

Default Provisions in Arkansas's Uniform LLC Act – Now You Know



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In previous blog posts ([here](#) and [here](#)) my colleagues have written about Arkansas's adoption of the Uniform LLC Act (as adopted in Arkansas, the "Act") and the new default duty of loyalty owed by the members and managers of the LLC to each other under the Act. Continuing in that vein, I would like to make sure that practitioners and those who are participants in LLCs are aware of other new default provisions in the Act.

First, the basics: from and after September 1, 2021, the Act's provisions to all LLCs domesticated or registered in Arkansas.^[1] Under the Act, if an LLC's operating agreement does not address a matter, the Act's provisions are applicable.^[2] If the operating agreement addresses a matter and attempts to vary a provision of the Act that the operating agreement is not allowed to vary, then the Act's provisions will, of course, apply instead.^[3] For foreign LLCs not domesticated in Arkansas, the law of the foreign LLC's state of formation governs (to the extent the foreign LLC's operating agreement hasn't validly changed it), but a foreign LLC cannot engage in activities or exercise powers in Arkansas if the Act prohibits those activities or powers for domesticated LLCs.^[4]

Certain Default Provisions the Operating Agreement Cannot Vary

1. Under Ark. Code Ann. § 4-38-105(e)(1), the operating agreement for an Arkansas-domesticated LLC cannot select law other than the Act to govern. However, a close read of the comments to the invariable section by the Uniform Law Commission seems to endorse an operating agreement's incorporation of another state's LLC statutes as binding on the LLC and its participants, to the extent the terms of those statutes are "not prohibited" by the Act.^[5]
2. Under Ark. Code Ann. § 4-38-105(e)(8), the operating agreement for an Arkansas-domesticated LLC cannot "unreasonably" restrict the rights to, and duties regarding, information about the LLC that the participant in the LLC is permitted to access under the Act.^[6]
3. Under Ark. Code Ann. § 4-38-105(e)(11), the operating agreement for an Arkansas-domesticated LLC cannot "unreasonably" restrict the right of a member to sue another member directly or to sue the LLC derivatively, as permitted by the Act.^[7]

Certain Default Provisions the Operating Agreement Can Vary

1. A member of an LLC can withdraw as a member at any time by communicating his or her will to do so.^[8]
2. A member of an LLC can transfer that member's "transferable interest" in the LLC to another person at will, without thereby ceasing to be a member, but the recipient of the transferable interest does not automatically become a member by reason of acquiring the transferable interest.^[9]

3. The LLC may not make a distribution, if after the distribution the LLC's total assets would be less than the total of: i) the LLC's total liabilities, plus ii) the amount that would be needed, if the LLC were dissolved at the time of the distribution, to satisfy the preferential rights of participants in the LLC whose preferential rights are superior to those of any person receiving the distribution.^[10]
4. In a member-managed LLC, each member has equal rights in the management and conduct of the LLC's activities and affairs. To make a decision if there is any disagreement, the vote of a majority of those members is controlling.^[11] Consider the following as an extreme example of this default provision. An LLC has five members: A, B, C, D, and E. A owns 80% of the LLC's interests, and B, C, D, and E own 5% each. Under the default, the vote of any three of B, C, D, and E is controlling, even though they only own 15% of the LLC's interests among the three of them.
5. Under Ark. Code Ann. § 4-38-407(a), if the operating agreement does not state that an LLC is manager-managed, it is member-managed.
6. It takes the affirmative vote of every member, whether the LLC is member-managed or manager-managed, to amend the operating agreement once it is adopted.^[12]
7. A person's obligation to make a contribution to an LLC is not excused by the person's death, disability, termination, or other inability to perform personally. Only the unanimous vote of the members is sufficient for the LLC to compromise or waive this kind of contribution obligation.^[13]
8. In a manager-managed LLC, the members do not owe the LLC or each other the duties of loyalty or care.^[14] Further, except for the contractual obligation of good faith and fair dealing, a member in a manager-managed LLC does not have any duty to the LLC or to any other member solely by reason of being a member.^[15]
9. In a manager-managed LLC, a person who is acting as manager, whether or not that person is also a member, can breach the duties imposed under the Act by acting (in his or her capacity as a manager) in a way that furthers that person's own interests.^[16]
10. In a manager-managed LLC, members only have a right to information if that information is sought for a purpose that is reasonably related to the member's interest as a member and the information sought is directly connected to that purpose. The member must first make demand on the LLC and describe the information sought with reasonable particularity.^[17]

Conclusion

For participants in LLCs and practitioners, knowing what is in an LLC's operating agreement is critically important. But just as important is knowing what the default rules are when the operating agreement does not exist or does not address a certain subject. Hopefully this article has illuminated some of the Act's default provisions so that participants in LLCs and practitioners can now be cognizant of them.

^[1] ARK. CODE ANN. § 4-38-110. ^[2] ARK. CODE ANN. § 4-38-105(d). ^[3] ARK. CODE ANN. § 4-38-105(a), (b), (e), (f). ^[4] ARK. CODE ANN. § 4-38-901. ^[5] See Comment to § 104(1) of the Uniform Limited Liability Company Act (2013). ^[6] See ARK. CODE ANN. § 4-38-410. ^[7] See ARK. CODE ANN. § 4-38-801 *et seq.*

^[8] ARK. CODE ANN. § 4-38-601(a). ^[9] ARK. CODE ANN. § 4-38-502(a). ^[10] ARK. CODE ANN. § 4-38-405(a). ^[11] ARK. CODE ANN. § 4-38-407(b). ^[12] ARK. CODE ANN. § 4-38-407(b)(4)(B), (c)(3)(B). ^[13] ARK. CODE ANN. § 4-38-403(a), (c). ^[14] ARK. CODE ANN. § 4-38-409(i)(1). ^[15] ARK. CODE ANN. § 4-38-409(i)(6). ^[16] ARK. CODE ANN. § 4-38-409(e), (i)(4); see Comment to § 409(e) of the Uniform Limited Liability Company Act (2013). ^[17] ARK. CODE ANN. § 4-38-

410(b). But note that (b)(4) requires the LLC to disclose any known information that is material to a member's vote if the member is required to vote on (or consent to) a matter.