WEST VIRGINIA CODE CHAPTER 31b ARTICLE 4

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§31B-4-401. Form of contribution.

A contribution of a member of a limited liability company may consist of tangible or intangible property or other benefit to the company, including money, promissory notes, services performed or other agreements to contribute cash or property, or contracts for services to be performed.

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§31B-4-402. Member's liability for contributions.

(a) A member's obligation to contribute money, property or other benefit to, or to perform services for, a limited liability company is not excused by the member's death, disability or other inability to perform personally. If a member does not make the required contribution of property or services, the member is obligated at the option of the company to contribute money equal to the value of that portion of the stated contribution which has not been made.

(b) A creditor of a limited liability company who extends credit or otherwise acts in reliance on an obligation described in subsection (a) of this section, and without notice of any compromise under section 4-404(c)(5), may enforce the original obligation.

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§31B-4-403. Member's and manager's rights to payments and reimbursement.

(a) A limited liability company shall reimburse a member or manager for payments made and indemnify a member or manager for liabilities incurred by the member or manager in the ordinary course of the business of the company or for the preservation of its business or property.

(b) A limited liability company shall reimburse a member for an advance to the company beyond the amount of contribution the member agreed to make.

(c) A payment or advance made by a member which gives rise to an obligation of a limited liability company under subsection (a) or (b) of this section constitutes a loan to the company upon which interest accrues from the date of the payment or advance.

(d) A member is not entitled to remuneration for services performed for a limited liability company, except for reasonable compensation for services rendered in winding up the business of the company.

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§31B-4-404. Management of limited liability company.

(a) In a member-managed company:

(1) Each member has equal rights in the management and conduct of the company's business; and

(2) Except as otherwise provided in subsection (c) of this section or in section 8-801(b)(3)(i), any matter relating to the business of the company may be decided by a majority of the members.

(b) In a manager-managed company:

(1) Each manager has equal rights in the management and conduct of the company's business;

(2) Except as otherwise provided in subsection (c) of this section or in section 8-801(b)(3)(i), any matter relating to the business of the company may be exclusively decided by the manager or, if there is more than one manager, by a majority of the managers; and

(3) A manager:

(i) Must be designated, appointed, elected, removed or replaced by a vote, approval or consent of a majority of the members; and

(ii) Holds office until a successor has been elected and qualified, unless the manager sooner resigns or is removed.

(c) The only matters of a member or manager-managed company's business requiring the consent of all of the members are:

(1) The amendment of the operating agreement under section 1-103;

(2) The authorization or ratification of acts or transactions under section 1-103(b)(2)(ii) which would otherwise violate the duty of loyalty;

(3) An amendment to the articles of organization under section 2-204;

(4) The compromise of an obligation to make a contribution under section 4-402(b);

(5) The compromise, as among members, of an obligation of a member to make a contribution or return money or other property paid or distributed in violation of this chapter;

(6) The making of interim distributions under section 4-405(a), including the redemption of an interest;

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(7) The admission of a new member;

(8) The use of the company's property to redeem an interest subject to a charging order;

(9) The consent to dissolve the company under section 8-801(b)(2);

(10) A waiver of the right to have the company's business wound up and the company terminated under section 8-802(b);

(11) The consent of members to merge with another entity under section 9-904(c)(1); and

(12) The sale, lease, exchange or other disposal of all, or substantially all, of the company's property with or without goodwill.

(d) Action requiring the consent of members or managers under this chapter may be taken or without a meeting.

(e) A member or manager may appoint a proxy to vote or otherwise act for the member or manager by signing an appointment instrument, either personally or by the member's or manager's attorney-in-fact.

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§31B-4-405. Sharing of and right to distributions.

(a) Any distributions made by a limited liability company before its dissolution and winding up must be in equal shares.

(b) A member has no right to receive, and may not be required to accept, a distribution in kind.

(c) If a member becomes entitled to receive a distribution, the member has the status of, and is entitled to all remedies available to, a creditor of the limited liability company with respect to the distribution.

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§31B-4-406. Limitations on distributions.

(a) A distribution may not be made if:

(1) The limited liability company would not be able to pay its debts as they become due in the ordinary course of business; or

(2) The company's total assets would be less than the sum of its total liabilities plus the amount that would be needed, if the company were to be dissolved, wound up and terminated at the time of the distribution, to satisfy the preferential rights upon dissolution, winding up and termination of members whose preferential rights are superior to those receiving the distribution.

(b) A limited liability company may base a determination that a distribution is not prohibited under subsection (a) of this section on financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances or on a fair valuation or other method that is reasonable in the circumstances.

(c) Except as otherwise provided in subsection (e) of this section, the effect of a distribution under subsection (a) of this section is measured:

(1) In the case of distribution by purchase, redemption or other acquisition of a distributional interest in a limited liability company, as of the date money or other property is transferred or debt incurred by the company; and

(2) In all other cases, as of the date the:

(i) Distribution is authorized if the payment occurs within one hundred twenty days after the date of authorization; or

(ii) Payment is made if it occurs more than one hundred twenty days after the date of authorization.

(d) A limited liability company's indebtedness to a member incurred by reason of a distribution made in accordance with this section is at parity with the company's indebtedness to its general, unsecured creditors.

(e) Indebtedness of a limited liability company, including indebtedness issued in connection with or as part of a distribution, is not considered a liability for purposes of determinations under subsection (a) of this section if its terms provide that payment of principal and interest are made only if and to the extent that payment of a distribution to members could then be made under this section. If the indebtedness is issued as a distribution, each payment of principal or interest on the indebtedness is treated as a distribution, the effect of which is measured on the date the payment is made.

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§31B-4-407. Liability for unlawful distributions.

(a) A member of a member-managed company or a member or manager of a manager-managed company who votes for or assents to a distribution made in violation of section 4-406, the articles of organization, or the operating agreement is personally liable to the company for the amount of the distribution which exceeds the amount that could have been distributed without violating section 4-406, the articles of organization, or the operating agreement if it is established that the member or manager did not perform the member's or manager's duties in compliance with section 4-409.

(b) A member of a manager-managed limited liability company who knew a distribution was made in violation of section 4-406, the articles of organization, or the operating agreement is personally liable to the company, but only to the extent that the distribution received by the member exceeded the amount that could properly have been paid under section 4-406.

(c) A member or manager against whom an action is brought under this section may implead in the action all:

(1) Other members or managers who voted for or assented to the distribution in violation of subsection (a) of this section and may compel contribution from them; and

(2) Members who received a distribution in violation of subsection (b) of this section and may compel contribution from the member in the amount received in violation of subsection (b) of this section.

(d) A proceeding under this section is barred unless it is commenced within two years after the distribution.

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§31B-4-408. Member's right to information.

(a) A limited liability company shall provide members and their agents and attorneys access to its records, if any, at the company's principal office or other reasonable locations specified in the operating agreement. The company shall provide former members and their agents and attorneys access for proper purposes to records pertaining to the period during which they were members. The right of access provides the opportunity to inspect and copy records during ordinary business hours. The company may impose a reasonable charge, limited to the costs of labor and material, for copies of records furnished.

(b) A limited liability company shall furnish to a member, and to the legal representative of a deceased member or member under legal disability:

(1) Without demand, information concerning the company's business or affairs reasonably required for the proper exercise of the member's rights and performance of the member's duties under the operating agreement or this chapter; and

(2) On demand, other information concerning the company's business or affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.

(c) A member has the right upon written demand given to the limited liability company to obtain at the company's expense a copy of any written operating agreement.

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§31B-4-409. General standards of member's and manager's conduct.

(a) The only fiduciary duties a member owes to a member-managed company and its other members are the duty of loyalty and the duty of care imposed by subsections (b) and (c) of this section.

(b) A member's duty of loyalty to a member-managed company and its other members is limited to the following:

(1) To account to the company and to hold as trustee for it any property, profit or benefit derived by the member in the conduct or winding up of the company's business or derived from a use by the member of the company's property, including the appropriation of a company's opportunity;

(2) To refrain from dealing with the company in the conduct or winding up of the company's business as or on behalf of a party having an interest adverse to the company; and

(3) To refrain from competing with the company in the conduct of the company's business before the dissolution of the company.

(c) A member's duty of care to a member-managed company and its other members in the conduct of and winding up of the company's business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct or a knowing violation of law.

(d) A member shall discharge the duties to a member-managed company and its other members under this chapter or under the operating agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

(e) A member of a member-managed company does not violate a duty or obligation under this chapter or under the operating agreement merely because the member's conduct furthers the member's own interest.

(f) A member of a member-managed company may lend money to and transact other business with the company. As to each loan or transaction, the rights and obligations of the member are the same as those of a person who is not a member, subject to other applicable law.

(g) This section applies to a person winding up the limited liability company's business as the personal or legal representative of the last surviving member as if the person were a member.

(h) In a manager-managed company:

(1) A member who is not also a manager owes no duties to the company or to the other members solely by reason of being a member;

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(2) A manager is held to the same standards of conduct prescribed for members in subsections (b) through (f) of this section;

(3) A member who pursuant to the operating agreement exercises some or all of the rights of a manager in the management and conduct of the company's business is held to the standards of conduct in subsections (b) through (f) of this section to the extent that the member exercises the managerial authority vested in a manager by this chapter; and

(4) A manager is relieved of liability imposed by law for violation of the standards prescribed by subsections (b) through (f) of this section to the extent of the managerial authority delegated to the members by the operating agreement.

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§31B-4-410. Actions by members.

(a) A member may maintain an action against a limited liability company or another member for legal or equitable relief, with or without an accounting as to the company's business, to enforce:

(1) The member's rights under the operating agreement;

(2) The member's rights under this chapter; and

(3) The rights and otherwise protect the interests of the member, including rights and interests arising independently of the member's relationship to the company.

(b) The accrual, and any time limited for the assertion, of a right of action for a remedy under this section is governed by other law. A right to an accounting upon a dissolution and winding up does not revive a claim barred by law.

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§31B-4-411. Continuation of term company after expiration of specified term.

(a) If a term company is continued after the expiration of the specified term, the rights and duties of the members and managers remain the same as they were at the expiration of the term except to the extent inconsistent with rights and duties of members and managers of an at-will company.

(b) If the members in a member-managed company or the managers in a manager-managed company continue the business without any winding up of the business of the company, it continues as an at-will company.

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