

ANALYSIS OF 2000 AMENDMENTS TO THE DELAWARE LIMITED LIABILITY COMPANY ACT

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Introduction

The Delaware Limited Liability Company Act, 6 *Del. C.* § 18-101 *et seq.* (the “LLC Act”), was amended in 2000, as it is periodically, for the purpose of keeping it current and maintaining its preeminence. The 2000 amendments to the LLC Act were contained in Delaware State Senate Bill No. 367, and became effective August 1, 2000. Senate Bill No. 367 amended provisions of the LLC Act concerning (among other things): consent to service of process; the right to maintain certain proceedings in Delaware state courts; transfer and domestication; conversion; limitations on distributions; member action by written consent; manager action by written consent; the rights of a judgment creditor of a member or a member’s assignee with respect to the judgment debtor’s limited liability company interest; and duties and liabilities to persons, other than members or managers, who are parties to or otherwise bound by a limited liability company agreement.

Consent to Service of Process [§ 18-109]. Senate Bill No. 367 amended Section 18-109(a) of the LLC Act, which addresses service of process on managers and liquidating trustees of Delaware limited liability companies. Among other things, such subsection provides that a person’s service as a manager constitutes such person’s consent: (1) to the irrevocable appointment of the limited liability company’s registered agent (or the Delaware Secretary of State if there is no such registered agent) as such person’s agent upon whom service of process may be made; and (2) that any process served in accordance with Section 18-109 shall have the same legal force and validity as if served upon such person within the State of Delaware. 6 *Del. C.* § 18-109(a). The 2000 amendment to Section 18-109(a) provides that such provisions of Section 18-109(a) regarding consent to service of process (as well as other provisions of Section 18-109) apply not only to a person who is a “manager” (as defined in Section 18-101(10) of the LLC Act), but also to a person who participates materially in the management of a Delaware limited liability company, *whether or not such person is a member*.

Right to Maintain Certain Proceedings in Delaware State Courts [§ 18-109]. Section 18-109(d) of the LLC Act was amended by Senate Bill No. 367 to provide that, except by agreeing to arbitrate any arbitrable matter in a specified jurisdiction or in the State of Delaware, a member of a Delaware limited liability company who is not a manager may not waive its right to maintain a legal action or proceeding in the courts of the State of Delaware with respect to matters relating to the organization or internal affairs of the limited liability company.

Filing of a Certificate of Cancellation [§ 18-203]. Section 18-203 of the LLC Act has been amended to eliminate the requirement that a certificate of cancellation must be filed upon the conversion of a Delaware limited liability company.

Transfer and Domestication [§§ 18-212 and 18-213]. Sections 18-212 and 18-213 of the LLC Act address, respectively, (1) a “non-United States entity’s” domestication as a Delaware limited liability company, and (2) a Delaware limited liability company’s transfer to or domestication in a permitted jurisdiction outside Delaware. Senate Bill No. 367 amended both such Sections.

Section 18-212 of the LLC Act has been amended to confirm that, for purposes of Delaware law, the properties and liabilities of a non-United States entity shall not be deemed, as a consequence of its domestication to a Delaware limited liability company, to have been transferred to such limited liability company. 6 *Del. C.* § 18-212(h).

Section 18-213 of the LLC Act has been amended to confirm that, unless otherwise agreed, the transfer or domestication of a limited liability company out of the State of Delaware does not require such Delaware limited liability company to wind up its affairs under Section 18-803 of the LLC Act or pay its liabilities and distribute its assets under Section 18-804 of the LLC Act. 6 *Del. C.* § 18-213(d).

Conversion [§§ 18-214 and 18-216]. Section 18-214 of the LLC Act deals with the conversion of an “other entity” to a Delaware limited liability company. Section 18-216 of the LLC Act governs the conversion of a Delaware limited liability company to another Delaware business form. Both Section 18-214 and Section 18-216 were amended in 2000.

Senate Bill No. 367 amended Section 18-214(f) of the LLC Act to confirm that, for purposes of Delaware law, the properties and liabilities of an “other entity” shall not be deemed, as a consequence of the conversion, to have been transferred to the Delaware limited liability company to which such other entity has converted. Section 18-214 has been further amended by the addition of a new subsection (i). This amendment confirms the flexibility permitted by the LLC Act in connection with an other entity’s conversion to a Delaware limited liability company. New subsection (i) provides that, in connection with a conversion, “rights or securities of, or interests in, the other entity which is to be converted to a domestic limited liability company may be exchanged for or converted into cash, property, rights or securities of, or interests in, such domestic limited liability company or, in addition to or in lieu thereof, may be exchanged for or converted into cash, property, rights or securities of, or interests in, another domestic limited liability company or other entity.” 6 *Del. C.* § 18-214(i).

Section 18-216 of the LLC Act has been amended to confirm that the conversion of a Delaware limited liability company to another Delaware business form does not require the limited liability company to wind up its affairs under Section 18-803 of the LLC Act or pay its liabilities and distribute its assets under Section 18-804 of the LLC Act. Additional new language added to Section 18-216 makes clear that the LLC Act provides flexibility as to the treatment of rights or securities of, or interests in, a converting Delaware limited liability company: in connection with the conversion of a Delaware limited liability company, such rights, securities, or interests “may be exchanged for or converted into cash, property, rights or securities of, or interests in, the business form into which the domestic limited liability company is being converted or, in addition to or in lieu thereof, may be exchanged for or converted into cash, property, rights or securities of, or interests in, another business form.” 6 *Del. C.* § 18-216.

Limitations on Distributions [§§ 18-215, 18-607, and 18-804]. Subsection (h) of Section 18-215 of the LLC Act limits the distributions that may be made with respect to a series. Section 18-607 of the LLC Act concerns limitations on distributions by Delaware limited liability companies, generally. Section 18-804 provides limitations on the distributions that may be made by a Delaware limited liability company upon its winding up. Each of such provisions was amended in 2000.

Senate Bill No. 367 amended Section 18-215 to clarify the limitations on distributions with respect to a series and Sections 18-607 and 18-804 to clarify the limitations on distributions by Delaware limited liability companies. A new sentence has been added to each of such Sections to make clear that, for the applicable purposes, the term “distribution” does not include amounts constituting reasonable compensation for present or past services or reasonable payments made in the ordinary course of business pursuant to a bona fide retirement plan or other benefits program.

Series of Members, Managers, and Limited Liability Company Interests [§ 18-215]. Section 18-215 of the LLC Act addresses series of members, managers, and limited liability company interests. Senate Bill No. 367 effected several amendments to Section 18-215, which: confirm that the LLC Act provides flexibility regarding the way in which assets associated with a series may be held (such assets may be held “directly or indirectly, through a nominee or otherwise,” 6 *Del. C.* § 18-215(b)); confirm that termination of a series may be approved by a vote of members as well as by written consent, 6 *Del. C.* § 18-215(j)(3); eliminate an inconsistency in the LLC Act relating to the termination of a series, 6 *Del. C.* § 18-215(j); clarify existing provisions of the LLC Act as to the winding up and distribution of the assets of a series, 6 *Del. C.* § 18-215(k); and, as mentioned above, clarify the limitations on distributions with respect to a series, 6 *Del. C.* § 18-215(h).

Member Action by Written Consent [§ 18-302]. The 2000 amendment to Section 18-302 of the LLC Act deals with a “quorum requirement” of sorts. The amendment provides that, unless otherwise provided in the limited liability company agreement, member action by written consent in lieu of a meeting requires the signed consent in writing of members “having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all *members* entitled to vote thereon were present and voted.” 6 *Del. C.* § 18-302(d) (emphasis added).

Manager Action by Written Consent [§ 18-404]. Section 18-404 of the LLC Act also has been amended to deal with a “quorum requirement.” The amendment provides that, unless otherwise provided in the limited liability company agreement, manager action by written consent in lieu of a meeting requires the signed consent in writing of managers “having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting *at which all managers entitled to vote thereon were present and voted.*” 6 *Del. C.* § 18-404(d) (emphasis added).

Rights of Judgment Creditors [§ 18-703]. Senate Bill No. 367 amended Section 18-703 of the LLC Act in its entirety, to address more comprehensively the rights of a judgment creditor of a member or a member’s assignee with respect to the judgment debtor’s limited liability company interest.

Under amended Section 18-703, “[o]n application by a judgment creditor of a member or of a member’s assignee, a court having jurisdiction may charge the limited liability company interest of the judgment debtor to satisfy the judgment.” 6 *Del. C.* § 18-703(a). Such a charging order “constitutes a lien on the judgment debtor’s limited liability company interest.” 6 *Del. C.* § 18-703(b).

Section 18-703 as amended provides that the court may appoint a receiver of the share of the distributions due or to become due to the judgment debtor in respect of the limited liability company, 6 *Del. C.* § 18-703(a), may make all other orders, directions, accounts and inquiries that the judgment debtor might have made or the circumstances of the case may require, 6 *Del. C.* § 18-703(a), and at any time may order a foreclosure of the limited liability company interest subject to the charging order, 6 *Del. C.* § 18-703(b). Any such receiver, and any purchaser at such a foreclosure sale, shall have only the rights of an assignee. 6 *Del. C.* § 18-703(a), (b).

New subsection (c) of Section 18-703 provides that, subject to the limited liability company agreement, a charged limited liability company interest may be redeemed, at any time before foreclosure, by: (1) the judgment debtor; (2) one or more of the other members, with property other than limited liability company property; or (3) the limited liability company, with the consent of all of the members whose interests are not so charged.

New subsection (d) of Section 18-703 continues to make clear that the LLC Act does not deprive a member of a right under exemption laws with respect to the member’s limited liability company interest.

Section 18-703 of the LLC Act provides the exclusive remedy by which a judgment creditor of a member or member’s assignee may satisfy a judgment out of the judgment debtor’s limited liability company interest, as set forth in new subsection (e) of Section 18-703.

Finally, the 2000 amendments to Section 18-703 clarify that “[n]o creditor of a member shall have any right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the limited liability company.” 6 *Del. C.* § 18-703(f).

Duties and Liabilities of Members, Managers, and Other Persons [§ 18- 1101]. The amendment to Section 18-1101(c) of the LLC Act confirms the enforceability of certain provisions in a limited liability company agreement that relate not only to duties and liabilities to members and managers, but also to other persons party to, or otherwise bound by, the limited liability company agreement.