomas E. Rutledge, *External Entities and Internal Aggregates: A Deconstructionist Conundrum*, 43 SUFFOLK U. LAW REV. 655 (2008-09); J. William Callison, *Indeterminacy, Irony and Partnership Law*, 2 STAN. AGORA 73-76 (2001), <http://agora.stanford.edu/agora/libArticles2/agora2v1.pdf>; David Millon, *The Ambiguous Significance of Corporate Personhood*, 2 STAN. AGORA 38, 58 (2001), <http://agora.stanford.edu/agora/libArticles2/agora2v1.pdf>.

<sup>25</sup> See Rev. Unif. Part. Act §201(a), 6 (pt. I) U.L.A. 91 (2001) (“entity” characterization); *id.* §306(c), 6 (pt. I) U.L.A. 117 (limited liability).

<sup>26</sup> See, e.g., Ky. Rev. Stat. Ann. §275.165(2)(b).

<sup>27</sup> See table endnotes 15-16 and accompanying text.

<sup>28</sup> The mating of a donkey and a horse yields a mule having characteristics of each; we would not expect a mule to have either wings or gills, both being absent from either parent.

<sup>29</sup> Thomas Earl Geu, *Understanding the Limited Liability Company*, *supra* note 3 at 44-45.

<sup>30</sup> See, e.g., Thomas E. Rutledge & Thomas Earl Geu, *The Analytic Protocol for the Duty of Loyalty Under the Prototype LLC Act*, 63 ARK. L. REV. 473, 475-76 (2010).

<sup>31</sup> E.g., *contrast* MBCA §8.30 (fiduciary obligations of corporate directors) with Rev. Unif. Ltd. Liab. Co. Act §409, 6B U.L.A. 488 (2008) (fiduciary obligations in LLC); Ky. Rev. Stat. Ann. §271B.8-300 (fiduciary obligations of directors) with *id.* §§275.170(1), (2) (fiduciary duties of alternatively members or managers of LLC); *id.* §271B.8-310(1)(c) (allowing a “fair to the corporation” defense to a conflict of interest transaction) with *id.* §275.170(3) (precluding a fairness defense to a conflict of interest transaction).

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