

Revised Uniform Limited Liability Company Act

*cutting edge
issues for filing
officers*

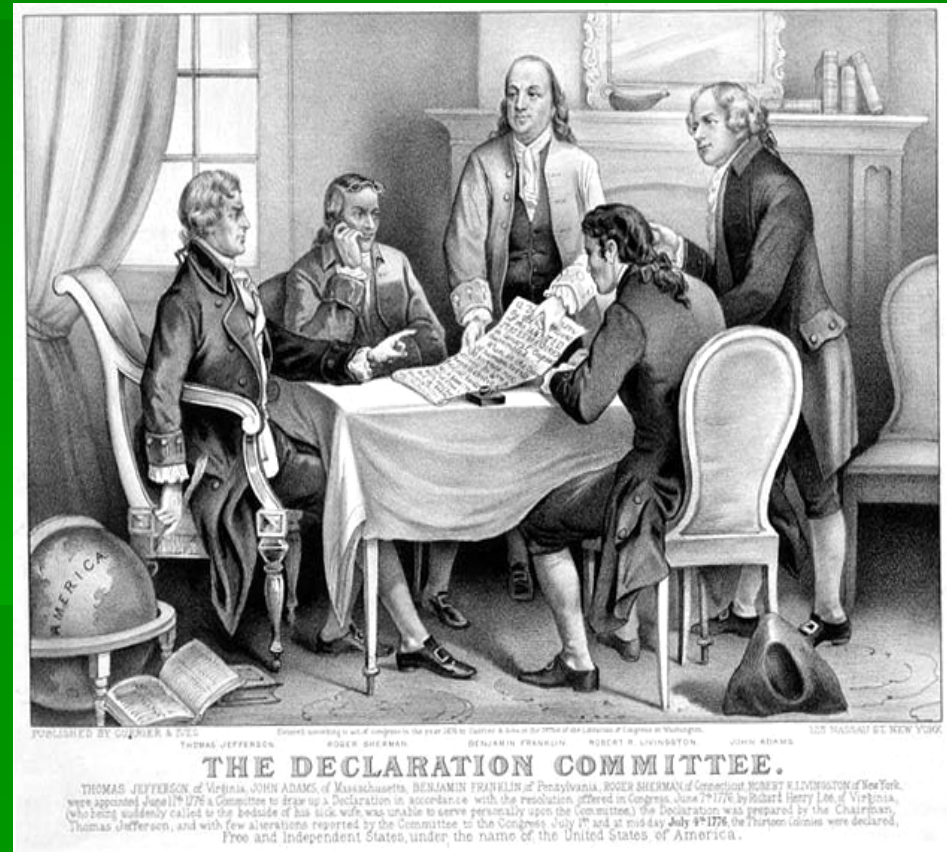


*IACA Annual Meeting – 2007
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the new Act ...

- the product of wise individuals



of diverse perspectives



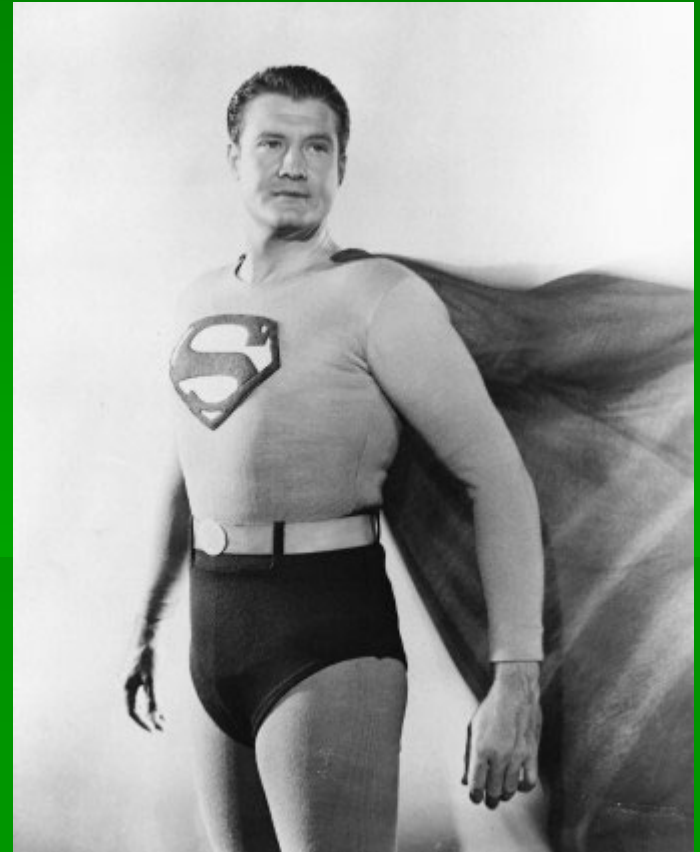
point – counterpoint dialectic



- exploring each dimension of all issues

IACA viewpoint respected as reflecting ...

- truth
- justice
- and . . .
- the American way



why a new uniform act?

- **more than 18 years have passed since the IRS issued its gate-opening Revenue Ruling 88-76**
- **more than 8 years since the “check the box” regulations busted down the entire fence**
- **most states have done work on their own LLC statutes (ranging from tinkering to substantial re-writes)**
- **opportunity existed to collect the “best and brightest” ideas**

**so, what's exciting about the
new uniform act for filing
officers?**



five items

1. a change of terminology
2. a claim of quality
3. a formation issue (herein of “shelf LLCs”)
4. a trap for the unwary **undone** (herein of de-codifying apparent authority)
5. a contradiction in terms **eschewed** (herein of the “series LLC”)

1. a claim of quality



- drafting a statute is like being a cabinet maker
- NCCUSL tried very hard to build a good, well functioning cabinet
 - rules clear
 - interconnection of rules clear
 - comments that provide roadmaps and explanations but do not legislate

2. a change in terminology

- “certificate of organization” rather than “articles of organization” to refer to the publicly filed document used to create a limited liability company
- change intended to signal that
 - i. the certificate merely reflects the existence of an LLC – **not the locus for important governance rules**
 - ii. this document is **significantly different from articles of incorporation**, which have a substantially greater power to affect inter se rules for the corporate entity and its owners.

Re-ULLCA, § 102(1), cmt

3. the difficult question of the “shelf LLC”



... meaning . . .

may the entity precede its owners into existence?

- to await the crystallizing of the deal?



the *corpufuscation debate*

- *Are we subverting LLCs by treating them as corporations?*

and . . .

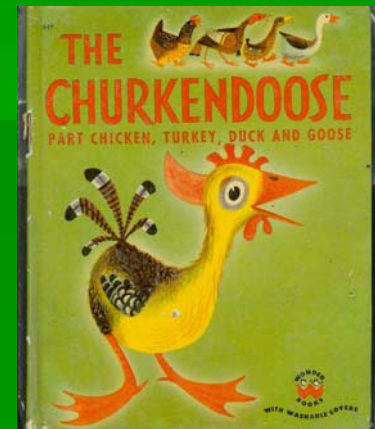
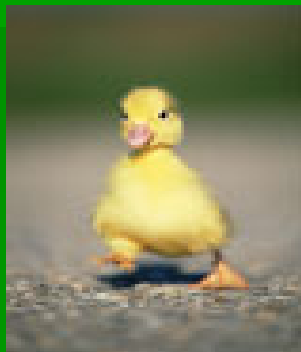
- *Why do we care?*

whether it's apples and oranges or apples and apples



- from the filing officer perspective ...
 - created by filing
 - separate entity
 - no automatic owner liability for any owner
- looks like a duck, waddles like . . .

then it is ...



the Act:

- permits an organizer to file a certificate of organization without a person “waiting in the wings” to become a member upon formation; but
- provides that the LLC is not formed until and unless at least one person becomes a member and the organizer makes a second filing stating that the LLC has at least one member.

the product of much hard work of many leading minds



- rare occurrence
 - business lawyers asking for more rather than fewer interactions with the government
- provides a retrospective approach to formation
 - but the date of formation will be apparent on the face of the record

a matter of

conceptual purity and double-filing
versus
conceptual hybridization and a single filing



§201(b) - A certificate of organization must state:

(3) if the company will have no members when the [Secretary of State] files the certificate, a statement to that effect.

(e) If a filed certificate of organization contains a statement as provided in subsection (b)(3), the following rules apply:

(1) The certificate lapses and is void unless, within [90] days from the date the [Secretary of State] files the certificate, an organizer signs and delivers to the [Secretary of State] for filing a notice stating:

(A) that the limited liability company has at least one member; and

(B) the date on which a person or persons became the company's initial member or members.

(2) If an organizer complies with paragraph (1), **a limited liability company is deemed formed as of the date of initial membership stated in the notice delivered pursuant to paragraph (1).**

conceptual conflict that plays out in many realms ...

- as in Fiddler on the Roof –
- horse, mule, horse, mule



one is the attitude toward filing

- Is it the agreement among the owners that creates the entity, with the filing a mere technicality?

or

- Does filing signify the acquisition of a privilege from the state – **separate entity status**
 - liability shield
 - capacity to sue and be sued
 - power to hold property

only G-d can make a tree ...

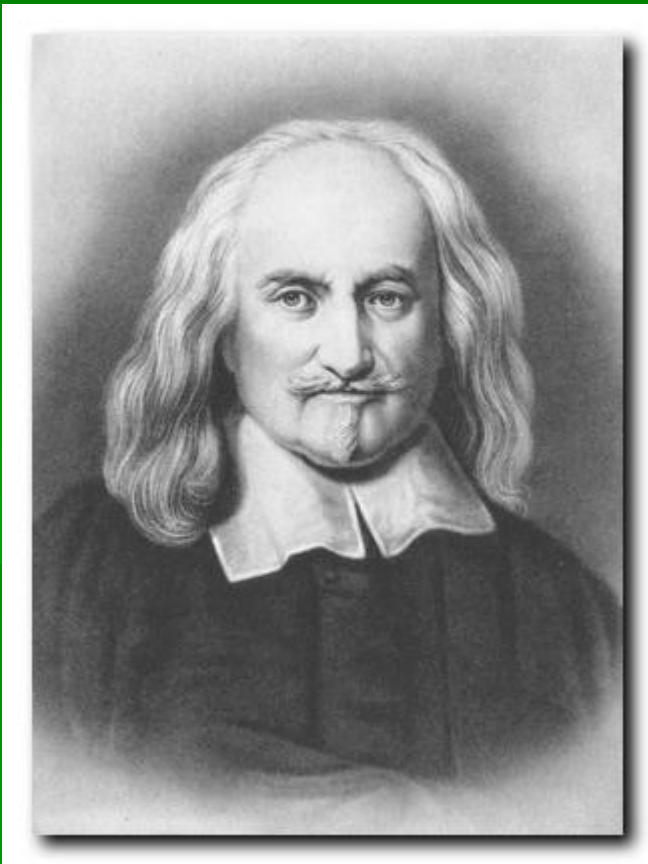


but only the State can make ...

fictional person



worth recalling the “state of nature”



“personal responsibility”

- proprietors had
 - unlimited upside
 - and
 - unlimited downside
- change from this “state of nature” required the intervention of the state

how one views the role of the state can

- inform the debate on how much disclosure the state might properly exact in return for the privilege
- illumine the question of whether a private entity should be able to create its own internal shields
 - of which more anon – the “series” LLC

3. statutory apparent authority

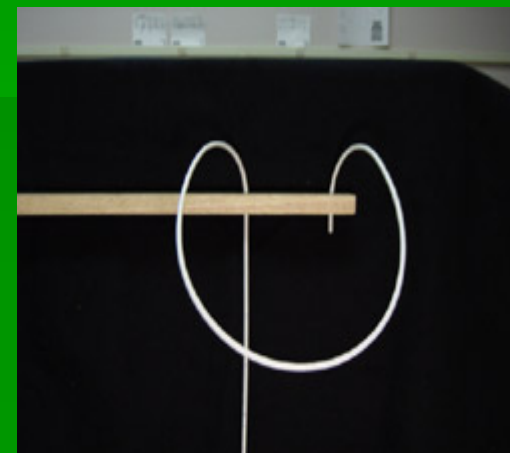
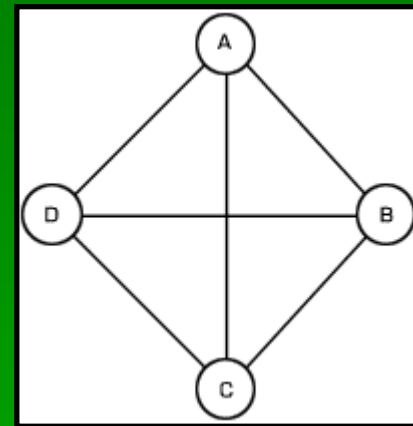
- in Uniform Acts since 1914
- codifying an archetypical “apparent authority by position”
- makes great sense for general and limited partnerships
 - name of the organization, plus
 - the name of the position

Re-ULLCA, § 301, cmt.

“A third party dealing with either type of partnership can know by the formal name of the entity and by a person’s status as general or limited partner whether the person has the power to bind the entity.”

not such great sense for LLCs

- almost infinite flexibility of structure
- no “clue” from the company name as to structure



nonetheless ...

- Most LLC statutes have attempted to use the same approach but with a fundamentally important (and problematic) distinction.
- An LLC's status as member-managed or manager-managed determines whether members or managers have the statutory power to bind.

But

- An LLC's status as member- or manager-managed is not apparent from the LLC's name.
- A third party must check the public record, which may reveal that the LLC is manager-managed, which in turn means a member as member has no power to bind the LLC.

As a result ...

- a provision that originated in 1914 as a protection for third parties can, in the LLC context, easily function as a trap for the unwary.



problem compounded by the use by LLC statutes of “manager” as a term of art

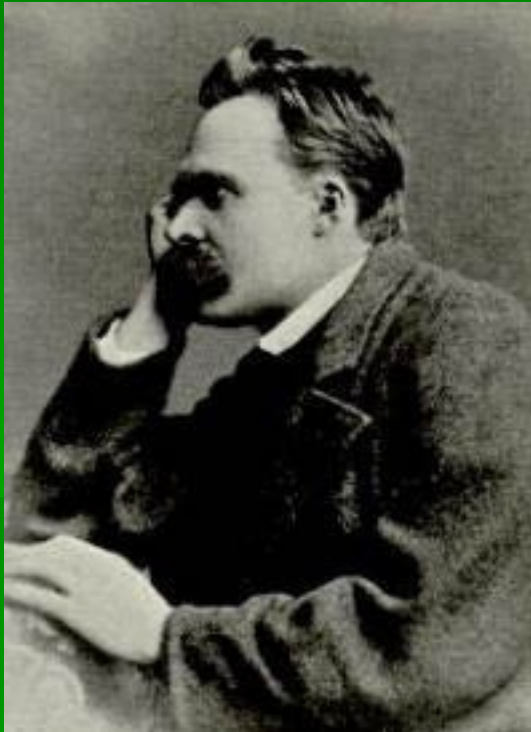
Property Manager
General Manager
Asset Manager
Regional Manager
Director of Property
Management/Operation
Vice President Property
Management/Operation

- label was already in use
- so far – cases mostly dealing with insurance coverage

three part solution



part one – imitate Nietzsche



on the demise of the
diety:

Die fröhliche Wissenschaft (The
Gay Science)1882

statutory apparent authority is dead

i.e. – de-codified

SECTION 301. NO AGENCY POWER OF MEMBER AS MEMBER.

(a) A member is not an agent of a limited liability company solely by reason of being a member.

part two – rely on the common law of agency

(b) A person's status as a member does not prevent or restrict law other than this [act] from imposing liability on a limited liability company because of the person's conduct.

EXAMPLE:

- David is a one of two members of DS, LLC, a member-managed LLC. David orders paper clips on behalf of the LLC, signing the purchase agreement, “David, as a member of DS, LLC.” The vendor accepts the order, sends an invoice to the LLC’s address, and in due course receives a check drawn on the LLC’s bank account. When David next places an order with the vendor, the LLC’s payment of the first order is a manifestation that the vendor may use in establishing David’s apparent authority to place the second order.
 - Re-ULLCA, § 301, cmt.

part three - a “souped up” version of RUPA’s statement of authority

- permits an LLC to publicly file a statement of authority for a position (not merely a particular person)
- will enable LLCs to provide reliable documentation of authority to enter into transactions without having to disclose to third parties the entirety of the operating agreement.



5. a noteworthy omission

- the “series” LLC
 - permits “an LLC to compartmentalize its operations and create ‘internal’ shields to protect assets associated with one aspect of the business from claims pertaining to others”



comes to us from Delaware



empowers a private entity – the “mother ship” to create sub-entities that are to be respected as separate for some purposes and conflated for others

- mostly now a device for avoiding fees, regulatory clearances, etc.

radical departure – at least outside the area of funds

- “anyone who tells you different is selling something”



historically – separate entity status comes from the state

- capacity to sue and be sued as the entity
- own property as the entity
- have debts as the entity (and not *ipso facto* as the owners)
- do all that
 - voilà – you are an entity

What need is filled in the practical world (you know, the one in which Larry Curly and Moe open a factory at 1 Blackacre Lane to make widgets) by the series?

In light of the at best significant (overwhelming?) issues of indefinite federal and state taxation, securities compliance (please raise your hand if you are willing to issue a clean non-consolidation opinion between offerings of series), drafting complexity, the issue of whether the internal liability shield will be respected in states that do not have series provisions, and the ultimate possibility that the bankruptcy is going to consolidate all of the series into the parent, why would you use a series LLC/LP in the practical world?

For me it is not enough (sorry, it is not even on the radar screen) that I can avoid needing to form multiple SMLLCs to segregate liabilities and assets. That cost is de minimus and I am pretty sure I know the requirements and effect of doing so.

Tom Rutledge (ABA Business Law Section Advisor to the Re-ULLCA Drafting Committee), in a posting to the LNET-LLC List Serv, October 21, 2006 7:36 AM

from the filing officer's perspective ...

- may a series of a foreign LLC register to do business?
- must a series of a foreign LLC register to do business?
- should the State “franchise” the power to create fictional persons?

just say NO ...



and now . . .



the big finish

the end . . .



Revised
Uniform
Limited
Liability
Company
Act