

Alabama Limited Liability Company Law of 2014

C. Collin Rich
Hubbard, McIlwain & Brakefield, P.C.
crich@hubbardfirm.com

Background

- Enacted March 2014
- Codified at [Ala. Code §10A-5A-1](#), *et seq.*
- Effective for all LLCs formed after January 1, 2015. Effective for all LLCs, regardless of date of formation, January 1, 2017.¹

¹ Ala. Code §10A-5A-12-01

Terminology Changes

- Articles of Organization → Certificate of Formation²
- "Ceases to be a Member" → Dissociation³
- Operating Agreement → Limited Liability Company Agreement⁴
- Financial Rights → Transferable Interest⁵

² Ala. Code §10A-5A-1-02(a)
³ Ala. Code §10A-5A-6-02
⁴ Ala. Code §10A-5A-1-02(a)
⁵ Ala. Code §10A-5A-1-02(b)

What You Can't Do

An LLC Agreement can modify any statutory default, except that it may not⁶:

- Vary the nature of the LLC as a separate legal entity;
- Vary the applicable law;
- Restrict rights under the Act other than the rights of a member, dissociated member, or transferee;
- Vary the power of the Court under Section 2.05 to compel an LLC to sign a document upon the petition of an aggrieved party;

6 (LLC Code § 10A-5A-1.08(c))

What You Can't Do

An LLC Agreement can modify any statutory default, except that it may not:

- Eliminate the implied contractual covenant of good faith and fair dealing;
- Waive the requirement that promises of contribution by members be in writing to be enforceable;
- Eliminate or limit liability of a Member or any other person for any act/omission constituting bad faith violation of good faith covenant of fair dealing;
- Vary the law applicable to obligations or liabilities of a Member for amount of distribution;

What You Can't Do

An LLC Agreement can modify any statutory default, except that it may not:

- Reduce limitations period for actions alleging improper distribution;
- Waive prohibition on issuance of a Certificate of Transferable Interest in Bearer Form;
- Vary the power of the Court to decree dissolution upon application by Member or Series (more on this later) claiming the business is not practicable to carry on;
- Vary the requirement to wind up LLC's activities;

What You Can't Do

An LLC Agreement can modify any statutory default, except that it may not:

- Vary provisions related to special rules for professional services LLCs;
- Vary right of a requirement of consent of all members with resulting personal liability because of a conversion or merger;
- Waive requirements of Series, i.e., Series accounts must be separate records, the LLC Agreement must have language regarding limits in Section 11.02(a), and the LLC's Certificate of Formation must say the LLC may have one or more Series of assets;

SERIES

What is a Series?

SERIES

As one commentator has said, "Series LLCs are a form of entity that require a half bottle of aspirin and a full bottle of Scotch to understand."

7 Jay Adkisson, *Series LLC: And The Abuse Of The Unknowns?*,
 Forbes, December 26, 2011,
<http://www.forbes.com/sites/jayadkisson/2011/12/26/series-llc-and-the-abuse-of-the-unknowns>.

Series: Ala. Code §10A-5A-11.01, et seq.

- One of the more significant changes to the statutory scheme governing LLCs.
- Allows for the creation of one or multiple Series of assets under the LLC Agreement.
- A Series is, in effect, a subsidiary of an LLC within the LLC.
- A Series has “(1) separate rights, powers, or duties with respect to specified property or obligations of the [LLC] or profits and losses associated with specified property or obligations; or (2) has a separate purpose or investment objective.”⁸

⁸ Ala. Code §10A-5A-11.01(a)

Series: Ala. Code §10A-5A-11.01, et seq.

- Debts and liabilities of a Series are enforceable against the assets of that Series only, and are not enforceable against the LLC as a whole or another series.⁹
 - In order to receive this protection, the records for the Series must account for the assets of only that Series and be separate from the records of the LLC or any other Series thereof.¹⁰
- Series assets may be held directly or indirectly, and may be held in the name of the LLC.¹¹

⁹ Ala. Code §10A-5A-11.02 (a)
¹⁰ Ala. Code § 10A-5A-11.02 (b)
¹¹ Ala. Code §10A-5A-11.03 (a)

Who’s in Charge?

Elimination of Member-Managed and Manager-Managed Distinction

Ala. Code §10A-5A-3.02
Power to bind Limited Liability Company

No person shall have the power to bind the limited liability company, or a series thereof, except:

(a) to the extent the person is authorized to act as the agent of the limited liability company or a series thereof under or pursuant to the limited liability company agreement;

(b) to the extent the person is authorized to act as the agent of the limited liability company or a series thereof pursuant to Sections 10A-5A-4.07, 10A-5A-7.03 or 10A-5A-11.11; or

(c) to the extent provided by law other than this chapter.

Ala. Code §10A-5A-3.02
Power to bind Limited Liability Company

“This section eliminates any statutorily imposed agency powers that existed under the Prior LLC Law, thus giving the members much more freedom to agree upon appropriate governance structures. Agency powers can arise under the terms of the Limited Liability Company Agreement, by consents of the members as provided in Section 4.02 or under the law of agency.”¹²

¹² Ala. Code 10A-5A-3.02 Commentary

So, What does that Mean?

- You can appoint whoever you want as an “agent” under the LLC Agreement;
- If you don’t appoint an “agent”, then the Members oversee the LLC and may bind it; and
- Regardless, the law of Agency/Apparent Authority can always override.¹³

¹³ Ala. Code §10A-5A-3.02 Commentary

Do Your Duty

An expansion of duties

Ala. Code §10A-5A-4.08

- Duties of persons with authority to direct and oversee the activities and affairs of an LLC (or a Series) to the LLC/Series and its members include, but are not limited to, the duty of loyalty and care.
 - Duty of Loyalty Includes:
 - To account to the LLC/Series and hold as trustee for it any property, profit, or benefit derived by that person in the conduct or winding up of the LLC's/Series' activities or affairs or derived from a use by that person of the LLC's/Series' property, including the appropriation of the LLC's/Series' opportunity.
 - To refrain from dealing with the LLC/Series in the conduct or winding up of the LLC's/Series' activities and affairs as or on behalf of a party having an interest adverse to the LLC/Series.
 - To refrain from competing with the LLC/Series in the conduct of the LLC's/Series' activities and affairs before the dissolution of the LLC/Series.

Ala. Code §10A-5A-4.08

- Duties of persons with authority to direct and oversee the activities and affairs of an LLC (or a Series) to the LLC/Series and its members include, but are not limited to, the duty of loyalty and care.
 - Duty of Care Includes:
 - Refraining from engaging in grossly negligent or reckless conduct;
 - Refraining from intentional misconduct; and
 - Refraining from knowing violations of law.

Ala. Code §10A-5A-4.08

- Persons who have the authority to direct and oversee the activities and affairs of an LLC/Series must also discharge their duties to the LLC/Series and their respective members under the Act and the LLC Agreement, and must exercise any rights consistently with the implied contractual covenant of good faith and fair dealing.

Ala. Code §10A-5A-4.08

- Statutory default duties. The only difference is these duties are no longer exclusive and the focus is now on “direction and oversight” of the LLC/Series.
- Commentary: The door is now opened “to other duties which may be applicable through equitable and common law principles, including the law of agency, to establish the duties and obligations of members, agents and others to each other and to the [LLC/Series].”
 - Remember, the implied contractual covenant of good faith and fair dealing may not be altered by the LLC Agreement.

Improper Distributions

Ala. Code §10A-5A-4.06

- A "distribution" may not be made to a member if, at the time of the distribution, the distribution would cause the LLC's/Series' liabilities to exceed the fair value of its assets.
- "Distribution" is a transfer to a person on account of an LLC interest.¹⁴
- Calculation of liabilities does not include liabilities to members on account of their transferable interests or liabilities for which the recourse of creditors is limited to specific property of the LLC, however, that property is included in assets to the extent the value exceeds the specific recourse liability.

14 Ala. Code §10A-5A-1.02(b)

Transfer Restrictions

Ala. Code §10A-5A-1.06

- Allows for enforcement of transfer restrictions in an LLC Agreement.

Charging Orders

Ala. Code §10A-5A-5.03

- Provides for a Charging Order, upon application by a judgment creditor to a court of competent jurisdiction, limited to the right to distributions to a member or transferee based on its transferable interest. The Charging Order is a lien on the judgment debtor's transferable interest.
- Provides a specific mechanism for the LLC to pay a distribution subject to a Charging Order by allowing payment of the distribution into the court. Also limits the LLC's liability for the amount so paid.
- Charging Order is the exclusive remedy by which a judgment creditor of a member or transferee may satisfy a judgment out of a judgment debtor's transferable interest.
 - A judgment creditor holding a Charging Order has not right to foreclose upon the Charging Order, the resultant lien, or the judgment debtor's transferable interest. A judgment creditor of a member or transferee has no right to possession of, or to exercise legal or equitable remedies with respect to the property of an LLC.
 - Further, a judgment creditor may not obtain and courts may not enter orders for accounts or inquiries that the judgment debtor might have made.

Post-Dissolution Reinstatement

Ala. Code §10A-5A-7.07 – 7.10

- Provides for the post-dissolution reinstatement of an LLC.
- Requires consents of Members and a certificate of reinstatement.
- Upon reinstatement, the LLC for all purposes is deemed to have continued its activities and affairs as if dissolution had never occurred, except that those persons acting in reliance on the dissolution before those persons had notice of the reinstatement shall not be adversely affected by the reinstatement.

Derivative Actions

Ala. Code §10A-5A-9.01, ET seq.

- Under the previous LLC law, Members could bring actions in the right of the LLC if the Member(s) or Manager(s) failed to bring an action they could have initiated on behalf of the LLC.
- Now, in addition, Members may also maintain a direct action against Members or the LLC to enforce its rights and to protect its interests.
