THE GEORGIA LLC ACT: RECENT DEVELOPMENTS AND FUTURE POSSIBILITIES

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ABSTRACT

The Georgia Limited Liability Company Act (the "Georgia LLC Act") is 20 years old. No longer considered a novelty, the LLC has emerged as the predominant form of business entity in Georgia and throughout the United States. Despite the explosive growth in the use of LLCs, the Georgia LLC Act has held up well. Its durability is due in part to its emphasis on flexibility, which has allowed businesses to adapt the LLC form to fit their own needs. However, as LLC law has matured the Georgia LLC Act has undergone some changes. This article discusses in detail the most recent set of amendments. In addition, based on trends from around the country, the article considers additional changes that may be in Georgia's future. Some of the more significant developments from other jurisdictions include adoption of the Revised Uniform Limited Liability Company Act ("RULLCA"), "series" LLCs, "L3Cs," and an "override" of certain Uniform Commercial Code provisions.

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I. INTRODUCTION

The limited liability company ("LLC") has emerged as the predominant form of business entity not only in Georgia, but also throughout the United States. The Georgia Limited Liability Company Act (the "Georgia LLC Act") turned twenty years old in 2013.[1] In Georgia, the LLC has far outpaced the

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1. GEORGIA LIMITED LIABILITY COMPANY ACT, 1993 Ga. Laws 123 (codified as amended at O.C.G.A. §§ 14-11-100 to -1109) (West 2012). For overviews of the 1993 legislation see Charles R. Beaudrot, Jr. & Kendall

corporation as the preferred form for new business entities.[2] Arguably, however, legal scholarship has not yet given this historic development the attention it deserves.[3] Few would have

Houghton, *Effective Use of Limited Liability Companies in Georgia: An Overview of Their Characteristics and Advantages*, 45 MERCER L. REV. 24 (1993); Robert P. Bryant, *Georgia's New Limited Liability Company Act*, 30 GA. ST. B. J. 59, 62 (1993); A.B. Cochran, III, *Limited Liability Company Act: Provide for the Formation of Limited Liability Companies*, 10 GA. ST. U. L. REV. 79 (1993). The Foreign Qualification of LLCs Act permitted out-of-state LLCs to qualify to do business in Georgia. *Id.* at 80. The Foreign Qualification of LLCs Act was repealed by the Georgia LLC Act, although the provisions of the earlier act survived substantially intact in O.C.G.A. sections 14-11-701 to -712. *Id.* at 89.

2. *See generally* Rodney D. Chrisman, *LLCs Are the New King of the Hill: An Empirical Study of the Number of New LLCs, Corporations, and LPs Formed in the United States Between 2004-2007 and How LLCs Were Taxed for Tax Years 2002-2006*, 15 FORDHAM J. CORP. & FIN. L. 459, 460 (2010) (reporting that "the number of new LLCs formed in America in 2007 [outpaced] the number of new corporations formed by a margin of nearly two to one."). Chrisman was unable to overcome the challenges of collecting complete data for other types of entities—such as limited partnerships and general partnerships—but comments that his "research indicates that the numbers for these entities are very small in relation to LLCs and are frequently isolated to certain states or industries." *Id.* at 462. *See also* L. Andrew Immerman & Ethan D. Millar, *Why Not Form a New Business as an LLC?,* PRAC. TAX LAW., Spring 2005, at 21 [hereinafter *Why Not Form*].

3. *See* CARTER G. BISHOP & DANIEL S. KLEINBERGER, LIMITED LIABILITY COMPANIES: TAX AND BUSINESS LAW (Warren, Gorham & Lamont, Inc., 1994 & Supp. 2012-02); J. WILLIAM CALLISON, LIMITED LIABILITY COMPANIES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE (Thompson/West, 1st ed. 1994); LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN & KEATINGE ON LIMITED LIABILITY COMPANIES (West, 6th ed. 2012). The Committee on LLCs, Partnerships and Unincorporated Entities of the American Bar Association Business Law Section maintains an online library containing some of the most important articles in this field. *LLCs, Partnerships and Unincorporated Entities: Meeting Materials,* ABA BUSINESS LAW SECTION, http://apps.americanbar.org/buslaw/committees/CL590000pub/materials.shtml (last visited April 8, 2013). *See also* SUSAN PACE HAMILL, BUSINESS TAX STORIES, THE STORY OF LIMITED LIABILITY COMPANY: COMBINING THE BEST FEATURES OF A FLAWED BUSINESS STRUCTURE 295 (Steven A. Bank & Kirk J. Stark, eds. 2005). One reason for the relative neglect of LLCs in the scholarly world undoubtedly is that, for reasons of tax and governance, with

guessed in 1993 that this ungainly beast – which appeared to some to be a tax-motivated mishmash of corporate and partnership concepts[4] – would soon overtake the corporation as the most common form of Georgia business entity.[5] The

some exceptions, publicly traded companies cannot be formed as LLCs. *Id.* However, many publicly traded companies enter into LLCs, sometimes involving huge dollar amounts. *Id.* at 296-97.

4. *See* Rev. Rul. 88-76, 1988-2 C.B. 360, *declared obsolete by* Rev. Rul. 98-37, 1998-2 C.B. 133. Initially, the primary appeal of LLCs had been their combination of pass-through tax treatment, that is, no corporate-level tax with limited liability, or the protection of LLC members, in their capacity as members, from uncontracted-for liabilities. *Why Not Form*, *supra* note 2, at 24. This appeal of LLCs continues today. Without the IRS's 1988 decision to permit certain LLCs to be taxed as partnerships, it is unlikely that the LLC would have begun to flourish. *See id.* at 27. Despite the limited liability of members, based on other characteristics the IRS determined that a Wyoming LLC could be classified as a partnership. Rev. Rul. 88-76, 1988-2 C.B. 360. In the "check the box" regulations effective in 1997, the Treasury and the IRS abandoned the attempt to the classify LLCs based on their characteristics, leaving most multi-member LLCs free to figuratively "check a box" to be taxed as partnerships unless for some reason the LLC wanted to be taxed as a corporation. T.D. 8697, 1997-1 C.B. 215. The same regulations for the first time confirmed that in most cases single-member LLCs could, if they so desired, be treated as "disregarded" pass-through entities for tax purposes. *Id.* The "check the box" regulations supercharged the growth of both single-member and multi-member LLCs.

5.GA. SECRETARY OF STATE BRIAN B. KEMP, *Corporations Division: Active Entities*, http://www.sos.ga.gov/Corporations/stats.htm (last visited April 8, 2013). Statistics attest to the remarkable rise of the Georgia LLC. *See id.* In 2009, 54,134 Georgia LLCs were formed – nearly three times the number of Georgia for-profit corporations (18,275). GA. SECRETARY OF STATE BRIAN B. KEMP, *Corporate Entities Formed by Year*, http://sos.ga.gov/cgi-bin/EntitiesFormedByYear.asp (last updated April 16, 2013). In 2011, the number of Georgia LLCs formed exceeded the number of for-profit corporations by a ratio of nearly four-to-one (63,115 LLCs, compared with 16,392 for-profit corporations), and in 2012, that ratio grew to nearly five-to-one (69,230 LLCs, compared with 15,074 for-profit corporations). *Id.* Even more surprising than the dominance of LLCs among recently formed businesses is their overall lead among active businesses. As of April 8, 2013, there were 332,164 domestic Georgia LLCs active, compared to 204,769 Georgia for-profit corporations. *Corporations Division: Active Entities*, *supra*. In addition to the Georgia for-profit corporations, as of the same date, there were 169 Georgia insurance companies, 67,264 Georgia nonprofit corporations, and 12,143 Georgia

Georgia LLC Act's durability owes a good deal to its flexibility, which has allowed businesses to adapt the LLC form to fit their own needs. However, as LLC law has matured, the Georgia LLC Act has undergone some changes.

In 2007, the Partnership and LLC Committee of the State Bar of Georgia's Business Law Section (the "Committee") began a line-by-line review of the Georgia LLC Act, which ultimately led in 2009 to a series of amendments to the act. This article discusses the Georgia LLC Act and the 2009 amendments in detail and, based on trends from around the country, considers what additional changes might lie in the future. Some of the more significant developments from other jurisdictions include adoption of the Revised Uniform Limited Liability Act ("RULLCA"), "series" LLCs, "L3Cs," and an "override" of certain Uniform Commercial Code (the "UCC") provisions.

II. FACTORS INFLUENCING AN LLC'S CHOICE OF STATE OF FORMATION

While the popularity of LLCs has generally surpassed that of corporations, the ratio of LLCs to corporations varies from state to state based on particular factors.[6] States can be grouped into three categories depending on the degree to which they attempt to attract in-state and out-of-state LLCs of various sizes.[7]

professional corporations. *Id.* Total Georgia limited partnerships on that date numbered 16,657, and only 23,754 out-of-state LLCs were active in Georgia. *Id.* In Georgia, a general partnership files the LLP election with a county superior court, rather than with the Secretary of State. O.C.G.A. § 14-8-62(a) (West 2012). Georgia limited partnerships formed before July 1, 1988, when the Georgia Revised Uniform Limited Partnership Act went into effect, are not required to file with the Secretary of State, unless they elect to be covered by the Georgia Revised Uniform Limited Partnership Act. *See* O.C.G.A. §§ 14-9-1201, 14-9A-2.1, -20, -110, -115 (West 2012).

6. Franklin A. Gevurtz, *Why Delaware LLCs?*, 91 OR. L. REV. 57 (2012); Mohsen Manesh, *Delaware and the Market for LLC Law: A Theory of Contractibility and Legal Indeterminacy*, 52 B.C. L. REV. 189 (2011).

7. *See* LARRY E. RIBSTEIN, THE RISE OF THE UNCORPORATION 132 (Oxford Univ. Press, 1st ed. 2009). This tripartite division is similar to the categorization presented in Larry E. Ribstein's groundbreaking book. *Id.*

1. States that vie for both in-state and out-of-state LLCs, especially the largest LLC companies. Delaware is the prime example and exerts a significant nationwide influence over LLC law.[8] In 2007, Delaware accounted for about 8.2% of the total LLC formations and undoubtedly included many of the largest LLCs formed that year.[9] Considering Delaware's small population, that is an enormous percentage of the total; but more than 90% of LLCs are being formed elsewhere. In recent years, Nevada has made an effort to lure LLCs from other states.[10]

2. States that appear to make little effort to attract LLCs. Until recently, these states had been the principal market for uniform LLC legislation like RULLCA and the Uniform Limited Liability Company Act ("ULLCA").[11] Until the last few years discussions of the uniform acts had little relevance to the major population centers of the country.

3. States that seek to attract in-state LLCs. Although Delaware law dominates discussions of LLC law, the vast majority of LLCs are formed outside Delaware and in states falling within this third category.[12] These states neither attempt to enact a mirror-image of Delaware's LLC law, nor acquiesce in enacting the uniform LLC acts. This category includes states that represent a majority of the most populous metropolitan areas.

Georgia fits squarely within the third category. It is a major population center—the Atlanta metropolitan area is the nation's ninth largest metropolitan region.[13] The Committee focused its efforts on making formation in Georgia attractive for Georgia-

8. *See* Chrisman, *supra* note 2.

9. *Id.* (reporting 112,982 Delaware LLC formations compared to 1,375,148 for the entire United States).

10. *See, e.g.*, *The Nevada Advantage*, NEVADA SECRETARY OF STATE ROSS MILLER, http://nvsos.gov/index.aspx?page=422 (last visited May 7, 2013).

11. *See infra* Part VII.A (discussing ULLCA & RULLCA).

12. *See* Chrisman, *supra* note 2.

13. Jacques Couret, *Metro Atlanta population hits 5.48 million*, ATLANTA BUS. CHRON., Nov. 20, 2012, *available at* http://www.bizjournals.com/atlanta/news/2012/11/20/metro-atlanta-population-hits-548.html. Metro Atlanta remained the ninth largest metropolitan area with 5.48 million people. *Id.*

based businesses. LLCs formed under the Georgia LLC Act tend to be firms that operate primarily or exclusively in Georgia.[14] The Committee's goals in updating the Georgia LLC Act in 2009 were primarily to make Georgia's LLC law a sound choice for locally-operated LLCs and, perhaps more importantly, to ensure that Georgia LLCs, whether previously existing or newly-formed, would be governed by a suitable statute.

Although there are various factors that may explain the choice to form LLCs over corporations, and to form in one state rather than another, there has been relatively little empirical research into the factors that drive these decisions.[15] Daniel M. Häusermann's study, seeking to explain the interstate variation in LLC popularity, found that a small difference in the initial formation fees between corporations and LLCs[16] explained "more of the variation in LLC popularity [relative to corporations] than all other factors taken together."[17] The difference in formation fees is a trivial amount, yet it is highly visible at the time of formation.[18] According to this study, formation fees explained more interstate variation in LLC popularity than other factors such as recurring fees assessed to remain active and differences in substantive law.[19]

If Häusermann's findings are correct, one reason may be the

14. *Supra* note 5 and accompanying text.

15. *See, e.g.*, Jens Dammann & Matthias Schündeln, *Where Are Limited Liability Companies Formed? An Empirical Analysis*, 55 J.L. & ECON. 741 (2012); Daniel M. Häusermann, *For a Few Dollars Less: Explaining State to State Variation in Limited Liability Company Popularity*, 20 U. MIAMI BUS. L. REV. 1 (2011); Bruce H. Kobayashi & Larry E. Ribstein, *Delaware for Small Fry: Jurisdictional Competition for Limited Liability Companies*, 2011 U. ILL. L. REV. 91 (2011); Manesh, *supra* note 6; Gevurtz, *supra* note 6. Although Gevurtz criticizes the use of state-level data as an interpretive methodological tool, his methodology also suffers from weaknesses, based as it is on a survey of merely 50 business attorneys. Gevurtz, *supra* note 6, at 60. Nonetheless, its anecdotal nature may uncover motivations missed by hard numbers and statistical formulae.

16. Häusermann, *supra* note 15, at 3.

17. *Id.*

18. *Id.* at 21-22 ("A potential explanation of this result is that the founders of LLCs and corporations are aware of the fees due at the formation of the entity . . . .").

19. *Id.* at 7, 32, 49. *But see* Gevurtz, *supra* note 6, at 110.

lingering misperception that LLCs either are, or are essentially equivalent to, corporations. No matter how small the business, the difference in formation fees between an LLC and a corporation is almost certainly trivial compared to the impact the choice will have for the entity going forward. When the decision-maker allows this fee difference to play a significant role in the choice of entity, it is a sign that he likely does not appreciate the differences between the two forms of entity.[20]

It would be extremely surprising if formation fees had an equally pronounced impact on the choice of jurisdiction.[21] An LLC formed in one state and doing business in another state must pay a formation fee in one state, plus a fee for registering to do business in another state,[22] which tends to drive up the cost of forming anywhere other than the home state. In addition, business owners most likely to be swayed by the trivial differences in formation fees are unlikely to be conducting comparative research when deciding between states.

The differences in substantive law among LLC acts appear unlikely to exert a statistically significant influence on the choice of state of formation.[23] Neither statutory provisions that protect LLC members holding a minority interest in the company,[24] provisions aimed at protecting third party rights (e.g., veil piercing),[25] nor provisions concerning the fiduciary duties of members and managers, seem to make a significant difference.[26] Likewise, the presence of mandatory rules that cannot be contracted away likely has little effect on state of

20. Häusermann, *supra* note 15, at 39-40.

21. *Id.* at 19.

22. *Id.* at 19-22.

23. *Id.* at 7.

24. Damman & Schündeln, *supra* note 15, at 756-57; Gevurtz, *supra* note 6, at 105; Häusermann, *supra* note 15, at 27; Kobayashi & Ribstein, *supra* note 15, at 119, 121, 123, 125.

25. Gevurtz, *supra* note 6, at 105, 115; Häusermann, *supra* note 15, at 29; Kobayashi & Ribstein, *supra* note 15, at 119, 121, 123, 125. *But see* Damman & Schündeln, *supra* note 15, at 756-57 (finding LLCs more likely to be formed in jurisdictions that prohibit veil-piercing).

26. Häusermann, *supra* note 15, at 30-31; Kobayashi & Ribstein, *supra* note 15, at 119, 121, 123, 125, 133-34. *But see* Damman & Schündeln, *supra* note 15, at 758 (finding that larger LLCs prefer jurisdictions with strict rules governing manager liability).

formation decisions.[27] It is unclear whether statutory provisions that expressly provide for maximum freedom of contract among LLC members are a statistically significant factor.[28] It appears that most LLCs are formed in whatever jurisdiction the organizers find convenient, with little or no regard for the substantive law of that jurisdiction.

The quality of the courts in the formation state may be a factor that is on occasion considered in the choice of state of formation.[29] It is possible that freedom of contract increases certainty that the courts will respect the terms of the LLC governing document, thereby reducing the importance placed on the quality of the court in a particular jurisdiction.[30] But freedom of contract is no substitute for a quality judicial system.

As one would expect, the size of the company appears to have a significant effect on choice of formation state, with the smaller businesses opting to form locally and the larger businesses more apt to form out-of-state.[31] Larger businesses are more likely to have multistate activities and owners, and in some instances the business may be spread out too widely to name an unambiguous "local" jurisdiction.[32] Also, larger businesses may be more willing to put in the effort to determine the most favorable jurisdiction, and will tend to have more

27. Häusermann, *supra* note 15, at 32; Kobayashi & Ribstein, *supra* note 15, at 104-05.

28. Gevurtz, *supra* note 6, at 105; Häusermann, *supra* note 15, at 35-36; Damman & Schündeln, *supra* note 15, at 756-57.

29. Gevurtz, *supra* note 6, at 105; Kobayashi & Ribstein, *supra* note 15, at 130. *But see* Damman & Schündeln, *supra* note 15, at 775 (stating that there is "little or no statistically significant evidence that [court quality] determine[s] the formation choices of LLCs.").

30. *See* Häusermann, *supra* note 15, at 36; Manesh, *supra* note 6, at 234-35 ("[H]eightened contractibility and the resulting reduction in legal indeterminacy offered by Delaware LLC law . . . . neutralizes Delaware's judicial advantage by marginalizing the role of Delaware's judges in the adjudication of LLC disputes . . . .[C]ontractibility also enhances the value of many other states' LLC law product.").

31. Damman & Schündeln, *supra* note 15, at 743 (finding that 92% of the firms with 20 or more employees were formed in the state of their principal place of business). As the number of employees increased, the percentage of locally formed LLCs fell off precipitously, with only 38% of the LLCs with 5,000 or more employees formed locally. *Id.*

32. *Id.*

sophisticated advisors who are familiar with some of the most attractive alternatives.

Some formation decisions are influenced by misconceptions about state tax. Many Georgia residents are aware that Florida, which borders Georgia, has no personal income tax. Some Georgia practitioners have found in dealing with clients that Florida attracts interest among Georgia businesses for that reason. In addition, vague impressions about favorable tax treatment in Delaware or, more recently, Nevada, seem to influence some LLC formations. However, the state of formation usually has little or no effect on the state tax liability of the LLC or its members.[33]

In principle, the operating agreement for an LLC formed under the law of one state could specify that the parties would be governed by the law of another state by agreeing to be governed by the law of the non-forming state. The law of the state of formation might respect such a contractual specification, at least to the extent the other state's law does not override mandatory provision of the formation state's law. However, it is by no means common to form in one state while attempting to adopt the rules of another. One also often sees a tendency for LLC agreements to name the state of formation as the jurisdiction in which disputes will be resolved, whether or not such provisions in LLC agreements will be enforced.

III. FORMATION OF AN LLC: GEORGIA VERSUS DELAWARE

If an LLC is not organized where it has its principal place of business, it has likely turned to Delaware as the state of formation.[34] Although Delaware is sometimes perceived as the natural choice for larger businesses, many sizable LLCs choose to form in Georgia.[35] A common reason a Georgia-based business forms in Delaware is because one or more of the

33. *See* Ethan Millar, *State Taxation of LLCs Not Always Black and White: A Georgia Case Study*, 2006 TAX NOTES 823 (Sept. 18, 2006).

34. Damman & Schündeln, *supra* note 15, at 745 (noting that 54% of the LLCs that formed outside the state of their principal place of business chose Delaware as the state of formation); Kobayashi & Ribstein, *supra* note 15, at 116 (showing in table 2 that 61.7% of LLCs with fifty or more employees that formed out of state chose Delaware as the state of formation).

35. *See supra* note 5 and accompanying text.

members, or potential members, are based outside Georgia and are more comfortable with Delaware. Substantive differences between Georgia's LLC Act and Delaware's LLC Act do not commonly influence the decision about where to form the LLC.[36] Both states' LLC acts accommodate nearly any contractual arrangement the parties' desire, and the acts' suppleness makes them infinitely adaptable. However, there are a few substantive differences worth noting.

A. Series LLCs

Delaware's LLC law authorizes series LLCs,[37] while the Georgia LLC Act does not.[38]

B. Charging Orders

The charging order–a device originating in partnership law–is a judicial lien against the LLC member's economic interest. In Delaware, the "entry of a charging order is the exclusive remedy by which a judgment creditor of a member or of a member's assignee may satisfy a judgment out of the judgment debtor's limited liability company interest."[39] The rights of a judgment creditor under the Georgia LLC Act are not subject to such a (seemingly) straightforward limitation.[40] However, Georgia's position on charging orders is clearer than Delaware's in one respect. Georgia expressly precludes foreclosure of a charging order.[41] Delaware's LLC Act formerly provided for foreclosure of a charging order, but recently removed that provision.[42] Removing the express authorization of foreclosure from the Delaware statute presumably reflected intent to

36. *But see infra* notes 254-58 and accompanying text (suggesting that some Georgia practitioners are concerned that the Georgia LLC Act may offer less protection against interference from the creditors of a member).

37. DEL. CODE ANN. tit. 6, § 18-215 (West 2013).

38. *See infra* Part VII.D (discussing series LLCs).

39. DEL. CODE ANN. tit. 6, § 18-703(d) (West 2013).

40. O.C.G.A. § 14-11-504 (West 2012); *see infra* notes 150-58 and accompanying text; *see infra* Part VII.G (discussing charging orders).

41. § 14-11-504; *see infra* notes 150-58 and accompanying text; *see infra* Part VII.G (discussing charging orders).

42. *See* DEL. CODE. ANN. tit. 6, § 18-703, *amended by* LIMITED LIABILITY COMPANY ACT, 75 Del. Laws, ch. 51 (2005).

eliminate foreclosure, and that presumption is confirmed by a legislative "Synopsis" accompanying the 2005 change.[43] However, elimination of foreclosure in Delaware is by implication, whereas elimination of foreclosure in Georgia is explicit.

C. Uniform Commercial Code Override

Delaware's LLC Act has a limited override of Article 9 of the UCC.[44] The Georgia LLC Act does not.[45]

D. Elimination of Fiduciary Duties

Delaware's LLC Act permits the complete elimination of fiduciary duties, but the contractual covenant of good faith and fair dealing–a contract law concept–remains under Delaware law and presumably the law of Georgia.[46] Georgia places a

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43. LIMITED LIABILITY COMPANY ACT, 75 Del. Laws, ch. 51 (2005). According to the Synopsis:

> These sections amend § 18-703 to clarify the nature of a charging order and provide that a charging order is the sole method by which a judgment creditor may satisfy a judgment out of the limited liability company interest of a member or a member's assignee. Attachment, garnishment, foreclosure or like remedies are not available to the judgment creditor and a judgment creditor does not have any right to become or to exercise any rights or powers of a member (other than the right to receive the distribution or distributions to which the member would otherwise have been entitled, to the extent charged).

Id.

44. DEL. CODE ANN. tit. 6, § 18-1101(g) (West 2013).

45. *See infra* Part VII.F (discussing the controversy over UCC overrides).

46. DEL. CODE ANN. tit. 6, § 18-1101(c) (West 2013). For a discussion of the implied covenant see Paul M. Altman & Srinivas M. Raju, *Delaware Alternative Entities and the Implied Contractual Covenant of Good Faith and Fair Dealing Under Delaware Law*, 60 BUS. LAW. 1469, 1470-74 (2005). For a discussion of the difference between "good faith" in the fiduciary context and the contractual context, see Mark J. Loewenstein, *The Diverging Meaning of Good Faith*, 34 DEL. J. CORP. L. 433, 434-36 (2009). Even in Delaware, the courts may be inclined to seize on ambiguities in the agreement in order to find some vestige of fiduciary duties. *Compare* Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC, C.A. No. 3658-VCS, 2009 WL 1124451, at *8-10 (Del. Ch. Apr. 20, 2009) (fiduciary duties not eliminated) *with* Fisk Ventures, LLC v. Segal, C.A. No. 3017-CC, 2008 WL

floor on the duty of members and managers, but the floor is low indeed.[47] Duties and liabilities of a member or manager cannot be eliminated or limited "[f]or intentional misconduct or a knowing violation of law; or . . . [f]or any transaction for which the person received a personal benefit in violation or breach of any provision of a written operating agreement."[48] In addition,

> [t]he member or manager shall have no liability to the limited liability company or to any other member or manager for his or her good faith reliance on the provisions of a written operating agreement, including, without limitation, provisions thereof that relate to the scope of duties (including fiduciary duties) of members and managers.[49]

E. Bankruptcy Remote LLCs

Businesses will continue to form bankruptcy-remote LLCs in Delaware.[50] The perception of certainty and predictability under Delaware law, and the expertise in Delaware law that advisors throughout the country operating in this niche have acquired, seem to be overwhelming advantages. However, some of the 2009 amendments to the Georgia LCC Act, including provisions for members that hold no LLC interest and provisions for third party rights, could in principle make Georgia a more suitable alternative than before.[51]

1961156, at *11 (Del. Ch. May 7, 2008) (unambiguous elimination of those duties respected).

47. O.C.G.A. § 14-11-305(4) (West 2012).

48. *Id.* at art. 305(4)(A).

49. *Id.* at art. 305(4)(B).

50. *See* BISHOP & KLEINBERGER, *supra* note 3, ¶ 1.04[5]. Bishop and Kleinberger explain that

> [i]n significant asset-based lending transactions, secured lenders frequently insist that the prospective borrower (i.e., the "parent") form a new special purpose vehicle (i.e., the "remote entity") and transfer assets intended to secure the loan directly to that remote entity, which becomes the actual borrower. The purpose of this transaction is to separate the assets from the parent (that is, create "remoteness"), so that the assets securing the new loan will not become part of the parent's bankruptcy estate if the parent files a bankruptcy petition.

Id. (footnotes omitted).

51. *See infra* Part VI.J.

F. Operating Agreement Binding on Assignees

The Georgia LLC Act lacks the Delaware rule expressly making the LLC agreement binding on assignees of an economic interest in the LLC.[52] One of Georgia's concerns about the Delaware rule was the risk that someone might read it as requiring an assignee, perhaps even to include an involuntary assignee, to be obligated to meet a capital call. However, as explained below, the binding effect of the operating agreement on members and assignees was clarified by the 2009 Amendments.[53]

G. Effect of Oral Agreements

Although the Georgia LLC Act requires a writing to override certain default rules,[54] it does not express any position on whether the statute of frauds applies to an oral operating agreement. By contrast, the Delaware LLC Act does not require that variations from the default rule be in writing, and recently was even amended to exclude oral LLC operating agreements from the statute of frauds.[55] In addition, the Georgia LLC Act, unlike Delaware's, does not specifically address implied agreements.[56]

H. Independent Legal Significance

The Delaware LLC Act has been amended to codify the doctrine of "independent legal significance" for actions taken under the act.[57] According to the amendment, an

> [a]ction validly taken pursuant to 1 provision of [the statute is not] invalid solely because it is identical or similar in substance to an action that could have been taken pursuant to

52. DEL. CODE ANN. tit. 6, § 18-101(7)(a) (West 2013).

53. *See infra* Part VI.J.

54. *See infra* Part III.I.

55. DEL. CODE ANN. tit. 6, § 18-101(7) (West 2013) ("A limited liability company agreement is not subject to any statute of frauds (including § 2714 of this title).").

56. *See id.*

57. DEL. CODE ANN. tit. 6, § 18-1101(h) (West 2013); *cf.* SICPA Holding S.A. v. Optical Coating Lab., Inc., No. Civ. A. 15129, 1997 WL 10263, at *5 (Del. Ch. Jan. 6, 1997) (stating the corporate "independent legal significance" doctrine as a fundamental aspect of corporate law in Delaware).

> some other provision of this chapter but fails to satisfy 1 or more requirements prescribed by such other provision.[58]

Whether or not the doctrine of independent legal significance is applicable to Georgia LLCs is difficult to determine because the Georgia LLC Act does not expressly adopt it.

I. Different Default Rules

The default rules sharply differ between Georgia and Delaware. Most notably, the two states take contrasting positions on the relative rights of members to vote and to receive distributions in the absence of agreements to the contrary. The Georgia LLC Act retains the traditional partnership rule of per capita voting and distributions,[59] regardless of the relative capital contributions of the members. The Delaware Act emulates the corporate approach: voting and distributions are proportional to the capital contributed.[60]

For sophisticated parties deciding between Georgia and Delaware as the state of formation, the differing default rules are not likely to tip the scales one way or the other because the default rules are easily waived.[61] However, some practitioners

58. DEL. CODE ANN. tit. 6, § 18-1101(h).

59. *See* O.C.G.A. § 14-11-308(a)(1) (West 2012) (stating per capita vote by default in member-managed LLC); O.C.G.A. § 14-11-404 (West 2013) (stating per capital distributions by default). When LLCs were first being formed, they were often seen as a substitute for partnerships, and partnership principles tended to predominate. *Why Not Form*, *supra* note 2, at 24-25 Now that so many LLCs are formed in situations where corporations otherwise would be used, it may be time to reexamine Georgia's default rule. However, in discussing future possibilities in Part VII of this article, we have focused on more substantive changes, rather than further refinement of the default rules.

60. *See* DEL. CODE ANN. tit. 6, § 18-402 (West 2013) (stating default voting by interest in profits) and DEL. CODE ANN. tit. 6, §§ 18-503 to -504 (stating default allocation of profits and distributions by value of unreturned contributions).

61. *See, e.g.*, O.C.G.A. § 14-11-304(a) (West 2012) (vesting management in the members unless otherwise provided in the articles of organization or a written operating agreement). The default rules do not seem to influence choice of state of formation for less sophisticated parties either, because these parties are unwilling to incur the expense of customizing their agreement, are not likely to be familiar with the varying default rules, and

feel a lingering worry that despite a contrary provision in the operating agreement, the default rule may exert some influence over a court deciding a dispute, especially in a situation where some ambiguity may have crept unnoticed into the agreement.

Through the years, Delaware has generated a sizable body of LLC decisional law. Business advisors from every part of the country are familiar with Delaware's LLC Act and appreciate its flexibility.[62] The general reputation of Delaware for favoring business, and of Delaware courts' expertise in resolving business disputes, often gives parties a sense of security. Because of this sense of security, an advisor's recommendation to form a business in Delaware is not likely to be second-guessed.[63] On the other hand, the freedom of contract embedded in Georgia's LLC Act, and the concomitant legal certainty it brings, could diminish the need for an expert judiciary like the courts in Delaware and enhance the value Georgia's LLC Act can bring.[64]

IV. DIFFERENTIATING BETWEEN LLCS AND CORPORATIONS

The growth of the LLC was not accompanied by a comparably widespread increase in the appreciation of the form's peculiarities.[65] Many businesses, often on the sound advice of tax professionals, began to adopt LLCs in place of corporations without understanding the significance of the switch.[66] The 2009 amendments to the Georgia LLC Act were,

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are not likely to incur the extra cost of forming in Delaware while doing business only in Georgia. *See* sources cited *infra* notes 70-76.

62. *See* Manesh, *supra* note 6, at 210-20.

63. *Id.*

64. *See id.* at 234-35.

65. *See generally* William H. Clark, Jr., *The Relationship of the Model Business Corporation Act to Other Entity Laws*, 74 L. & CONTEMP. PROBS. 57 (Winter 2011) (comparing LLCs and corporations formed under the Model Business Corporations Act).

66. *See, e.g.*, Thomas E. Rutledge, *External Entities and Internal Aggregates: A Deconstructionist Conundrum*, 42 SUFFOLK U. L. REV. 655 (2009) (discussing at length the erosion of the distinction between incorporated and unincorporated organizations). *See also* L. Andrew Immerman, *Is There Any Such Thing as an LLC Unit?*, 11 BUS. ENTITIES 20, 20 (2009) (discussing differences between LLCs and corporations); *see*

to a large extent, an attempt to clarify the similarities and differences between LLCs and corporations.

The LLC was initially perceived as a hybrid between the limited partnership and the corporation, but the contribution of limited partnership law was far greater.[67] The original Georgia LLC Act looked like an offspring of the Georgia Revised Uniform Limited Partnership Act (the "Georgia RULPA"),[68] with the Georgia Business Corporation Code more like a distant cousin.[69] A number of the provisions of the Georgia LLC Act as enacted in 1993 gave the LLC some resemblance to the corporation, besides the obvious characteristic that members of LLCs were by default to have limited liability comparable to that of corporate shareholders.[70] There were provisions for dissenters' rights,[71] which had no precedent in the Georgia

RIBSTEIN, *supra* note 7, at 1 (comparing corporations with LLCs and other unincorporated entities).

67. RIBSTEIN, *supra* note 7, at 119-31.

68. O.C.G.A. §§ 14-9-100 to -1204 (West 2012).

69. O.C.G.A. §§ 14-2-101 to -1703 (West 2012).

70. *See* O.C.G.A. § 14-11-303(a) (West 2012) (limiting the liability of LLC members and certain others); O.C.G.A. § 14-2-622, -732(f) (shareholder liability); O.C.G.A. § 14-2-922, -926 (West 2012) (shareholder liability in certain close corporations). However, in contrast to most other states, a limited partner in a Georgia limited partnership does not lose its liability protection by participating excessively in the control of the partnership management and enjoyed that liability protection even before Georgia recognized LLCs. O.C.G.A. § 14-9-303 (West 2012). The liability protection for LLC members was not necessarily any greater than for limited partners. Since the Georgia LLC Act went into effect, Georgia has authorized both the "limited liability limited partnership" election and the "limited liability partnership election," and so neither general partners nor limited partners need suffer unlimited liability. O.C.G.A. §§ 14-8-62 to -65, 14-11-1107(h)-(j) (West 2012). Liability for wrongful distribution for LLCs is covered by section 14-11-408 of the Georgia LLC Act and section 14-2-832 of the Georgia Business Corporation Code for corporations. O.C.G.A. §§ 14-11-408; 14-2-832 (West 2012). In at least one respect, the LLC may shield owners more effectively than does the corporation because section 14-11-314 of the Georgia LLC Act specifically provides that failure to observe formalities related to the conduct of the LLCs business is not a basis for imposing personal liability on LLC members. O.C.G.A. § 14-11-314 (West 2012). There is no comparable provision for corporate shareholders.

71. O.C.G.A. §§ 14-11-1001 to -1013 (West 2012).

RULPA, as well as provisions for meetings,[72] voting,[73] and derivative actions[74] that were more elaborate than in the Georgia RULPA.

The Georgia LLC Act sets out "default" rules that, the drafters hoped, would tend to embody the expectations of those parties most likely to rely on these rules.[75] The default rules are somewhat more elaborate for Georgia LLCs than for Georgia partnerships and, in some instances, are reminiscent of the Georgia Business Corporation Code. Most of the Georgia LLC Act is intended to be a series of default rules that the parties are free to vary by written agreement.[76] Default rules should be less important to sophisticated parties because these parties tend to adopt elaborate written operating agreements that leave little to the statutory default rules. Therefore, the drafters of the Georgia LLC Act tried to pay particular attention to less sophisticated parties, who, it is assumed, are more likely to be governed by the default rules.

Despite some similarities to corporations, Georgia LLCs are by and large unconstrained by the traditional apparatus of corporate law. There is nothing in the LLC world that is comparable to corporate shares of stock, shareholders, directors, or officers, even though the LLC agreement, as a contract, may include these familiar words and may assign some meaning to them. Unfortunately, corporate law practitioners and businesspeople, in shifting from corporations to LLCs, too often assume that an LLC is just a corporation that happens to have the initials "LLC" instead of "Inc." at the end of its name. If LLC and corporation are essentially synonyms, little more is required in adapting to the LLC world than a mechanical substitution of synonyms: "member" or "unitholder" for

72. *Compare* O.C.G.A. §§ 14-9-302, -405, -902 (West 2012) *with* O.C.G.A. §§ 14-11-309 to -310, -312, -702, -805, -1003 to -1004 (West 2012).

73. *Compare* O.C.G.A. §§ 14-9-302, -405, -702 *with* O.C.G.A. §§ 14-11-101, -307 to -310, -313, -408, -601, -805, -1001 to -04.

74. *Compare* O.C.G.A. §§ 14-9-1001 to -1004 *with* O.C.G.A. §§ 14-11-801 to -808, -1007.

75. O.C.G.A. §§ 14-11-301 to -314.

76. *See, e.g.*, O.C.G.A. § 14-11-304(a) (vesting management in the members unless otherwise provided in the articles or organization or a written operating agreement).

shareholder; "units" or "membership interests" for stock; "managers" or "governors" for directors; "company" for corporation; and so forth. Some practitioners may even balk at a minor change in wording, deriving an undeserved sense of comfort from familiar expressions like "shares of stock" or "officers" or "board of directors," as if those terms had a determinate meaning for Georgia LLCs.

For practitioners accustomed to corporations, the Georgia LLC Act's default rule of sharing per capita–rather than, as in Delaware, in proportion to capital contributed–may be particularly surprising.[77] Even though the 2009 amendments, to some extent, accommodate expectations carried over from the corporate world, the per capita rule arguably makes sense as a default rule for LLCs. One possible reason is that investors are unlikely to put up substantial capital without some agreement on the economics of the venture. The authors of this article, however, in practice have seen counterexamples in which members contributed large sums without a written operating agreement.

The tendency of practitioners to assimilate LLCs to corporations is mirrored in opinions of the courts throughout the country,[78] and Georgia is no exception.[79] It is easier than one might have hoped to find examples in which courts assume without discussion that LLCs are corporations or that corporate law applies with equal force to LLCs. For example, in *Gardner v. Marcum*, the Georgia Court of Appeals considered whether to hold the members of an LLC personally liable.[80] The court reasoned that

> [a]s a rule, "[o]ne who deals with a *corporation* as such an entity cannot, in the absence of fraud, deny the legality of the

77. *See* sources cited *supra* note 59.

78. *See, e.g.*, Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 624 (2009); Olmstead v. FTC, 44 So. 3d 76, 80 (Fla. 2010) ("An LLC is a type of corporate entity, and an ownership interest in an LLC is personal property that is reasonably understood to fall within the scope of 'corporate stock.'").

79. *See, e.g.*, Grossi Consulting, LLC v. Sterling Currency Grp., LLC, 722 S.E.2d 44 (Ga. 2012); *In re* Lisa M. Cummings, 728 S.E.2d 688 (Ga. 2012); Fielbon Dev. Co., LLC v. Colony Bank Houston Cnty., 660 S.E.2d 801 (Ga. Ct. App. 2008); Smith v. Morris, Manning & Martin, LLP, 666 S.E.2d 683 (Ga. Ct. App. 2008).

80. 665 S.E.2d 336 (Ga. Ct. App. 2008).

> *corporate* existence for the purpose of holding the owner liable." Gardner and Steele, although they may be members of DGP [an LLC], are not liable for DGP's obligations solely by reason of being members, and "whether to pierce the *corporate* veil is normally a jury issue."[81]

Although the court in *Gardner* referred to the LLC as a "corporation" and cited authority on piercing the "corporate veil," it also referred to section 14-11-303(a) of the Georgia LLC Act, which states that a member, "solely by reason of being a member," is not liable for obligations of the LLC.[82]

In *St. James Entertainment LLC v. Crofts*, the United States District Court for the Northern District of Georgia relied on the principle that "*corporate* officers and directors have a fiduciary relationship to the *corporation* and its shareholders and must act in good faith" to show that an LLC member has a fiduciary duty to the LLC, even though the court also cites to the Georgia LLC Act to support the fiduciary relationship.[83] Similarly in *Internal Medicine Alliance, LLC v. Budel*, the Georgia Court of Appeals referred often to the Georgia LLC Act, including section 14-11-305(1).[84] Yet for its statement that "a managing member must

81. *Id.* at 373 (emphasis added).

82. *Id.* at n.17. Perhaps not surprisingly, courts turn to corporate law when considering "piercing the corporate veil" of the LLC as an equitable remedy, although "piercing the entity veil" would be a more accurate expression. *See, e.g.*, ARC Real Estate LLC v. Richards, No. 10-41171-MGD, 2011 Bankr. LEXIS 1455, *10-11 (Bankr. N.D. Ga. Mar. 17, 2011); Otero v. Vito, No. 5:07-cv-405 (CAR), 2009 U.S. Dist. LEXIS 86638, *3-4 (M.D. Ga. Sept. 22, 2009).

83. 837 F. Supp. 2d 1283, 1291 (N.D. Ga. 2011) (emphasis added). This rule has a long and varied history, as applied by Georgia courts to both corporations and, more recently, LLCs. *See* Argentum Int'l, LLC v. Woods, 634 S.E.2d 195 (Ga. Ct. App. 2006) (applying to LLC); GLW Int'l Corp. v. Yao, 532 S.E.2d 151 (Ga. Ct. App. 2000) (applying to corporation).

84. 659 S.E.2d 668, 673 (Ga. Ct. App. 2008). Section 14-11-305 of the Georgia LLC Act begins:

> In managing the business or affairs of a limited liability company:
> (1)A member or manager shall act in a manner he or she believes in good faith to be in the best interests of the limited liability company and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

O.C.G.A. § 14-11-305 (West 2012). Importantly, perhaps, the section as quoted by the court omitted the lead-in language. *Budel*, 659 S.E.2d at 673.

act with the 'utmost good faith and loyalty' in managing the LLC," the court cited only a case on the fiduciary duties of *corporate* officers and directors,[85] thereby implying that the case was directly on point.[86] More recently in *Sun Nurseries, Inc. v. Lake Erma, LLC*, the appeals court not only referred to the LLC as both a "limited liability company" and a "limited liability corporation," but also resorted to "the law of corporations" as justification for the proposition that an LLC, as an entity, is separate from its members.[87]

V. THEMATIC OUTLINE OF THE GEORGIA LLC ACT'S 2009 AMENDMENTS

In view of the explosive growth of LLC law and in the number of Georgia LLCs, the Committee decided in 2007 to undertake a comprehensive review of the Georgia LLC Act. While the Committee's legislative proposals were somewhat lengthy, they were hardly radical. The package was endorsed by the State Bar of Georgia, introduced into the Georgia legislature as House Bill 308, and ultimately enacted, effective July 1, 2009.[88]

85. *Budel*, 659 S.E.2d at 674 (quoting Quinn v. Cardiovascular Physicians, 326 S.E.2d 460, 463 (Ga. 1985).

86. *Id.* at 674-75. *See also* Old Nat'l Villages, LLC, v. Lenox Pines, LLC, 659 S.E.2d 891, 862-93 (Ga. Ct. App. 2008) (using both phrases "limited liability corporation" and "limited liability company" while applying corporate law and citing to section 14-11-304(b) of the Georgia LLC Act). It is not clear why the *Budel* court addressed the duties of a "managing member," rather than simply of a manager, especially given that the term "managing member" is not used in the Georgia LLC Act. *Budel*, 659 S.E.2d at 673-74. The Georgia LLC Act seems to imply that in managing the LLC, a member who is also a manager is no different than any other manager. *See* O.C.G.A. § 14-11-304(d) (West 2012) (stating that a member who is also a manager has all the rights and duties of a manager).

87. 730 S.E.2d 556, 563-64 (Ga. Ct. App. 2012). *See also* Pinnacle Benning, LLC v. Clark Realty Capital, LLC, 724 S.E.2d 894, 900 (Ga. Ct. App. 2012) (referring to LLC as both "limited liability corporation" and "limited liability company").

88. O.C.G.A. §§ 14-11-100 to -1109 (West 2012). Georgia House Resolution 308 was sponsored by Representative David Ralston and signed by the Governor on April 21, 2009. GEORGIA LIMITED LIABILITY COMPANY ACT, 2009 Ga. Laws 108 (codified as amended at O.C.G.A. §§ 14-11-100 to

The 2009 amendments continue the longstanding "policy of this state with respect to LLCs to give maximum effect to the principle of freedom of contract and to the enforceability of operating agreements."[89] The guiding principle of the Georgia LLC Act from the beginning has been respect for the agreement of the parties.[90] The flexibility afforded by this principle helps explain why the Georgia LLC Act has continued to work so well: whatever constraints other laws may impose, as far as the Georgia LLC Act is concerned the parties can put almost anything they want into operating agreements. Although the 2009 amendments cover a wide array of disparate points, an overall theme emerges: the Act accommodates the use of the LLC as a substitute for the corporation without sacrificing the LLC's unique flexibility.

A. The LLC As a Corporation Substitute

1. Limited Liability

Limited liability ensures that LLC members have protection against personal liability at least as strong as corporate shareholders (unless waived). There is no automatic personal liability of members to each other.[91] Additionally, there is no automatic personal liability of members to outside creditors for distributions that are inconsistent with the LLC's internal rules or procedures, but are not otherwise in violation of Georgia law.[92]

2. Continuity

The 2009 amendments enhance the LLC's continuity of existence (if the LLC wants continuity). By default, the personal representative takes over as member upon death or

-1109 (West 2012)). The only subsequent amendments to the Georgia LLC Act have affected filing fees. *See* O.C.G.A. § 14-11-1101(a) (West 2012).

89. O.C.G.A. § 14-11-1107(b) (West 2012). Delaware has an almost identical "contract is king" rule. DEL CODE ANN. tit. 6, § 18-1101(b) (West 2013).

90. Treas. Reg. § 301.7701-3(b)(ii) (2012) (allowing the LLC to "specify in its organizational documents whether the members will have limited liability . . . .").

91. O.C.G.A. § 14-11-303(a) (West 2012).

92. O.C.G.A. § 14-11-408(a)-(b) (West 2012).

incapacity, instead of death or incapacity causing dissolution.[93] The operating agreement may restrict the ability of members to cause dissolution,[94] and the LLC can undo a termination within ninety days.[95]

3. Separate Entity

The 2009 amendments reinforce the treatment of the LLC as a separate entity and not merely an agreement among the members. The organizer of the LLC need not be a member,[96] the LLC may have one or more members,[97] and the LLC is bound by its own operating agreement.[98]

4. Conformity to Corporate Code

The amended version of the Georgia LLC Act conforms more to the corporate code in two instances: (1) it allows for notice to be sent electronically,[99] and (2) a Certificate of Termination is now made optional.[100]

B. Mergers and Conversions

When initially enacted, the Georgia LLC Act had provisions for inter-entity conversions (that is, elections for other business entities to become LLCs) that were somewhat novel in 1993.[101] However, inter-entity conversions, as well as mergers, are now a staple of business law practice. Some of the 2009 amendments to the Georgia LLC Act were made with a view towards further regularizing inter-entity transactions.[102]

One change is that a general partnership may now elect to become an LLC.[103] In addition, when another type of business

93. O.C.G.A. § 14-11-506 (West 2012).

94. O.C.G.A. § 14-11-602(a)-(b) (West 2012).

95. *Id*. at art. 602(c).

96. O.C.G.A. § 14-11-101(12) (West 2012).

97. § 14-11-101(18), -203(e) (West 2012).

98. § 14-11-101(18), -505 (West 2012).

99. O.C.G.A. § 14-11-311(2) (West 2012).

100. O.C.G.A. § 14-11-610 (West 2012).

101. *See* O.C.G.A. §§14-2-1109.1 (West 2012); 14-11-212 (West 2012).

102. *See* Cassady V. Brewer & L. Andrew Immerman, *Georgia Modifies and Expands Its Entity Conversion Rules*, PUBOGRAM (A.B.A. Sec. Bus. L.), July 2006, at 10-12.

103. O.C.G.A. § 14-11-212(a) (West 2012).

entity elects to become an LLC, or merges into an LLC, interests in the other entity may be "canceled."[104] A written merger agreement can be considered the "plan of merger," i.e., there is no need to prepare a separate merger agreement and a plan.[105] When a company merges into an LLC, articles of organization are amended in accordance with the articles of merger, not the plan of merger.[106] Lastly, admission of members in connection with mergers and conversions is clarified.[107]

C. Membership, LLC Interest, and Third Party Rights

LLCs continue to function like partnerships in that LLCs tend to keep governance or management rights ("membership") and economic rights as an equity holder ("LLC interest" or "transferable interest") separate. Within corporations, both types of rights are generally aspects of "share" ownership. In addition, LLCs often want to grant enforceable rights to third parties who are neither members nor holders of equity interests.

The 2009 amendments allow for the flexible "admission" of members,[108] management rights without economic rights,[109] and membership without LLC interests (i.e., without economic rights).[110] Any person can be given enforceable rights, without membership *or* LLC interest.[111] Lastly, the binding effect of the operating agreement on members and assignees is clarified.[112]

VI. SECTION BY SECTION COMMENTS ON THE 2009 CHANGES TO THE GEORGIA LLC ACT

The following discussion is arranged sequentially by section of the Georgia LLC Act.

104. O.C.G.A. §§ 14-11-212(b)-(c), -905(a)(8) (West 2012).
105. O.C.G.A. § 14-11-901 (West 2012).
106. § 14-11-905(a)(7).
107. O.C.G.A. § 14-11-505(f) (West 2012).
108. *Id.* at art. 505.
109. *Id.* at art. 505(a)-(d).
110. *Id.* at art. 505(a)-(c), (e).
111. *See* O.C.G.A. §§ 14-11-101(18), -602(a)-(b) (West 2012).
112. § 14-11-505(d) (revising provisions formerly in 101(18)).

A. Definition of LLC

An amendment to the definition of "limited liability company" in section 14-11-101(12) of the Georgia LLC Act eliminates a possible unintended implication that only a "member" may form an LLC.[113] Since its original enactment in 1993, section 14-11-203(b) of the Georgia LLC Act has stated that the organizer of an LLC need not be a member.[114] However, prior to the 2009 amendments, section 14-11-101(12) might have been read as requiring an LLC to be formed by members, because an LLC was defined as "a limited liability company formed under this chapter *by one or more members*."[115] This possibly inconsistent implication was eliminated simply by striking the words "by one or more members" from the definition.[116]

The words "by one or members" were not originally part of section 14-11-101(12) of the Georgia LLC Act. As initially enacted, this section defined a "limited liability company" as "a limited liability company formed under this chapter."[117] There was no particular reason to believe that an LLC needed to have more than one member, other than the general thinking that the conduct and operation of an LLC, like a partnership, is largely a matter of contract and a contract requires at least two parties. However, to further clarify that the Georgia LLC Act permits a single-member LLC, section 14-11-101(12) was amended a few years later to define "limited liability company" as "a limited liability company formed under this chapter *by one or more members*."[118] In addition, the 1997 amendments changed the definition of "operating agreement," to the effect that a writing signed by the member of a single-member LLC and stating that

113. § 14-11-101(12) ("'Limited liability company' means a limited liability company formed under this chapter.").

114. O.C.G.A. § 14-11-203(b) (West 2012) ("An organizer need not be a member of the limited liability company at the time of formation or thereafter.").

115. GEORGIA LIMITED LIABILITY COMPANY ACT, 1997 Ga. Laws 1380 (codified as amended at O.C.G.A. § 14-11-101) (emphasis added).

116. § 14-11-101(12).

117. GEORGIA LIMITED LIABILITY COMPANY ACT, 1993 Ga. Laws 123 (codified as amended at O.C.G.A. § 14-11-101(12) (West 2012)).

118. GEORGIA LIMITED LIABILITY COMPANY ACT, 1997 Ga. Laws 1380 (codified as amended at O.C.G.A. § 14-11-101(12)) (emphasis added).

it is intended to be a written operating agreement, "shall constitute a written operating agreement and shall not be unenforceable by reason of there being only one person who is a party to the operating agreement."[119] The Committee felt that the 1997 amendments were not intended to either endorse or reject the possibility of a no-member LLC.

Although the 1997 amendment to section 14-11-101(12) of the Georgia LLC Act was intended to clarify the status of single-member LLCs, it inadvertently may have created the impression that the *organizer* of a Georgia LLC was required to be a member. The 2009 amendment removed the words "by one or more members" in section 14-11-101(12) to leave no room for doubt that the organizer need not be a member.[120] To ensure that the amendment to section 14-11-101(12) could not be construed as casting doubt on Georgia's recognition of single-member LLCs, section 14-11-203(e) of the Georgia LLC Act was added at the same time, explicitly stating that "[d]uring any period when a limited liability company has any members it may have one or more members."[121]

Section 14-11-101(12) of the Georgia LLC Act does not address, nor do the authors believe it was intended to address, the different question of whether an LLC can be validly formed if it has no members. The notion of a no-member LLC is puzzling and perhaps should not be countenanced.[122] Notwithstanding such objections, many Georgia practitioners have assumed since the initial enactment of the Georgia LLC Act that the status of a no-member LLC as a Georgia legal entity is unproblematic. For example, a report by the *Members of the Legal Opinion Committee of the Real Property Law Section* discusses status opinions for Georgia LLCs without suggesting that a favorable opinion on the status of a Georgia LLC may require that the LLC have a member.[123]

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119. § 14-11-101(18).

120. GEORGIA LIMITED LIABILITY COMPANY ACT, 2009 Ga. Laws 108 (codified as amended at O.C.G.A. § 14-11-101(12)).

121. O.C.G.A. § 14-11-203(e) (West 2012).

122. *See, e.g.*, Robert R. Keatinge, *Shelf LLCs and Opinion Letter Issues: Exegesis and Eisegesis of LLC Statutes*, PUBOGRAM (A.B.A. Sec. Bus. L.), March 2006, at 15.

123. LEGAL OP. COMM. OF THE REAL PROP. LAW SECTION, AMENDED AND RESTATED REPORT ON LEGAL OPINIONS TO THIRD PARTIES IN GEORGIA REAL

The language of the Georgia LLC Act, as originally enacted, was probably consistent with the assumption that an LLC may be formed without a member. As noted above, the statutory definition of LLC initially made no mention of members. In addition, section 14-11-203(c) of the Georgia LLC Act states that an LLC is formed when the articles become effective under section 14-11-206 of the Georgia LLC Act, which does not require that the LLC have a member.[124] More importantly, section 14-11-205(a)(3) of the Georgia LLC Act seems to implicitly endorse the concept of a no-member LLC when it states that any document required or permitted to be delivered to the Secretary of State for filing shall be executed "[b]y any organizer if the limited liability company has been formed but it has no members or managers. . . ."[125]

The Delaware approach presents its own interpretive challenges. The Delaware LLC Act defines an LLC as a limited liability company "formed under the laws of the State of Delaware and having one or more members."[126] Under the Delaware LLC Act, a business entity is not a Delaware LLC unless it has at least one member.[127] On the other hand, a straightforward reading – although not necessarily the only reasonable reading – of the Delaware LLC Act suggests that a Delaware LLC may be formed without having any members.[128] One could read the Delaware LLC Act as paradoxically suggesting that while an LLC may be formed without members,

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ESTATE SECURED TRANSACTIONS, 95–103, 185–86, 190 (Exec. Comm. of the Real Prop. Law Section of State Bar of Ga., 2009) (implying that the LLC's authority and power is unimpaired by its failure to have any members), *available at* http://garealpropertylaw.com/wp-content/uploads/2010/07/2009ReportonLegalOpinions.pdf. The Model Opinion Limited Liability Company Status Opinion states that a "[b]orrower was formed and duly organized as a limited liability company under the laws of the State of Georgia. Borrower is existing and in good standing under the laws of the State of Georgia." *Id.* at 92. The report could even be read as implying that the LLC's authority and power is unimpaired by its failure to have any members.

124. O.C.G.A. § 14-11-206 (West 2012).

125. O.C.G.A. § 14-11-205(a)(3) (West 2012).

126. DEL. CODE ANN. tit. 6, § 18-101(6) (West 2013).

127. *See* TriBar Opinion Committee, *Third-Party Closing Opinions: Limited Liability Companies*, 61 BUS. LAW. 679, 684 (2006).

128. DEL. CODE ANN. tit. 6, § 18-201 (West 2013).

such an LLC is, by definition, not an LLC.

B. Definition of Operating Agreement

The prior definition of an operating agreement included certain substantive rules of law that were not properly part of the definition of "operating agreement."[129] The 2009 amendments moved some substantive rules, together with changes to those rules, to section 14-11-505 of the Georgia LLC Act.[130] The amendments eliminate the possible implication that operating agreements are, *by definition*, binding on the members. The extent to which an operating agreement binds the members of an LLC is a substantive issue of law, which should not be resolved by reference to the definition of operating agreement.

However, some substantive rules were inserted into section 14-11-101(18) of the Georgia LLC Act by the 2009 amendments. The new language, which arguably embodies a substantive rule, confirms that an operating agreement is not unenforceable simply because it is executed by the single member of the LLC.[131] It also confirms that an LLC is "not required to execute its operating agreement and, except as otherwise provided in the operating agreement, is bound by its operating agreement whether or not the limited liability company executes the operating agreement."[132] LLC members, and perhaps third parties, have a legitimate expectation that the LLC will be bound by its own operating agreement, whether or not the company signs the agreement. For example, it is

129. O.C.G.A. § 14-11-101(18) (West 2012).

130. O.C.G.A. § 14-11-505 (West 2012).

131. § 14-11-101(18).

132. *Id.* Although title 6, section 18-101(7) of the Delaware LLC Act and section 111(a) of the Revised Uniform Limited Liability Company Act take the position that the LLC is bound by its own LLC agreement or operating agreement, most states do not have a statutory rule on the issue, and judicial authority in the absence of a statutory rule is mixed. *Compare* Bubbles & Bleach, LLC v. Becker, No. 97-C-1320, 1997 WL 285938, at *6 (N.D. Ill. May 23, 1997) (holding that an LLC is not bound by the arbitration clause in its operating agreement) *and* Mission Residential, LLC v. Triple Net Properties, LLC, 654 S.E.2d 888, 891 (Va. 2008) (holding similarly) *with* Elf Atochem N.A. Inc. v. Jaffari, 727 A.2d 286, 293 (Del. 1999) (noting that prior to enactment of the Delaware statutory rule on point, an LLC is bound by its LLC agreement).

common for an operating agreement to require that the LLC itself buy out (redeem or liquidate) the interest of a member under specified circumstances, such as the member's death,[133] and the LLC should not be relieved of this obligation by failing to sign its own operating agreement. The new provision expressly validates that expectation, while permitting an operating agreement to state to what extent it is not binding on the company.

Further changes to section 14-11-101(18) confirm that an operating agreement may provide enforceable rights to a person who is not party to the operating agreement.[134] LLCs sometimes find it useful to grant rights to persons (such as lenders, employees, or option holders) who are not parties to the operating agreement,[135] and the Georgia LLC Act authorizes operating agreements to do so.

C. Single-Member LLCs

A new subsection (e) was added to section 14-11-203 of the Georgia LLC Act, stating that at any time when an LLC has members, "it may have one or more members."[136] This subsection ensures that the change to section 14-11-101(12) carries no implication that an LLC must have more than one member.

D. Conversion of General Partnership to LLC

The amendment to section 14-11-212(a) of the Georgia LLC Act adds "general partnership" to the list of business entities that may elect to convert to into LLCs.[137] General partnerships had been inadvertently omitted from this list when section 14-11-212(a) was amended in 2006.[138]

E. Cancelling Interests on Conversion to an LLC

The amendments to sections 14-11-212(b) and (c) of the

133. *See* O.C.G.A. § 14-11-506 (West 2012).

134. *Id.* ("An operating agreement may provide enforceable rights to any person, including a person who is not a party to the operating agreement, to the extent set forth therein.").

135. *See* DEL. CODE ANN. tit. 6, § 18-101(7) (West 2013).

136. O.C.G.A. § 14-11-203 (West 2012).

137. O.C.G.A. § 14-11-212(b) - (c) (West 2012).

138. *Id.* at art. 212(a).

Georgia LLC Act clarify that interests in a business entity may be "canceled" when the entity elects to convert to an LLC.[139] The certificate of conversion and the operating agreement address the manner and means of such cancellation, consistent with the requirements of the Georgia LLC Act.[140]

F. Liability to Other Members

The amendment to section 14-11-303(a) of the Georgia LLC Act clarifies that, unless otherwise agreed in writing, "a member, manager, agent, or employee" of an LLC is not at risk of facing unlimited personal liability to other members, or to assignees of interests, merely by virtue of their status.[141] The shareholder of a corporation does not, merely by being a shareholder, risk unlimited personal liability to other shareholders.[142] The protection given to a member of an LLC against unlimited personal liability is generally expected to be as strong as the protection given to a shareholder of a corporation. The amendment helps ensure that members of an LLC and shareholders of a corporation receive comparable protection under state law. If the members of the LLC want to waive liability protection, they may do so,[143] but unlimited personal liability of the members to each other should be the exception and not the rule.

It seems clear that the language of section 14-11-303(a) prior to 2009 limited the liability of members, agents, employees, and managers. However, similar language in New York did not protect partners in a limited liability partnership ("LLP") from unlimited personal liability to each other (although the limitations on their liability to third parties were not called into question).[144] In *Ederer v. Gursky*, the Court of Appeals of New York held a partner in a New York LLP bears unlimited

139. *Id.* at art. 212(b)-(c).

140. *Id.*

141. O.C.G.A. § 14-11-303(a) (West 2012).

142. O.C.G.A. § 14-2-622 (West 2012).

143. *See* O.C.G.A. § 14-11-303(b) ("Notwithstanding the provisions of subsection (a) of this Code section, under a written operating agreement or under another written agreement, a member or manager may agree to be obligated personally for any or all of the debts, obligations, and liabilities of the limited liability company.").

144. N.Y. P'SHIP LAW § 26(b) (McKinney 2013).

personal liability to the other partners in the LLP, without regard to personal fault, and apparently without regard to the type of claim that the other partners may be making.[145]

Ederer concerned LLPs rather than LLCs. The authors believe the case would have come out differently had the entity been an LLC. *Ederer* was so troubling, however, that it was important to leave no room for doubt that the rule in *Ederer* is inapplicable to Georgia LLCs. Because the 2009 amendments concerned only Georgia LLCs, those amendments did not attempt to modify Georgia's LLP provisions to ensure that courts will not interpret those provisions as the court did in *Ederer*.[146] However, as *Ederer* itself pointed out, the partners may vary their responsibilities to one another and the partnership through agreement.[147] Georgia LLPs may want to consider amending their partnership agreements to forestall any argument for unlimited personal liability.

G. Electronic Notice

The amendment to section 14-11-311(2) of the Georgia LLC Act clarifies that notice may be provided by electronic transmission or other wireless communication.[148] This change helps modernize the Georgia LLC Act and reduces needless inconsistencies with the Georgia Business Corporation Code.

H. Limited Liability for Distributions

The amendment to section 14-11-408 of the Georgia LLC Act gives additional protection to members and managers

145. 881 N.E.2d 204, 211-12 (N.Y. 2007) (affirming the decision of the Appellate Division, 826 N.Y.S.2d 210 (N.Y. App. Div. 2006)). The decision of the Appellate Division arguably was made on much narrower grounds than that of the higher court and may well have intended to impose personal liability on the partners only up to the value of the assets that the partners took out of the LLP. *See* L. Andrew Immerman & Lee Lyman, *A Hole in Lawyers' Liability Shield?*, BUS. L. SEC. NEWSL. (Bus. L. Sec., State Bar of Ga.), January 2009.

146. O.C.G.A. §§ 14-8-15(b), -62 to -64 (West 2012). In the authors' view, *Ederer* was incorrectly decided and, even without any amendments to the Georgia statutes, should not be followed in Georgia with respect to any limited liability entity.

147. *Ederer*, 881 N.E.2d at 211-12.

148. O.C.G.A. § 14-11-311(2) (West 2012).

against personal liability on distributions that do *not* violate Georgia law.[149] This is a subtle but important issue. Section 14-11-407(a) of the Georgia LLC Act prohibits distributions that render the LLC unable to pay its debts or reduce its assets below its liabilities.[150] The 2009 amendments have no impact on a member or manager who wrongfully consents to such a prohibited distribution.[151]

However, it is possible for a distribution to violate, in some way, the provisions of the articles of organization or the operating agreement while being entirely permissible under section 14-11-407(a) of the Georgia LLC Act. Many operating agreements tend to impose formal requirements for the approval of distributions – requirements that are destined from the start to be entirely ignored. Prior to the amendment, however, the Georgia LLC Act arguably imposed automatic personal liability for a distribution in violation of an LLC's self-imposed limitation.[152] If the members of the LLC agree among themselves to bear personal liability for such a distribution, they of course may include such an agreement in the articles of organization or operating agreement. However, personal liability should not be automatically placed on the members. As stated in Part VI.F *supra*, LLC members should have no more personal liability than shareholders of a corporation and the amendments to section 14-11-408 of the Georgia LLC Act bring the members' liability more in line with corporate shareholder liability.

I. Rights of Judgment Creditor of Member

The amendment to section 14-11-504(b) of the Georgia LLC Act clarifies that when a creditor receives a judgment against a member or an assignee of an LLC interest, the creditor is not thereby granted leave to interfere in the management of the LLC or to take certain other actions that would be disruptive to the company's business.[153] The prior language of the statute was already clear that when a judgment creditor obtains a "charging order" against the member (or against an assignee of an interest

149. O.C.G.A. § 14-11-408 (West 2012).
150. O.C.G.A. § 14-11-407(a) (West 2012).
151. § 14-11-408(b).
152. *Id.* at art. 408(a).
153. O.C.G.A. § 14-11-504(b) (West 2012).

in an LLC), the judgment creditor had no right to insert itself as a member of the company or otherwise interfere in management.[154] Rather, "the judgment creditor has only the rights of an assignee of the limited liability company interest."[155] Unless otherwise provided in the articles of organization or operating agreement, an assignee, including a creditor that has the rights of an assignee, has no membership rights and no rights to participate in management.[156]

The limitation on the rights of a judgment creditor was already reflected in the "pick your partner" principle of the Georgia LLC Act.[157] This principle is at the heart of partnership law and has been carried over into the LLC statutes of every state. Under this principle, a court cannot force a person into partnership with someone else.[158] Similarly, the members of an LLC cannot be required against their will to accept someone as a member.

Section 14-11-504(b) of the Georgia LLC Act was amended to eliminate the risk that certain open-ended language in that provision might be interpreted as negating the "pick your partner" principle. The authors know of no instance in which any court adopted an interpretation at odds with the "pick your partner" principle and do not believe that such an interpretation would be correct. Such an interpretation would essentially render meaningless the limitation on judgment creditors set forth in section 14-11-504(a). Because the language of the statute was vague, however, some Georgia lawyers advised LLC clients to organize in states in which the statute was clearer.

Under section 14-11-504(b) of the Georgia LLC Act, the "remedy conferred by this Code section shall not be deemed exclusive of others which may exist."[159] Georgia may be

154. GEORGIA LIMITED LIABILITY COMPANY ACT, 1993 Ga. Laws 123 (codified as amended at O.C.G.A. § 14-11-504(b)).

155. § 14-11-504(a).

156. O.C.G.A. § 14-11-503(3) (West 2012).

157. *Id.*

158. S*ee, e.g.*, Nigri v. Lotz, 453 S.E.2d 780, 783 (Ga. App. Ct. 1995) (finding that a judgment creditor does not "become a substituted limited partner, and is only entitled to receive the distributions to which the debtor limited partner would have been entitled.").

159. O.C.G.A. § 14-11-504(b) (West 2012).

unique in its open-ended statement that the charging order is *not* exclusive.[160] Many other LLC acts, such as Delaware's, make the charging order the exclusive remedy.[161] It is likely that jurisdictions, such as Delaware, in which the charging order is expressly stated to be the creditor's exclusive remedy, will continue to be more attractive for an individual whose motive in forming an LLC is largely to protect assets from the individual's creditors.

It might have been preferable to bring Georgia more in line with other states. However, to minimize changes to the prior statute, the amendment retains the open-ended structure of section 14-11-504(b) of the Georgia LLC Act and does not prejudge the issue of what other remedies may exist.[162] Judgment creditors of members or assignees are prohibited from interfering with the management of the LLC, forcing the dissolution of the company, or obtaining a court-ordered foreclosure sale of the interest.[163] This makes section 14-11-504(b) less troubling because, whatever other remedies may exist, the "pick your partner" principle clearly is not abrogated.

The amendment, like the rest of section 14-11-504, relates only to judgment creditors of members and has no implications for secured creditors. A secured creditor that is also a judgment creditor does not lose any of the rights it has as a secured creditor.[164] In addition, the amendment has no implications for the LLC's own creditors. A claim by a member's creditor for fraudulent conveyance would be unaffected to the extent that

160. *See* Carter G. Bishop, Fifty State Series: LLC Charging Order Case Table, 1-70 (Feb. 11, 2013) (unpublished manuscript) [hereinafter *Fifty State Series*], *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1565595; ELIZABETH L. MORGAN & AMY P. JETEL, 2 ASSET PROTECTION: DOM. & INT'L L. & TACTICS § 18:5 (2013). *See also* Elizabeth N. Kozlow, *A Charging Order Conundrum: Is It Really the "Exclusive Remedy" of an LLC Member Judgment Creditor?*, 63 BAYLOR L. REV. 884, 884 (2011).

161. DEL. CODE ANN. tit. 6, § 18-703 (West 2013). Note that, regardless of the state in which the LLC is formed, a court in a different jurisdiction may determine that its own law applies to a requested charging order.

162. § 14-11-504(b).

163 *Id.* The amended language of section 14-11-504(b) of the Georgia LLC Act was derived in part from N.J. STAT. ANN. § 42:2B-45 (West 2013).

164. For secured creditors' rights, see title 11, article 9 of the Georgia Commercial Code.

the claim is against the entity receiving the allegedly fraudulent transfer.[165]

J. LLC Member Lacking an LLC Interest

In an attempt to clarify the often perplexing distinction between a "member" and the holder of a "limited liability company interest," the amendment to section 14-11-505(a) of the Georgia LLC Act eliminates a possible implication that the "member" of an LLC must hold a "limited liability company interest."[166] "Limited liability company interest," as defined in section 14-11-101(13) of the Georgia LLC Act, is a technical term and is not strictly analogous to a corporate "share." New subsection (e) to section 14-11-505 clarifies the significance of the deletion in section 14-11-505(a). A member, including a sole member, may become a member without making a contribution to the LLC; and need not hold an LLC interest to continue as a member.[167]

Although "limited liability company interest" is sometimes incorrectly thought to encompass the full panoply of rights that a member may have with respect to an LLC, the term as defined by the Georgia LLC Act has a more limited meaning. "Limited liability company interest" refers only to the economic interest that the member may have as an equity holder, including the member's share of profits and losses, and the member's right to receive distributions.[168] If an LLC desires to designate some other stakeholder – perhaps an employee, creditor, or former equity-owner – as a "member," even though the stakeholder does not have a "limited liability company interest," the statute should not prohibit the company from so doing.[169]

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165. The transferee entity can be directly liable for the judgment against the transferor if the conveyance to the entity was fraudulent. *See* Taylor v. S & M Lamp Co., 12 Cal. Rptr., 323, 331 (Cal. Ct. App. 1961); Chrysler Credit Corp. v. Peterson, 342 N.W.2d 170, 172 (Minn. 1984); Firmani v. Firmani, 752 A.2d 854, 856 (N.J. 2000).

166. *See* DEL. CODE ANN. tit. 6, § 18-301(d) (West 2013).

167. O.C.G.A. § 14-11-505(e) (West 2012).

168. *Id.* Additionally, a member's rights may encompass more than economic interests including rights to governance or management, or simply the receipt of information. These other rights are not inherently tied to the holding of a "limited liability company interest" in the somewhat narrow sense defined by the statute.

169. DEL. CODE ANN. tit. 6, § 18-101(7) (West 2013).

The amendment incidentally helps clarify the purposes for which an LLC may be formed. The rule has long been that a Georgia LLC may be formed to engage in any "lawful activity."[170] A natural reading of the "lawful activity" rule indicates that an LLC could be formed for non-profit activities, as well as business or other for-profit activities.[171] However, because it was arguable that a "member" needed to have an LLC interest, there was some question whether an LLC that was formed for purposes other than earning profits (or making distributions) could have "members" in the strict sense. If an LLC member need not have an economic interest, however, it is easier to give the rule permitting an LLC to engage in any "lawful activity" its natural reading.[172]

K. Timing of Admission or Assignment

Two additional new subsections, (d) and (f), were added to section 14-11-505 of the Georgia LLC Act. Subsection (d) codifies concepts – formerly included in the definition of "operating agreement" – concerned with the timing of a member's admission to the LLC, the time at which a member or assignee becomes bound by the operating agreement, and the recognition of an assignee's rights.[173] In addition, subsection (d) addresses uncertainties that have arisen in practice as to when a member is bound by an operating agreement, particularly in situations where there is no writing to confirm the intent of the parties.[174] New subsection (f) addresses the same issue, but in the context of admitting a member into an LLC pursuant to a merger or conversion.[175]

170. O.C.G.A. § 14-11-201 (West 2012).

171. *Compare* section 14-11-201 of the Georgia LLC Act *with* section 14-8-6(a) of the Uniform Partnership Act, which defines a partnership as "an association of two or more persons to carry on as co-owners *a business for profit* and includes, for all purposes of the laws of this state, a limited liability partnership." O.C.G.A. § 14-8-6(a) (West 2012) (emphasis added).

172. *See, e.g.*, N.C. GEN. STAT. ANN. § 57C-1-03(d) (West 2013) (stating that an LLC may be organized for any lawful purpose or activity, "whether or not such trade, investment, purpose, or activity is carried on for profit.").

173. *See supra* notes 129-35 and accompanying text.

174. O.C.G.A. § 14-11-505(d) (West 2012).

175. *Id.* at art. 505(f).

L. Prevent Needless Dissolutions

The additions to section 14-11-506 of the Georgia LLC Act and section 14-11-602, discussed below, should prevent certain undesirable and unintended LLC dissolutions by enabling LLCs, like corporations, to continue in business indefinitely if they so choose, without suffering needless disruptions to their status as ongoing businesses.[176] Section 14-11-506 has new language stipulating that, if there is only one member of an LLC and that member dies or becomes incapacitated, the executor or other legal representative of the member will become the substitute member of the LLC.[177] A member may "opt out" of this provision by stating his desire to do so in the articles of organization or a written operating agreement.[178] In addition, the legal representative or executor may "opt out" by providing a written notice to that effect within ninety days after the triggering event.[179] Without the change, it is too easy for the death or incapacity of the sole member of an LLC to trigger an unexpected and unwanted dissolution.

M. Waiver of Right to Cause Dissolution

The risk to lenders that the LLC members might override restrictions on dissolution in the company's articles of organization or written operating agreement may have hindered some Georgia LLCs in obtaining loans. This may have caused some Georgia LLC borrowers to form LLCs under the laws of other states (usually Delaware). The amendments to section 14-11-602(a)(3) and (b)(3) of the Georgia LLC Act allow the members of an LLC to waive their right to authorize the company to wind up and dissolve.[180] This waiver right can have the effect of enhancing the continuity of the life of an LLC and thus aligning LLC law more closely with corporate law.[181] Like the changes to section 14-11-101(18),[182] the goal of this

176. O.C.G.A. §§ 14-11-506 (West 2012) (dealing with deceased or incompetent members); 14-11-602 (West 2012) (dealing with dissolution of the LLC).

177. § 14-11-506.

178. *Id.*

179. *Id.*

180. O.C.G.A. § 14-11-602.

181. *Id.* at art. 602(a)-(b).

182. *See supra* notes 129-35 and accompanying text.

amendment was to permit an LLC to grant enforceable rights to third parties.

N. Retroactively Cure Dissolutions

Subsection (c) was added to section 14-11-602 of the Georgia LLC Act to permit the LLC, before it files a certificate of termination, to reverse certain unwanted dissolutions.[183] This new subsection allows the members to amend the articles of organization or operating agreement to undo a dissolution; or, so long as there is at least one member, to continue the limited liability company after an event of dissolution.[184] Like the changes to section 14-11-506,[185] section 14-11-602(c) should help LLCs avoid unnecessary disruptions.[186]

O. Certificate of Termination is Optional

Section 14-11-610 of the Georgia LLC Act formerly said that a dissolved LLC "shall" file a certificate of termination with the Secretary of State "when" the LLC has wound up and can truthfully make certain required statements.[187] However, there was no time limit for filing the certificate and it was unclear what liability would be incurred for failure to file the certificate.[188] In practice, some, if not many, LLCs fail to file this certificate after winding up because once an LLC has wound up, it may have no managers, members, or employees to take care of filing the certificate of termination. Amended section 14-11-610 recognizes the reality that the filing is optional and expressly makes the filing of a certificate of termination optional, arguably corresponding more closely to the section's corporate counterpart.[189]

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183. § 14-11-602(c).

184. *Id.*

185. *See supra* notes 176-79 and accompanying text.

186. Section 14-11-602(c) of the Georgia LLC Act is a somewhat streamlined version of title 6, section 18-806 of the Delaware LLC Act's revocation of dissolution. *Compare* O.C.G.A. § 14-11-602(c) *with* DEL. CODE ANN. tit. 6, § 18-806 (West 2013).

187. GEORGIA LIMITED LIABILITY COMPANY ACT, 1999 Ga. Laws 405 (codified as amended at O.C.G.A. § 14-11-610 (West 2012)).

188. *Id.*

189. *See* O.C.G.A. § 14-2-1408(a) (West 2012) (stating a corporation "may" dissolve by filing a comparable statement with the Secretary of State).

P. Eliminate Unnecessary Merger Document

Previously, a merger required both a "written agreement of merger"[190] and a "plan of merger."[191] It seemed unnecessary and confusing to require two similar (perhaps even substantially identical) but distinct instruments governing the same merger. The amendment to section 14-11-901(a) of the Georgia LLC Act therefore provides that the written agreement of merger may serve as the plan of merger if it contains the required provisions.[192] Companies that wish to utilize a separate plan of merger, in addition to the agreement of merger, may continue to do so by providing for a separate plan in the agreement of merger. This simplification of the merger rules also helps LLCs conform to corporations.[193]

Q. Articles of Organization Conformed to Articles of Merger

Former section 14-11-905(a)(7) of the Georgia LLC Act provided that the articles of organization of the surviving limited liability company in a merger would be amended to the extent provided in the "plan of merger."[194] The amendment to section 14-11-905(a)(7) of the Georgia LLC Act replaced "plan of merger" with "articles of merger."[195] The plan of merger "may" set forth amendments to the articles of organization of the surviving LLC,[196] but the articles of merger come later and apparently are required to set forth any amendments to the survivor's articles or organization.[197] It seemed more logical that the articles of organization (a document filed with the Secretary of State) would be conformed to the articles of merger (another document filed with the Secretary of State) than to the plan of merger (a private, unfiled document).

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190. GEORGIA LIMITED LIABILITY COMPANY ACT, 1995 Ga. Laws 470 (codified as amended at O.C.G.A. § 14-11-901 (West 2012)).

191. *Id*.

192. § 14-11-901.

193. O.C.G.A. § 14-11-1101, -1103 (West 2012) (providing for a corporate "plan of merger," but no "written agreement of merger").

194. GEORGIA LIMITED LIABILITY COMPANY ACT, 1995 Ga. Laws 470 (codified as amended at O.C.G.A. § 14-11-905 (West 2012)).

195. O.C.G.A. § 14-11-905(a)(7).

196. O.C.G.A. § 14-11-902(c)(1) (West 2012).

197. O.C.G.A. § 14-11-904(2) (West 2012).

R. Cancellation of Interests in LLC Merger

The change to section 14-11-905(a)(8) of the Georgia LLC Act states that interests in a merged LLC may be cancelled in the merger.[198] This change maintained consistency with the changes to sections 14-11-212(b) and (c).[199]

S. Repealer and Effective Date

The 2009 amended Georgia LLC Act includes the standard Georgia "repealer" language that repeals all laws and parts of laws in conflict with the new legislation. The amendments became effective July 1, 2009 for all Georgia LLCs, regardless of date of formation. When the Georgia LLC Act was changed in 1999 from the partnership-like default dissolution rule towards a quasi-corporate continual life for an LLC, the shift was sufficiently "radical" that the drafters decided to make the change prospective.[200] The 2009 amendments instead follow the usual practice in Georgia of setting a single effective date for all provisions.

As discussed above, many of the amendments were merely clarifications and were not intended to change the result under prior law. In some cases, the amendments clearly did effect changes, although probably minor changes, and in still other cases, it may be difficult to determine whether the law changed. For example, was it previously possible, as plainly it is now, for an LLC "member" to lack an LLC interest? If a dispute arises as to whether an amendment is a clarification or a change it will be up to the Georgia courts to resolve, although it may be that such disputes are unlikely to arise.

VII. POSSIBLE FUTURE CHANGES TO THE GEORGIA LLC ACT

The discussion of the 2009 amendments covered many details of the statutory language. This section of the article discusses some of the areas in which changes are likely to be considered in the future. The emphasis in this part of the article is more on the broader issues than on the minutiae of wording.

198. § 14-11-905(a)(8).

199. *See supra* notes 139-40 and accompanying text.

200. Michael E. Eisenstadt, *Corporations, Partnerships and Associations*, 16 GA. ST. U. L. REV. 38, 41-43 (1999).

A. The Revised Uniform Limited Liability Company Act ("RULLCA")

ULLCA was never adopted in Georgia.[201] Georgia had already adopted its own LLC act by the time ULLCA was finalized and did not see a strong enough reason to scrap the product of its own recent efforts in favor of ULLCA.[202] In 2006, the National Conference of Commissioners on Uniform State Laws promulgated RULLCA.[203] If Georgia had already adopted ULLCA, then moving to RULLCA arguably might be less disruptive, although RULLCA varies greatly even from its predecessor.[204]

Before 2011, the only jurisdictions to enact RULLCA were

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201. The Nat'l Conference of Comm'rs on Uniform State Laws, *Legislative Fact Sheet – Limited Liability Company (Revised)*, UNIFORM LAW COMMISSION, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Limited%20Liability%20Company%20(Revised) (last visited Apr. 12, 2013).

202. A working group within the Committee on Partnerships and Unincorporated Business Organizations, Business Law Section, American Bar Association had prepared a "Prototype Limited Liability Company Act" (the "Prototype Act") which did have an influence on the Georgia LLC Act as initially enacted. The Prototype Act was recently revised. *See* Am. Bar Ass'n Section of Bus. Law, *Revised Prototype Limited Liability Company Act*, 67 BUS. LAW. 117, 118 (Nov. 2011) [hereinafter *Revised Prototype*]. An interim draft of the Revised Prototype Limited Liability Company Act was consulted at the time the 2009 amendments were considered (Jan. 2009 draft v2.02). *Id.* The Revised Prototype Act has since appeared in print, although even the published version is not intended to be the last word. Rather, the act is "under continual review and scrutiny," and the drafting process continues on an "evergreen" basis. *Id.*

203. Limited Liability Company (Revised), UNIFORM LAW COMMISSION, http://www.uniformlaws.org/Act.aspx?title=Limited Liability Company (Revised) (last visited Apr. 21, 2013). The *Harmonized Revised Uniform Limited Liability Company Act* is part of a project to harmonize the language of the various unincorporated entity acts and to revise the language to permit them to be integrated into a single "code of entity laws." The Nat'l Conference of Comm'rs on Uniform State Laws, *Harmonization of Business Entity Acts*, UNIFORM LAW COMMISSION, http://www.uniformlaws.org/Committee.aspx?title=Harmonization%20of%20Business%20Entity%20Acts (last visited Apr. 12, 2013).

204. *See* Bruce H. Kobayashi & Larry E. Ribstein, *The Non-Uniformity of Uniform Laws*, 35 J. CORP. L. 327, 332 (2009) (arguing that ULLCA decreased the level of uniformity that would have existed without it).

Idaho (2008),[205] Iowa (2008),[206] Nebraska (2010),[207] and Wyoming (2010).[208] Utah[209] and the District of Columbia[210] joined in 2011. The identity of the early adopters gave credence to the hypothesis that major centers of commerce and population were not in the market for RULLCA. It was arguable that less populous jurisdictions were the ones more willing to take uniform LLC legislation, rather than invest the time and effort necessary to particularize their own LLC legislation. In 2012, however, the hypothesis was rebutted when California[211] and New Jersey adopted RULLCA.[212] Although California and New Jersey do not have a reputation for attracting LLC formations, their size alone gives them importance. The two states together have accounted for significantly more LLCs than Delaware.[213]

There are a number of reasons why in our view Georgia should not adopt RULLCA now, if ever. Georgia's adoption of RULLCA would require essentially abandoning the Georgia LLC Act. To justify such a disruption, the benefits of RULLCA

205. IDAHO CODE ANN. §§ 30-6-101 to -1104 (West 2012).

206. IOWA CODE ANN. §§ 489.101 to -.1304 (West 2009).

207. NEB. REV. STAT. §§ 21-101 to -197 (2012).

208. WYO. STAT. ANN. §§ 17-29-101 to -1105 (West 2012).

209. UTAH CODE ANN. §§ 48-3-101 to -1405 (West 2012).

210. *See* D.C. CODE §§ 29-801.01 to -810.01 (2012).

211. 2012 Cal. Legis. Serv. ch. 419 (West) (codified at CAL. CORP. CODE §§ 17701.01 to -17713.06). The California RULLCA will take effect January 1, 2014, and will apply to all California LLCs. *Id.* The Business Law Section of the State Bar of California advocated for the adoption of RULLCA. Memorandum from Ron Wargo, Chair, Business Law Section Partnerships and Limited Liability Companies Committee, for Office of Governmental Affairs (June 1, 2010), *available at* http://www.calbar.ca.gov/LinkClick.aspx?fileticket=zu68OHm6zHI%3D&tabid=2796.

212. N.J. STAT. ANN. §§ 42:2C-1–94 (West 2013). The New Jersey RULLCA is effective March 20, 2013, 180 days after enactment for LLCs formed after that date. 2012 N.J. Sess. Law Serv. ch. 50 (West). For existing LLCs, the new Act will become effective in March 2014, 18 months following the adoption of the statute. *Id.* New Jersey LLCs may elect to be governed by the New Jersey RULLCA even before the effective date that would otherwise apply. *Id.*

213. *See* Chrisman, *supra* note 2, at 475 (according to the study, 366,657 LLCs were formed in Delaware during 2004-2007, compared with 239,362 in California and 206,800 in New Jersey).

ought to be more evident than they appear to be at the moment. In the absence of fundamental flaws within, or major complaints about, the Georgia LLC Act, there ought to be at least some presumption against wholesale change. Whether RULLCA may have some particular features worth emulating is a different question and incorporating some ideas from RULLCA into the Georgia LLC Act would be less unsettling than replacing Georgia's LLC statute in its entirety

Another reason for reluctance to embrace RULLCA is that, while some leading scholars ardently support RULLCA, others have leveled severe criticisms against it.[214] In some important respects RULLCA is self-consciously innovative and even unique, particularly in its approach to three areas: fiduciary duties,[215] management and agency authority,[216] and "shelf" LLCs.[217]

If it were clearer that RULLCA promoted uniformity among state LLC statutes, and that such harmony would be desirable, the case for RULLCA would be stronger. Apart from the substantive merits of one LLC statute over another, uniformity for its own sake may have some benefits. Uniformity in some

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214. *Compare* Daniel S. Kleinberger & Carter G. Bishop, *The Next Generation: The Revised Uniform Limited Liability Company Act*, 62 BUS. LAW. 515 (2007) *with* Larry E. Ribstein, *An Analysis of the Revised Uniform Limited Liability Company Act*, 3 VA. L. & BUS. REV. 35 (2008) [hereinafter *Analysis*]; *See also* RIBSTEIN & KEATINGE, *supra* note 3, at Appendix E-2.

215. *See* RULLCA § 110 (stating restrictions on waivers of fiduciary duties); § 409 (contrasting open-ended "uncabined" fiduciary duties with the attempt by ULLCA 409 to "corral" such duties); and § 701(a)(5)(B) (stating oppressive or directly harmful action by managers or members in control of the LLC against a member is a nonwaivable ground for court-ordered dissolution).

216. *See* RULLCA §§ 301, -407 (eliminating statutory apparent authority that is, apparent authority based on one's position as a member of a member-managed LLC or as the manager of a manager-managed LLC and throw the question of apparent authority back to the common law of agency).

217. *See* RULLCA §§ 201(b)(3), -201(e), -701(a)(3). An LLC formed without any initial members is sometimes referred to as a "shelf LLC" -- it metaphorically sits on a shelf awaiting a member to pick it up. Under RULLCA, if the LLC lacks members on formation, the certificate of organization must so state, and the certificate lapses unless within a fixed period (RULLCA recommends ninety days) an organizer files a notice that the LLC has at least one member. *Analysis*, *supra* note 214, at 40-41.

instances may reduce compliance costs and promote nationwide certainty, predictability and consistency. But at present it is hard to say whether adopting RULLCA would bring Georgia closer to the consensus view or take it further away. It is possible that the convergence towards uniformity that has spontaneously emerged among the states might actually be at least partially undone by RULLCA, thereby creating more divergence than otherwise would have existed. Even with some big-name jurisdictions on its side,[218] it is uncertain whether RULLCA is enhancing uniformity, because RULLCA differs in so many respects from other LLC statutes. However, if RULLCA's burst of popularity presages additional state adoptions, then perhaps it will eventually lead to greater national uniformity.

Even if the adoption of RULLCA would ultimately lead to the homogenization of LLC law, some commentators stress the value of the diversity, choice and innovation that occur as states develop their own LLC statutes.[219] An LLC's operating agreement is a long-term contract.[220] The need for uniformity may be greater in the case of short-term contracts, where individualizing the terms would be unfeasible or inefficient.

One hypothesis is that, if LLC law were uniform, parties would expend less energy in choosing the state of formation. However, in practice, the cost involved in deciding where to form an LLC seems minimal, and eliminating or reducing choices may not result in any significant cost savings.[221] LLCs tend to choose their home state or Delaware; businesses and their advisors normally do not spend a great deal of time pouring over the particular provisions of LLC acts in an attempt to locate the ideal jurisdiction.[222] To the extent that LLC acts are only a series of default rules, the particulars of a state's LLC act should be irrelevant in making the choice of formation. Rather, parties concerned about an issue will more likely try to specify the desired result in the operating agreement, in preference to looking around for a default rule that is more to

218. *See supra* notes 205-12 and accompanying text.

219. *See, e.g.*, Larry E. Ribstein, *A Critique of the Uniform Limited Liability Act*, 25 STETSON L. REV. 311 (1995).

220. O.C.G.A. § 14-11-305(4)(A)-(B) (West 2012).

221. *See supra* Part II.

222. *See supra* Part II.

their liking.

In any case, at present there is no realistic prospect of national uniformity. Only a handful of states have adopted RULLCA and it is uncertain whether many others are interested in seriously considering it. Delaware, perhaps the most important state for LLC law, seems dedicated to developing and perfecting its own LLC law, and presenting itself as a superior alternative to other states. Delaware is unlikely to be a customer for RULLCA anytime in the foreseeable future.

B. Derivative Suits

The Georgia LLC Act is for the most part a series of default rules that the parties are free to vary. The right of an LLC member in Georgia to bring a derivative action is exceptional in that it appears not to be waivable.[223] The mandatory right of members to bring a derivative action is contrary to the Georgia LLC Act's general policy to favor freedom of contract.[224] This exception to the general rule is ironic in that it has been questioned whether the derivative suit is suitable at all in the LLC context,[225] and, therefore, one might not have expected the derivative suit to be singled out as compulsory.

Even if the right of a member to bring a derivative action is nonwaivable, the requirement of court approval to discontinue or settle a derivative action seems to be merely a default rule, which the operating agreement may supersede.[226] If the LLC operating agreement is free to set its own standards for the settlement or discontinuance of a derivative action, the member's right to bring a derivative action may have less bite than at first appears.

Regardless of the policies that might favor a modification of the derivative suit provisions, the 2009 amendments stayed away from any change affecting derivative suits simply because this is a hot button issue for too many people. However, it would be worthwhile, at some point, to revisit this area.

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223. O.C.G.A. § 14-11-801 (West 2012).

224. *See* O.C.G.A. § 14-11-201(b) (West 2012).

225. *See* Larry E. Ribstein, *Litigating in LLCs*, 64 BUS. LAW. 739 (2009); *see also* RIBSTEIN & KEATINGE, *supra* note 3, § 10:3.

226. O.C.G.A. § 14-11-804 (West 2012).

C. Low-Profit LLCS ("L3Cs")

The rise of social enterprises has brought with it a movement to enact statutes explicitly authorizing low-profit LLCs ("L3Cs"). As "[p]opularly defined, social enterprise means using traditional business methods to accomplish charitable or socially beneficial objectives. Social enterprise is quasi charitable. It is a hybrid. It is neither entirely profit-driven nor entirely philanthropic."[227] The L3C is only one of a number of recent innovations designed to promote the development of social enterprises.[228] It is quite possible to be enthusiastic about the potential of social enterprise for advancing the common good, while at the same time challenging the suitability of the L3C for playing any role in social enterprises.

L3Cs are LLCs that are intended to facilitate program-related investments ("PRIs") by private foundations.[229] PRIs are investments made primarily to accomplish charitable purposes and not income or appreciation of property.[230] Unfortunately, PRIs are expensive for private foundations to implement, and tax penalties for unqualified investments are harsh.[231] PRIs need review by experts, and in some instances may even require an IRS ruling. Ideally an L3C statute would streamline the review process. The L3C statutes explicitly incorporate the federal tax requirements applicable to PRIs as part of an L3C's purposes, and thereby present the superficial appearance of expediting compliance with those requirements.[232]

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227. Cassady V. Brewer, *A Novel Approach to Using LLCs for Quasi-Charitable Endeavors (A/K/A "Social Enterprise")*, 38 WM. MITCHELL L. REV. 678, 679 (2012).

228. *See* Elizabeth Carrott Minnigh, *A Brave New World: The L3C, Benefit, Flexible Purpose and Social Purpose Hybrid Models*, 53 TAX MGM'T MEMORANDUM 475 (Dec. 31, 2012). Although the social enterprise entities have been predominantly corporate, there are other formats besides the L3C that have been designed for LLCs. For example, Maryland law features a "Benefit LLC" modeled after the Benefit Corporation. MD. CODE ANN., CORPS. & ASS'NS §§ 4A–1101 to –1108 (West 2013).

229. I.R.C. § 4944(c) (2011).

230. *Id. See also* Luther M. Ragin Jr., *Program-Related Investments in Practice*, 35 VT. L. REV. 53, 55 (2010).

231. David A. Levitt, *Investing in the Future: Mission-Related and Program-Related Investments*, PRAC. TAX LAW. Spring 2011, at 33, 38.

232. Bradford E. Block, *L3C Doing Well and Doing Good: Low Profit Limited Liability Companies*, 99 ILL. B.J. 310, 311-12 (2011).

In 2008, Vermont became the first state to supplement its LLC act with L3C provisions, and since then a number of other jurisdictions have followed suit.[233] To some commentators the L3C is a promising development, but the LC3 has aroused some passionate opposition from others.[234] There are at best serious questions about the advisability of L3C legislation, and

233. 805 ILL. COMP. STAT. ANN. §§ 180/1-5, -10, -26, -180/5-5 (West 2013); LA. REV. STAT. ANN. §§ 12:1301, -1302(C), -1305(B)(3), -1306(A)(1)(b), -1309(A)(4) (2012); ME. REV. STAT. ANN. tit. 31, §§ 1502, -1508, -1509, -1511) (2012); MICH. COMP. LAWS ANN. § 450.4102 (West 2012); N.C. GEN. STAT. ANN. §§ 57C-2-01(d), -21(a)(6), -55D-20(a)(6) (West 2013); R.I. GEN. LAWS ANN. §§ 7-16-2, -9, -49, -76 (West 2012); UTAH CODE ANN. §§ 48-2C-412, -1411 (West 2012); VT. STAT. ANN. tit. 11, §§ 21.01, -.04, tit. 21, § 3023(a)(6) (West 2012); WYO. STAT. ANN. § 17-15-102(a)(ix) (West 2012). In addition, two Indian nations have adopted L3C provisions. *See Oglala Sioux Tribal Council Ordinance 09-23*, AMERICANS FOR CMTY. DEV., *available at* http://www.americansforcommunitydevelopment.org/downloads/OGLALA%20SIOUX%20L3C%20LAW.pdf. There is currently an estimated total of 825 L3Cs organized throughout the United States. *See Here's the Latest L3C Tally*, INTERSECTOR PARTNERS L3C, http://www.intersectorl3c.com/l3c_tally.html (last visited May 7, 2013). For a survey of the state statutes, see Carter G. Bishop, Fifty State Series: L3C and B Corporation Legislation Table, (February 15, 2013) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1561783##.

234. *See* Cassady V. Brewer, *Seven Ways to Strengthen and Improve the L3C*, 26 REGENT U. L. REV. (forthcoming) (advocating changes that he argues would salvage the concept as the L3C in its current form suffers from fundamental defects) [hereinafter *Seven Ways*]; Cassady V. Brewer & Michael J. Rhim, *Using The 'L3C' For Program-Related Investments*, TAX'N OF EXEMPTS, Nov./Dec. 2009, at 11. *But cf.* Daniel Kleinberger, ABA Business Law Section, on Behalf of Its Committees on LLCs and Nonprofit Organizations, Opposes Legislation for Low Profit Limited Liability Companies (L3Cs) (May 10, 2012) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2055823; J. William Callison & Allan W. Vestal, *The L3C Illusion: Why Low-Profit Limited Liability Companies Will Not Stimulate Socially Optimal Private Foundation Investment in Entrepreneurial Ventures*, 35 VT. L. REV. 273 (2010); Carter G. Bishop, *The Low-Profit LLC (L3C): Program Related Investment by Proxy or Perversion?*, 63 ARK. L. REV. 243 (2010); J. William Callison, *L3Cs: Useless Gadgets?*, BUS. L. TODAY, Nov./Dec. 2009, a*vailable at* http://apps.americanbar.org/buslaw/blt/2009-11-12/nonbindingopinions.shtml.

hopefully Georgia will not begin to authorize L3Cs until the value of the concept has been established. Although L3C legislation was introduced in Georgia in 2012,[235] such legislation reportedly has been deferred indefinitely.[236]

Many experts question whether, at least under current law, L3Cs facilitate PRI compliance, or whether instead they are a standing invitation to noncompliance.[237] Until federal tax law is changed to accommodate L3Cs, L3Cs appear to be no better or worse than standard LLCs. With some effort, it should be possible to draft a suitable operating agreement for a PRI under existing LLC acts, including the Georgia LLC Act.[238] If private foundations are under the impression that an L3C obviates the need for the diligence that would otherwise be required for a PRI, the L3C would be an attractive nuisance. Georgia should be reluctant to complicate its LLC law with provisions whose value at present is so questionable. If Congress adopts federal tax legislation that in some way blesses the use of the L3C, then the addition of L3C provisions to the Georgia LLC Act may become warranted. In the meantime, for anyone who is determined to use an L3C, it appears that an L3C formed in Vermont or another L3C jurisdiction should be able to register to do business in Georgia or any other state, although it may need to add "LLC" to its name in order to register in a non-L3C state.[239]

D. Series LLCs

A "series" LLC is an LLC that is formed as a single company, but with multiple internal divisions or series, as specially authorized by state law.[240] Each series may have

235. H.B. 594, 151st Gen. Assemb., Reg. Sess. (Ga. 2011).

236. *Seven Ways*, *supra* note 234, at n.7.

237. *See* sources cited *supra* note 234.

238. For an excellent general template, see Cassady V. Brewer & J. Haskell Murray, Sample Operating Agreement: A Georgia LLC with a Private Foundation Member Making a Program-Related Investment, (unpublished manuscript) (on file with the authors).

239. *See* Brewer & Rhim, *supra* note 234. There are a few L3Cs based in Georgia, such as SEEDR L3C (formed under Michigan law) and Virtuous Capital L3C (Vermont entity). INTERSECTOR PARTNERS L3C, *supra* note 233.

240. *See e.g.*, Jennifer Avery et al., *Series LLCs: Nuts and Bolts, Benefits and Risks, and the Uncertainties that Remain*, 45 TEX. J. BUS. L. 9 (2012).

separate business purposes or objectives, separate managers, separate assets, separate owners or members, and separate liabilities.[241] The series LLC offers engaging legal issues for the theorist, but the practical value of the series LLC, outside a few special contexts, has been less evident.[242] No one seems to question the value of series LLC in the right circumstances – unlike L3Cs, which have provoked some unmitigated hostility. However, many have embraced the untested series LLC concept too warmly and uncritically. Adding series LLC provisions to the Georgia LLC Act could contribute further to the mistaken notion that these entities are suitable for routine business and investment use. It is not too much to expect sophisticated parties, who choose to use series LLCs despite the risks and uncertainties, to form their series LLCs in Delaware or another series LLC state. The case for adopting series LLC provisions is stronger now than it was in 2009, largely because proposed regulations issued in 2010 brought the tax classification of series LLCs into sharper focus.[243] But these are only proposed

241. DEL. CODE ANN. tit. 6, § 18-215 (West 2013); 805 ILL. COMP. STAT. ANN. § 180/37-40 (West 2013); IOWA CODE ANN. § 490A.305 (West 2012) (repealed 2008); NEV. REV. STAT. ANN. § 86.296 (West 2011); OKLA. STAT. ANN. tit. 18, § 2054.4(B) (West 2012); TENN. CODE ANN. § 48-249-309 (West 2012); TEX. BUS. ORGS. CODE ANN. § 101.601 (West 2011); UTAH CODE ANN. § 48-2c-606 (West 2012).

242. *See generally* Thomas E. Rutledge, *The Man Who Tells You He Understands Series Will Lie to You About Other Things As Well*, J. PASSTHROUGH ENTITIES, Mar./Apr. 2013, at 69 (2013) (discussing the uncertainty of the series LLC); Cara Griffith & Shonda Humphrey, *A Look at the Benefits and Pitfalls of Series LLCs*, 2012 TAX NOTES 53 (July 2, 2012); Bradley T. Borden & Mathews Vattamala, *Series LLCs in Real Estate Transactions*, 46 REAL PROP., TR. & EST. L.J. 255, 259 (2011) (presenting evidence that "[a]t a minimum, tens of thousands of series LLCs exist today."); Christopher McLoon & Margaret Callaghan, *The Dangerous Charm of the Series LLC*, 24 ME. B. J. 266 (2009); Thomas E. Rutledge, *Again, For the Want of a Theory: The Challenge of the 'Series' to Business Organization Law*, 46 AM. BUS. L. J. 311 (2009).

243. *Internal Revenue Bulletin* No. 2010-45, 626 (Nov. 8, 2010). For some commentaries on the Proposed Regulations and the current tax treatment of series LLCs see Allen Sparkman, *Tax Aspects of Series LLCs*, BUS. L. TODAY, Feb. 22, 2013, *available at* http://apps.americanbar.org/buslaw/blt/content/2013/02/article-03-sparkman-b.shtml; N.Y. STATE BAR ASS'N TAX SECTION, REPORT ON PROPOSED REGULATIONS CONCERNING SERIES ORGANIZATIONS (Aug. 5, 2011),

regulations, and even if they did represent current law they would leave many issues unresolved. Among other problems, these are only federal tax regulations, and the authorities have barely begun to explore the state tax implications of the series LLC.[244]

A series LLC is often seen as an alternative to either forming a non-series LLC with multiple divisions or branches, or to forming multiple LLCs. Potential reasons that may be adduced in favor of forming series LLCs rather than multiple LLCs include reduced filing fees, franchise taxes, and formation costs. It is possible to establish a new series at a moment's notice as any number of series can be placed under the same management structure, and recordkeeping for all series may be combined. For example, multiple series of one LLC may have the same board, the same officers, and the same annual meeting.

However, the advantages of a series LLC over multiple LLCs can easily be exaggerated. Some states treat each series as a separate company for purposes of fees and taxes, so the cost savings may be smaller than expected. Multiple LLCs can be formed quickly and relatively inexpensively, although the costs

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available at http://www.nysba.org/Content/ContentFolders20/TaxLawSection/TaxReports/1245Rpt.pdf; AM. BAR ASS'N SECTION OF TAXATION, COMMENTS ON REG-119921-09 PROPOSED REGULATIONS ON SERIES OF A DOMESTIC SERIES ORGANIZATION (Apr. 29, 2011), *available at* http://meetings.abanet.org/webupload/commupload/TX329000/newsletterpubs/Reg_119921_09.pdf); M. McLoughlin & B. Ely, *IRS Issues Long-Awaited Guidance on Series LLCs; Will the States Soon Follow?*, 20 J. MULTISTATE TAX'N 8 (2011); Carter G. Bishop, *The Series LLC: Tax Classification Appears in Rear View*, 2011 TAX NOTES 12 (Jan. 17, 2011). For a table summarizing each state's series LLC provisions and published guidance on series LLCs, see Bruce P. Ely, Christopher R. Grissom & William T. Thistle, *State Tax Treatment of LLCs and LLPs – An Update*, 2013 TAX NOTES 401 (Feb. 11, 2013).

244. Some state issues include: Will the "master" or "parent" LLC and each series be liable for its own franchise tax and fees? For purposes of income tax nexus, will a state disregard separate series and treat each the LLC as a single entity? Will apportionment apply separately to the master and each series, or to the LLC as a whole? Will sales tax apply on transfer among series of one LLC? How will each state tax a series LLC as a whole?

add up as the number of separate LLCs increases.[245] Multiple LLCs can often be arranged to be under unified management and governance, as there is usually no need under state law for any LLC to have its own directors, officers, or meetings, or to have any directors, officers, or meetings at all.[246] Recordkeeping is not necessarily more efficient, because in order to rely on the internal liability shield each series ought to have separate records. In addition, if each series is treated as a separate partnership for tax purposes, which is likely to be the case for any series in which two or more members have economic interests, then separate records, as well as separate tax returns, will be essential.

On the other hand, if the business is subject to a regulatory scheme that requires each separate entity to have a separate board, separate managers, separate licenses, or to make separate filings, the advantages of the series LLC relative to multiple LLCs may be greater. Of course, the extent to which the series LLC will reduce regulatory compliance burdens, relative to multiple LLCs, depends on the particular regulatory scheme. For example, will the relevant state or local jurisdiction permit several series of a single LLC to share one liquor license?[247]

A series LLC arguably will facilitate the fine-tuning of members' rights. For example, member X might own 100% of Series 1, 50% of Series 2, 20% of Series 4, and 0% of Series 5. However, the same results are already possible, but perhaps with less convenience, by inserting comparable fine-tuning provisions into the operating agreement of a non-series LLC.

There is no internal liability shield in a non-series LLC, and in the minds of at least some advisors the big advantage of a series LLC over a non-series LLC is liability protection. The assets of one series of the LLC are thought to be insulated from the liabilities of another series. The internal liability shield is

245. Segregated portfolio companies, used in high-volume securitizations or other structured finance transactions. For example, you can form fifty series of an LLC, to issue interests in fifty pools of assets; no need to form fifty separate LLCs.

246. *See generally* BISHOP & KLEINBERGER, *supra* note 3, ¶ 3.08.

247. *See, e.g.*, Bernie R. Kray, Comment, *Respecting the Concept and Limited Liability of a Series LLC in Texas*, 42 ST. MARY'S L. J. 501, 524 n.100 (2011) ("[I]t is unlikely that a series LLC could hold one Texas liquor license for multiple locations.").

perhaps the one feature of the series LLC that cannot be replicated within a Georgia operating agreement. Unfortunately, the degree to which the series LLC offers liability protection is untested at best.[248] For businesses that are seriously concerned about insulating liabilities, multiple LLCs are by far the safer route.

One problem with relying on the internal liability shield of the series LLC is that states lacking series LLC statutes may refuse to recognize the separate liability of separate series of a single LLC.[249] The Georgia LLC Act is typical in its statement of the "internal affairs" doctrine: "The laws of the jurisdiction under which a foreign limited liability company is organized govern its organization and internal affairs and the liability of its managers, members, and other owners . . . ." [250] Under this doctrine, the liability of the member of, for example, a Delaware LLC for debts of the LLC should be governed by Delaware law. At least on its face, however, this section of the Georgia LLC Act says nothing about the liability of one part (or "series") of the Delaware LLC for debts of other parts (or "series") of the Delaware LLC.

Even if Georgia does not adopt its own series LLC legislation, it may be worth considering an amendment to the Georgia LLC Act so as not to discourage out of state series LLCs from doing business in Georgia. An amendment might address the status of out-of-state series LLCs doing business in Georgia, including the recognition of the internal liability shield and the mechanics of registering a foreign series LLC to do business in Georgia.

248. *See, e.g.*, Michelle Harner, Jennifer Ivey-Crickenberger & Tae Kim, *Series LLCs: What Happens When One Series Fails? Key Considerations and Issues*, BUS. L. TODAY, Feb. 2013, at 1, *available at* http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=2303&context=fac_pubs; *see also* Amanda J. Bahena, *Series LLCs: The Asset Protection Dream Machines?*, 35 J. CORP. L. 799 (2010).

249. *See* Allen Sparkman, *Series LLCs in Interstate Commerce*, BUS. L. TODAY, Feb. 2013, at 1, *available at* http://apps.americanbar.org/buslaw/blt/content/2013/02/article-03-sparkman-b.pdf.

250. O.C.G.A. § 14-11-701(a) (West 2012).

E. Restricted LLCs

An even more recent innovation is the Restricted LLC, which, along with the "Restricted LP," was started in Nevada in 2009 as a means to boost estate tax valuation discounts.[251] The default rule applicable to a Restricted LLC restricts distributions to members for a ten-year period.[252] It has been reported that the draftsman of Nevada's Restricted LLC Act believes that certain other "more proactive states" will need to move forward with Restricted LLC statutes "in order to stop Nevada from having a monopoly on all valuation discount transfers."[253] Nevada evidently hopes Restricted LLCs will entice estate planners from around the country. However, the authors, at this time, are not aware of any interest in Georgia to follow Nevada's lead.

F. LLCs and UCC Article 9

Security interests under Article 9 of the Georgia Uniform Commercial Code create at least the appearance of superseding LLC transfer restrictions that would otherwise be enforceable.[254] The extent to which the appearance reflects an underlying reality is the subject of much debate. However, Delaware and a few other jurisdictions have resolved the issue by expressly granting priority to the LLC agreement over certain potentially conflicting provisions in the versions of Article 9 adopted in those states.[255]

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251. *See* Thomas E. Rutledge, *The Nevada Restricted LLC/LP: Damned if You Do and Damned if You Do*, J. PASSTHROUGH ENTITIES, Mar./Apr. 2010, at 43; Steven J. Oshins & Robert S. Keebler, *New Nevada Restricted LLC and LP Law: An Ideal Combination With a Graduated GRAT*, 37 EST. PLAN. J. 28 (Jan. 2010).

252. *See* NEV. REV. STAT. ANN. § 86.161 (West 2011).

253. Phil Kavesh, *Interview with Steven J. Ohins, Esq. on Nevada Restricted LLC/LP*, WEALTH STRATEGIES J., June 22, 2011, *available at* http://www.wealthstrategiesjournal.com/articles/2011/06/interview-with-steven-j-oshins.html.

254. *See* O.C.G.A. §§ 11-9-406 to -408 (West 2012).

255. TEX. BUS. ORGS. CODE ANN., §§ 101.106, -154.001 (West 2011); DEL CODE ANN. tit. 6, § 18-1101(f), (g), §§ 9-408(e), -406(i) (West 2013); VA. CODE ANN. §§ 8.9A-406(k), -408(g), 13.1-1001.1(B), 50-73.84(c) (West 2012); KY. REV. STAT. ANN. §§ 275.255(4), 362.1-503(7), 362.2-702(8) (West 2012); COLO. REV. STAT. ANN. §§ 7-90-104, -109(44) (West 2013); MISS. CODE ANN. § 79-29-711 (West 2012). The Revised Prototype Limited

Many LLC practitioners in Georgia would welcome a statutory award of priority to LLC transfer restrictions over contrary (or apparently contrary) rules in Article 9. However, such a statutory provision could not be proposed by the Georgia Bar Association as part of the 2009 amendments because opposition from the Uniform Commercial Code Committee of the Business Law Section rendered it controversial. UCC lawyers and business entity lawyers tend to look at the issue from widely divergent points of view and have not found a mutually satisfactory resolution.[256] However, many LLC practitioners believe the absence of an Article 9 override inevitably means that, in at least some instances, any marginal benefit of organizing an LLC in Georgia, rather than Delaware, is not worth the risk.

As explained in Part III,I *supra*, Georgia's default rules on LLC transfers draw a distinction between economic rights and governance rights. The LLC "interest" (i.e., the set of economic

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Liability Company Act also proposes a UCC override, based on the Delaware and Virginia provisions. *Revised Prototype*, *supra* note 202.

256. For an explanation from the point of view of Uniform Commercial Code lawyers, see Steven O. Weise, *PEB COMMENTARY NO. ____; Application of UCC Sections 9-406 and 9-408 to Transfers of Interests in Unincorporated Business Organizations*, ST044 ALI-ABA 377, 380 (2012) (noting "a perception that § 9-406 and § 9-408 are at odds with the types of transfer restrictions that are common in the context of unincorporated business organizations," including contractual transfer restrictions in business entity agreements) (on file with the John Marshall Law Journal). Comments on the draft were due no later than April 2, 2012, but according to a Feb. 25, 2013 email that the authors received from the American Law Institute, no such comments are publicly available. *Id.* For other explanations of U.C.C. sections 9-406 and 9-408 as applied to LLCs, see Neil B. Cohen & William H. Henning, *Freedom of Contract vs. Free Alienability: An Old Struggle Emerges in a New Context*, 46 GONZ. L. REV. 353 (2010-2011); Dennis B. Arnold, *Enforcing Security Interests in Membership Interests and Partnership Interests Under Revised Article 9 of the Uniform Commercial Code*, 535 PLI/REAL 717, 753-54 (2007), MUÑOZ, SARASEK & STEIN, COMMERCIAL REAL ESTATE FINANCING 2009: HOW THE WORLD CHANGED 297 (Practising Law Institute 2009); Allan G. Donn, *Revised UCC Article 9 and Other Recent Developments Affecting Unincorporated Business Organizations*, J. PASSTHROUGH ENTITIES, Mar./Apr. 2002, at 15.

rights) is assignable by default.[257] Under the default rule, a member who assigns its entire LLC interest ceases to be a member, although the pledge of an interest is not in itself an assignment.[258] Also by default, the assignee can become a member only with the unanimous consent of all the other members.[259]

However, freedom of contract is the essence of Georgia LLC law and the default rules exist only for the sake of LLCs that have not reached agreement on a particular point. In evaluating the merits of an override of Article 9, it is irrelevant whether the result under Article 9 conforms to the LLC default rules. The default rules should exert no influence over an LLC that, in its articles of organization or operating agreement, chooses to vary them.[260] Many LLC agreements prohibit the assignment and even the pledge of an interest without some level of member consent. Because the Georgia LLC Act gives "maximum effect" to the enforceability of an LLC's operating agreement, the members may expect that prohibitions imposed by the operating agreement will protect them from having to recognize a member's creditor as an assignee of the interest.

LLC interests are sometimes pledged as security,[261] whether

257. O.C.G.A. § 14-11-502 (West 2012). A pledge in itself is not considered an assignment: "[t]he pledge of, or granting of a security interest, lien, or other encumbrance in or against, any or all of the limited liability company interest of a member is not an assignment. . ." *Id.* at art. 502(7).

258. *Id.* at art. 502(6)-(7).

259. O.C.G.A. § 14-11-503(1) (West 2012).

260. *See* O.C.G.A. §§ 14-11-502, -503, -1107(b) (West 2012). *See also* Donn, *supra* note 256, at 15 ("It is customary in an agreement governing closely held entities to restrict the transferability of interests in the entity. . . . [I]t is also customary to impose restrictions on the rights of the owners to impose liens on their interests. Generally, unincorporated business organization statutes expressly recognize restrictions on transfer of ownership interests."). *But see* RTS Landfill, Inc. v. Appalachian Waste Sys., LLC, 598 S.E.2d 798, 802-03 (Ga. Ct. App. 2004) (reaching the surprising conclusion that a below-market "Right of First Refusal and Purchase Option" on LLC interests was unenforceable as an unreasonable restraint on alienation of personal property).

261. Lynn A. Soukup, *It's a Matter of Collateral: LLCs, Partnerships and the UCC*, BUS. L. TODAY, Jan./Feb. 2005, at 53; Michael VanNeil & James W. May, *Limited Liability Company Membership Interests: What a Lender*

or not such pledges violate the LLC agreement. Article 9 gives at least the appearance of rendering such prohibitions "ineffective," as Article 9 favors the alienability of interests and invalidates many restrictions on assignment.[262] There is inevitably a tension between the LLC policy stressing freedom of contract and the Article 9 policy exalting freedom of alienability.[263] In 2001, changes in Article 9 highlighted this tension and prompted Delaware and other states to adopt non-uniform provisions to defuse the tension.[264] If an LLC member pledges its interest in the LLC to secure a debt of the member, to what extent will Article 9, as amended in 2001, override restrictions set forth in the LLC's operating agreement or articles of organization?

The categorization of property determines which UCC provisions apply to perfection, priority, and transfer restrictions.[265] These provisions negate contractual and statutory anti-assignment provisions that would otherwise impede the transfer of "general intangibles," a catch-all type of personal property under which most interests in LLCs fall.[266]

Needs to Do with LLC Collateral on Default, BUS. L. TODAY, Mar./Apr. 2009, at 47.

262. *See* U.C.C. §§ 9-406(d), -408 (2011).

263. *See generally* Cohen & Henning, *supra* note 256, at 353. As summarized by Cohen and Henning, the fundamental conflict is that

> our legal system gives effect to contractual provisions agreed to by the parties to a transaction unless they run afoul of a strong public policy. Yet, the history of that same system has been to disfavor restraints on alienation of property. Obviously, these two concepts cannot both be effectuated . . . either the contractual restriction will be given effect (at the expense of free alienability) or free alienability will prevail (at the expense of the contractual prohibition).

Id.

264. *Id*. at 369-71.

265. Part 4 of Article 9 of Georgia's Unified Commercial Code contains provisions intended to free certain types of property to be used as collateral for loans. O.C.G.A. §§ 11-9-406 to -408 (West 2013). *See* Lynn A. Soukup & Plamen I. Russev, *Payment Obligations and Other Property as Collateral: Contractual Restrictions on Assignment Rendered Ineffective by Article 9*, 37 UCC L.J. 35 (2005).

266. O.C.G.A. § 11-9-102(a)(43) (West 2013) (defining general intangible as "any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods,

Thus, on its face, Article 9 appears to override otherwise enforceable provisions in an LLC's governing documents that restrict assignments of membership interests. Those who claim that the Article 9 override applies in only very narrowly limited circumstances sometimes argue that Article 9 only overrides those agreements to which the LLC is a party and that it does not invalidate transfer restrictions agreed upon among LLC members.[267]

Whatever the theoretical merits of the arguments for and against a statutory override of the Article 9 restrictions, the failure of the 2009 amendments to include a UCC override inevitably increases the attractiveness of certain other states, particularly Delaware, over Georgia for LLC formations. Although the authority is not clear, it appears that the law of the jurisdiction in which the LLC is formed will determine whether the UCC renders transfer restrictions ineffective.[268] Even if the Draft PEB Commentary is most likely correct that Article 9 is benign, is there any reason for the LLC owners to take a chance? At least for the non-specialist lawyer and judge those UCC provisions approach inscrutability.

LLC practitioners may be unable to confidently predict the extent to which a Georgia court would protect the LLC from a member's secured creditors. In advising an LLC about selecting a state of formation, the attorney wants to ensure that the agreement of the members will be respected. The LLC and its founding members would not be seeking to assist a member's hypothetical potential future creditor in getting

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instruments, investment property, letter of credit rights, letters of credit, money, and oil, or other minerals before extraction. The term includes payment intangibles and software"). A more difficult question is whether rights with respect to an LLC constitute "payment intangibles" under section 9-406?

267. *See, e.g.*, Cohen & Henning, *supra* note 256, at 406; Soukup & Russev, *supra* note 265, at § VI, ¶ 2 ("[T]he anti-assignment provision . . . may be viewed as a restriction in an agreement among the members of the LLC or partnership (and not . . . between the account debtor and an assignor), in which case sections 9-406(d) and 9-408(a) will not apply to negate the restriction.").

268. *See* U.C.C. § 9-401, cmt. 3 (2011); Soukup & Russev, *supra* note 265; Donn, *supra* note 256, at 18 ("Assuming that the Delaware rule will prevail, then that would be another reason for a closely held entity to consider Delaware as the state of organization.").

around the restrictions that the members agreed to in the operating agreement. From that perspective, if there is even a marginal risk that restrictions on transferability of interests as reflected in the operating agreement of a Georgia LLC will succumb to challenges by such a secured creditor, then some LLCs will decide that forming in Delaware is worth the trouble.

G. Charging Orders Against Single Member LLCs

When the surge in LLCs over the last twenty years collided with the financial crisis that began in 2008, the charging order, previously a rather obscure creditor remedy, attained sudden prominence.[269] As discussed in Part VI.I, *supra*, the 2009 amendments attempted to clarify the nature of a charging order under the Georgia LLC Act.[270] The question of whether the single-member LLC ought to be treated differently than the multi-member LLC has become especially pressing in recent years as courts and legislatures attempt to deal with the single-member LLCs that are being established to protect an individual's assets from his or her creditors. For example, in response to *Olmstead v. Federal Trade Commission*,[271] the Florida legislature expressly prohibited foreclosure on a charging order except as to a single-member LLC.[272] Other

269. Some recent commentaries on charging orders include: Jay D. Adkisson, Carter G. Bishop & Thomas E. Rutledge, *Recent Developments in Charging Orders*, BUS. L. TODAY, Feb. 2013, at 1, *available at* http://apps.americanbar.org/buslaw/blt/content/2013/02/article-04-adkisson.pdf; John M. Malloy, Craig J. Langstraat & James M. Plenik, *Charging Order Protection Can Be a Chameleon*, 90 TAXES 59, 64 n.33 (2012) (listing 16 states "that do not explicitly say that the charging order is the sole remedy for a creditor" but fails to include Georgia); Carter R. Bishop, *LLC Charging Orders: A Jurisdictional and Governing Law Quagmire*, 12 J. BUS. ENTITIES 14 (2010); Alan S. Gassman & Sabrina M. Moravecky, *Charging Orders: The Remedy for Creditors of Debtor Partners*, ESTATE PLANNING, Dec. 2009, at 21; Thomas E. Rutledge, Carter G. Bishop & Thomas Earl Geu, *Foreclosure and Dissolution Rights of a Member's Creditors: No Cause for Alarm*, 21 REAL PROP. TRUST & EST. L. J. 35 (2007).

270. *See supra* notes 150, 153, 155-59 and accompanying text.

271. 44 So. 3d 76 (Fla. 2010).

272. FLA. STAT. ANN. § 608.433(6)-(8) (West 2013).

states have also been wrestling with this issue.[273]

The 2009 amendments did not address issues that arise with respect to "asset protection" vehicles. No attempt was made to render Georgia any more suitable, or any less suitable, for asset protection vehicles than it had previously been. However, the issues created by single-member LLCs are important and ought to be considered in the future.

H. Partnership Acts

Given the dominance of the LLC among unincorporated Georgia entities, interest within the Georgia bar in reworking the Georgia partnership acts has been tepid at best. Although the Committee initiated a review of the Georgia RULPA after completing its review of the Georgia LLC Act, the review stalled because the enthusiasm felt for modernizing the Georgia LLC Act simply did not exist in the case of the Georgia RULPA.[274] As of April 8, 2013, Georgia LLCs outnumbered Georgia limited partnerships by 332,164 to 16,657, a ratio of nearly 20 to 1.[275] These statistics alone make it evident why practitioners might place a relatively low priority on improving the Georgia RULPA.

As the review of Georgia RULPA began, there was no sentiment within the Committee in favor of replacing the current statute with the longer and more complicated Uniform Limited Partnership Act ("Re-RULPA").[276] Re-RULPA is a "stand-alone" limited partnership act, while the Georgia RULPA is entwined with the Georgia Uniform Partnership Act.[277] There was little appetite for drafting or defending such a

273. For the positions taken by LLC statutes in other states see *Fifty State Series*, *supra* note 160.

274. O.C.G.A. §§ 14-9-100 to -1204 (West 2013).

275. *Supra* note 5.

276. UNIF. LTD. PART. ACT 2001 § 101 to –1207 (2012). Re-RULPA reportedly has been adopted in 18 states. The Nat'l Conference of Comm'rs on Uniform State Laws, *Legislative Fact Sheet – Limited Partnership Act*, UNIFORM LAW COMMISSION, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Limited%20Partnership%20Act (last visited April 21, 2013).

277. *See* O.C.G.A. § 14-9-1204 (West 2013) ("[T]he 'Uniform Partnership Act,' shall govern in any case not provided for in [the Georgia Revised Uniform Limited Partnership Act].").

potentially destabilizing change when few complaints about the current state of affairs were being heard from practitioners. Even if the Committee were to revive its attempt to take a hard look at the Georgia RULPA, the authors believe it is very unlikely that the Committee would recommend Re-RULPA because it would require a thorough overhaul of the current limited partnership act, including a "de-linking" of the limited partnership act from the general partnership act. While a project to revise the Georgia RULPA inspired relatively little interest, the prospect of slogging through the Georgia Uniform Partnership Act seemed to generate virtually none at all.[278]

I. Conformity to Corporate Code

In the authors' opinion, there are and should be numerous differences between the Georgia LLC Act and the Georgia Business Corporation Code.[279] On the other hand, because the two statutory schemes are not always considered in tandem when one or the other is amended, some of the differences may be historical accidents that ought to be eliminated. The Committee did not undertake to comprehensively review the many differences to determine whether some of them ought to be eliminated. However, a handful of the 2009 amendments do bring the corporate code and LLC act closer together.[280] In addition, the State Bar of Georgia's Corporate Code Committee of the Business Law Section has been conducting a review of the Georgia Business Corporation Code. As part of that review the members of that committee have discussed with the Committee the possibility of eliminating unnecessary discord between the Georgia Business Corporation Code and the Georgia LLC Act.

278. O.C.G.A. §§ 14-8-1 to -63 (West 2013). The Georgia Uniform Partnership Act is based on the Uniform Partnership Act (1914) ("UPA"), rather than the Uniform Partnership Act (1994, amended 1997) ("RUPA"), which puts Georgia distinctly in the minority. *See* The Nat'l Conference of Comm'rs on Uniform State Laws, *supra* note 276. However, Georgia has modernized its act by, for example, authorizing the "limited liability partnership" election. *See* O.C.G.A. § 14-8-62 to –64 (West 2013).

279. O.C.G.A. § 14-2-101 to -1703 (West 2013).

280. *See supra* Part VI.

VIII. CONCLUSION

LLCs are a relatively new form of entity when compared to corporations and partnerships. The partnership model, particularly that of the limited partnership, exerted great influence on the Georgia LLC Act from the outset. Nevertheless, the LLC form has increasingly been adopted in situations where formerly a corporation would have been the natural choice. The adopters are often at best vaguely aware that LLCs are not corporations. A challenge facing drafters of LLC legislation is to accommodate reasonable expectations of businesses that use LLCs in place of corporations, without undermining the un-corporate characteristics that have been fundamental to LLCs.

Many of the 2009 amendments can be seen as modifying the default characteristics of Georgia LLCs to accentuate their resemblance to corporations. For example, some amendments were designed to ensure that the liability protection enjoyed by LLC members is comparable to corporate shareholders' limited liability. In addition, the 2009 amendments help ensure the continuity of the LLC's existence, reinforcing the identity of the LLC as an entity separate from its members, and equating the Georgia LLC Act to the Georgia corporate code in minor respects. Other changes, however, clarified some of the key un-corporate aspects of LLCs, most importantly the principle that economic rights do not entail membership rights. The same tension between un-corporate and corporate attributes is visible in many of the possible future changes. For example, some of the controversies surrounding charging orders and UCC Article 9 concern the extent to which "pick your partner," a principle derived from partnership law, does and should apply.