CALIFORNIA RULLCA REVIEW

Non-Liquidating Distributions

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The California Revised Uniform Limited Liability Company Act (RULLCA; 2012 Ch. 419 [SB 323])), which is codified at Section 17701.01 *et seq.* of the California Corporations Code (in effect or repealed, the Code), repealed the Beverly-Killea LLC Act (the Old Act) effective January 1, 2014.

RULLCA's provisions governing non-liquidating distributions of LLCs largely conform to the provisions contained in the Uniform Limited Partnership Act of 2008, Sections 15905.03-15905.09 of the Code, which governs all California limited partnerships beginning January 1, 2010. Accordingly, the major accomplishment of the new RULLCA provisions is to create in large part the same set of non-liquidating distribution rules for both limited partnerships and LLCs in California.

The RULLCA provisions, which are in Sections 17704.04-17704.06 of the Code, follow the basic construct of the Old Act provisions in Sections 17250-17254 of the Code, but do deviate in several respects. For instance, as with the Old Act, RULLCA provisions (i) generally defer to the operating agreement to govern distributions, (ii) contain default provisions if the operating agreement does not provide for distributions, (iii) limit distributions of property in kind, (iv) limit the amount of distributions to protect against the distributions rendering the LLC insolvent, and (v) provide rules for the recovery of distributions in excess of the limits. However, RULLCA changes the specifics of those rules, some of the more material of which are:

1. The default rule of RULLCA looks to the value of contributions to the LLC in determining which members receive non-liquidating distributions. The default provision of the Old Act provided for distributions in proportion to capital contributions or the allocation of profits.

2. The RULLCA provisions regarding distributions of property in kind now allow for an LLC to make a distribution of property in kind if each part of the asset distributed is fungible and each person receives a percentage of the asset equal in value to the person's share of the distribution.

3. The RULLCA provisions substitute the concept of "disassociation of a person" for the provisions that pertained to "withdrawal of a member," but neither set of provisions provides for a distribution to such a person upon that event, unless set forth in the articles of organization or written operating agreement.

4. The RULLCA provisions provide that a person who receives a distribution "knowing" that it would exceed the amount that the LLC could distribute under the insolvency limitations is personally liable to the LLC for the excess distribution. The provision of the Old Act requires "actual knowledge of facts indicating the impropriety of the distribution" AND that the distribution makes liabilities greater than the fair market value of assets of the LLC after certain adjustments. It is hard to say whether litigators can or will discern a material difference in the "knowing" standard, but the elimination of the second prong in the Old Act rule seems to widen the prospect of member liability for impermissible distributions – there are fewer facts to prove.

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