Business Law Update

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- 7. <u>Bagby v. First St. Deli II, LLC, 2023 WL 5092833 (Iowa Ct. App. 2023)</u>

Federal Legislative Developments

<u>New Beneficial Ownership Information Reporting Requirements for Business Entities</u> <u>Under the Federal Corporate Transparency Act (CTA), 33 U.S.C. § 5336</u>

Beginning on January 1, 2024, the CTA will require many companies in the United States to report information about their beneficial owners, i.e., the individuals who ultimately own or control the company. Reporting companies will have to provide the information to the Financial Crimes Enforcement Network (FinCEN), a bureau of the U.S. Department of the Treasury. The CTA is being implemented through regulations that were finalized by the Treasury Department in 2022. *See* 31 CFR § 1010.380.

Overview of CTA Requirements:

- The CTA was passed and is being implemented to combat money laundering and other illicit activities through shell corporations and similar entities. The CTA requires a "Reporting Company" to disclose certain basic company information (e.g., name, business address, jurisdiction of formation, tax i.d. number), as well as "Beneficial Ownership Information" (BOI), described below, in reports filed with FinCen through an electronic interface.
- "Reporting Companies" under the CTA include entities that are created or registered by filing a document with a secretary of state or similar offices at the state level. Reporting Companies thus include corporations, LLCs, LLPs, LLLPs, and non-profit corporations, but not general partnerships or sole proprietorships.
- An entity that otherwise qualifies as a Reporting Company does not need to file reports under the CTA *if* the entity meets the requirements for an exemption from reporting. Exempt entities generally include heavily regulated business entities or large operating companies, and non-profits that are tax exempt under IRC § 501(c)(3). The vast majority of private businesses, and many non-profit businesses, will NOT qualify for an exemption.
- A Reporting Company's BOI must cover the following persons, all of whom are caught by the "Beneficial Owner" definition:

(1) individuals who own or control at least 25% of the company's ownership interest;

(2) individuals who exercise "substantial control" over the company, like the CEO, CFO, COO, and general counsel;

(3) individuals who hold the power to appoint or remove a majority of the company's governing board or senior officers; and

(4) individuals who direct, determine, or have substantial influence over important decisions made by the Reporting Company, like organic transactions, major expenditures, issuance of debt or equity, and approval of the Reporting Company's operating budget.

- Specified personal identifying information included in BOI must include each Beneficial Owner's name, date of birth, physical residence address, and unique identifier number from a recognized issuing jurisdiction (e.g., driver's license or passport) and a photo of that document.
- For Reporting Companies formed on or after January 1, 2024, BOI must also be reported for "Company Applicants" (i.e., incorporators and organizers), including those who directed the formation filing. In the case of a Company Applicant, however, a business address may be provided rather than a residential address.
- BOI in the reports filed with FinCen will not be publicly available, but will be accessible by federal and state law enforcement agencies.
- A Reporting Company or a Beneficial Owner for whom BOI must be reported can provide the necessary information to FinCen through a registration process that results in a FinCen Identifier, which can then be used in lieu of BOI for reporting purposes.
- A Reporting Company formed on or after January 1, 2024 will have 30 days to file the intial report with FinCen.
- A Reporting Company in existence on January 1, 2024 will have one year (i.e, all of calendar year 2024) to file the initial report.
- After an initial report is filed, a Reporting Company must promptly (i.e., within 30 days) file updates with FinCen if relevant information changes.
- There are civil and criminal penalties for non-compliance.

The above summary is by no means a complete description of the CTA's requirements. Helpful resources include:

- FinCEN's BOI Webpage: <u>https://www.fincen.gov/boi</u>
 FinCEN's Small Business Resources: <u>https://www.fincen.gov/boi/small-business-resources</u>
 FinCEN's Reference Materials: <u>https://www.fincen.gov/boi/Reference-materials</u>
 FinCEN's Small Entity Compliance Guide: <u>Small Entity Compliance Guide</u> |
 <u>FinCEN.gov</u>
 FinCEN's Frequently Asked Questions resource: <u>Beneficial Ownership Information</u>
 <u>Reporting | FinCEN.gov</u>
- Many published articles are available on-line. <u>See, e.g., William E. Quick, The</u> <u>Corporate Transparency Act: Deniers Beware, BUSINESS LAW TODAY, July 10, 2023</u>

Iowa Legislative Developments

- 1. <u>HF 655</u> amends Iowa Code Ch. 489 (Iowa's Revised Uniform Limited Liability Company Act) to conform substantially to the 2013 edition of the ULC's Uniform Limited Liability Company Act.
 - For detailed information, see the Appendix to this Outline—a 30-slide Powerpoint presentation authored by David Walker and Bill Boyd (hereafter *Appendix Slides*_).
 - The LLC materials in my *Iowa Practice—Business Organizations* volumes for 2023-24 (forthcoming from Thomson Reuters and available now on Westlaw) also reflect HF 655's revisions to Ch. 489.
 - History of Iowa's LLC Laws and Importance of LLCs See Appendix Slides 2-9.
 - o Ch. 490A 1992-2008
 - Ch. 489 (based on RULLCA 2006) 2009-2023
 - Ch. 489 as amended by HF 655 (based on ULCCA 2013) 2024-?
 - Overview of Ch. 489 as amended by HF 655
 - Substantial continuity from Ch. 489 as enacted in 2008
 - New definitions and some re-numbering
 - Better coordination with IBCA and other entity acts
 - A few key changes (see below)
 - Key Changes to Ch. 489
 - New definitions and/or re-numbering include several critical concepts, like the "Operating Agreement" (OA). The OA definition is unchanged but is now in § 489.102(19).
 - Permissible OA variations and other rules on the effect of OAs are now in §§ 489.105-489.107. The revised provisions reflect a modest increase in flexibility for terms that may be included in OAs. *See Appendix Slides* 13-15.
 - The "Registered Office" concept disappears for Iowa LLCs and is replaced by a requirement that the LLC's "Registered Agent" must have a place of business in Iowa.
 - The "Duty of Care" in an LLC is modified to require the fiduciary to "*refrain from engaging in grossly negligent or reckless conduct, willful or intentional misconduct, or knowing violation of law.*" The new language reflects a relaxation of the duty of care from the former version of Ch. 489, which used "ordinary care" language. However, the

former "ordinary care" standard was explicitly subject to a statutorilydefined "business judgment rule" that afforded substantial discretion to fiduciaries. *See Appendix Slide 18*.

- Charging order rules in § 489.503 now provide that if a charging order is foreclosed against a membership interest in a sole-member LLC, the purchaser at the foreclosure sale succeeds to the member's management rights, as well as to the member's economic interests. *See Appendix Slide 21*.
- "Administrative dissolution" is added as an event of dissolution in § 489.701 (*see Appendix Slide 24*).
- Although § 489.701(d) still includes authority for judicial dissolution of an LLC on the basis of "oppression," transferees may no longer invoke that remedy.
- There are two new important rules regarding LLC derivative suits. *See Appendix Slides 25-26.*
 - Under § 489.802 (formerly § 489.902) derivative suits are now subject to a "universal" demand rule with no "futility" exception.
 - Under new § 489.806 an LLC may establish a "Special Litigation Committee" (SLC) in response to a derivative suit. While an LLC's OA may not modify § 489.806's requirements for a valid SLC, the OA may provide that the LLC may not appoint an SLC.
- Rules for foreign LLCs are now in Part 9 of Ch. 489 and substantially conform to foreign corporation registration provisions in the IBCA. Rules for merger, conversion, and domestication transactions involving LLCs remain in Part 10 of Ch. 489 but now include "interest exchange" transactions and track parallel provisions in Parts 9 and 11 of the IBCA. *See Appendix Slide 27.*
- 2. <u>HF 352</u> establishes a state and local tax limit workaround that would allow certain individual income taxpayers (owners of partnerships and S Corporations who make a voluntary election) to pay an Iowa income tax through their pass-through partnership or S Corporation.
- **3.** <u>**HF 553**</u> allows a "covered entity," as defined by the legislation, to establish an affirmative defense to a tort claim alleging failure to implement reasonable information security controls resulted in a data breach concerning personal or restricted information.

4. <u>HF 675</u> amends Iowa's Uniform Money Services Act to become the Uniform Money Transmission Modernization Act.

Case Law Developments

Federal Decisions:

1. <u>Mallory v. Norfolk S. Ry. Co., 600 US 122, 143 S.Ct. 2028 (2023)</u>, turned away a Due Process challenge to a Pennsylvania statute that subjects out-of-state corporations that register to do business in Pennsylvania to general jurisdiction. As summarized in an on-line Supreme Court Business Docket report by Wachtell, Lipton, Rosen & Katz:

The Court, in an opinion authored by Justice Gorsuch and joined by Justices Thomas, Alito (in part), Sotomayor, and Jackson, grounded its analysis in a pre-International Shoe precedent from 1917, which it deemed controlling, and the notion that registering foreign corporations effectively "consented" to personal jurisdiction—a waivable defense, after all. The immediate implications of the decision of Mallory are limited, as Pennsylvania's statutory scheme, at the moment at least, stands alone in its breadth. But as Justice Barrett warned in dissent, "[i]f States take up the Court's invitation to manipulate registration," the Court's general jurisdiction precedents—which generally limit such all-purpose jurisdiction to a corporation's state of incorporation and principal place of business— "will be obsolete."

Whether Justice Barrett's forecast comes to pass will also depend on whether statutes like Pennsylvania's can survive a challenge under the dormant Commerce Clause. In a notable concurrence providing the Court's fifth vote, Justice Alito explained that while he could not agree that the Pennsylvania statute violated the defendant corporation's Due Process rights, "there is a good prospect" it violates the dormant Commerce Clause's implied restrictions on discriminating against out-of-state corporations and unduly burdening interstate commerce. Such challenges are likely to gain traction in light of Justice Alito's concurrence, particularly if other states follow in Pennsylvania's footsteps.

2. <u>BH Mgmt. Serv., LLC v. B.H. Prop., LLC, 2022 WL 18780124 (S.D. Iowa 2022)</u>, applied Iowa piercing / alter ego tests and concluded that, under those tests, a corporate subsidiary's contacts in Iowa did not subject the subsidiary's parent to personal jurisdiction in Iowa.

The Iowa Federal District Court acknowledged that Iowa alter ego analysis *could be* applied to determine whether a corporate parent has so controlled the affairs of its subsidiary that the parent should be subject to personal jurisdiction based on its subsidiary's activities. The court also correctly noted that under Iowa piercing analysis, the following factors are relevant to piercing:

Undercapitalization, failure to keep separate books and finances, failure to observe corporate formalities, use of the corporation to commit fraud or illegality, and other

evidence that the corporation "is a mere sham." [Citing Cemen Tech, Inc. v. Three D Indus., LLC, 753 N.W.2d 1, 6 (Iowa 2008) and other authorities.]

For more information on Iowa piercing tests, see generally Matthew G. Doré, *Lifting the Veil on Iowa Piercing Jurisprudence and Suggestions for Reform*, 67 DRAKE L. REV. 619 (2019).

However, the BH Management court found that plaintiff had not satisfied these piercing tests and thus evaluated the parent's minimum contacts on their own. The court ultimately determined that the parent corporation's Iowa contacts were not sufficient to support personal jurisdiction in Iowa.

3. <u>Grant v. Zorn, 2023 WL 4358717 (S.D. Iowa 2023)</u>, denied a plaintiff's request to enforce a judgment against the owner of the corporate defendant based on Iowa veilpiercing theory, but nonetheless concluded that piercing might be a basis for such a result. The court therefore authorized post-judgment discovery on the issue of piercing and scheduled a supplemental evidentiary hearing on that issue.

State Court of Appeals Decisions:

1. <u>Hopper v. City of Waterloo, 977 N.W.2d 115, 2022 WL 610321(Iowa Ct. App. 2022)</u> (table, unpublished disposition), affirmed a trial court's ruling that real property had been abandoned to the city, rejecting a challenge from an investor of the corporate owner of the property.

The property in question had been sold to Dynasty Investment Group, Inc. (DIG), an Iowa corporation, on contract for deed. Hopper, who claimed to be a DIG shareholder, was in federal prison when the City sued for abandonment of the property. Hopper sought to intervene in the proceeding on DIG's behalf on several theories, including an argument that he had standing to participate as DIG's alter ego.

The Court of Appeals properly rejected the attempt, finding that DIG was the real party in interest, and noting that the Iowa courts had consistently rejected "reverse piercing" claims of the type Hopper asserted.

- 2. <u>Hopp v. Leistad Systems, Inc., 991 N.W.2d 539 (Iowa App. 2023) (table, unpublished</u> <u>disposition)</u>, affirmed a summary judgment ruling that no partnership existed between a distributor and associate distributors where there was no sharing of profits, no coownership of assets, and no filing of partnership tax returns.
- 3. Postma v. Wedebrand, 995 N.W.2d 817, 2023 WL 3856337 (Iowa Ct. App. 2023) (table, unpublished disposition), made several decisions relating to corporate shareholders' meetings under the Iowa Business Corporation Act (IBCA).

As regards the validity of actions taken at a shareholders' meeting, the court held that failure to provide a shareholder with proper notice of the meeting as required by the IBCA rendered actions taken at the meeting **void**. The court rejected the argument that the

complaining shareholder waived his right to receive notice of the challenged shareholders' meeting by failing to complain about notice problems for several prior shareholder meetings.

The court also held that *unsigned minutes* of a shareholders' meeting at the corporation were not admissible as proof that a corporate buy-sell agreement had been amended at that meeting.

Collectively, the two rulings in *Postma* reflect the importance of attending to required notice rules for corporate shareholders' meetings, as well as the importance of creating proper written minutes of meetings.

4. <u>Hora v. Hora, 991 N.W.2d 785, 2023 WL 1809035 (Iowa Ct. App. 2023) (table, unpublished disposition)</u>, involved derivative suit claims for breach of fiduciary duty against a director/officer of a family farm corporation and the director/officer's son, an employee of the corporation. The district court dismissed the claims after an 11-day trial, but the Iowa Court of Appeals reversed most of this ruling, concluding the district court erred in applying the law applicable to self-dealing and fiduciary duty.

The Court of Appeals held that Keith Hora, the director/officer, was liable for damages to the corporation because he failed to obtain disinterested approval for self-dealing transactions that improperly benefitted him, including personal expenses paid with corporate funds and improper vehicle reimbursements. Keith's son, Kurt, an employee of the corporation, had misappropriated some of the farm corporation's corn crops, and the court also held Keith liable for those transactions.

The court acknowledged that Keith could have avoided liability for these duty of loyalty violations by showing the challenged transactions were "fair to the corporation" within the meaning of Iowa Business Corporation Act (IBCA) Section 490.863. However, the court concluded that Keith had failed to meet this burden for both sets of transactions. With respect to self-dealing claims based on the director's improper reimbursement for personal expenditures from corporate funds, the court stated:

While there is some record evidence suggesting that the total compensation Keith received could have been appropriate, an arms-length transaction would not include athletic tickets and personal shopping paid for with crop and infrastructure accounts or the double-dipping vehicle reimbursements.

With respect to self-dealing claims based on the theft of corn from the corporation by Kurt (Keith's son), the court stated:

We find that Keith has not carried his burden. At core, what Keith enabled was civil conversion or criminal theft of HFI corn by his son Kurt

It is important to appreciate that although the court properly refused to apply the business judgment rule to the above-described self-dealing transactions, the court concluded the business judgment rule *did* apply to other claims in the case. The complaining shareholders

had also alleged that Keith had diminished the value of the corporation's shares through poor record-keeping and bad management.

Although the court concluded (as described above) that Keith and his son, Kurt, had engaged in improper self-dealing and misappropriation (claims for which they owed damages to the corporation), the court held that the separate record-keeping and mismanagement claims against Keith were "either shielded by the business-judgment rule or not supported by sufficient record evidence that would allow us to find bad faith, dishonesty, intention to harm, or unfairness to the corporate interest."

5. <u>Safe Bldg. Compliance & Tech. v. Bernholtz, 995 N.W.2d 109, 2023 WL 3083534</u> (Iowa Ct. App. 2023) (table, unpublished disposition), involved claims for misappropriation of funds against a former director of Safe Building Compliance & Technology, an Iowa non-profit corporation organized under Iowa Code Ch. 504.

The director, Michelle Naughton, admitted she had improperly used some corporate funds for personal expenses, but challenged other expenses as either approved by the board of directors or spent after she resigned as a director. The Iowa Court of Appeals affirmed the Iowa District Court's ruling (following a bench trial) that Naughton was liable for damages for the challenged transactions, which the court treated as self-dealing transactions, and thus violations of Naughton's duty of loyalty as a director.

The challenged transactions concerned payments the non-profit corporation made when it leased and made improvements to a building that belonged to a corporation owned by Naughton and her husband. Naughton's family also lived in the building, with utilities paid for by the non-profit. In addition, the non-profit paid for life and disability insurance policies on Naughton and her husband.

Naughton acknowledged that these transactions entailed conflicts of interest, but asserted that the corporation's board was aware of the transactions and provided the requisite disinterested approval for them under Iowa Code Section 504.833. The court rejected the defense based on the non-profit corporation's bylaws, which set out specific procedures for approval of self-dealing transactions. Naughton's failure to follow those procedures was fatal, the Iowa Court of Appeals concluded, because Section 504.833 expressly allows corporations to impose *additional* requirements for approval of conflict-of-interest transactions.

Note: If a for-profit corporation organized under Iowa Code Chapter 490 had articles or bylaws that imposed special requirements for approval of conflict-of-interest transactions, a director who failed to follow those procedures might also be challenged on good faith grounds, even if the director otherwise complied with the disinterested approval processes set forth in Iowa Code Chapter 490 (Sections 490.860-490.863).

6. <u>Aterra 144, 1960 Grand Avenue, WDM, LLC v. David B. Anders, 992 N.W.2d 239,</u> 2023 WL 2148774 (Iowa Ct. App. 2023) (table, unpublished disposition), affirmed a

district court's ruling (following a bench trial) that enforced a former LLC member's guarantee of a restaurant lease.

Anders was one of several members of an LLC that leased premises in a West Des Moines shopping center for a chicken restraurant in 2005. Anders executed a guaranty that covered "time payment of rent and all other charges to be paid by [the LLC] under the Lease." The guaranty also provided it "would remain in full force and effect as to any renewal or extension of the Lease regardless of any modification of the Lease."

When the LLC defaulted on the lease and the landlord sued Anders, he contended the landlord had abandoned the guaranty or alternatively, was barred by the doctrine of accord and satisfaction. Anders relied on the fact that the lease default occurred *after* other members purchased his interest in the LLC, and *after* the lease was renewed and modified with several addenda, and *after* new guarantees were executed to support the lease. In addition, the original landlord had sold the building where the restaurant premises was located. Anders also claimed the original landlord had orally advised him that his guaranty was released, although Anders had no signed writing to support that contention.

The district court ruled, and the Iowa Court of Appeals affirmed, that none of these facts established that the landlord had abandoned Anders' guaranty and accepted other guaranties in its place, and did not amount to accord and satisfaction.

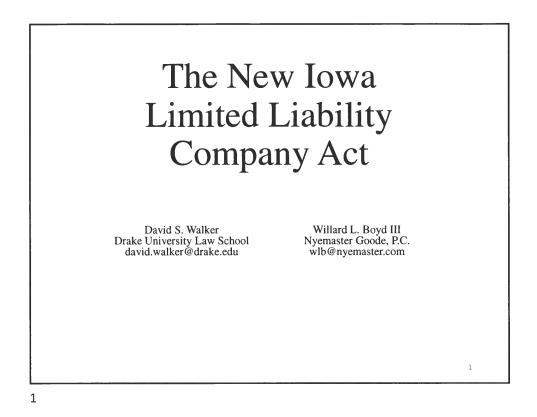
7. <u>Bagby v. First St. Deli II, LLC, 2023 WL 5092833 (Iowa Ct. App. 2023)</u>, reversed a district court ruling (following a bench trial) that a loan contract was not enforceable on grounds of unconscionability.

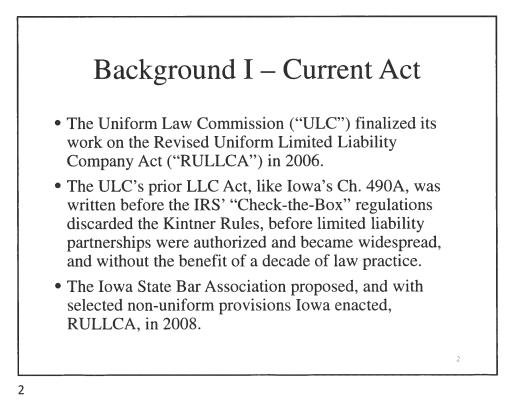
Bagby loaned \$10,000 to First Street Deli, and its owners—Harker and her daughter under terms of a written loan agreement that required repayment of \$15,000 over six months. Payments were to be made in bi-weekly installments of \$750 each, with a late fee provision of \$25 per day. Borrowers repaid \$11,500 on the loan, though many payments were late.

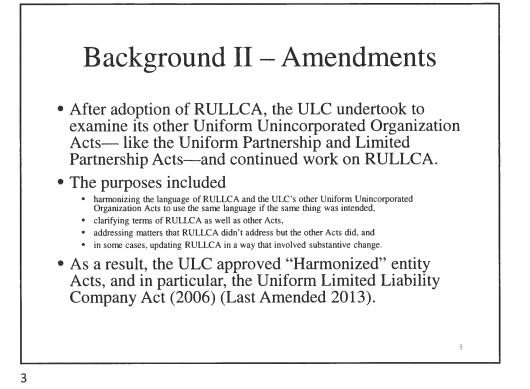
Bagby sued to collect over \$50,000—his calculation of payments due when late fees were factored in. The district court refused to enforce the loan agreement as written, finding its terms unconscionable and that the late fees were an unenforceable penalty, and ruled that borrowers owed nothing more on the loan. Bagby appealed, and the Iowa Court of Appeals reversed.

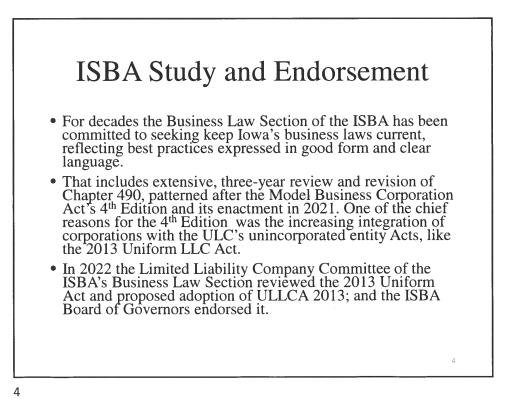
The court noted that a finding of unconscionability can be based on procedural or substantive grounds, but concluded that neither was present here. Bagby's loan terms were clear—with no fine print or convoluted language—and the substantive terms of the loan (repayment of \$15,000 for a \$10,000 loan) were similar to those initially proposed by the borrowers, who had been unable to secure traditional financing. The court further held that the loan agreement's late fee provision was not unenforceable as a penalty because the borrowers had not met their burden of proof on that issue.

Appendix to Business Law Update 11/1









Iowa's Enactment of the ULC's 2013 Act and What Other States Have Done

- HF655 was signed into law by the Governor in June 2023.
- The new LLC Act becomes effective on January 1, 2024.
- To date, 17 of the 19 states that have adopted a uniform limited liability company act since the "harmonized" LLC Act was pre-released in 2011 or officially approved in 2013 have adopted the 2013 Uniform LLC Act—known simply as "ULLCA." These States include Arizona, Arkansas, Connecticut, D.C., North Dakota, Washington, Utah, Wisconsin, and Pennsylvania.
- Some States continue to have the ULC's 2006 version.
- Some States continue to have the much earlier 1995 version.
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| and The Importance of LLCs | |
|---|---------|
| • Domestic LLCs | 148,094 |
| Foreign LLCs | 17,272 |
| For-Profit Corporations | 44,577 |
| Foreign For-Profit Corporations | 14,284 |
| • Domestic LLPs | 4,035 |
| Foreign LLPs | 214 |
| General Partnerships | 79 |
| Domestic Limited Partnerships | 1110 |
| • Domestic LLLPs | 499 |
| • Foreign Limited Partnerships | 510 |
| • Foreign LLLPs | 23 |

"New" Iowa Limited Liability Company Act Is *Not* a Whole New Act

- An LLC remains a creature of contract, indeed becomes even more so.
- The architecture of the Uniform Act and Chapter 489 remain the same.
- The central role of the operating agreement remains and is expanded.
- The Act remains a "default Act," meaning that with few exceptions the Act's provisions apply only when not displaced by the operating agreement.
- Sections on the nature, purpose, duration and governing law are the same.
- Formation of the LLC by filing a certificate of organization remains.
- "Pick your partner" and limited liability principles remain clear.
- Continued focus on facilitating business practice and service to clients.

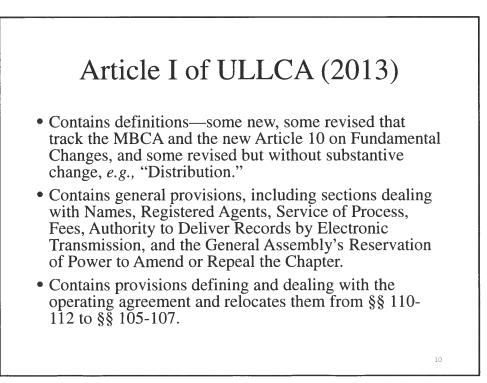
Coordination with Other Law, and Specifically, the Iowa Business Corporation Act (Ch.490)

- The drafters of ULLCA and the MBCA 4th intentionally coordinated significant parts of the two pieces of legislation to facilitate general business practice and also to address the increasing number of interentity transactions, *e.g.*, corporation-LLC.
- Examples of such areas are provisions dealing with the following:
 - Definitions
 - Registered Agents
 - · Administrative Dissolution
 - Foreign LLCs
 - Direct and Derivative Litigation
 - Fundamental Changes (Merger/Interest Exchange/Conversion/Domestication)
- Synergy went both ways: MBCA 4th's foreign corporation article followed ULLCA 2013's foreign LLC article, and likewise, registered agents.

Coordination with the Iowa Secretary of State

- Business Law Section's LLC Committee included Iowa SOS Director of Business Services Carl Dietz, and members of the Committee intentionally coordinated provisions of ULLCA 2013 with current Iowa business legislation, like the 2006 ULLCA and Chapter 490:
- Names
- Filings
- Registered Agents
- Biennial Reports
- Administrative Dissolutions





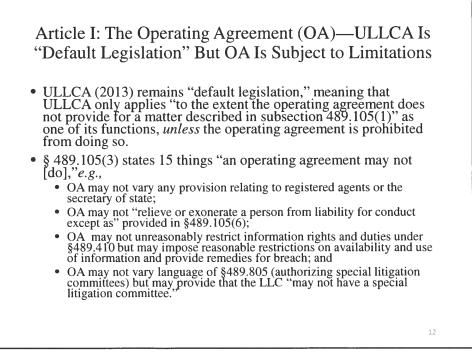
Article I: The LLC Operating Agreement: Definition and Functions Remain the Same

• The definition of "operating agreement" is unchanged (§ 489.102(13)): "the agreement, whether or not referred to as an operating agreement and whether oral, implied, in a record, or in any combination thereof, of all the members of a limited liability company, including the sole member, concerning the matters described in § 105(a). The term includes the agreement as amended or restated."

• Functions remain the same (§ 489.105(1)). Subject to restrictions and allowed variation, the operating agreement governs the

- relations among members as members and between members and the LLC;
- rights and duties under ULLCA of a person in the capacity as manager;
- activities and affairs of the LLC, the conduct of those activities and affairs; and
- the means and conditions for amending the operating agreement (§§ 489.106(4) and 489.107(1), which are unchanged and authorize restrictions on amendments to a signed writing and to 3rd party approval or satisfaction of a condition).





Article I: Expansion of Freedom of Contract in the Operating Agreement

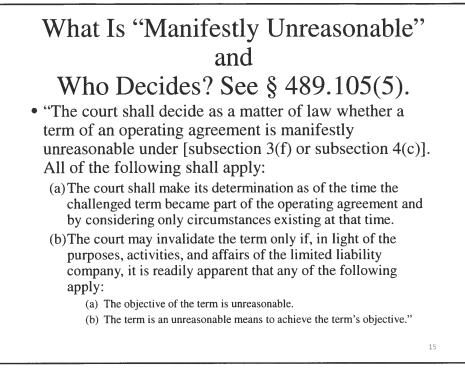
- Under §489.105(3), the OA may not "alter or eliminate the duty of loyalty or the duty of care, except as otherwise provided in subsection (4)."
- But Section 489.105(4) has been clarified in a way that expands on the notion that an LLC is a creature of contract and extends greater freedom to parties to express their deal and rely on contractual duties, not statutory duties, again, "if not manifestly unreasonable."
- Similarly, the operating agreement may not eliminate the contractual obligation of good faith and fair dealing under §489.409(4) but it may state the standards for measuring performance of the obligation, again, "if not absent manifestly unreasonable."

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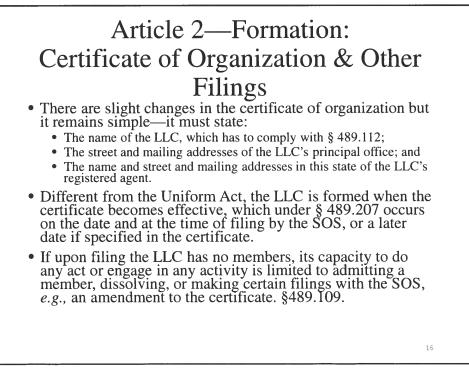
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What the Operating Agreement May Do

- Section 489.105(4)(c) states, "If not manifestly unreasonable, the operating agreement may do all of the following:
 - (1) Alter or eliminate the aspects of the duty of loyalty stated in section 489.409, subsections 2 and 9;
 - (2) Identify specific types or categories of activities that do not violate the duty of loyalty;
 - (3) Alter the duty of care, but may not authorize conduct involving bad faith, willful or intentional misconduct, or knowing violation of law; and
 (4) Alter or eliminate any other fiduciary duty."
- So it's clear that ULLCA (2013) authorizes extensive freedom of contract.
- But it wasn't intended by the ULC to thereby adopt a totally contractarian view of an LLC and look at it as if it were solely an "arm's length transaction." The "if not manifestly unreasonable" limitation prevents that.

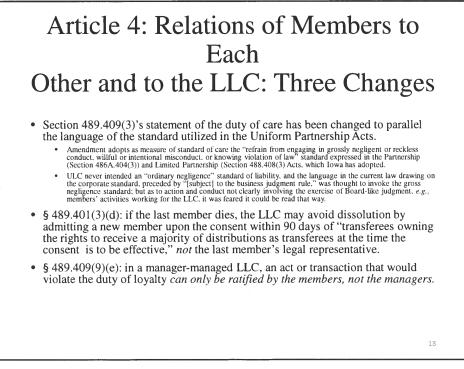






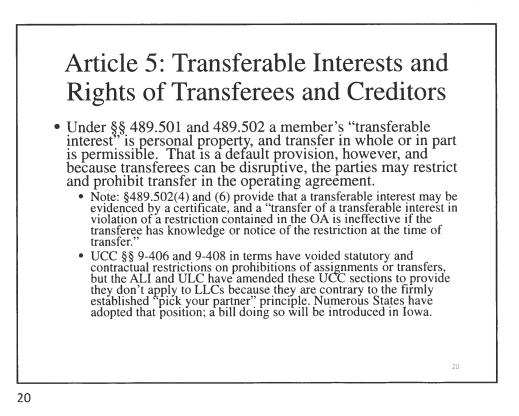
Article 3: Relations of Members and Managers to Persons Dealing with the LLC

- Section 489.301 is unchanged—members have no agency authority "solely by reason of being a member;" it's determined by Agency Law.
- Provision for a "Statement of Limited Liability Company Authority" ("SOA") in 489.302 is unchanged, including a non-Uniform provision the Real Property Section and the Bar advanced that makes an SOA continuously effective until amended or cancelled.
- Section 489.304(1)'s important statement of limited liability of members and managers is unchanged except for the clarifying addition of one sentence, "*This subsection applies regardless of the dissolution of the company*." (Emphasis added)



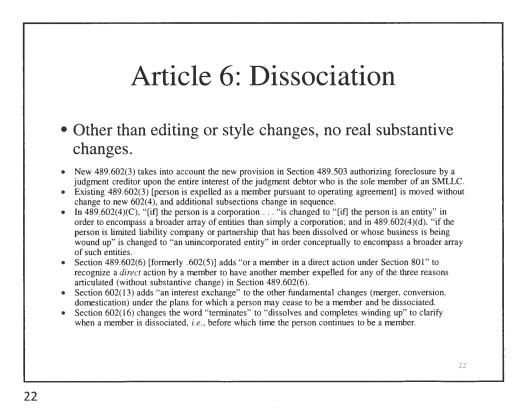
Article 4: Some Reminders

- Under § 489.404 there is no right to receive a distribution before dissolution, only if the company decides to make an interim distribution; and if it does, the default is that the distribution must be in equal shares.
- Under § 489.407, whether in a member-managed or mangermanaged LLC, unless the operating agreement ("OA") provides otherwise, any transaction outside the ordinary course of business—merger, interest exchange, conversion, domestication, or amendment of the operating agreement requires the consent of all of the members.
- There is no substantive change in § 489.410 on Information Rights, but don't forget the change in § 489.105 explicitly authorizing the OA to impose "reasonable restrictions on availability and use of information" and appropriate remedies for breach, including liquidated damages.



Article 5: Substantive Revision – Charging Orders

- IC § 489.503 authorizes a judgment creditor of a member or of a transferee to obtain a charging order against the transferable interest of the judgment debtor entitling the judgment creditor to receive any distributions that would otherwise be made to the judgment debtor.
- ULLCA (2013) added a new subsection to deal with a judgment debtor who is the *sole* member of a single member limited liability company.
- New § 489.503(6) recognizes that when an LLC has only one member, the "pick your partner" concept is inapposite; and in that situation, the court may foreclose on the charging order so that the purchaser obtains not just the economic rights but also the management rights of the debtor, thus becoming the member and dissociating the judgment debtor as a member.



Article 7: Dissolution and Winding Up

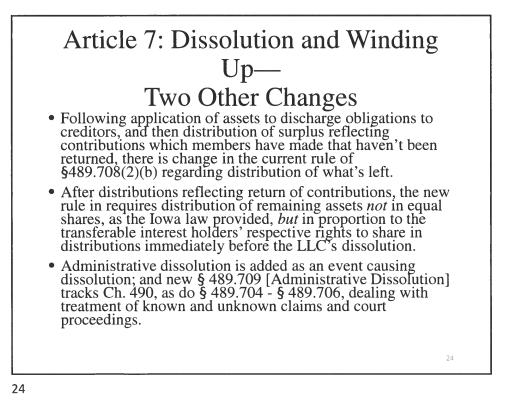
• For the most part, there are only editing or style changes, and the default provisions of Article 7 substantively remain the same.

• One exception is a replacement of the current rule that if an LLC ceases to have any members for 90 days, dissolution occurs unless

- The last person to have been a member, *or the legal representative of that person*, designates a person to become a member (emphasis added); and
- The designated person consents to become a member.

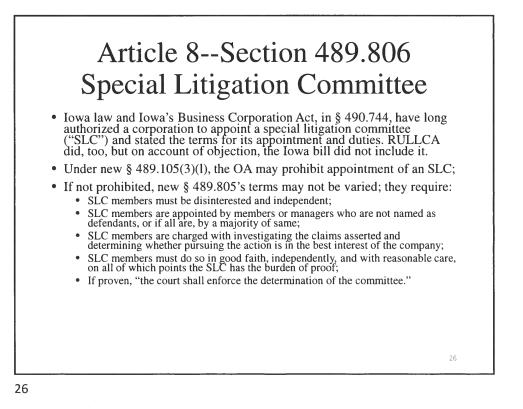
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• As discussed earlier under Article 4 and § 489.401 [Becoming a Member], the new rule provides that the decision to admit a new member or to proceed with dissolution in winding up rests with the transferees holding the rights to receive a majority of the distributions as transferees at the time consent is to be given, **not** the last member's designated representative.



Article 8: Actions by Members--Changes

- This Article has been Article 9 in Chapter 489. It's now Article 8.
- Sections 489.801 and 802 differentiate direct and derivative actions.
- Section 489.802 continues the "universal demand" rule in the current LLC Act and in Chapter 490 and eliminates "futility" of demand as an excuse for not making one. Plaintiff(s) may commence suit earlier if notified of rejection or if "irreparable injury to the company would result by waiting for the expiration of the ninety-day period."
- The new LLC Act authorizes an LLC to appoint a special litigation committee if it is named or made a party in a derivative action. Current Iowa law did not enact the 2006 provision authorizing one. (Nonetheless, the OA was not prohibited from authorizing one.)





- Article 9 deals with Foreign Limited Liability Companies, and as previously stated, its provisions track the provisions on foreign corporations in Iowa's Business Corporation Act--IC 490.1501-.12.
- Article 10 deals with Merger, Interest Exchange, Conversion, and Domestication—Fundamental Changes—and track Articles 9 and 11 of Iowa's Business Corporation Act.
- Article 11 deals with Professional Limited Liability Companies.
 - Incorporates amendments made to the Iowa Professional Corporation Act in 2003 to allow for a professional corporation to
 convert to a business corporation in the event it ceases activities that required the entity to be a professional corporation.
 - Amendments would allow PLLC to elect to no longer be a PLLC but instead be a regular limited liability company in similar



