

# Delaware LLC Agreements: Planning and Drafting Approaches

Evaluating and Leveraging the Contractual Flexibility Afforded by the Amended DLLC Act

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WEDNESDAY, JUNE 8, 2016

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

Michael W. Whittaker, Partner, **Potter Anderson & Corroon**, Wilmington, Del.

Nathan J. Neuberger, Shareholder, **Reinhart Boerner Van Deuren**, Milwaukee

Joshua J. Novak, Director, **Richards Layton & Finger**, Wilmington, Del.

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YOUR DELAWARE ADVANTAGE

# **Delaware LLC Agreements: Planning and Drafting Approaches**

## Part 1 – Anatomy of an LLC Agreement

Michael W. Whittaker

June 8, 2016

# LLC Agreements

- Length and complexity of LLC Agreements can vary greatly
- Issues that can affect the Anatomy of the LLC Agreement include:
  - The purpose of the LLC (i.e., what business will it conduct)
  - The number and types of members
  - The internal management structure of the LLC



# Primary Issues to Address in LLC Agreements

- Formation
- Capitalization
- Distributions
- Tax Issues
- Management
- Transfers of Interests
- Dissolution



# Formation Issues

- Authorize or ratify the filing of the LLC's Certificate of Formation
- Admit initial members
- Describe the purpose or business of the LLC
- Identify the LLC's registered office and registered agent





# Capitalization

- Issuance of initial interests and admission of initial members
- Initial capital contributions
- Capital calls
- Penalties for failing to make a contribution
- Authority to issue additional interests



# Distributions

- Who has authority to declare?
- How are distributions shared?
- Restrictions on distributions
- Distributions on resignation (if permitted)



# Tax Issues

- Allocations
- Other tax issues



# Management

- How will the LLC be managed?
- If not managed by Members, what rights do the Members have?
- Fiduciary Duties
- Indemnification & Advancement



# Transfers of LLC Interests

- Restrictions on Transfers
  - Rights of First Refusal
  - Drag Along and Tag Along rights
- Admission of Substituted Members
- Rights of Unadmitted Transferees



# Dissolution

- What events trigger a dissolution?
- The Winding up Process and Liquidating Distributions
- Filing the Certificate of Cancellation



# Contact

Michael W. Whittaker

Direct dial: (302) 984-6104

[mwhittaker@potteranderson.com](mailto:mwhittaker@potteranderson.com)

Potter Anderson & Corroon LLP

1313 North Market Street

P.O. Box 951

Wilmington, DE 19899-0951

[www.potteranderson.com](http://www.potteranderson.com)



*The Delaware LLC Act*  
*VS.*  
*Other States*

Nate Neuberger  
June 8, 2016



## *Delaware LLC Act vs. Other States*

### 1. Anonymity

# Delaware LLC Act vs. Other States

## 1. Anonymity

 **Arizona**  
Corporation Commission

eCorp Search File Service FAQ


Search for an Entity Name

Search Date and Time:  
5/20/2016 10:43:43 AM


File Number:  
L18214810

Corporation Name:  
BAAM, LLC

[Collapse](#) | [Expand](#)

Corporate Inquiry 				
File Number	Corporation Name	Check Corporate Status		
L18214810	BAAM, LLC	<a href="#">Check Corporate Status</a>		

Manager/Member Information 				
Name	Title	Address	Date of Taking Office	Last Updated
JARRETT BOON	MANAGER	14052 S. 24TH WAY PHOENIX, AZ 85048	01/29/2013	02/28/2013
JEFFREY B ANGER	MEMBER	6640 S. CARTIER DR GILBERT, AZ 85298	01/29/2013	02/28/2013

# Delaware LLC Act vs. Other States

## 1. Anonymity

Entity Details			
<b>THIS IS NOT A STATEMENT OF GOOD STANDING</b>			
<a href="#">File Number:</a>	5027354	<a href="#">Incorporation Date / Formation Date:</a>	8/19/2011 (mm/dd/yyyy)
<a href="#">Entity Name:</a>	B 3 MINERALS LLC		
<a href="#">Entity Kind:</a>	Limited Liability Company	<a href="#">Entity Type:</a>	General
<a href="#">Residency:</a>	Domestic	State:	DELAWARE
<b><a href="#">REGISTERED AGENT INFORMATION</a></b>			
Name:	HARVARD BUSINESS SERVICES, INC.		
Address:	16192 COASTAL HWY		
City:	LEWES	County:	Sussex
State:	DE	Postal Code:	19958
Phone:	302-645-7400		
<p>Additional Information is available for a fee. You can retrieve Status for a fee of \$10.00 or more detailed information including current franchise tax assessment, current filing history and more for a fee of \$20.00.</p>			
Would you like <input type="radio"/> Status <input type="radio"/> Status, Tax & History Information <input type="button" value="Submit"/>			
<input type="button" value="Back to Entity Search"/>			

## *Delaware LLC Act vs. Other States*

### 2. Statutory Missteps

# *Delaware LLC Act vs. Other States*

## 2. Statutory Missteps

Wisconsin LLC Act:

### **183.0401 Management.**

- (1) Unless the articles of organization vest management of a limited liability company in one or more managers, management of the limited liability company shall be vested in the members, subject to any provision in an operating agreement or this chapter restricting or enlarging the management rights and duties of any member or group of members.

# *Delaware LLC Act vs. Other States*

## 2. Statutory Missteps

Wisconsin LLC Act:

### **183.0401 Management.**

(1) Unless the articles of organization vest management of a limited liability company in one or more managers, management of the limited liability company shall be vested in the members, subject to any provision in an operating agreement or this chapter restricting or enlarging the management rights and duties of any member or group of members.

Delaware LLC Act:

### **§ 18-402 Management of limited liability company.**

Unless otherwise provided in a limited liability company agreement, the management of a limited liability company shall be vested in its members in proportion to the then current percentage or other interest of members in the profits of the limited liability company owned by all of the members, the decision of

*Delaware LLC Act vs. Other States*

3. Non-Waivable Provisions

# Delaware LLC Act vs. Other States

## 3. Non-Waivable Provisions

Illinois LLC Act:

(b) The operating agreement may not:

(1) unreasonably restrict a right to information or access to records under Section 10-15;

(2) vary the right to expel a member in an event specified in subdivision (6) of Section 35-45;

(3) vary the requirement to wind up the limited liability company's business in a case specified in subdivisions (3) or (4) of Section 35-1;

(4) restrict rights of a person, other than a manager, member, and transferee of a member's distributional interest, under this Act;

(5) restrict the power of a member to dissociate under Section 35-50, although an operating agreement may determine whether a dissociation is wrongful under Section 35-50, and it may eliminate or vary the obligation of the limited liability company to purchase the dissociated member's distributional interest under Section 35-60;

(6) eliminate or reduce a member's fiduciary duties, but may:

(A) identify specific types or categories of activities that do not violate these duties, if not manifestly unreasonable; and

(B) specify the number or percentage of members or disinterested managers that may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate these duties;

(6.5) eliminate or reduce the obligations or purposes a low-profit limited liability company undertakes when organized under Section 1-26; or

(7) eliminate or reduce the obligation of good faith and fair dealing under subsection (d) of Section 15-3, but the operating agreement may determine the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable.



## *Delaware LLC Act vs. Other States*

### 3. Non-Waivable Provisions

Illinois LLC Act:

(b) The operating agreement may not:

- (1) unreasonably restrict a right to information or access to records under Section 10-15;
- (2) vary the right to expel a member in an event specified in subdivision (6) of Section 35-45;
- (3) vary the requirement to wind up the limited liability company's business in a case specified in subdivisions (3) or (4) of Section 35-1;
- (4) restrict rights of a person, other than a manager, member, and transferee of a member's distributional interest, under this Act;
- (5) restrict the power of a member to dissociate under Section 35-50, although an operating agreement may determine whether a dissociation is wrongful under Section 35-50, and it may eliminate or vary the obligation of the limited liability company to purchase the dissociated member's distributional interest under Section 35-60;

(6) eliminate or reduce a member's fiduciary duties,

but may:

- (A) identify specific types or categories of activities that do not violate these duties, if not manifestly unreasonable; and
  - (B) specify the number or percentage of members or disinterested managers that may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate these duties;
- (6.5) eliminate or reduce the obligations or purposes a low-profit limited liability company undertakes when organized under Section 1-26; or
- (7) eliminate or reduce the obligation of good faith and fair dealing under subsection (d) of Section 15-3, but the operating agreement may determine the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable.

## *Delaware LLC Act vs. Other States*

### 3. Non-Waivable Provisions

Delaware LLC Act:

(g) The rights of a member or manager to obtain information as provided in this section may be restricted in an original limited liability company agreement or in any subsequent amendment approved or adopted by all of the members or in compliance with any applicable requirements of the limited liability company agreement. The provisions of this subsection shall not be construed to limit the ability to impose restrictions on the rights of a member or manager to obtain information by any other means permitted under this chapter.

## *Delaware LLC Act vs. Other States*

### 4. Outlier Case Law

*Delaware LLC Act vs. Other States*

4. Outlier Case Law

A. Maine - *Beaudry v. Harding*

*Delaware LLC Act vs. Other States*

4. Outlier Case Law

A. Maine - *Beaudry v. Harding*

B. Massachusetts - *Kosanovich v. 80 Worcester Street Associates, LLC*

# Delaware LLC Agreements: Planning and Drafting Approaches

June 8, 2016

Joshua J. Novak



## Taking Advantage of the Flexibility of the Delaware LLC Act in Drafting LLC Agreements

## Flexibility – In General

- Delaware LLCs are “primarily creatures of contract.” – *TravelCenters of Am. LLC v. Brog*, C.A. No. 3751-CC (Del. Ch. Dec. 5, 2008).
- It is the limited liability company agreement that “defines the scope, structure and personality of limited liability companies.” – *Fisk Ventures, LLC v. Segal*, C.A. No. 3017-CC (Del. Ch. May 7, 2008).
- 18-1101(b) of the Delaware LLC Act: “It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements.”
- 18-1101(i) of the Delaware LLC Act: “A limited liability company agreement that provides for the application of Delaware law shall be governed by and construed under the laws of the State of Delaware in accordance with its terms.”
- 18-101(7) of the Delaware LLC Act: A manager, member, assignee and the LLC itself are bound by the LLC agreement whether or not such manager, member, assignee or LLC executes the LLC agreement.



## Flexibility – In General

- In most instances, the Delaware LLC Act acts as a default in the event an LLC agreement is silent with respect to a matter: “Unless otherwise provided in the limited liability company agreement...”
  - Mergers, conversions, amendments, dissolution/winding up, etc.
- Even with respect to provisions of the Delaware LLC Act that are not expressly permitted to be overridden in an LLC agreement, a Delaware court may permit the LLC agreement to do so nonetheless.
  - *R&R Capital, LLC v. Buck & Doe Run Valley Farms, LLC*, C.A. No. 3803-CC (Del. Ch. Aug. 19, 2008)
    - Members of a Delaware LLC purported to waive their rights to seek judicial dissolution of the LLC in an LLC agreement.
    - Court upholds such waiver notwithstanding that Section 18-802 does not, by its terms, expressly permit a member to waive such right.
    - “Delaware’s strong policy in favor of freedom of contract in the LLC Agreements requires such a result.”
- 18-101(7) of the Delaware LLC Act: A limited liability company agreement may provide rights to a person, including a person who is not a party to the limited liability company agreement, to the extent set forth therein.

## Flexibility – Examples of Limited Restrictions in the LLC Act

- 18-106(a): A limited liability company may carry on any lawful business, purpose or activity, whether or not for profit, with the exception of the business of banking as defined in Section 126 of the DGCL.
- 18-109(d): Except by agreeing to arbitrate any arbitrable matter in a specified jurisdiction or in the State of Delaware, a member who is not a manager may not waive its right to maintain a legal action or proceeding in the courts of the State of Delaware with respect to matters relating to the organization or internal affairs of a limited liability company.
- 18-607 and 18-804: Limitations on ability of an LLC to make distributions pre- and post-dissolution to protect LLC creditors.
- 18-702(c): A limited liability company shall not have the power to issue a certificate of limited liability company interest in bearer form.

## Flexibility – Structured Finance Transactions

- Springing/Special Members
- Independent Managers
- Waiver of Bankruptcy as an event that would, by default, cause a member to cease to be a member of an LLC under 18-304 of the Delaware LLC Act
- Personal Representative Provision
- SPE Covenants
- Lender rights

## Flexibility – Investment Funds

- Fiduciary duties
  - 18-1101(c): A member's or manager's or other person's duties (including fiduciary duties) may be expanded, restricted or eliminated in an LLC agreement; provided that an LLC agreement may not eliminate the implied contractual covenant of good faith and fair dealing.
  - Examples:
    - Sole Discretion
    - Allocation of portfolio investments among old, current and future funds
    - Upstairs modifications/Dual fiduciaries
- Submission to jurisdiction/Service of process
  - 18-109(d): In a written limited liability company agreement or other writing, a manager or member may consent to be subject to the nonexclusive jurisdiction of the courts of, or arbitration in, a specified jurisdiction, or the exclusive jurisdiction of the courts of the State of Delaware, or the exclusivity of arbitration in a specified jurisdiction or the State of Delaware, and to be served with legal process in the manner prescribed in such limited liability company agreement or other writing.

## Flexibility – Investment Funds (cont'd)

- Side Letters
  - Used to interpret, establish rights under, alter or supplement the terms of a fund agreement and other fund-related documents.
  - *ESG Capital Partners II, LP v. Passport Special Opportunities Master Fund, LP*, C.A. No. 11053-VCL (Del. Ch. Dec. 16, 2015)
    - In the context of a Delaware limited partnership, but same analysis would apply to LLCs.
    - Partnership agreement gave each of the investors an equity stake in the partnership and provided that any distribution was to be made to all of the investors in proportion to their respective percentage interests in the partnership.
    - Partnership entered into a side letter with an investor that purported to give that investor a right to receive a preferential transfer of partnership assets.

## Flexibility – Investment Funds (cont'd)

- *ESG Capital Partners II, LP v. Passport Special Opportunities Master Fund, LP* (cont'd)
  - Side Letter rendered a nullity because of integration clause in investor's subscription agreement that was entered into after the Side Letter.
  - Even if Side Letter remained in effect notwithstanding the integration clause, Side Letter rights at issue were invalid because (i) the general partner of the partnership lacked authority to grant these rights, and (ii) the Side Letter could not be used as a means to amend the partnership agreement without complying with the amendment provisions.
  - Highlights the benefit that a carefully drafted side letter authorization provision can provide.

## Flexibility – Master Limited Partnerships

- Elimination of default fiduciary duties
  - Example: Except as expressly set forth in this Agreement or expressly required by the Delaware Act, neither the General Partner nor any other Indemnitee shall have any duties or liabilities, including fiduciary duties, to the Partnership or any Limited Partner, and the provisions of this Agreement, to the extent that they restrict, eliminate or otherwise modify the duties and liabilities, including fiduciary duties, of the General Partner or any other Indemnitee otherwise existing at law or in equity, are agreed by the Partners to replace such other duties and liabilities of the General Partner or such other Indemnitee.
  - *Dieckman v. Regency GP LP, et al.*, C.A. N. 11130-CB (Del. Ch. Mar. 29, 2016)
    - Fiduciary duties were eliminated under the LPA, thus so was any duty of disclosure.
    - The LPA contained only one disclosure requirement: A copy or summary of the Merger Agreement to be provided.
    - The Implied Covenant does not create any additional disclosure obligations in this context.

## Flexibility – Master Limited Partnerships (cont'd)

- Contractual “Good Faith” Standard
  - Example: Whenever the General Partner makes a determination or takes or declines to take any other action, or any Affiliate of the General Partner causes the General Partner to do so, in its capacity as the general partner of the Partnership as opposed to in its individual capacity, whether under this Agreement, any Group Member Agreement or any other agreement contemplated hereby or otherwise, then, unless another express standard is provided for in this Agreement, the General Partner or such Affiliates causing the General Partner to do so shall make such determination or take or decline to take such other action in good faith and shall not be subject to any other or different duties or standards (including fiduciary duties or standards) imposed by this Agreement, any Group Member Agreement, any other agreement contemplated hereby or under the Delaware Act or any other law, rule or regulation or at equity.
  - Example: A determination or other action or inaction will conclusively be deemed to be in “good faith” for all purposes of this Agreement, if the Person or Persons making such determination or taking or declining to take such other action subjectively believe that the determination or other action or inaction is in, or not opposed to, the best interests of the Partnership Group.



## Flexibility – Master Limited Partnerships (cont'd)

- Conflicts of Interest
  - Example: Whenever a potential conflict of interest exists or arises between the General Partner or any of its Affiliates, on the one hand, and the Partnership, any Group Member or any Partner, on the other, any resolution or course of action by the General Partner or its Affiliates in respect of such conflict of interest shall be permitted and deemed approved by all Partners, and shall not constitute a breach of this Agreement, of any Group Member Agreement, of any agreement contemplated herein or therein, or of any duty stated or implied by law or equity, if the resolution or course of action in respect of such conflict of interest is approved by Special Approval.
  - Example: In any proceeding brought by any Limited Partner or by or on behalf of such Limited Partner or any other Limited Partner or the Partnership challenging any action by the Conflicts Committee with respect to any matter referred to the Conflicts Committee for Special Approval by the General Partner, the Person bringing or prosecuting such proceeding shall have the burden of overcoming the presumption that the Conflicts Committee or the Board of Directors, as applicable, acted in good faith.

## Flexibility – Miscellaneous

- Indemnification
  - 18-108: Subject to such standards and restrictions, if any, as are set forth in its limited liability company agreement, a limited liability company may, and shall have the power to, indemnify and hold harmless any member or manager or other person from and against any and all claims and demands whatsoever.
  
- Exculpation
  - 18-1101(e): A limited liability company agreement may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a member, manager or other person to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement; provided, that a limited liability company agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.

## Flexibility – Miscellaneous

- Dissolution
  - Section 18-801 provides that an LLC agreement may provide the time at which an LLC will dissolve (including upon the happening of events specified in the LLC agreement).
  - Examples: finite term, sale of all/substantially all assets, change of control, etc.



Joshua J. Novak  
Richards, Layton & Finger, PA  
302.651.7700  
[novak@rlf.com](mailto:novak@rlf.com)

# *Pitfall: Delaware LLC Act Fiduciary Duty Waivers*

Nate Neuberger  
June 8, 2016

*Delaware LLC Act*  
*Fiduciary Duty Waivers*

Delaware corporate law fiduciary duties

- Directors and controlling stockholders

*Delaware LLC Act  
Fiduciary Duty Waivers*

Delaware corporate law fiduciary duties

- Directors and controlling stockholders
- Duty of Care / Duty of Loyalty

*Delaware LLC Act  
Fiduciary Duty Waivers*

Delaware corporate law fiduciary duties

- Directors and controlling stockholders
- Duty of Care / Duty of Loyalty
- History of judicial refinement



*Delaware LLC Act  
Fiduciary Duty Waivers*

Delaware corporate law fiduciary duties

- Directors and controlling stockholders
- Duty of Care / Duty of Loyalty
- History of judicial refinement
- Non-waiveable
  - Director exculpation under DGCL §102(b)(7)
  - Corporate opportunity waivers under DGCL §122(17)

*Delaware LLC Act  
Fiduciary Duty Waivers*

Delaware LLC fiduciary duties

- Managers and controlling members

*Delaware LLC Act  
Fiduciary Duty Waivers*

Delaware LLC fiduciary duties

- Managers and controlling members
- Waiveable

*Delaware LLC Act  
Fiduciary Duty Waivers*

Delaware LLC fiduciary duties

- Managers and controlling members
- Waiveable
- Line of cases in recent years

*Delaware LLC Act  
Fiduciary Duty Waivers*

Delaware LLC fiduciary duties

- Managers and controlling members
- Waiveable
- Line of cases in recent years
- Silent LLC Agreement: Default duties apply?

*Delaware LLC Act*  
*Fiduciary Duty Waivers*

2013: Delaware legislature acts

- Amends §18-1104 of the LLC Act

*Delaware LLC Act  
Fiduciary Duty Waivers*

2013: Delaware legislature acts

- Amends §18-1104 of the LLC Act
- Default fiduciary duties apply unless limited in LLC Agreement
  - §18-1101: "Implied contractual covenant of good faith and fair dealing" remains unwaiveable.

*Delaware LLC Act*  
*Fiduciary Duty Waivers*

## Significance?

- Fiduciary duty claims are abundant
  - Example: *Wiggs v. Summit Midstream Partners*



*Delaware LLC Act  
Fiduciary Duty Waivers*

## Significance?

- Fiduciary duty claims are abundant
  - Example: *Wiggs v. Summit Midstream Partners*
- "Aiding and Abetting" breach of fiduciary duty
  - Increase investor exposure
  - Outside D&O

*Delaware LLC Act*  
*Fiduciary Duty Waivers*

## Practice tips

- Default duties apply unless waived

*Delaware LLC Act*  
*Fiduciary Duty Waivers*

## Practice tips

- Default duties apply unless waived
- Waivers must be clear and explicit

*Delaware LLC Act*  
*Fiduciary Duty Waivers*

## Practice tips

- Default duties apply unless waived
- Waivers must be clear and explicit
- Cannot waive "Implied contractual covenant of good faith and fair dealing"

*Delaware LLC Act*  
*Fiduciary Duty Waivers*

## Practice tips

- Default duties apply unless waived
- Waivers must be clear and explicit
- Cannot waive "Implied contractual covenant of good faith and fair dealing"
- "Limitation of Liability" and "Indemnification" sections of LLC Agreement
  - Minefield for "waiver" language

*Delaware LLC Act  
Fiduciary Duty Waivers*

Example:

A. No Fiduciary Duty Waiver

## *Delaware LLC Act Fiduciary Duty Waivers*

Example:

A. No Fiduciary Duty Waiver

B. Exculpation

No Manager shall be liable to the Company or any Member for any loss suffered by the Company or any Member unless such loss is caused by a breach of this Agreement by the Manager or the Manager's fraud, gross negligence or willful misconduct ...

## *Delaware LLC Act Fiduciary Duty Waivers*

Example:

A. No Fiduciary Duty Waiver

B. Exculpation

No Manager shall be liable to the Company or any Member for any loss suffered by the Company or any Member unless such loss is caused by a breach of this Agreement by the Manager or the Manager's **breach of fiduciary duty**, fraud, gross negligence or willful misconduct ...



# Thank You

Nathan J. Neuberger  
Reinhart Boerner Van Deuren  
414.298.8100  
[nneuberger@reinhartlaw.com](mailto:nneuberger@reinhartlaw.com)