Business Law Section Newsletter

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Notes from the Editors

by Denise Walsh, Lori Mayer and Thomas Zalewski

You may have noticed the newsletter is coming out a little later than in the past. We have made some changes in the publication schedule, but not to worry, we will still have three issues each year.

Cyber threats! We hear about them more and more nowadays. Seminars are held discussing how to protect company information. Articles are written on the steps companies should take to safeguard customer data. Insurance is offered to cover potential data breaches. This edition of the newsletter contains a timely article about the recent Yahoo data breaches and, specifically, focuses on how cyber threats are addressed in the acquisition agreement between Yahoo and Verizon.

As reported in the fall issue of the newsletter, a recent New Jersey Supreme Court case addressed standards for court-ordered dissociation of limited liability company members. The *IE Test, LLC v. Kenneth Carroll* decision continues to garner attention from the bar, as lawyers speculate over its impact. Included in this issue of the newsletter is another perspective on the case.

With President Donald Trump now in office and expected changes on the horizon, one New Jersey accountant provides readers with a summary of the key features of President Trump's proposed tax plan.

Limited liability companies are a popular entity choice here in New Jersey and elsewhere. Given their popularity, it is crucial that business lawyers are familiar with the New Jersey Revised Uniform Limited Liability Company Act, including the actions of a company that require the unanimous consent of the members. This issue contains an article discussing the actions requiring unanimous consent.

In addition to these articles, Lydia Stefanowicz focuses on the *Statement of Opinion Practice*. The statement is the result of a joint project of the Working Group on Legal Opinions and the Legal Opinions Committee of the American Bar Association's Business Law Section. The joint project is an effort to foster a national opinion practice that will be widely recognized and endorsed across various practice areas and legal specialties.

We hope the articles contained in this edition of the newsletter are helpful in your practice and in advising your business clients.

We encourage you to submit an article for publication on a topic of interest to you and other members of the business law community. We also appreciate suggestions from the business law community on topics you would like to see addressed in future editions. Please feel free to reach out to any of the editors with suggestions on future topics or how this newsletter can better benefit you and your practice.

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In addition to many other changes President Donald Trump has discussed making, President Trump has proposed changes to the tax laws. This article introduces some of the key Trump tax plan elements that could affect individuals and small business owners, if enacted into law.

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This article discusses the seven-factor test for judicial dissociation of a member set forth in the *IE Test, LLC v. Kenneth Carroll* case. It is written from a different perspective than the article contained in the fall issue of the newsletter. It delves into what the Court did (and, perhaps more significantly, did not) consider in rendering its decision.

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by Lydia C. Stefanowicz

In this installment of Lydia's opinion column, the author provides an overview of the Statement of Opinion Practices. The statement is the result of a joint project undertaken several years ago by the Working Group on Legal Opinions and the Legal Opinions Committee of the American Bar Association's Business Law Section. It is meant to foster national opinion practice and to apply to all types of third-party closing opinions in a wide variety of transactions.

The opinions of the various authors contained within this issue do not reflect any legal advice on the part of any author or any author's law firm and should not be viewed as the opinions of the Business Law Section or the New Jersey State Bar Association.

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Call for Articles

We are seeking articles for the summer 2017 issue of the *Business Law Section Newsletter* on topics of interest to business lawyers in New Jersey and written by New Jersey State Bar Association members.

The deadline for submitting articles for the summer edition is **May 31, 2017**.

Interested in submitting? Contact any of the editors:

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We look forward to hearing from you.

Does Your Acquisition Agreement Realistically Address Cyber Threats? The Verizon-Yahoo Agreement May Provide Guidance

by Noel D. Humphreys

Last summer, Yahoo agreed to sell itself to Verizon for around $6 billion. Shortly afterwards, it came to light that in 2014 intruders had electronically copied half a billion Yahoo customer information files. Then, in Dec. 2016, it was reported that, in a separate, earlier data breach during 2013, intruders had obtained copies of the records of more than 1 billion Yahoo users, including names, telephone numbers, encrypted passwords, and unencrypted security questions that could be used to reset a password.[1]

If there had been any doubt about it before, these intrusions exemplify that every acquisition transaction carries risk arising out of unauthorized computer access and data theft.

What can a lawyer do to address the issue when representing either side in a transaction? Lawyers are skilled at allocating risk. That's what representations and warranties in acquisition agreements accomplish. The lawyers who crafted the Yahoo stock purchase agreement had addressed the problem in a skillful lawyer-like way. Pertinent provisions of the Yahoo-Verizon contract (the Yahoo contract) are set out in this article.[2]

Yahoo's representations included a statement that Yahoo's "organizational, physical, administrative, and technical measures applicable to Personal Data" are "reasonably consistent with…reasonable practices in the industry," as well as Yahoo's contractual commitments and any "written public-facing policy…related to privacy, information security or data security…."[3] This representation relates most directly to the data breaches that occurred.

From the buyer's point of view, this representation regarding data security may not be as strong as the buyer might have liked, in retrospect. If one assumes Yahoo actually met the standard set forth in the representation, its adherence to the industry norm did not prevent the theft of a half-billion data files. Given how common data security breaches are today, maybe industry norms in general fail to protect personal data adequately. Maybe lawyers who represent buyers should not rely on adherence to industry norms as the basis for the representations. Maybe industry practices that do not thwart widespread data theft should not be considered 'reasonable.'

As it turned out, the representation in the Yahoo contract contains several features that favor Yahoo. First, the representation is made only to the actual knowledge of certain Yahoo officers and employees. Second, Yahoo's security measures must only be 'reasonably consistent' with 'reasonable' industry practices. Third, a failure to 'reasonably' comply with 'reasonable' industry practices is excused if failure to have implemented and maintained the practices "would not…reasonably be expected to have" a material adverse effect (MAE). So, reasonable expectation of MAE is the standard, rather than an actual MAE. Fourth, the MAE limitation takes effect only when Yahoo fails the first two parts of the standard. Therefore, if Yahoo matched reasonable industry security practices that allow widespread data theft, it is not liable, regardless of any actual adverse effect or any expectation of one. The standard to be met is measured by reasonable industry practice, and not what is actually necessary to protect customer data.

Vicariously experiencing what Yahoo and Verizon have been going through, business lawyers can take away a few basic lessons that do not require high-level computer literacy.

Acquisition agreements can appropriately address risks of data theft and unauthorized access to computer systems, as well as allocation of costs arising out of them. Such risk allocations these days seem more common in the context of sensitive information about individual human beings than in the context of company operation generally. Perhaps by including in acquisi-

tion agreements provisions that address these questions, lawyers can help strengthen American infrastructure against cyber attacks and hacked email accounts.

In an unscientific perusal of recent, publicly available acquisition agreements, the author found no examples of statements about distributed denial of service (DDoS) attacks or other commonly found cyber threats. In 2016, DDoS attacks grew more frequent, persistent and complex. According to Verisign, in the second quarter of 2016, both attack size and attack frequency had increased 75 percent from one 12-month period to the next.[4] Traditional patterns of drafting representations and warranties to define and allocate cyber risks typically appear in well-crafted agreements such as Yahoo's contract. The Yahoo contract includes representations about computer security in the section headed "Intellectual Property." Some contracts split those representations between a section headed "IT & Security" and a section headed "Privacy and Data Security," or similarly titled provisions.

An acquirer typically wants to know that a target's electronic equipment and software function properly and that personally identifiable information about customers, patients or others has been handled in a legally compliant manner. The Yahoo contract has a thorough definition of "Personal Data," and addresses both these concerns.

Economic success of a business that sells online often derives from matching customers and online advertising, based on algorithms and relationships with third parties. Consequently, an acquirer could reasonably be expected to ask not only about the target's own handling of data, but also about how independent third parties handle data and serve advertising on the target's website. The acquirer may ask the target about contract provisions and other steps the target has taken to ensure that independent contractors handle sensitive information suitably. At least two separate representations in the Yahoo contract deal with steps Yahoo took to ensure compliance by its own independent contractors and vendors in handling sensitive data. The Yahoo contract calls out compliance with published privacy policy statements, as well as more general compliance with law. An unscientific survey of other publicly available acquisition agreements suggests the unusual care the Yahoo contract drafters took to address Yahoo's compliance with its own "written public-facing policies regarding privacy and data security."

The Yahoo contract has a specific representation to the effect that Yahoo obtained required consents to the transfer of personal data from Yahoo to the buyer.[5] Another representation addresses the need for governmental consents to the proposed transaction. On its face, this additional representation presumably arose because of the strict European rules that apply to transfer of sensitive personal information. On the other hand, given settlements the Federal Trade Commission (FTC) has entered into recently, representations focused on published privacy policies may justify this additional representation about consents, regardless of the applicability of European practices and standards.

In addition to statements about current computer systems, management practices and contract obligations, the Yahoo contract contains provisions regarding past security breaches. Relevant questions a buyer might ask include: Have there been any security breaches? Has any personal data been taken? Has there been an unauthorized intrusion that was reported to a governmental authority, such as the FBI? Has any data breach notification law been triggered in a way that requires notice to customers? The contract's definition of 'security breach' focuses on breaches involving loss of personal data, but an acquisition agreement could address 'breaches' based on unauthorized intrusions (regardless of effects on personal data).

Some agreements, but not the Yahoo contract, ask whether the seller has a data recovery plan or incident response plan, whether back-up copies of critical data are stored locally, or whether the seller has practiced its incident response plan recently.

In the Yahoo contract and many others, representations regarding data security frequently contain a 'knowledge' qualifier and a 'material adverse effect' qualifier. Past data breaches, including the Yahoo breaches, establish that an intruder may have access to a system for months before the system's owner notices. As a result, a knowledge qualifier may not provide the protection a buyer actually wants, but a seller may consider the qualifier to be essential.

Buyers do not seem to typically ask whether there has actually been a security breach. Instead, buyers seem to be settling for representations that management does not know of security breaches. In light of the widespread experience of unauthorized access to computer systems, buyers may want to consider a more aggressive stance on representations of this sort.

Now that, thanks to Yahoo, practitioners have a better idea of some of the things that can go wrong at inopportune times, lawyers can help clients forestall adverse outcomes by focusing attention on allocating risks around cyber threats in acquisition agreements and other agreements.

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Endnotes

1. *See* Scott Moritz and Brian Womack, Verizon Explores Lower Price or Even Exit From Yahoo Deal, Dec. 15, 2016, https://www.bloomberg.com/news/articles/2016-12-15/verizon-said-to-explore-lower-price-or-even-exit-from-yahoo-deal; Goel, Vindu and Perlroth, Nicole, Yahoo Says 1 Billion User Accounts Were Hacked, *NY Times*, Dec. 14, 2016, available at http://www.nytimes.com/2016/12/14/technology/yahoo-hack.html?_r=0.
2. The "Yahoo contract" as defined in this article is the stock purchase agreement dated as of July 23, 2016, between Yahoo! Inc. and Verizon Communications, Inc. The contract is attached as Exhibit 2.1 to Yahoo's Current Report on Form 8-K filed with the Securities and Exchange Commission on July 25, 2016, and can be found at https://www.sec.gov/Archives/edgar/data/1011006/000119312516656036/d178500dex21.htm.
3. *See* Section 2.16(o) of the Yahoo contract.
4. *See* https://www.verisign.com/assets/report-ddos-trends-Q22016.pdf.
5. *See* Section 2.16(n) of the Yahoo contract.

Key Features of the Proposed Trump Tax Plan

by Maria T. Rollins

President Donald Trump has proposed a detailed tax plan (the Trump tax plan) that will revise and update both the individual and corporate tax codes. This article introduces some of the key plan elements that could affect individuals and small business owners, if enacted into law.

Top Tax Rates Decrease

Currently, the 2017 top tax rate on ordinary income is 39.6 percent. Under the Trump tax plan, the top rate on ordinary income will drop to 33 percent. President Trump also has proposed lower rates throughout all tax brackets.

More taxpayers will pay the 20 percent tax capital gains. This rate will kick in for all taxpayers in the top bracket ($127,500 if single and $255,000 if married filing jointly). Currently, this rate does not kick in until one earns more than $425,400 if single and $487,650, if married filing jointly.

One Tax Rate for Businesses

The Trump tax plan would include a single 15 percent tax rate for business income, whether the business is an S-corporation, partnership or Schedule C. Because sole proprietorships qualify, more wage earners may become self-employed business owners.

Under the Trump tax plan, companies could expense 100 percent of all asset acquisitions, with no limitation.

Capped Deductions

For individual taxpayers, Trump plans an overall limit on itemized deductions of $100,000 if single and $200,000 if married filing jointly. Currently, itemized deductions are reduced by three percent for every dollar a taxpayer's income exceeds $250,000 if single and $300,000 if married filing jointly.

Elimination of the Estate Tax

Trump has proposed eliminating the estate tax. Still up for discussion is the gift tax, or whether the estate tax will be eliminated all at once or phased out over time. Also, there would be no step-up in basis. It is unclear if under Trump's plan heirs would take the assets at the decedent's basis or if appreciation on the assets is taxable at death.

Other Key Plan Features for Individuals

The Trump tax plan also eliminates:

- Head of household filing status for single parents
- Net investment income tax
- Alternative minimum tax (AMT) for individuals

The plan increases the standard deduction from $6,300 to $15,000 for singles and from $12,600 to $30,000 for married couples filing jointly. It also taxes carried interest as ordinary income.

Other Changes Impacting Businesses

Businesses will need to pay attention to these proposed changes as well:

- Reduction in the corporate income tax rate from 35 percent to 15 percent
- Elimination of the corporate AMT
- Elimination of the domestic production activities deduction under Section 199 of the Internal Revenue Code and all other business credits, except for the research and development credit
- Implementation of a deemed repatriation of currently deferred foreign profits, at a tax rate of 10 percent

Conclusion

It may appear that with many of these proposed changes most individuals and businesses will pay less tax under Trump's plan. Tax planning, however, will be challenging since exactly how and when it will affect taxpayers during 2017 is still unknown. The timing of key proposals under the plan could be delayed into late 2017 or early 2018. Tax advisors will need to monitor the progress in advising clients, especially those contemplating significant transactions during 2017. ■

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NJ-RULLCA Provisions Requiring Unanimous Consent of Members

by Gianfranco A. Pietrafesa

There are numerous provisions in the New Jersey Revised Uniform Limited Liability Company Act (NJ-RULLCA)[1] requiring the consent of all members of a limited liability company (LLC) regarding certain actions. Fortunately, NJ-RULLCA implicitly authorizes the members of an LLC to agree in the company's operating agreement to require something less than unanimous consent of the members. N.J.S.A. 42:2C-11(c) expressly identifies the provisions an operating agreement may not alter or eliminate (unless done in accordance with NJ-RULLCA). By implication, any other statutory provisions may be altered or even eliminated in the operating agreement. In further support of this principle is the statutory language included in NJ-RULLCA about the freedom of contract and the enforceability of operating agreements.[2]

The following list identifies the actions requiring the unanimous consent or vote of the members under NJ-RULLCA. As noted, an operating agreement may change the required vote from unanimous to something less than unanimous, such as a simple majority or super-majority vote.

1. After the formation of an LLC, a person may become a member only with the consent of all existing members.[3]
2. Any action, matter or decision outside the ordinary course of business, regardless of whether the LLC is member-managed or manager-managed[4] (This includes decisions to (a) sell, lease, exchange or otherwise dispose of all or substantially all of the LLC's property outside the ordinary course of business, (b) mergers, (c) conversions and (d) domestications.)[5]
3. Amending the operating agreement, regardless of whether the LLC is member-managed or manager-managed[6]
4. Authorizing or ratifying an act or transaction that violates the fiduciary duty of loyalty[7]
5. Expelling a member from the LLC pursuant to the provisions of NJ-RULLCA. However, the vote of the member being expelled is not required (obviously)[8]
6. Dissolving the LLC[9]
7. As noted, merging the LLC with or into another entity, converting the LLC into another type of business entity, and domesticating the New Jersey LLC into another state so that it becomes an LLC of the other state[10]
8. With regard to any merger, conversion or domestication, if a member will be subject to personal liability as a result of the merger, conversion or domestication, that member must approve the merger, conversion or domestication. Since almost all members will be similarly situated, any merger, conversion or domestication that will result in personal liability to the members will require the approval of all members.[11]

Gianfranco A. Pietrafesa is a partner of Archer & Greiner, P.C. in its Hackensack office, where he is a member of its business counseling group. He is a director and past chair of the Business Law Section and served on the select committee that drafted NJ-RULLCA.

Endnotes

1. N.J.S.A. 42:2C-1 *et seq.*
2. N.J.S.A. 42:2C-11(i).
3. N.J.S.A. 42:2C-31(c)(3).
4. N.J.S.A. 42:2C-37(b)(4) & -37(c)(4)(c).
5. *See* N.J.S.A. 42:2C-37(c)(4), -75(a), -79(a) & -83(a). (Note that NJ-RULLCA uses the term "activities" instead of "business" because an LLC may be used for nonprofit purposes. *See* N.J.S.A. 42:2C-4(b); Uniform Law Commission Comment to RULLCA Section 108(b)).
6. N.J.S.A. 42:2C-37(b)(5) & (c)(4)(d).
7. N.J.S.A. 42:2C-39(f).
8. N.J.S.A. 42:2C-46(d).
9. N.J.S.A. 42:2C-39(a)(2).
10. N.J.S.A. 42:2C-75(a); 42:2C-79(a); 42:2C-83(a).
11. N.J.S.A. 42:2C-86.

Unanimous New Jersey Supreme Court Constricts Authority of Trial Courts to Approve Dissociation of Passive Members by Adoption of a Seven-Factor Test to Determine 'Not Reasonably Practicable' —*IE Test, LLC v. Carroll*

by Peter D. Hutcheon

As discussed in the fall issue of the *Business Law Section Newsletter*, the New Jersey Supreme Court issued a unanimous decision in Aug. 2016, regarding standards for court-ordered dissociation of limited liability company (LLC) members.[1]

Although the facts have been reported previously, they are worth repeating in some detail in the context of this article.

Two men (Carroll and Cupo), apparently engineers, formed an engineering consulting business as a Delaware limited liability company, with 51 percent owned by Carroll and 49 percent by Cupo. A third man, James, was an employee. The business was to design testing systems used by manufacturers. James was employed as business development manager, and later as vice president. In 2009, the company filed for Chapter 7 bankruptcy. Just before filing bankruptcy, Cupo formed a New Jersey LLC and was its sole member. Then, James purchased a 50 percent interest in the new LLC. Thereafter, the three men entered into what the Court terms "a preliminary agreement" under which Carroll owned 33 percent, Cupo 34 percent, and James 33 percent of the new LLC. The Court's opinion does not detail what, if anything, Carroll contributed for his one-third interest beyond making one sales call. Cupo managed engineering, manufacturing, and financial matters. James was responsible for business development.

The new LLC prospered (making almost $400,000 in 2009 (its first year) and over $1,230,000 for the first six months of 2010). Cupo and James were paid $170,000 per year and received several $10,000 bonus distributions. Carroll received nothing. The three were unable to agree on the terms of an operating agreement, and Carroll demanded payments (in part to recover a claimed $2.5 million loss in the failed LLC). Cupo and James claimed they were unable to obtain bank financing due to the absence of an operating agreement, which limited the new LLC's ability to grow. Carroll stated he "would be willing to assist in financing if impeded by the lack of an operating agreement."[2]

In late Jan. 2010, after Cupo and James were no longer communicating with Carroll (and vice-a-versa), Cupo and James sought to dissociate Carroll from the LLC, either due to "wrongful conduct that adversely and materially affected the...business" or to conduct which made it "not reasonably practicable" to carry on the business.[3]

New Jersey Statutes Annotated, at N.J.S.A. 42:2B-24, (the New Jersey Limited Liability Company Act), which governs this case, was replaced by the Revised Uniform Limited Liability Company Act at N.J.S.A. 42:2C-1, *et seq.*, effective March 18, 2013, but the "not reasonably practicable" standard remains in N.J.S.A. 42:2C-46. The trial court denied the first claim, but granted the second, valuing the business at over $680,000 and awarding Carroll over $220,000 as a result of his dissociation. The Supreme Court's opinion does not report that Carroll made any challenge to this 2010 valuation, then or subsequently. At Carroll's request, the trial court stayed its judgment of dissociation and payment to him, pending appeal. That decision was affirmed by the New Jersey Superior Court, Appellate Division, in an opinion not approved for publication. Carroll then petitioned the Supreme Court for certification, which was granted in 2015. Although not stated in the court's opinion, presumably the stay continued through the Supreme Court's judgment.

The New Jersey Supreme Court, over six and a half years after the trial court decision, unanimously reversed, holding that the trial court must apply a seven-factor test to determine if Carroll's conduct made it "not reasonably practicable" for him to be a member of the LLC. The Supreme Court was clearly influenced by Carroll's relative passivity, and by the ability of Cupo and James to manage the operations of the LLC by majority rule, as provided in the New Jersey statute for member-managed LLCs without an operating agreement (except for decisions to admit a member or to dissolve). Thus, Carroll would be entitled to one third of the LLC's value, including increases from 2010 on. But, in effect, the Supreme Court was recognizing a 'right to remain' once admitted to a New Jersey LLC.

The opinion does not state whether Carroll received any payments from the New Jersey LLC during the period between Jan. 2010 and Aug. 2016. Given the positions of the parties, such payments would have occurred only to the extent the LLC made distributions (which Cupo and James did not necessarily need to occur, as they could take salary and bonuses). Nonetheless, as a member of an LLC, Carroll would have been subject to an annual allocation of one third of the LLC's profits and losses, and would have been subject to taxation on the allocated profits. Carroll was, accordingly, left with tax liability, presumably with only limited funding from distributions from the LLC.

One may wonder how Cupo and James reacted to having Carroll as a classic 'silent partner,' with a claim to a third of any growth in the LLC (if his appeal succeeded), without the requirement of any effort or contribution from him. The Court, however, did not directly discuss this aspect of 'reasonable practicability.' The Court also did not address (perhaps due to a failure to proffer proof) the impact of the absence of an operating agreement on an application for bank financing. Generally, such an absence would severely limit banks from offering such financing, especially given the heightened scrutiny of loans in the post-2008 regulatory environment.

The seven-factor test adopted by the Court is: 1) the nature of the member conduct relating to the LLC business; 2) whether, if the member remains, the entity may be managed for its purposes; 3) whether the dispute among members prevents them from working together for the benefit of the LLC; 4) whether there is a deadlock; 5) whether, even if a deadlock exists, the members can make management decisions; 6) whether, due to the LLC's financial condition, there is a business to operate; and 7) whether continuing in operation, with the member remaining, is financially feasible.[4]

The Supreme Court then instructs:

> A trial court considering an application to expel a member under...the "not reasonably practicable" standard should conduct a case-specific analysis of the record using those factors, and other considerations raised by the record, with no requirement that all factors support expulsion, and no single factor determining the outcome.[5]

It is telling that the Court uses the term "expel" to characterize a judicially sanctioned dissociation; indeed, the Court calls Section 24(b)(3)(c) "...the LLCA's expulsion remedy."[6] The Court also notes Carroll's claim that "the court order dissociating him from...[the LLC] deprived him of protections that the Legislature conferred on minority investors...."[7]

In troubled marriages, one may obtain a 'no-fault' divorce, essentially for irreconcilable differences. Often, there is related litigation regarding the amount of equitable distribution, but there is no legal right to *remain* a spouse. The Court's constrictions on the authority of trial courts to grant a similar separation (together with payment to a dissociated member of the value of that member's interest) suggests that, in New Jersey at least, once an LLC is formed separating someone from membership is not to be granted easily, regardless of how impracticable it may be to proceed.

It is also of interest that the Court did not acknowledge that the not reasonably practicable standard in N.J.S.A. 41:2B-24 was essentially copied from the judicial dissolution provision[8] of the Revised Uniform Limited Partnership Act as in effect in New Jersey, a pattern similarly replicated under Delaware law. The Court did not discuss any decisions under either of the related Delaware statutes. Nor did it address the governance distinctions between a limited partnership (with a requirement of at least one general partner) and an LLC, distinctions that might have been germane to its analysis.

More fundamentally, the Court, (despite citing Section 66(a) of the Limited Liability Company Act,[9] which calls for the act "to be liberally construed to give the maximum effect to the principle of freedom of

contract and to the enforceability of operating agreements") did not consider whether the failure of participant members of an LLC to reach consensus on the terms of an operating agreement is in effect a repudiation of the contractual basis from which the LLC proceeds (*i.e.*, that continuation of an LLC with those members was not reasonably practicable).

Conclusion

The New Jersey Supreme Court's focus on the abstract logic of statutory language, and on the Court's newly announced seven-factor test, led it to force three men to remain in business together for over 6 ½ years, despite their inability to get along. The experience under the same not reasonably practicable standard in other jurisdictions reflects a judicial understanding there that successful unincorporated businesses require a substantial level of agreement among the parties. When that agreement is not reasonably practicable, the parties may seek a judicial 'divorce' so the business may have a better chance to survive and prosper.

Peter D. Hutcheon is a member of Norris, McLaughlin & Marcus, P.A. and former chair (1990-1992) of the New Jersey State Bar Association's Business Law Section.

Endnotes

1. *IE Test, LLC v. Carroll*, 226 N.J. 166, 140 A.3d 1268 (Aug. 8, 2016).
2. *Id.* at 176.
3. *Id.* at 174.
4. *Id.* at 183.
5. *Id.* at 184.
6. *Id.* at 178.
7. *Id.* at 176.
8. N.J.S.A. 42:2A-52.
9. N.J.S.A. 42:2B-66(a).

In My Opinion—Statement of Opinion Practices

by Lydia C. Stefanowicz

Several years ago, the Working Group on Legal Opinions (WGLO) and the Legal Opinions Committee of the American Bar Association's (ABA's) Business Law Section undertook a joint project to identify selected aspects of customary practice and other practices applicable to third-party legal opinions that are commonly understood and accepted throughout the United States. The joint project is an effort to foster a national opinion practice that will be widely recognized and endorsed across various practice areas and legal specialties. It has resulted in preparation of the *Statement of Opinion Practices*. The *Statement of Opinion Practice* is designed to build upon the *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*,[1] which was approved by over 30 bar associations and other groups. The *Statement of Opinion Practices* has application to all types of third-party closing opinions in a wide variety of transactions.

To undertake the joint project, a committee was formed, which includes representatives of various state bar groups and others interested in opinion practice. The members of the project committee held numerous conference calls and meetings over the last several years, and reviewed and discussed many drafts of a proposed statement, all with an expectation that bar groups and others would endorse the final work product. The project committee examined the existing literature on legal opinions, including various bar reports, and focused on updating and amplifying the *Legal Opinion Principles*[2] and the *Guidelines for the Preparation of Closing Opinions*.[3]

The *Statement of Opinion Practices* is designed to update the *Legal Opinion Principles* in their entirety, and to update selected provisions of the *Guidelines for the Preparation of Closing Opinions*.

A version of the *Statement of Opinion Practices* was approved for distribution as an exposure draft dated March 31, 2016, by both the WGLO Board of Directors and the ABA Business Law Section's Legal Opinions Committee. Various bar groups and associations were asked to consider the exposure draft, offer their comments and suggestions and advise the project committee if they would join with other groups in approving a final version of the *Statement of Opinion Practice* as descriptive of the commonly understood and accepted opinion practices set forth therein. The project committee subsequently recirculated a revised draft dated Jan. 18, 2017, which incorporated certain comments received to the March 31 exposure draft. Once the final version is approved by WGLO and the ABA committee, it will again be circulated to bar associations and other groups for their final approval. The New Jersey State Bar Association Business Law Section's Board of Directors is one of the many bar groups nationwide reviewing and considering the *Statement of Opinion Practices*.

The following excerpt is designed to provide a sample of some of the principles embodied in the current draft:

4.1 Expression of Professional Judgment
An opinion expresses the professional judgment of the opinion giver regarding the legal issues the opinion addresses. It is not a guarantee that a court will reach any particular result.

4.2 Bankruptcy Exception and Equitable Principles Limitation
The bankruptcy exception and equitable principles limitation apply to opinions even if they are not expressly stated.

4.3 Cost and Benefit
The benefit to the recipient of a closing opinion and of any particular opinion should warrant the time and expense required to give them.

4.4 Golden Rule
Opinion givers and counsel for opinion recipients should be guided by a sense of professionalism and not treat closing opinions as if they were part of a business negotiation. An opinion giver should not be expected to give an opinion that counsel

> for the opinion recipient would not give in similar circumstances if that counsel were the opinion giver and had the requisite competence to give the opinion. Correspondingly, before declining to give an opinion it is competent to give, an opinion giver should consider whether a lawyer in similar circumstances would ordinarily give the opinion.

The *Statement of Opinion Practices* is a worthwhile effort, and represents an important contribution to opinion literature. It is another attempt to articulate widely accepted principles in third-party closing opinion practice that are designed to bring reasonable standards into opinion practice with the goal of making the issuance of legal opinions more efficient and cost-effective. ■

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Endnotes

1. 63 Bus. Law. 1277 (2008).
2. 53 Bus. Law. 831 (1998).
3. 57 Bus. Law. 875 (2002).