HAND OUT #9

Mississippi and Delaware Limited Liability Company Acts

Code Sections with Default Rules and other Significant Code Sections

Prepared by Mississippi Secretary of State, Division of Policy and Research
July 2009

MS LLC Act Code Sections with Default Rules | **DE LLC Act Code Sections with Default Rules**

Article 1. General Provisions

§ 79-29-107. Records to be kept **[see also Article 3 § 79-29-308. Information]**	Unless contained in the Certificate of Formation or Operating Agreement, each LLC shall keep a writing setting out amount and description and value of each member's contribution and which member has agreed to contribute.	**§ 18-305. Access to and confidentiality of information; records**	Implies that certain records must be kept because members have rights to obtain them from the LLC. *See discussion of inspection rights in Article 3 below.* The LLC Agreement may specify reasonable standards to furnishing this information. The LLC Agreement may have requirements regarding later agreements regarding inspection rights.
§ 79-29-108. Nature of business; powers	Subject to Certificate of Formation, LLC may carry on any lawful activity. Unless Certificate of Formation provides otherwise, LLC has same powers as an individual to carry out its business, etc.	**§ 18-106. Nature of Business permitted, powers** **[Delaware has more specific language, i.e., such as how LLC agreement can restrict LLC powers]**	An LLC shall possess and exercise powers granted by law or by its LLC Agreement. LLC agreement can impose standards and restrictions on the ability of an LLC to make or guaranty contract and enter into hedge, swap, or put agreements, etc.
§ 79-29-109. Business transactions of member or manager with the limited liability company	Default Rule: A member or manager may lend money to and transact business with LLC	**§ 18-107. Business transactions of member or manager with the limited liability company** **[DE has more specific language than MS, i.e., such as types of business that members and managers can do with the LLC]**	Default Rule: members or managers may lend money to, borrow money from, act as a surety, guarantor, provide collateral for, etc. and transact other business with the LLC.
§ 79-29-110. Indemnification	Default Rule: mandatory member and manager indemnification. Determination of whether indemnification is permissible is by majority vote of quorum of managers or of members (of non-parties). Certificate of Formation or Operating Agreement may expand indemnity rights.	**§ 18-108. Indemnification**	The LLC Agreement may put standards and restrictions on LLC's ability and powers indemnifying members, managers, or other person from and against any demands and claims.

Article 2. Formation, Certificate of Formation

§ 79-29-202. Amendment to certificate	Default Rule: all members must agree to do this. Section (4).	**§ 18-202. Amendment to certificate of formation**	Does not contain a default rule or address whether all members must agree to amend the Certificate. **Section 302** seems to permit an LLC Agreement to provide for

			taking of action (including an amendment of the Certificate) without the approval of any member or class or group of members.
§ 79-29-209. Merger of limited liability company	Default Rule: Mergers are permitted.	**§ 18-209. Merger and consolidation**	Does not have default rule that mergers are permitted but states that the LLC Agreement may prohibit mergers and consolidations.
§ 79-29-210. Action on a plan of merger	Default Rule: Plan of Merger must be adopted by members. Approval of Plan requires majority vote. There are also other default rules for voting groups.	**§ 18-209. Merger and consolidation**	Default Rules: Requires approval of merger by members and sets forth requirements for classes and groups to approve merger.
§ 79-29-214. Appraisal rights	Default Rule: Members are entitled to appraisal rights for mergers, asset sales and any other action to the extent provided by the Certificate of Formation or Operating Agreement. Certificate of Formation or Operating Agreement can expand appraisal rights to include other actions.	**§ 18-210. Contractual Appraisal Rights**	No default rule that members get appraisal rights. The LLC Agreement or merger agreement may provide for contractual appraisal rights for mergers, consolidation conversions, sale of assets, and any amendment to an LLC Agreement.

Article 3. Members

§ 79-29-301. Admission of members (by the LLC; not how an assignee becomes a member which is covered by § 79-29-704)	Default Rule: This requires unanimous written consent in the case of a person acquiring an LLC interest from the LLC.	**§ 18-301. Admission of Members**	Default Rule: Admission of a non-assignee requires consent of all members [a person is admitted upon consent of all members and when the person's admission is reflected in the records of the LLC]. Default Rule: an assignee is admitted when the person's permitted admission is reflected in the LLC records. Default Rule: a member has no preemptive rights.
§ 79-29-302. Management of limited liability company **[see also § 79-29-401 Management of an LLC by Managers]**	Default Rule: vested in members. Certificate of Formation or Operating Agreement may limit manager's powers and authority. Default Rule: manager action is by majority vote (§ 401) not by percentage of a manager's LLC ownership *Example*: Two managers to one manager is a majority.	**§ 18-402: Management of LLC** **[DE's rule is substantially different. DE contains more specific language on how an LLC agreement can define the management issues.]**	Default Rule: management is vested in members in proportion to the percentage of members in the profits owned by all the members, the decision of members owning greater than 50% of the said percentage of the profits is controlling. *Example*: The vote of one member with 51% ownership controls over 2 members with 49% ownership. The LLC Agreement can vest management in a particular manager and provide for how the manager is chosen. The LLC Agreement may provide for a manager to hold certain offices and have certain responsibilities. The LLC Agreement may provide for how a manager is terminated or ceases to be a manager.

§ 79-29-303. Agency power of members and managers **[who has authority to bind the LLC]**	In a Manager Managed LLC, members do not have authority to bind the LLC. Members in a manager managed LLC (acting solely in the capacity as members) are not Agents – Default Rule: managers are agents and their actions are binding. Operating Agreement can extend authority of members to bind the LLC. Every member (of a member managed LLC) is an agent of the LLC and has authority to bind the LLC.	**§ 18-402. Management of limited liability company** **[DE has a substantively different default rule, i.e., authority of a non-manager member in a manager managed LLC to bind the LLC: DE –Yes; MS – No, if acting solely as a member]**	In a Manager Managed LLC, members and managers have authority to bind LLC. Default Rule: Each manager and member is an agent of the LLC and has the authority to bind the LLC.
§ 79-29-304. Classes and voting	Default Rule: Each member gets one vote, need majority vote to take actions. Certificate of Formation or Operating Agreement may provide for different classes and voting rights. Certificate of Formation or Operating Agreement may provide for meeting notice provisions, waivers, action by consent without meeting, voting in person or by proxy, etc. with respect to voting rights.	**§ 18-302. Classes and voting** **§ 18-402. Management of the LLC**	Default Rule: management is vested in members in proportion to the percentage of members in the profits owned by all the members, the decision of members owning greater than 50% of the said percentage of the profits is controlling. *Example*: The vote of one member with 51% ownership controls over 2 members with 49% ownership. The LLC Agreement may provide: 1) for classes or groups and may make provision for future creation of the same; 2) for taking of action including amending the LLC Agreement without the approval of any member, group or class; 3) that a person who is not a party to the agreement must approve an amendment to the agreement; 4) that any member, class or group shall have no voting rights; 5) for meeting notices, waivers, action by consent, record date, quorum requirements, voting in person or by proxy, etc. with respect to voting rights. The LLC Agreement may grant member, class or group the right to vote separately or in groups on any matter. Default Rule: meetings may be held electronically. Default Rule: written consent is allowed. Must be signed by not less than the minimum number of votes needed to authorize the action at a meeting with all voting members present and voting. Default Rule: Members may vote in person or by a proxy. Default Rule: Electronic transmission of written consent is valid.

§ 79-29-305. Liability to third parties	(1) A person who is a member of a LLC is not liable, by reason of being a member, under a judgment, decree or order of a court, or in any other manner, for a debt, obligation or liability of the LLC, whether arising in a contract, tort, or otherwise or for the acts or omissions of any other member, manager, agent or employee of the LLC. (2) A member of a LLC is not a proper party to a proceeding by or against a LLC, by reason of being a member of the LLC, except: (a) Where the object of the proceeding is to enforce a member's right against or liability to the LLC; or (b) In a derivative action brought pursuant to Article 11(Derivative Actions) (3) Notwithstanding the provisions of subsections (1) and (2) of this section, under a LLC agreement or under another agreement, a member or manager may agree to be obligated personally for any or all debts, obligations and liabilities of the LLC.	**§ 18-303. Liability to Third Parties**	No member or manager shall be obligated personally for debts, obligations, liabilities of the LLC solely by reason of being a manager or member. Note: a recent DE case held LLC members who committed a tort could be held personally liable for the tort even though it was committed in the member's official capacity as a member. A member or manager can agree under the LLC agreement or other agreement to be personally obligated for the above.
§ 79-29-306. Limited liability company agreement	Members may enter into one. Default Rule: All members must approve amendment to Operating Agreement.	**§ 18-101. Definitions "Limited Liability Company agreement"; § 18-302 Classes and Voting**	Defines agreement to include written, oral or implied of the members as to the affairs of the LLC and the conduct of its business. DE does not have this default rule that is provided at MS § 79-29-306. § 18-302 Classes and Voting provides that an LLC agreement may provide for an amendment to the agreement without the vote or approval of any member or class or group of members.
§ 79-29-307. Events of dissociation [When a person ceases to be a member of the LLC.]	**Default Rule: No member can unilaterally withdraw from the LLC.** **Default Rule: Members cannot remove a member.** Default Rule: provides for various Dissociation Events: (a) Withdrawal by voluntary act in accordance with the LLC Agreement (b) Assignment of LLC interest as	**§ 18-304. Events of bankruptcy (person ceases to be a member upon happening of certain events);** **§ 18-603 Resignation of Members**	**Default Rule: member may not resign unilaterally prior to dissolution and winding up of the LLC.** Default Rule: a member ceases to be a member upon: makes an assignment for benefit of creditors, files for bankruptcy, is adjudged bankrupt or insolvent, or similar events, receiver is appointed (similar to MS statutes). § 18-603 Resignation of Member.

	provided in § 79-29-702 (c) Removal in accordance with Certificate of Formation or LLC Agreement. (d) – (e) Subject to contrary provision in the Certificate of Formation or LLC Agreement or unanimous consent, the member makes an assignment for the benefit of creditors, files a voluntary petition for bankruptcy, is adjudicated bankrupt or insolvent or for other similar actions. (f) Subject to contrary provision, in the case of a member who is an individual- dies or is judged incompetent (g) - (j) Subject to contrary provision, member is a trust, partnership, LP, LLC, corporation, or estate and such entity terminates/dissolves, etc. Operating Agreement or Certificate of Formation can provide for additional events.	**§ 18-705. Powers of estate of deceased or incompetent member**	§ 18-705 powers of estate of deceased/incompetent member if member dies or is incompetent- his personal manager may exercise his rights, including any power under the LLC Agreement. If corporation or trust or other entity type of member dissolves or is terminated the powers of that member are exercised by his personal representative.
§ 79-29-308. Information **[Inspection Rights]**	Certificate of Formation or Operating Agreement can put limits on inspection rights. Access to certain info cannot be changed in the Certificate of Formation or Operating Agreement. [No provisions regarding manager access to information or right of manager to withhold certain information from members.]	**§ 18-305. Access to and confidentiality of information; records**	The LLC Agreement or manager or members can set standards governing the information that is to be furnished to members. Each member has the right to obtain certain LLC info for any purpose reasonably related to the member's LLC interest: 1) information on status of business and its financial condition; 2) tax returns; 3) member or manager lists – names and addresses; 4) copies of LLC Agreement, Certificate of Formation and Powers of attorney; 5) cash and other property and services contributed by each member and which each member has agreed to contribute in the future; 6) any other information regarding LLC affairs that are just and reasonable. Manger has the right to keep certain information confidential from members, such as trade secrets. Access must be reasonable and for a reasonable period of time. Member can enforce these rights in court. The LLC Agreement can put limits on inspection rights. Amendment to the LLC Agreement can put limits on inspection rights, but amendment must be approved by all the members.

Article 4. Management

§ 79-29-401. Management of a limited liability company by a manager or managers	The Certificate of Formation or Operating Agreement may delegate management responsibility to managers. Default Rules: 1. Managers need not be residents. 2. Managers shall be elected by members (majority vote). 3. Vacancies shall be filled by member (Majority vote). 4. All managers can be removed without cause by members. 5. Manager action is by majority vote. The Certificate of Formation or Operating Agreement may vary the default rules and may also prescribe qualifications for managers, fix the number of managers, provide for mechanisms to change number of managers.	**§ 18-401. Admission of managers** **§ 18-407. Delegation of Rights and Powers to manage**	A person may become a manager as provided in § 18-101(10) (definition of manager)– pursuant to an LLC Agreement or similar instrument under which the LLC is formed. If the LLC Agreement provides for management by a manager then the management shall be vested in the manager who shall be chosen in the manner provided in the LLC Agreement. Manager ceases to be a manager as provided in the LLC Agreement. **Default Rule: each member and manager is an agent of the LLC and has the authority to bind the LLC.** Default Rules manager meetings may be held by teleconference – action can be taken by majority consent, managers may vote by proxy. Consents may be delivered electronically.
§79-29-402 General Standards of Conduct for a Manager	(1) A manager shall discharge his duties as a manager: (a) In good faith; (b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (c) In a manner he reasonably believes to be in the best interests of the LLC. (2) In discharging his duties, a manager is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by: (a) One or more managers or employees of the LLC whom the manager reasonably believes to be reliable and competent in the matters presented; (b) Legal counsel, public accountants, or other persons as to matters the manager reasonably believes are within the person's professional or expert competence; or (c) A committee of the managers of which he is not a member if the	**§ 18-1101. Construction and application of chapter and limited liability company agreement** **[DE does not specifically state that managers or members have fiduciary duties. It is unclear whether there are any default fiduciary duties. The Courts have not specifically addressed this question. *See Law Journal Article on this issue.*]**	(b) It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of LLC agreements. (c) To the extent that, at law or in equity, a member or manager or other person has duties (including fiduciary duties) to a LLC or to another member or manager or to another person that is a party to or is otherwise bound by a LLC agreement, the member's or manager's or other person's duties may be expanded or restricted or eliminated by provisions in the LLC agreement; provided, that the LLC agreement may not eliminate the implied contractual covenant of good faith and fair dealing. (d) Unless otherwise provided in a LLC agreement, a member or manager or other person shall not be liable to a LLC or to another member or manager or to another person that is a party to or is otherwise bound by a LLC agreement for breach of fiduciary duty for the member's or manager's or other person's good faith reliance on the provisions of the LLC agreement. (e) A LLC 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 LLC or to another member or manager or to another person

	manager reasonably believes the committee merits confidence. (3) A manager is not acting in good faith if he has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (2) unwarranted. (4) A manager is not liable for any action taken as a manager, or any failure to take any action, if he performed the duties of his office in compliance with this section.		that is a party to or is otherwise bound by a LLC agreement; provided, that a LLC 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.
§ 79-29-403. Limitation of liability of members and managers (to the LLC or its members (not liability to third parties))	The Certificate of Formation or Operating Agreement may eliminate or limit member or manager liability but cannot limit liability for the amount of an unentitled received financial benefit; an intentional infliction of harm on members or LLC; an intentional violation of law; or violation of liability for wrongful distribution.	**§ 18-1101. Construction and application of chapter and limited liability company agreement**	*See above.* **§ 18-303** provides: Cannot limit liability for the amount of an unentitled received financial benefit; an intentional infliction of harm on members or LLC, an intentional violation of law or violation of liability for wrongful distribution.

Article 5. Finance

§ 79-29-502. Liability for contributions	Default Rule: member must perform enforceable contribution promise. Contribution promise may be compromised only by consent of all members. Certificate of Formation or Operating Agreement may provide penalties for failures to contribute.	**§ 18-502. Liability for Contributions.**	Default Rule: Member is obligated to LLC to perform any contribution promise, even after death/disability. Default Rule: Member's obligation to contribute or return a wrongful distribution may be compromised only by unanimous member consent. LLC Agreement may provide for penalties for or consequences of failures to contribute.
§ 79-29-503. Sharing of profits and losses	Default Rule: based on contributions.	**§ 18-503. Allocation of Profits and losses**	Default Rule: Allocations are based on contributions.
§ 79-29-504. Sharing of distributions	Default Rule: based on contributions.	**§ 18-504. Allocation of Distributions**	Default Rule: Allocations are based on contributions.

Article 6. Distributions

§ 79-29-601. Interim distributions	Default Rule: members not entitled to them.	**§ 18-601. Interim Distribution**	Default Rule: members not entitled to them.
§ 79-29-602. Distribution upon dissociation	Default Rule: member gets fair value of ownership interest as of dissociation date.	**§ 18-604. Distribution upon resignation**	Default Rule: Member gets fair value of ownership interest as of the resignation date, based on such member's right to share in distributions.

§ 79-29-603. Distribution in kind	Default Rule: member only entitled to cash distribution, and may not be compelled to accept an in-kind distribution.	**§ 18-605. Distribution in kind**	Default Rule: Member has no right to receive any distribution except for in cash. Members may be compelled to accept in-kind distributions if they are equal to the percentage in which the member shares in distributions.
§ 79-29-605. Limitations on distribution	Default Rule: Preferential rights of other members must first be satisfied.	**§ 18-607 Limitations on Distribution**	§ 18-607 provides for liability of member who knowingly receives a wrongful distribution. 3 year statute of limitations, unless otherwise agreed.

Article 7. Assignment of Limited Liability Company Interests

§ 79-29-702. Assignment of limited liability company interest	Default Rule: LLC interests are assignable Default Rule: Member ceases to be a member upon assignment of his entire ownership interest Default Rule: Pledge, Liens etc. shall not cause the member to cease to be a member.	**§ 18-702. Assignment of limited liability company interest**	Default Rule: LLC Interests are assignable. Default Rule: Assignee has no right or powers of a member. Member ceases to be a member upon the assignment of the entire interest. Default Rule: pledge, liens, etc. shall not cause the member to cease to be a member. Default Rule: Assignee has no right to participate in the management of the LLC. Default Rule: member's interest may be evidenced by a certificate. Default Rule: assignee has no liability as a member solely as a result of the assignment. Default Rule: LLC may purchase any LLC interest. Default Rule: any such interest acquired by the LLC shall be deemed cancelled.
§ 79-29-704. Right of assignee to become a member	Default Rule: An assignee may become a member only if all members consent. Default Rule: assignor is not released from his liability to the LLC under Articles 5 and 6.	**§ 18-704. Right of Assignee to become member**	Assignee may become a member as provided in the LLC Agreement and upon unanimous member consent or compliance with any procedure provided for in the LLC Agreement. Default Rule: assignee who becomes a member is liable for assignor's obligations to make contributions as provided in § 18-502, but shall not be liable for the assignor's obligations under subchapter VI.

Article 8. Dissolution

§ 79-29-801. Nonjudicial dissolution	Default Rule: All members must consent to nonjudicial dissolution Default Rule: If there is a dissociation, and a majority of the remaining members consent, then the LLC is non-judicially dissolved.	**§ 18-801 Dissolution**	Default Rule: LLC has perpetual existence. Default Rule: Death, retirement, resignation, expulsion, bankruptcy or dissolution of any member does not dissolve the LLC.

§ 79-29-803. Winding up	Default Rule: Managers or members who have not wrongfully dissolved the LLC may wind up the LLC. Default Rule: Persons winding up the affairs are entitled to reasonable compensation.	**§ 18-803. Winding Up**	Default Rule: a manager who has not wrongfully dissolved a LLC or, if none, the members or a person approved by the members or, if there is more than 1 class or group of members, then by each class or group of members, in either case, by members who own more than 50% of the then current percentage or other interest in the profits of the LLC owned by all of the members or by the members in each class or group, as appropriate, may wind up the LLC's affairs; but the Court of Chancery, upon cause shown, may wind up the limited liability company's affairs upon application of any member or manager, the member's or manager's personal representative or assignee, and in connection therewith, may appoint a liquidating trustee.
§ 79-29-805. Distribution of assets	Default Rule: Assets are distributed to members and former members in satisfaction of liabilities for distributions under the Act. Default Rule: Assets distributed first to members for return of their contributions and second respecting their LLC interests, in proportion in which members share in distributions.	**§ 18-804. Distribution of Assets**	Default Rule: Assets are distributed to members and former members in satisfaction of liabilities for distributions under the Act. Default Rule: Assets are distributed to members first for the return of their contributions and second respecting their LLC interests, in the proportions in which the members share in distributions. This section provides a procedure to distribute the assets and to pay claims and obligations. Default Rule: For an LLC which has dissolved any remaining assets shall be distributed as provided in the Act. Default Rule: a member who receives a distribution from an LLC to which this section applies shall have no liability under this chapter or other applicable law for the amount of the distribution after the expiration of 3 years from the date of the distribution unless an action to recover the distribution from such member is commenced prior to the expiration of the said 3 year period and an adjudication of liability against such member is made in the said action.