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Business Organizations - Staying Afloat with a Hole in the Wyoming LLC Act: Default Rules in a Contractual LLC World

Catherine M. Rogers

BUSINESS ORGANIZATIONS – Staying Afloat With a Hole in the Wyoming LLC Act: Default Rules in a Contractual LLC World. *Lieberman v. Wyoming.com LLC*, 82 P.3d 274 (Wyo. 2004).

INTRODUCTION

In fiscal year 2004, more domestic limited liability companies than corporations were once again registered in Wyoming.[1] While glaringly little case law exists to elucidate the language used in the Wyoming Limited Liability Company Act ("WLLCA"), its pronounced ability to allow an investor to protect his or her personal assets from risks taken by the business venture while retaining control over his or her investments appears to have created enormous confidence in the limited liability company ("LLC") structure.[2] Not only does this characteristic encourage the formation of LLCs, it also lowers investors' thresholds for assuming risky behavior.[3] While the WLLCA may thereby encourage entrepreneurship and bring business to Wyoming, state lawyers should keep in mind this business entity is no panacea.[4] Default rules exist should gaps occur in LLC operating agreements and articles of organization whether client names have been merely cut and pasted into a borrowed form or time has been taken to create a unique contract.[5] When a gap in LLC documents and the pertinent state statutes occurs, an investor's increased propensity to take on risk coupled with a lack of established default rules could result in both an unpredictable and ruinous outcome.[6] The experience of E. Michael Lieberman is both an advisory and cautionary tale.

In September of 1994, Wyoming.com LLC ("Wyoming.com"), an internet service provider, was formed with capital contributions valued at

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1. WYOMING SECRETARY OF STATE OFFICE, CORPORATIONS DIVISION—NEW REGISTRATIONS REPORT 1 (2004), *at* http://soswy.state.wy.us/corporat/m-stats/fy0304nr.pdf (last visited Dec. 3, 2004). In Wyoming fiscal year 2003 (which runs from July 1, 2002 to June 30, 2003), 1,977 Wyoming profit corporations and 2,630 Wyoming limited liability companies were registered with the Wyoming Secretary of State. *Id.* In fiscal year 2004, 2,937 Wyoming profit corporations and 3,682 Wyoming limited liability companies were registered with the Wyoming Secretary of State. *Id.*

2. Lieberman v. Wyoming.com LLC, 11 P.3d 353, 357 (Wyo. 2000); Brief of Appellant E. Michael Lieberman at 10, Lieberman v. Wyoming.com LLC, 82 P.3d 274 (Wyo. 2004) (No. 01-193). As of this writing, the only other case to address the Wyoming LLC is *Kaycee Land and Livestock v. Flahive*. *See* Kaycee Land and Livestock v. Flahive, 46 P.3d 323 (Wyo. 2002) (addressing whether piercing the Wyoming LLC veil was a possibility).

3. Jonathan R. Macey, *The Limited Liability Company: Lessons for Corporate Law*, 73 WASH. U. L. Q. 433, 448 (1995).

4. *Id.* at 446-47.

5. Sandra K. Miller, *The Role of the Court in Balancing Contractual Freedom with the Need for Mandatory Constraints on Opportunistic and Abusive Conduct in the LLC*, 152 U. PA. L. REV. 1609, 1610-11 (2004).

6. Tammy Savidge Moore, *The Policy of Opting-Out of Fiduciary Duties in a Limited Liability Company:* McConnell v. Hunt Sports Enterprises, 42 S. TEX. L. REV. 183, 186-87 (2000).

$50,000.[7] One of three founding members, E. Michael Lieberman ("Lieberman"), was initially vested with a forty percent ownership interest based on a capital contribution valued at $20,000.[8] On February 27, 1998, a co-founder and majority interest holder of the LLC terminated Lieberman's employment as vice president and required he leave Wyoming.com's premises.[9] Two weeks later, Lieberman served Wyoming.com a "Notice of Withdrawal of Member Upon Expulsion: Demand for Return of Contributions to Capital."[10] This notice requested the immediate return of Lieberman's "share of the current value of the company."[11] On March 17, 1998, the remaining members of Wyoming.com approved the return of Lieberman's $20,000 capital contribution and elected to continue the legal existence of Wyoming.com.[12] Lieberman declined the $20,000, however, having anticipated the return of the fair market value of his equity interest in addition to his capital contribution, a value he estimated to be $400,000.[13]

This case first came to the Fremont County District Court in June of 1998 as consolidated actions for summary judgment.[14] Wyoming.com

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7. Lieberman v. Wyoming.com LLC, 11 P.3d 353, 355 (Wyo. 2000); Brief of Appellant E. Michael Lieberman at 7, Lieberman v. Wyoming.com LLC, 11 P.3d 353 (Wyo. 2000) (99-97).

8. *Lieberman I*, 11 P.3d at 355. This capital contribution consisted of services rendered and still to be performed. *Id.* When two new members were added to the LLC in August of 1995, Wyoming.com's Articles of Organization was amended to reflect each new member's $25,000 capital contribution and two and one-half percent ownership interest. *Id.* The August 14, 1995 Amendment to the Articles of Organization mistakenly created interests totaling to 105%. Brief of Appellant E. Michael Lieberman at 4-5, Lieberman v. Wyoming.com LLC, 11 P.3d 353 (Wyo. 2000) (No. 99-97). This mistake was corrected in the January 20, 1996 Amendment to the Articles of Organization wherein Lieberman's interest was amended to thirty-seven and sixty-two hundredths percent of ownership interest. Amendment to the Articles of Organization of Wyoming.com LLC (Feb. 3, 1997) (on file with the Wyoming Secretary of State). This factual discrepancy was not pursued, however, and both courts used the forty percent number throughout *Lieberman I* (Lieberman v. Wyoming.com LLC, 11 P.3d 353 (Wyo. 2000)) and *Lieberman II* (Lieberman v. Wyoming.com LLC, 82 P.3d 274 (Wyo. 2004)). *Lieberman I*, 11 P.3d at 360 n.11; Lieberman v. Wyoming.com LLC, 82 P.3d 274, 279 (Wyo. 2004).

9. *Lieberman I*, 11 P.3d at 355. Paragraph 7.4 of Wyoming.com's Operating Agreement provided, "Any officer may be removed at any time by the Members with or without cause." *Id.* at 356 n.4.

10. *Id.* at 355.

11. *Id.*

12. *Id.* at 356.

13. *Id.* at 355-56. This $400,000 figure, "based on a recent offer from the Majority Shareholder," was used before Lieberman discovered the LLC's listing agreement, dated February 16, 1998. Brief of Appellant E. Michael Lieberman at 7, Lieberman v. Wyoming.com LLC, 11 P.3d 353 (Wyo. 2000) (99-97). This listing agreement represented Wyoming.com to have a value of $2,000,000, which would reflect a value of $800,000 to a forty percent interest holder. *Id.* at 2, 13. A value of $400,000 as forty percent of the LLC is in-step with a new member's capital contribution of $25,000 resulting in a two and one-half percent ownership interest in August of 1995, over two and one-half years before Lieberman withdrew from Wyoming.com. *See supra* note 8 and accompanying text.

14. *Lieberman I*, 11 P.3d at 356.

sought declaratory judgment as to its rights against Lieberman, and Lieberman sought the dissolution of Wyoming.com in order to obtain the return of his entire interest.[15] The district court held that Wyoming.com was not in a state of dissolution and that Lieberman could only demand the return of his stated capital contribution, $20,000, to be paid in cash.[16] Lieberman ap-

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15. *Id.*

16. *Id.* The remaining members of Wyoming.com had a right to continue, rather than dissolve, the LLC based on their rights under its Articles of Organization, as granted by the WLLCA. Wyoming.com Articles of Organization ¶ 9 (Sept. 28, 1994) (on file with the Wyoming Secretary of State). Wyoming Statute section 17-15-123 provides:

> (a) A limited liability company organized under this chapter shall be dissolved upon the occurrence of any of the following events:
>
> . . .
>
> (iii) Upon the death, retirement, resignation, expulsion, bankruptcy, dissolution of a member or occurrence of any other event which terminates the continued membership of a member in the limited liability company, unless the business of the limited liability company is continued by the consent of all the remaining members under a right to do so stated in the articles of organization of the limited liability company.

Wyo. Stat. Ann. § 17-15-123(a)(iii) (LexisNexis 2004). Wyoming.com's Articles of Organization repeats the language of WLLCA section 17-15-123(a)(iii). Wyoming.com Articles of Organization ¶ 9 (Sept. 28, 1994) (on file with the Wyoming Secretary of State). Lieberman did not deny Wyoming.com attempted to return his capital contribution. Lieberman I, 11 P.3d at 359. This placed his situation under the authority of Wyoming Statute section 17-15-120(a)(ii) rather than Wyoming Statute section 17-15-120(d)(i):

> (a) A member shall not receive out of limited liability company property any part of his or its contribution to capital until:
>
> (i) All liabilities of the limited liability company, except liabilities to members on account of their contributions to capital, have been paid or there remains property of the limited liability company sufficient to pay them;
>
> (ii) The consent of all members is had, unless the return of the contribution to capital may be rightfully demanded as provided in this act;
>
> (iii) The articles of organization are cancelled or so amended as to set out the withdrawal or reduction.
>
> (b) Subject to the provisions of subsection (a) of this section, a member may rightfully demand the return of his or its contribution:
>
> (i) On the dissolution of the limited liability company; or
>
> (ii) Unless otherwise prohibited or restricted in the operating agreement, after the member has given all other members of the limited li-

pealed, claiming the return of his contribution to capital should not be limited to his initial capital contribution, but should include the fair market value of his entire interest in Wyoming.com.[17]

While the Wyoming Supreme Court unanimously affirmed in *Lieberman I* that Lieberman was entitled to the return of his capital contribution of $20,000 and that Wyoming.com was not in a state of dissolution, the court realized a gap existed in the WLLCA as to what would become of a withdrawing member's equity, or ownership, interest.[18] Since Wyoming.com's Operating Agreement did not provide for this scenario either, the court found no evidence Lieberman's forty percent ownership interest had been canceled or forfeited.[19] In remanding the question of what would become of Lieberman's equity interest, the Wyoming Supreme Court suggested Lieberman's LLC membership certificate might contain additional pertinent contract language.[20]

> ability company prior notice in writing in conformity with the operating agreement. If the operating agreement does not prohibit or restrict the right to demand the return of capital and no notice period is specified, a member making the demand must give six (6) months prior notice in writing.
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> (c) In the absence of a statement in the articles of organization to the contrary or the consent of all members of the limited liability company, a member, irrespective of the nature of his or its contribution, has only the right to demand and receive cash in return for his or its contribution to capital.
>
> (d) A member of a limited liability company may have the limited liability company dissolved and its affairs wound up when:
>
> (i) The member rightfully but unsuccessfully has demanded the return of his or its contribution; or
>
> (ii) The other liabilities of the limited liability company have not been paid, or the limited liability company property is insufficient for their payment and the member would otherwise be entitled to the return of his or its contribution.

WYO. STAT. ANN. § 17-15-120 (LexisNexis 2004).

17. *Lieberman I*, 11 P.3d at 356, 359. Lieberman used "fair value" and "fair market value" interchangeably, indicating at times he also expected a value reflective of the company as a "going concern." *E.g.*, Brief of Appellant at 9-16, 22, *Lieberman* (No. 99-97). *See also* Brief of Appellee Wyoming.com LLC at 11, Lieberman v. Wyoming.com LLC, 11 P.3d 353 (Wyo. 2000) (No. 99-97).

18. *Lieberman I*, 11 P.3d at 360-61.

19. *Id.* at 361.

20. Lieberman v. Wyoming.com LLC, 82 P.3d 274, 281 (Wyo. 2004).

With no new evidence produced upon remand, Wyoming.com moved for partial summary judgment.[21] The LLC asked the district court two questions: (1) "at what time should Lieberman's equity interest be valued?" and (2) "how should it be valued?"[22] In response, the district court applied a paragraph of the LLC's Operating Agreement pertaining to member interests upon liquidation as applying to a member's withdrawal of membership (dissociation).[23] The subsequent calculation of Lieberman's capital account resulted in a negative amount; and, Lieberman again appealed to the Wyoming Supreme Court.[24]

For a second time, the Wyoming Supreme Court was faced with the question of what should become of a dissociated member's equity interest in

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21. *Id.* at 277, 281.
22. *Id.* at 277.
23. *Id.* at 278-79. The majority discerned,

> In granting summary judgment, the district court relied upon paragraph 6.2. However, paragraph 6.2 contains no provision addressing the rights and obligations of the members with regard to a member who has withdrawn. Paragraph 6.2 provides a method for distributing capital upon liquidation. It contains no indication of when liquidation can or must occur. It does not mandate a buyout or a liquidation of a member's equity interest. As such, it has no application to the immediate issue and the district court's reliance upon it was misplaced.

Id. at 279.

24. *Id.* at 277. The Fremont County District Court ordered liquidation of Lieberman's equity interest at its capital account value as of the date of withdrawal. *Id.* at 275. Wyoming.com's Operating Agreement provides:

> The Company shall maintain accurate records of the Capital Accounts of the Members. Each Member's capital account shall be credited with:
>
> a. The amount of money the Member has contributed to the Company.
>
> b. The fair market value of property the partner has contributed to the Company.
>
> c. The Member's distributive share of Company income and gain.
>
> Each Member's capital account shall be debited with:
>
> a. The amount of money distributed to the Member by the Company.
>
> b. The fair market value of property distributed to the Member by the Company.
>
> c. The Member's distributive share of Company loss and deduction.

Wyoming.com Operating Agreement ¶ 6.1 (July 25, 1995) (on file with Wyoming.com LLC).

the absence of a controlling statute or LLC provision.[25] In a 3-2 decision, the majority declared that without an express contractual provision to the contrary, Lieberman would simply maintain his forty percent equity interest while no longer being a member.[26] Lieberman would no longer have the salary or business control of a vice-president but would still be required to pay taxes on forty percent of the LLC's profits.[27] Each remaining LLC member was to have their interests increased in value by their termination of Lieberman as vice president resulting in his withdrawal.[28]

While this case note focuses on the choice of law options available and utilized in handling the squeeze-out identified in *Lieberman v. Wyoming.com LLC*, the reader should keep in mind the same list of options are available towards other gaps in LLC formation.[29] This paper first considers the historical background of the LLC, briefly touching on characteristics of the Uniform Limited Liability Company Act ("ULLCA") and the current LLC statutes of Idaho, Colorado, and Delaware, as states which may be competing with Wyoming for LLC business.[30] Next addressed are the development of fiduciary duties in business entities, and the recognition of

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25. *Lieberman II*, 82 P.3d at 279-81. No new evidence was provided for the Wyoming Supreme Court in *Lieberman II*. *Id.* at 281. As Justice Golden noted,

> [I]n *Lieberman I* this Court determined that further information might be available to help identify the contractual rights and obligations of the members upon the withdrawal of a member. Despite this Court's suggestion that the membership certificates might contain applicable contractual language, upon remand, the parties elected to introduce no additional evidence.

Id. at 280-81.

26. *Id.* at 274, 282. Wyoming.com's questions of valuation were left unanswered, regarded by the court as "moot." *Id.* at 276.

27. *Id.* at 282, 284 (Lehman, C.J., dissenting). The dissent recognized the realities of the majority's decision:

> In fact, the majority's resolution has created a situation where the remaining members are in a position of power to dictate the terms of any negotiations for a buyout. The remaining members are now conceivably in a position to retain earnings and avoid distributions, but as an equity owner Lieberman would still be required to pay taxes on those earnings. Additionally, Lieberman is no longer a member. He will not be drawing the salary of the member or controlling his equity interest in any manner.

Id. at 284 (Lehman, C.J., dissenting). *See infra* notes 162, 165-66, 233 and accompanying text.

28. *Lieberman II*, 82 P.3d at 284 (Lehman, C.J., dissenting). *See supra* note 27.

29. *See infra* notes 181-232 and accompanying text. Direction may be taken from the default rules of fiduciary duties, corporation or partnership law as a rooted in the WLLCA, or from a strict, plain language contractual approach. *Id.*

30. *See infra* notes 35-82, 94-96, 98-104 and accompanying text.

such duties in LLC acts and common law.[31] After an explanation of the arguments presented and rejected by the Wyoming Supreme Court, a more conscientious scrutiny of the parties' agreement, with regards to the legislative intent of the WLLCA and the default rules of fiduciary duties, is shown to provide a different outcome than the majority's conclusion.[32] In conclusion, consideration is given to the resulting ramifications of the Wyoming Supreme Court's decision in *Lieberman v. Wyoming.com LLC*.[33]

BACKGROUND

Historical Development of the LLC—"Let's just make an LLC"[34]

Created by state statute, a limited liability company is known as a hybrid between a partnership and a corporation.[35] Since Wyoming passed the first LLC act in 1977, the LLC has grown to be a favored form of business entity because it offers members active participation with the limited liability advantages of a corporation and the taxation benefits of a partnership.[36] Limited liability prevents members from being held liable for the

31. *See infra* notes 83-126 and accompanying text.

32. *See infra* notes 127-232 and accompanying text.

33. *See infra* notes 236-242 and accompanying text.

34. What anyone in Wyoming might say in considering a new business entity for any purpose. *See supra* note 1. From 1992 to 1996 LLCs increased by over 2300%, corporations increased by 13%, and limited partnerships increased by 15% according to a compilation of the individual secretaries of state records by the International Association of Corporation Administrators. Sandra K. Miller, *What Buy-out Rights, Fiduciary Duties, and Dissolution Remedies Should Apply in the Case of the Minority Owner of a Limited Liability Company?*, 38 HARV. J. ON LEGIS. 413, 442 (2001) ("LLCs span a significant range of business classifications, including engineering and management support services, real estate, construction and general contracting, investments, retail, health services, amusement and recreation, agriculture, oil and gas, restaurants, and leasing services.").

35. Lieberman v. Wyoming.com LLC, 11 P.3d 353, 357 (Wyo. 2000); Lieberman v. Wyoming.com LLC, 82 P.3d 274, 283 (Wyo. 2004) (Lehman, C.J., dissenting).

36. Larry E. Ribstein, *The Emergence of the Limited Liability Company*, 51 BUS. LAW. 1, *3 (1995) [hereinafter Ribstein, *Emergence*]. William J. Carney, *Limited Liability Companies: Origins and Antecedents*, 66 U. COLO. L. REV. 855, 855 (1995); *Lieberman II*, 82 P.3d at 283 (Lehman, C.J., dissenting). The WLLCA was originally created to mirror the *limitada*, a Latin business entity the Hamilton Brothers Oil Company of Denver had used in the early 1970s for foreign oil and gas operations. Carney, at 857-58; Letter from Hamilton Brothers Oil Company to Judge Walter Urbigkit, Chief Justice of the Wyoming Supreme Court 1 (June 5, 1992) (on file with the Wyoming Supreme Court as attachment to Brief of Appellant E. Michael Lieberman, Lieberman v. Wyoming.com LLC, 11 P.3d 353 (Wyo. 2000) (No. 99-97)) [hereinafter *Hamilton Bros.*]. Hamilton Brothers had received rulings from the IRS allowing members who participated in a Panamanian limited liability company to maintain limited liability with flow-through U.S. tax benefits. *Hamilton Bros.*, at 1. The company sought a similar domestic entity, and upon forming their first Wyoming LLC immediately sought this federal tax status. *Id.* Three and one-half years after the act's passage, Hamilton Brothers obtained a private letter ruling from the IRS recognizing the Wyoming LLC to have the tax status of a partnership. *Id.*; Carney, at 858. The day before this ruling was issued, however, the Internal Revenue Service proposed all entities with limited liability be taxed as corporations, regardless of their other characteristics. *Hamilton Bros.*, at 1. These proposed

company's debts and obligations, which increases investor confidence by protecting members' personal assets from LLC debt satisfaction.[37] Partnership tax status allows taxable income generated by the LLC to be computed based upon the entity's earnings, then proportionally allocated, or passed-through, to each member based on that member's interest in the LLC.[38] Members then pay tax on this LLC income as part of their personal income; an LLC, unlike a corporation, is not a separate tax paying entity.[39] Such a tax structure is often preferred because even if the LLC is not profitable, losses and tax credits pass-through to members for use on their personal income tax return.[40] This structure avoids the double taxation issue of C-corporations, wherein taxes on earnings are paid both by the corporation and by its shareholders when dividends are added to shareholders' ordinary income.[41]

In 1988, IRS Revenue Ruling 88-76 held that a Wyoming LLC could be classified as a partnership and not as a corporation for federal tax purposes if it has no more than two of the following four corporate characteristics: continuity of life, centralized management, free transferability of interests, and limited liability.[42] The WLLCA reflects this tax structure in its

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new regulations were clearly inconsistent with the Hamilton Brothers' ruling. *Id.* Regardless of this discrepancy, Florida passed its LLC act in 1982 to draw international investors, familiar and comfortable with the *limitada*, to the state. Carney, *supra* note 36, at 858, 861. Other states quickly passed state statutes only after the IRS issued Revenue Ruling 88-76 in 1988, however. *Id.* at 858. *See infra* note 42 and accompanying text. This ruling resolved the conflict between the Hamilton Brothers private letter ruling and proposed tax regulations. Carney, *supra* note 36, at 858.

37. Macey, *supra* note 3, at 435, 447-48.

38. Daniel S. Goldberg, *The Tax Treatment of Limited Liability Companies: Law in Search of Policy*, 50 BUS. LAW. 995, 995 (1995).

39. Macey, *supra* note 3, at 434. S-corporations are another type of pass-through entity available to investors. Carter G. Bishop, *Treatment of Members Upon Their Death and Withdrawal from a Limited Liability Company: The Case for a Uniform Paradigm*, 25 STETSON L. REV. 255, 258 (1995). This structure is limited, however, in that it does not have all the tax advantages of a partnership. *Id.*

40. Goldberg, *supra* note 38, at 995.

41. Macey, *supra* note 3, at 434. A C-corporation differs from an S-corporation in that it is subject to income taxation as an entity separate from its shareholders under Subchapter C of the IRS. ROBERT W. HAMILTON, BUSINESS ORGANIZATIONS 430, 449 (Aspen Law & Business 1996). Dividends are distributions of the net income on which the corporation has already paid taxes. Goldberg, *supra* note 38, at 995.

42. Rev. Rul. 88-76, 1988-2 C.B. 360. A business entity has the corporate characteristic of "continuity of life if the death, insanity, bankruptcy, retirement, resignation, or expulsion of any member will not cause a dissolution of the organization." Tassma A. Powers & Deby L. Forry, *Partnership Taxation & The Limited Liability Company: Check Out the Check-the-Box Entity Classification*, 32 LAND & WATER L. REV. 831, 839 (1997). The corporate characteristic of centralized management exists when anyone other than all of the members of an organization has control of the entity's business management decisions—managers are not necessarily LLC members. *Id.* at 840. Free transferability of interests is a corporate characteristic wherein a member can fully transfer his entire interest (i.e., control and a share in profits) without the consent of any other members. *Id.* at 842. "An organization has the corporate characteristic of limited liability if under local law there is no member who is per-

default provisions related to these characteristics, other than limited liability, mimicking a partnership structure unless contracted to follow the corporate form.[43] A Wyoming LLC will dissolve upon either its expiration date, the unanimous agreement of all members, or "the death, retirement, resignation, expulsion, bankruptcy, dissolution of a member or occurrence of any other event which terminates the continued membership of a member in the limited liability company," unless the remaining members unanimously consent to continue the LLC under a right to do so in its articles of organization.[44] A Wyoming LLC will be managed by all of its members in proportion to their capital contributions unless the LLC's articles of organization allows for elected managers to manage the company.[45] Under the WLLCA, non-economic rights cannot be transferred unless all members consent to the transferee's assumption of such rights.[46]

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sonally liable for the debts of or claims against the organization." *Id.* at 841. These rules of classification are often referred to as "Kinter Regulations," from the case *United States v. Kinter*. *Id.* at 836. *See* United States v. Kinter, 216 F.2d 418 (9th Cir. 1954).

43. *See infra* notes 44-46 and accompanying text. The corporate characteristic of limited liability is one of the main draws to the LLC. *See supra* note 37 and accompanying text. Wyoming Statute section 17-15-113 provides, "Neither the members of a limited liability company nor the managers of a limited liability company managed by a manager or managers are liable under a judgment, decree or order of a court, or in any other manner, for a debt, obligation or liability of the limited liability company." WYO. STAT. ANN. § 17-15-113 (LexisNexis 2004).

44. WYO. STAT. ANN. § 17-15-123 (LexisNexis 2004). Section 17-15-123 of the WLLCA explains events triggering dissolution of an LLC. *See supra* note 16.

45. WYO. STAT. ANN. § 17-15-116 (Lexis 2004). Section 17-15-116 of the WLLCA pertains to the management structure of an LLC unless otherwise contracted.

> Management of the limited liability company shall be vested in its members, which unless otherwise provided in the operating agreement shall be in proportion to their contribution to the capital of the limited liability company, as adjusted from time to time to properly reflect any additional contributions or withdrawals by the members; however, if provision is made for it in the articles of organization, management of the limited liability company may be vested in a manager or managers who shall be elected by the members in the manner prescribed by the operating agreement of the limited liability company.

Id.

46. *Id.* § 17-15-122 (LexisNexis 2004). Section 17-15-122 of the WLLCA is considered a "bulletproof" provision because it ensures an LLC will not be corporate-like in its transferability of interest:

> [I]f all of the other members of the limited liability company other than the member proposing to dispose of his or its interest do not approve of the proposed transfer or assignment by unanimous written consent, the transferee of the member's interest shall have no right to participate in the management of the business and affairs of the limited liability company or to become a member. The transferee shall only be entitled to receive

Until January 1, 1997, as long as only one additional corporate characteristic was paired with limited liability, an LLC would be taxed as a partnership.[47] After Treasury Regulation section 301.7701-3, however, a limited liability company was no longer limited to two of the four corporate characteristics in order to be taxed as a partnership.[48] State LLC acts could thus be seen as contractarian, or "enabling" statutes.[49] Federal tax stipulations that originally influenced the WLLCA were no longer a concern.[50]

Without federal tax guidelines as a tail to wag the dog, one may wonder what defines an LLC today. An LLC is a state business organization that is unincorporated with members and managers who do not have vicarious liability for the company and may be federally taxed as a partnership, corporation, tax-exempt entity, or disregarded for federal tax purposes.[51] This broad definition is a result of the business structure's flexibility.[52] While an LLC might often be construed as having the corporate aspect of limited liability with federal taxation treatment as a partnership, it is no longer limited to such a structure.[53] Thus, one of the advantages of an LLC

> the share of profits or other compensation by way of income and the return of contributions, to which that member would otherwise be entitled.

Id. IRS Revenue Procedure 95-10 requires only a majority, not unanimous consent. Rev. Proc. 95-10, 1995-3 I.R.B. 20.

47. Simplification of Entity Classification Rules, 61 Fed. Reg. 66,584, 66,584-87 (Dec. 18, 1996) (to be codified at 26 C.F.R. pt. 1, 301, 602). *See supra* note 42 and accompanying text.

48. Simplification of Entity Classification Rules, 61 Fed. Reg. 66,584, 66,584-87 (Dec. 18, 1996) (to be codified at 26 C.F.R. pt. 1, 301, 602). While state law may create different types of business organizations, it is important to note federal law has its own separate regulations for federal tax purposes. *Id.* at 66,585. As long as LLCs are not classified as associations or corporations, or as "joint-stock companies, insurance companies, organizations that conduct certain banking activities, organizations wholly owned by a State, organizations . . . taxable as corporations under a provision of the Code other than section 7701(a)(3), and certain organizations formed under the laws of a foreign jurisdiction (including a U.S. possession, territory, or commonwealth)," they could choose to be taxed either as a partnership or corporation by merely "checking the box." *Id.*

49. Carney, *supra* note 36, at 862. LLC statutes, while often having default provisions should parties neglect to consider for certain provisions, can be understood to be mainly "enabling" legislation because LLCs, by nature, are based on the "notion that parties will contractually fine-tune the parameters of their legal relationship in the governing documents of the business entity." Miller, *supra* note 5, at 1615.

50. Simplification of Entity Classification Rules, 61 Fed. Reg. 66,584, 66,584-87 (Dec. 18, 1996) (to be codified at 26 C.F.R. pt. 1, 301, 602). The original WLLCA is often referred to as a "bulletproof" state LLC statute because of its rigid formulation in order to ensure that an entity be taxed like a partnership rather than a corporation. Charles W. Murdock, *Limited Liability Companies in the Decade of the 1990s: Legislative and Case Law Developments and Their Implications for the Future*, 56 BUS. LAW. 499, 501 (2001).

51. 1 LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES § 1.3 (2d ed. 2004) [hereinafter RIBSTEIN & KEATINGE].

52. *Id.*

53. *See* WYO. STAT. ANN. § 17-15-144 (LexisNexis 2004) on the flexible limited liability company.

is that members can tailor its management and economic structure, to the extent they do not create a per se corporation.[54]

Anticipating the IRS "check-the-box" regulation, which lifted the no more than two out of four corporate characteristics requirement for partnership taxation, Wyoming and other states passed "flexible" LLC statutes.[55] Unlike the original "bulletproof" LLC acts, these flexible LLC statutes reflected the change in federal tax law allowing an LLC to have as many corporate characteristics as it desired—without becoming a full-fledged corporation—and still be taxed as a partnership by not "checking the box" on its income tax returns.[56] Without this federal tax requirement as a common denominator, the understanding and predictability of what exactly an LLC is to an investor, creditor, or consumer became increasingly unclear as each state had less direction in developing its approach to the LLC.[57] Hence, in an effort "to draft a flexible act with a comprehensive set of default rules designed to substitute as the essence of the bargain for small entrepreneurs and others," the Uniform Limited Liability Company Act was published by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") in 1994 and approved by the American Bar Association House of Delegates in 1996.[58]

The ULLCA reflects not only the relaxed federal tax guidelines but also represents the approach adopted in current state LLC legislation to establish a business form that is "essentially contractual in nature."[59] In determining default outcomes to member dissociation, the ULLCA considers different combinations of factors such as whether the LLC exists for a specified term or "at-will," whether it will be managed by members or managers, and if managers are to be members.[60] Thus, the ULLCA guidelines are

54. RIBSTEIN & KEATINGE, *supra* note 51, at § 1.4; Simplification of Entity Classification Rules, 61 Fed. Reg. 66,584, 66,585 (Dec. 18, 1996) (to be codified at 26 C.F.R. pt. 1, 301, 602). *See supra* note 48.

55. Murdock, *supra* note 50, at 501. *See* WYO. STAT. ANN. § 17-15-144, for the Wyoming "flexible limited liability company" established in 1995.

56. Powers & Forry, *supra* note 42, at 831-32.

57. Murdock, *supra* note 50, at 501-02.

58. UNIF. LTD. LIAB. CO. ACT, prefatory note (1996), http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ullca96.htm (last visited Dec. 3, 2004); RIBSTEIN & KEATINGE, *supra* note 51, at § 1.8.

59. Murdock, *supra* note 50, at 502. As of June 2004, only eight states have adopted portions of the ULLCA. RIBSTEIN & KEATINGE, *supra* note 51, at § 1.8. Alabama, Hawaii, Illinois, Montana, South Carolina, South Dakota, Vermont, West Virginia, and the U.S. Virgin Islands have all adopted significant portions of the ULLCA. *Id.* In 2003 the NCCUSL decided to revise the act, possibly due to a lack of state adoption. *Id.*

60. Bishop, *supra* note 39, at 265-66. Under the ULLCA, withdrawing members of a term LLC are treated as transferees. UNIF. LTD. LIAB. CO. ACT § 603(b)(1) (1996). If the company continues beyond its specified term, the member's distributional interest must be bought on the date the LLC would have expired. *Id.* § 603 (a)(2)(ii). This means until the end of the term, such withdrawn members cannot force a buyout upon dissociation and are entitled to any distributions but no longer have any management rights. Bishop, *supra* note

much more complex than simply opting to follow either partnership or corporation rules upon member dissociation.[61] Traditionally, a partner's withdrawal always resulted in the dissolution of a partnership.[62] The term "dissociation," however, was introduced in the Revised Uniform Partnership Act in response to the development of different outcomes resulting from a partner's withdrawal: depending on the situation, withdrawal could result in dissolution of the partnership or a buyout of the partner's interest.[63] By comparison, withdrawal of a shareholder's participation from a corporation generally does not require the corporation to purchase that shareholder's interest nor does it threaten the life of the company.[64]

Most state LLC acts enacted before the "check-the-box" regulations follow the partnership model in regards to dissociation and dissolution in order to ensure pass-through tax treatment.[65] Section 17-15-123 of the WLLCA is typical of such a provision in its assurance that the corporate model is not followed in regards to continuity of life unless agreement is reached after an event triggering dissolution.[66] The "check-the-box" regulations spurred some states to adopt flexible LLC statutes, which no longer required a subsequent agreement to continue the LLC upon the death, bankruptcy, or dissolution of a member.[67]

It is interesting to note how more recent LLC statutes, in states such as Idaho, Colorado, and Delaware, which may be competing with Wyoming

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39, at 272-73. Wyoming.com was to exist for thirty years from the date its Articles of Organization were filed. Articles of Organization of Wyoming.com LLC ¶ 2 (Feb. 3, 1997) (on file with the Wyoming Secretary of State). While the president and vice-president of Wyoming.com at the time of Lieberman's withdrawal were both members of the LLC, its "[o]fficers need not be selected from among the [m]embers." Wyoming.com Operating Agreement ¶ 7.2 (July 25, 1995) (on file with Wyoming.com LLC).

61. *See supra* note 60 and accompanying text.

62. UNIF. P'SHIP ACT § 29 (1914) ("The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.").

63. UNIF. P'SHIP ACT §§ 601, 603, 701, 801 (1997).

64. Bishop, *supra* note 39, at 260-61. Shares are freely transferable in a public corporation and a corporation has continuity of life. *See supra* note 42.

65. Miller, *supra* note 34, at 426-28.

66. *See* WYO. STAT. ANN. § 17-15-123 (LexisNexis 2004). *See supra* note 16.

67. Miller, *supra* note 34, at 429-30. *See* WYO. STAT. ANN. § 17-15-144 (LexisNexis 2004). The WLLCA states:

> [A] flexible limited liability company is dissolved and its affairs shall be wound up upon the occurrence of any event described in W.S. 17-15-123(a) . . . unless the business of the flexible limited liability company is continued either by the consent of all of the remaining members . . . or pursuant to a right to continue stated in the operating agreement.

WYO. STAT. ANN. § 17-15-144(c) (LexisNexis 2004).

for LLC business, handle member dissociation.[68] Under the Idaho Limited Liability Company Act, if a dissociating member is not removed via a provision in the operating agreement or is unable to assign all of his or her interest with the consent of the majority of remaining members, dissolution is not triggered, but he or she is treated as an assignee from the date of dissociation.[69] Such a dissociating member would be entitled to receive distributions as before dissociation, but would be unable to exercise the management and other rights of a member.[70] If a dissociating member is removed from an Idaho LLC via a provision in the operating agreement, he or she receives the "fair value" of his or her entire interest as of the date of dissociation.[71] Both Idaho and Colorado LLC statutes allow for damages should a member's withdrawal breach his or her operating agreement.[72] The Colorado LLC statute also provides that upon resignation or withdrawal a member will be treated similar to an assignee or transferee; dissolution only occurs upon the unanimous agreement of all Colorado LLC members.[73] Unless otherwise provided in the operating agreement, the Delaware Limited Liability Company Act does not allow a member to resign prior to the dissolution and winding up of the LLC.[74] Accordingly, the resignation of a Delaware LLC

68. *See infra* notes 69-75 and accompanying text. Colorado borders Wyoming to the south; the Colorado LLC Act was adopted in 1990. COLO. REV. STAT. ANN. § 7-80-101 (West 2004). Idaho borders Wyoming to the west; the Idaho LLC Act was adopted in 1993. IDAHO CODE § 53-601 (LexisNexis 2004). Delaware is a popular state for business registrations; the Delaware LLC Act was adopted in 1997. DEL. CODE ANN. tit. 6, §18-101 (2004).

69. IDAHO CODE §§ 53-630, 53-641(c) (LexisNexis 2004).

70. *Id.* §§ 53-630(2), 53-636.

71. *Id.* §§ 53-630(1), 53-641(1)(c). This "fair value" provision can be contracted around, as in *Lamprecht v. Jordan,* wherein the Idaho Supreme Court held a withdrawing member could not seek the fair market value of his interest because the LLC's operating agreement had already established that an exiting member's interest would be limited to the value of his capital account. Lamprecht v. Jordan, 75 P.3d 743, 745-48 (Idaho 2003).

72. IDAHO CODE § 53-641(3) (LexisNexis 2004); COLO. REV. STAT. ANN. § 7-80-602 (West 2004). Under Idaho law, these damages may offset distributions by "including the reasonable costs of obtaining replacement of the services the withdrawn member was obligated to perform." IDAHO CODE § 53-641(3) (LexisNexis 2004).

73. COLO. REV. STAT. ANN. §§ 7-80-603, 7-80-801 (West 2004). In a Colorado LLC, such a member is "entitled only to receive the share of the profits or other compensation by way of income and the return of contributions, to which such member would have been entitled if the member had not resigned or withdrawn." *Id.* § 7-80-603.

74. DEL. CODE ANN. tit. 6, §18-603 (2004). This statute specifically states:

> A member may resign from a limited liability company only at the time or upon the happening of events specified in a limited liability company agreement . . . . Notwithstanding anything to the contrary under applicable law, unless a limited liability company agreement provides otherwise, a member may not resign from a limited liability company prior to the dissolution and winding up of the limited liability company. Notwithstanding anything to the contrary under applicable law, a limited liability company agreement may provide that a limited liability company interest may not be assigned prior to the dissolution and winding up of the limited liability company.

member does not trigger dissolution, unless so provided in the operating agreement.[75]

The policy of freedom of contract is touted as underlying the Colorado LLC Act, the Delaware LLC Act, and the Delaware Limited Partnership Act, on which Delaware's LLC act is largely based.[76] In *Walker v. Resource Development Co. Ltd., L.L.C.*, an attempt to unilaterally remove an LLC member and keep his ownership interest without a supporting provision in the operating agreement failed.[77] The court found a "fundamental principle under Delaware law [is] that a majority of the members (or stockholders) of a business entity, unless expressly granted such power by contract, have no right to take the property of other members (or stockholders)."[78] The members of the LLC claimed a removal and expropriation of the member's interest was justified by the member's breach of fiduciary duty.[79] The court rejected this argument, finding it to be "troubling" because while the member had a relationship involving trust and confidence with the LLC "an apparent limit on liability for breach of fiduciary duty is to be interpreted broadly" so as not to include misappropriation of a member's property.[80] Furthermore, "members of an LLC [are] to rely in good faith on the terms of the operating agreement in the context in which it appears in the statute, and with regard to the general tenor of the statute as a whole."[81] Hence, the Delaware Court in this situation held the member's economic interest would be held in a constructive trust of the LLC's shares in the percent of the member's interest before expulsion.[82]

Id.

75. *Id.* § 18-801(b).

76. Elf Atochem N. Am., Inc. v. Jaffari, 727 A.2d 286, 290 (Del. 1999). *See* DEL. CODE ANN. tit. 6, §§ 18-1101(b), 17-1101(c) (2003); COLO. REV. STAT. ANN. § 7-80-108(4) (West 2004).

77. Walker v. Res. Dev. Co. Ltd., L.L.C., 791 A.2d 799, 800, 813 (Del. Ch. 2000).

78. *Id.* at 815. The Delaware Court of Chancery stated:

> Other mechanisms may be available to them to recast their business relations to eliminate persons from the enterprise, such as the merger provisions of the various business entity laws. But, these provisions do not provide for the forfeiture of economic rights, requiring instead that the persons whose interests are eliminated are entitled to receive fair value therefor.

Id.

79. *Id.* at 814. The members of the LLC were interpreting title 6, section 18-1104 of the Delaware LLC Act, which states, "In any case not provided for in this chapter, the rules of law and equity, including the law merchant, shall govern." *Id.* (citing DEL. CODE ANN. tit. 6, § 18-1104 (2003)).

80. *Id.* at 814-17.

81. *Id.* at 817.

82. *Id.* at 818.

Role of Fiduciary Duties—"But to say that a man is a fiduciary only begins analysis . . . ."[83]

Fiduciary duties arise when one party is dependent upon another for higher levels of responsibility and trust based on the nature of their relationship.[84] Limited liability company members, managers, and officers can be both agents and principals of an LLC depending on the situation.[85] The capacity and expectations associated with a relationship define the scope of fiduciary duties expected by each role.[86] While a fiduciary is understood to be "one who owes to another the duties of good faith, trust, confidence, and candor," this definition does not clearly address the extent of each responsibility.[87] Black's Law Dictionary defines "fiduciary relationship" as "a relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship."[88] Hence, a comprehensive, pre-set definition of what exactly a fiduciary is does not exist, as the meaning is determined by the nature of each relationship.[89] At the same time, it is well understood that the duty of care and the duty of loyalty are common aspects of fiduciary duties, and inherent in each is the duty to act carefully and unselfishly.[90]

A fiduciary's duty of care is intended to maintain management standards and prevent agents from extending their authority beyond the agreed scope of their position.[91] Duty of care obligations require a fiduciary to be

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83. SEC v. Chenery Corp., 318 U.S. 80, 85-86 (1943) (quoting Justice Frankfurter, "[I]t gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?").

84. Miller, *supra* note 5, at 1622.

85. Harvey Gelb, *Liabilities of Members and Managers of Wyoming Limited Liability Companies*, 31 LAND & WATER L. REV. 133, 140-41 (1996). As explained by Professor Gelb:

> Both members and managers may be LLC agents . . . . In addition, a member or manager may be using the LLC as his or her agent and may be liable as a principal for what the LLC does under agency principles. For example, a member or manager may be liable for a contract entered on his or her behalf by the LLC acting as his or her agent.

Id.

86. *See* Ribstein, *Emergence*, *supra* note 36, at *25-26 (discussing such scenarios as how former members who have been fully compensated for their LLC interests no longer have the expectation of a fiduciary relationship with remaining members, whether member successors have management roles and expectations of fiduciary duties, and how the various capacities of dissociating LLC members effects fiduciary expectations).

87. BLACK'S LAW DICTIONARY 282 (2d pocket ed. 2001).

88. *Id.*

89. *See supra* notes 87-88 and accompanying text.

90. RIBSTEIN & KEATINGE, *supra* note 51, at § 9.1 ("In general, fiduciary duties help to ensure that owners and managers act consistently with the interests of the firm and its members rather than in their own interests.").

91. *Id.* § 9.2.

conscientious and well informed before making a decision.[92] The WLLCA does not address LLC member fiduciary duty obligations.[93] In comparison, Idaho limits the duty of care liability to the LLC and its members to gross negligence or willful misconduct, and Idaho LLC members do not owe a duty of care or a duty of loyalty solely based on the fact they are a member, unless otherwise contracted.[94] The Colorado statute provides that an LLC manager, regardless of whether or not he or she is a member, owes the LLC a duty of care to refrain from grossly negligent behavior, reckless conduct, intentional misconduct, or a knowing violation of the law.[95] This statute differs from the Idaho provision in that a duty of care is not statutorily obliged to members by managers of a Colorado LLC.[96]

Maintaining a duty of loyalty requires acting in the principal's interest.[97] Under Colorado law, LLC managers are obligated not to compete or act in a conflict of interest with the LLC, and to hold in trust for the LLC any

92. Miller, *supra* note 5, at 1622.

93. *See* WYO. STAT. ANN. §§ 17-15-101 to -147 (LexisNexis 2004).

94. IDAHO CODE § 53-622 (LexisNexis 2004). The Idaho Limited Liability Company Act has the following provision related to the duties of those in control of Idaho LLCs:

> Unless otherwise provided in an operating agreement:
>
> (1) A member or manager shall not be liable . . . to the limited liability company or to the members of the limited liability company for any action taken or failure to act on behalf of the limited liability company unless the act or omission constitutes gross negligence or willful misconduct.
>
> (2) Every member and manager must account to the limited liability company and hold as trustee for it any profit or benefit derived . . . from:
>
> (a) Any transaction connected with the conduct or winding up of the limited liability company; or
>
> (b) Any use [of the LLC's] property . . . entrusted to the person as a result of his status as manager or member.
>
> (3) *One who is a member of a limited liability company in which management is vested in managers . . . and who is not a manager shall have no duties to the limited liability company or to the other members solely by reason of acting in the capacity of a member.*

Id. (emphasis added).

95. COLO. REV. STAT. ANN. § 7-80-404 (West 2004).

96. *Id. See supra* note 94. Prior to July 1, 2004, the Colorado LLC Act provided an LLC manager should perform his or her duties in good faith, in a manner he or she believes to be in the best interest of the LLC, and with the care of an "ordinarily prudent person." COLO. REV. STAT. ANN. § 7-80-406 (West 2003) ("A person who so performs his duties shall not have any liability by reason of being or having been a manager of the limited liability company.").

97. RIBSTEIN & KEATINGE, *supra* note 51, at § 9.7.

"profit, property, or benefit" derived from the LLC's business or an appropriation of the LLC's opportunity.[98] As with the duty of care, these duty of loyalty obligations under Colorado law may be clarified in an LLC's operating agreement as long as they are not unreasonably reduced.[99] The Idaho LLC Act is similar to the Colorado Act except instead of guarding against the misappropriation of an LLC's opportunity, the Idaho Act protects "other matters entrusted to the person as a result of his status as manager or member."[100] As with duty of care provisions, the Idaho duty of loyalty provisions apply to both managers and members, regardless of whether or not they hold management positions.[101]

Like the WLLCA, the Delaware LLC Act does not stipulate the duty of care or the duty of loyalty for LLC members.[102] However, the Delaware

98. COLO. REV. STAT. ANN. § 7-80-404 (West 2004).
99. *Id.* § 7-80-108.
100. IDAHO CODE § 53-622 (LexisNexis 2004).
101. *Id.*
102. Ribstein, *Emergence*, *supra* note 36, at *4; Miller, *supra* note 5, at 1635; *see* DEL. CODE ANN. tit. 6, § 18-1101 (2004). The Wyoming Business Corporation Act's standards of conduct for directors under Wyoming statute 17-16-830 is the same expectation of officers with discretionary authority under Wyoming statute 17-16-842:

> An officer with discretionary authority shall discharge his duties under that authority:
>
> (i) In good faith;
>
> (ii) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
>
> (iii) In a manner he reasonably believes to be in or at least not opposed to the best interests of the corporation.
>
> (b) In discharging his duties an officer is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data . . . .
>
> (c) An officer is not acting in good faith if he has knowledge concerning the matter in question that makes reliance otherwise permitted . . . .
>
> (d) An officer is not liable for any action taken as an officer, or any failure to take any action, if he performed the duties of his office in compliance with this section.
>
> (e) . . . an officer, in determining what he reasonably believes to be in or not opposed to the best interests of the corporation, shall consider the interests of the corporation's shareholders and, in his discretion, may consider any of the following:
>
> (i) The interests of the corporation's employees, suppliers, creditors and customers;

statute protects a member or manager who relies in good faith on "opinions, reports or statements presented to the limited liability company by any of its other managers, members, officers, employees or committees of the limited liability company."[103] The Delaware LLC Act is like the ULLCA in that it allows for parties to reduce or eliminate their fiduciary duties in their written agreement, but does not allow for the elimination of good faith and fair dealing as an implied contractual covenant.[104]

Although previously considered forms of fiduciary duties, the duties of good faith and fair dealing under the Revised Uniform Partnership Act are now considered a contract standard.[105] Wyoming follows the well-

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> (ii) The economy of the state and nation;
>
> (iii) The impact of any action upon the communities in or near which the corporation's facilities or operations are located;
>
> (iv) The long-term interests of the corporation and its shareholders, including the possibility that those interests may be best served by the continued independence of the corporation; and
>
> (v) Any other factors relevant to promoting or preserving public or community interests.

WYO. STAT. ANN. § 17-16-842 (LexisNexis 2004). The duties managers owe to other members and to the LLC under the ULLCA parallel the duties owed by a partner to a partnership and to other partners under the draft Wyoming has adopted of the Uniform Partnership Act, with the following exceptions:

> A partner's duty of loyalty may not be eliminated by agreement, but the partners may by agreement identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable.
> . . .
>
> The obligation of good faith and fair dealing may not be eliminated by agreement but the partners may by agreement determine the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable.

WYO. STAT. ANN. § 17-21-404 (LexisNexis 2004). *See* UNIF. LTD. LIAB. CO. ACT § 409 (1996).

103. DEL. CODE ANN. tit. 6, § 18-406 (2004).

104. *Id.* § 18-1101; UNIF. LTD. LIAB. CO. ACT § 103 (1996). The Colorado LLC Act stipulates "[a] member or manager shall discharge the member's or manager's duties to the limited liability company and exercise any rights consistently with the obligation of good faith and fair dealing." COLO. REV. STAT. ANN. § 7-80-404(3) (West 2004).

105. UNIF. P'SHIP ACT § 404, authors' cmt. (2004). The official comments of the Revised Uniform Partnership Act (RUPA) clarified the meaning of "good faith" and "fair dealing" as:

established rule that each party to a contract has obligations of good faith and fair dealing in both performance and enforcement.[106] The Wyoming Supreme Court defines "good faith" to mean "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community *standards of decency, fairness or reasonableness*."[107] The Uniform Commercial Code defines "good faith" as "honesty in fact and the observance of reasonable commercial standards of fair dealing."[108] The implied contractual covenant of good faith and fair dealing requires parties to act decently, fairly, and reasonably in regards to the purpose of the contract and the "justified" expectations of the other party.[109]

It is well accepted that partners under partnership law are fiduciaries to the partnership and to each other, thereby owing one another "[n]ot honesty alone, but the punctilio of an honor the most sensitive, [as] the standard of behavior."[110] In corporate law, directors and officers have a duty of loyalty and a duty of care to the company and thereby to the company's shareholders.[111] Due to the contractual nature of an LLC, however, inherent expectations of fiduciary duties do not readily exist.[112] In an LLC, not only is a member not necessarily a manager, but a manager is not necessarily required

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> [A] contract concept, imposed on the partners because of the consensual nature of a partnership. It is not characterized, in RUPA, as a fiduciary duty arising out of the partners' special relationship. Nor is it a separate and independent obligation. It is an ancillary obligation that applies whenever a partner discharges a duty or exercises a right under the partnership agreement or the Act.
>
> The meaning of "good faith and fair dealing" is not firmly fixed under present law. "Good faith" clearly suggests a subjective element, while "fair dealing" implies an objective component. It was decided to leave the terms undefined in the Act and allow the courts to develop their meaning based on the experience of real cases.

UNIF. P'SHIP ACT § 404 official cmt. (2004) (citation omitted).

106. Wilder v. Cody Country Chamber of Commerce, 868 P.2d 211, 220-21 (Wyo. 1994) (rev'd on other grounds) (citation omitted); RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.").

107. *Wilder*, 868 P.2d at 220 (citation omitted).

108. UNIF. COMMERCIAL CODE § 1-201(20) (2004).

109. *See supra* note 107 and accompanying text.

110. *See* Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) (quoting Justice Cardozo); UNIF. P'SHIP ACT § 404 (2004).

111. *See* Anest v. Audino, 773 N.E.2d 202, 209 (Ill. App. 2d 2002); Squaw Mountain Cattle Co. v. Bowen, 804 P.2d 1292, 1296 (Wyo. 1991); Sandra K. Miller, *What Standards of Conduct Should Apply to Members and Managers of Limited Liability Companies*, 68 ST. JOHN'S L. REV. 21, 39 (1994).

112. Miller, *supra* note 5, at 1621-22.

to be a member.[113] This can cause confusion, as the fiduciary roles of each position are still developing in the LLC, a business entity which is not "one size fits all."[114]

A difference in the default rules of fiduciary duties among corporation and partnership members can be found in how a "squeeze-out" is handled by each entity.[115] A "squeeze-out" results when the minority interest holder loses his or her employment and is voted out of management.[116] While the majority continues to receive salaries, it usually votes in its own interest to no longer distribute dividends, so that the minority interest holder's investment is lowered in value.[117] If the minority interest holder is then able to sell, rather than forfeit, his or her interest to the remaining members, it is understood to be at a greatly reduced price.[118] A minority interest holder is thereby squeezed-out of the fair value of his or her interest.[119]

When a squeeze-out occurs in a corporation, the minority shareholder may pursue a breach of fiduciary duty claim.[120] To succeed in such a claim, the minority shareholder must prove the majority's actions fell outside the protection of the business judgment rule.[121] This requires the minority shareholder overcoming the presumption the majority acted as a fiduciary

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113. Miller, *supra* note 111, at 25.

114. *Id.* at 28; Dennis S. Karjala, *Limited Liability Companies: Planning Problems in the Limited Liability Company,* 73 WASH. U. L. Q. 455, 477 (1995).

115. *See generally* Franklin A. Gevurtz, *Limited Liability Companies: Squeeze-outs and Freeze-outs in Limited Liability Companies,* 73 WASH. U.L.Q. 497 (1995). *See also infra* notes 120-26 and accompanying text.

116. Gevurtz, *supra* note 115, at 499.

117. *Id.*

118. *Id.* The magnitude of a squeeze-out should be kept in mind:

> The losses which a minority shareholder suffers in a squeeze-out are sometimes catastrophic. [Sh]e may be deprived of any effective voice in the making of business decisions. Not only that, [s]he may be locked out of the company's premises; and majority participants may be able to withhold from h[er] information on the affairs of the business and on policies being adopted and decisions being made . . . . Quite commonly when a participant invests in a close corporation she expects to work in the business on a full-time basis. She may put practically everything she owns into the business and expect to support herself from the salary she receives as a key employee of the company. Whenever a shareholder is deprived of employment by the corporation (as she frequently is in these squeeze plays) she may be in effect deprived of her principal means of livelihood.

F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL AND THOMPSON'S OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS § 1:3 (2004).

119. *See supra* notes 116-18 and accompanying text.

120. Gevurtz, *supra* note 115, at 499.

121. *Id.* at 504.

in the interest of the company.[122] When a conflict of interest exists, however, the defendant has the burden of proof of showing his or her action and its results were entirely fair.[123] Squeeze-outs are rarely found in partnerships because members are able to demand a buyout if not dissolution upon their withdrawal.[124] Because close corporation shareholders are like partners in that they "usually know each other personally and are more likely to reach decisions by 'a genuine interchange and pooling of views,'" these shareholders, like partners, owe each other the "utmost good faith and loyalty."[125] In such jurisdictions, a minority shareholder in a close corporation seeking justice from a squeeze-out—which is a form of oppressive behavior that exceeds "reasonable expectations"—may need to only "demonstrate that the same legitimate objective could have been achieved through an alternative course of action less harmful to the minority's interest."[126]

PRINCIPAL CASE

In *Lieberman v. Wyoming.com LLC*, the Wyoming Supreme Court consistently declined to look to partnership law, corporation law, other state law, or fiduciary duties among LLC managers for guidance in handling a withdrawing member's equity interest.[127] Rather, the court applied a strict plain language contractual approach, maintaining it is the court's duty to construe, not create, agreements in upholding the "paramount" public policy of freedom of contract.[128]

Under this approach, the Wyoming Supreme Court's unanimous decision in *Lieberman I* made two observations in regards to the language of the WLLCA, which, together, exposed a hole within the statutory scheme.[129]

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122. *Id.* at 499-500.

123. Miller, *supra* note 5, at 1642.

124. Gevurtz, *supra* note 115, at 501-02.

125. 1 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL AND THOMPSON'S CLOSE CORPORATIONS AND LLCS: LAW AND PRACTICE § 1.2 (Rev. 3d ed. 2004) (internal citation omitted); Smith v. Atlantic Properties, Inc., 422 N.E.2d 798, 801 (Mass. App. Ct.. 1981). A "close corporation" has few shareholders with no ready market for the company stock. 1 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL AND THOMPSON'S CLOSE CORPORATIONS AND LLCS: LAW AND PRACTICE § 1.2 (Rev. 3d ed. 2004).

126. Wilkes v. Springfield Nursing Home, 353 N.E.2d 657, 663 (Mass. 1976); Gevurtz, *supra* note 115, at 499-501. "'Reasonable expectations' are those spoken and unspoken understandings on which the founders of a venture rely when commencing the venture." Harvey Gelb, *Fiduciary Duties and Dissolution in the Closely Held Business*, 3 WYO. L. REV. 547, 575 (2003) (internal citation omitted). *See infra* note 227.

127. Lieberman v. Wyoming.com LLC, 11 P.3d 353 (Wyo. 2000); Lieberman v. Wyoming.com LLC, 82 P.3d 274 (Wyo. 2004). At most, the court in *Lieberman I* acknowledged the formation of the limited liability company to be rooted in a mix of partnership and corporation characteristics. *Lieberman I*, 11 P.3d at 357. The Wyoming Supreme Court stated it did not look to other states' case law because of variations in statutes authorizing the creation of LLCs. *Id.*

128. *Lieberman II*, 82 P.3d at 282.

129. *See infra* text accompanying notes 130, 133.

First, "a member's interest in an LLC consists of economic and non-economic interests."[130] Capital contributions are a type of economic interest; the right to receive profits and the ability to participate in management are examples of non-economic interests.[131] Under the WLLCA, a member's capital contribution does not include the fair market value of a member's interest.[132] Next, the court noted the distinction between a member withdrawing his capital contribution and a member withdrawing his membership (dissociation).[133] In so doing, the court acknowledged the WLLCA addresses the rights and obligations of LLC members in regards to a member withdrawing his or her capital contribution but not in regards to a member's non-economic interest upon withdrawing his or her membership.[134]

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130. *Lieberman I*, 11 P.3d at 357.

131. *Id.* The Wyoming Supreme Court, specifically, stated:

> Under the Wyoming LLC act, a member's interest in an LLC consists of economic and non-economic interests. One interest is a member's capital contribution, which a member may withdraw under certain conditions. Wyo. Stat. Ann. §§ 17-15-115 and 120. A member also generally has the right to receive profits. Wyo. Stat. Ann. § 17-15-119. A member's interest also usually grants him the ability to participate in management. Wyo. Stat. Ann. § 17-15-116. Overall, a member's interest is transferable, although the management rights of a transferee may be limited. Wyo. Stat. Ann. § 17-15-122. While these statutory provisions provide some guidance regarding a member's interest, we must also look at an LLC's operating agreement and articles of organization.

Id.

132. *Id.* at 359. The court did not find the value of Lieberman's capital contribution to have changed from its initial stated amount:

> [N]othing in § 17-15-120 indicates that fair market value of a member's interest is to be included in the amount to be paid to a member upon withdrawal of that member's capital contribution. In addition, § 17-15-129(b)(i) requires amendment to an LLC's articles of organization when the amount or character of contributions changes. Thus, the amount of a member's capital contribution is a constant not subject to market fluctuations. Numerous LLC acts from other states do allow a member to receive the fair market value (or fair value) of the member's interest. However, those provisions generally contemplate dissociation, not simply withdrawal of capital contributions.

Id. See supra note 16.

133. *Lieberman I*, 11 P.3d at 359. The court based this finding largely on the implication of Wyoming Statute section 17-15-119 that a member may withdraw some or all of his capital contribution while remaining a member. *Id.* "If the operating agreement does not so provide, distributions shall be made on the basis of the value of the contributions made by each member to the extent they have been received by the limited liability company and have not been returned." WYO. STAT. ANN. § 17-15-119 (LexisNexis 2004).

134. *Lieberman I*, 11 P.3d at 360-61; Lieberman v. Wyoming.com LLC, 82 P.3d 274, 275 (Wyo. 2004). The Wyoming Supreme Court concluded, "[h]aving determined that § 17-15-120 does not control a member's rights upon dissociation, we must determine what became of

When no new contractual language was presented upon remand, the Wyoming Supreme Court continued to maintain its strict plain language contractual approach in *Lieberman II*.[135] In a 3-2 decision, the majority had two bases of support in its holding that Lieberman would maintain his equity interest while no longer being a member.[136] First, the majority inferred from an explicit provision of Wyoming.com's Operating Agreement allowing someone buying into the LLC to have an equity interest without being a member, that it was understood by the parties that a withdrawing member could similarly maintain his equity interest while no longer being a member.[137] Hence, the Wyoming Supreme Court majority did not tie LLC membership to equity interests.[138] Next, the majority found support in the lack of an express contractual provision indicating either party must buy or sell a withdrawing member's equity interest for any amount.[139] In upholding the public policy interest of freedom to contract, the majority declined to create a solution to a scenario not provided for in the parties' written agreement as it considered such action akin to altering the parties' contract.[140]

In his first brief, Lieberman argued an LLC should be treated like a partnership, not a corporation, in regards to a withdrawing member's interest.[141] He based this argument on both the origin of the LLC as well as provisions such as section 17-15-123 of the WLLCA which deal with member interests similarly to a partnership.[142] Since a partner's withdrawal automatically triggers either the partnership's buyout of the withdrawing member's interest or the dissolution of the partnership, Lieberman maintained an LLC member should likewise receive the fair value of his interest when the

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Lieberman's interest, other than his capital contribution, in Wyoming.com." *Lieberman II*, 11 P.3d at 360; *Lieberman*, 82 P.3d at 279. *See supra* note 16.

135. *Lieberman II*, 82 P.3d at 277, 281-82. *See supra* note 25.

136. *Lieberman II*, 82 P.3d at 274, 281-82. *See infra* notes 137, 139.

137. *Lieberman II*, 82 P.3d at 274, 281-82. Regarding the transfer of shares, Wyoming.com's Operating Agreement states:

> If the transfer or assignment is made as originally proposed and the other Members fail to approve the transfer or assignment by unanimous written consent, the transferee or assignee will have no right to participate in the management of the business and affairs of the Company or to become a Member. The transferee or assignee will only be entitled to receive the share of the profit or other compensation by way of income and the return of contributions to which that Member would otherwise be entitled.

Wyoming.com Operating Agreement ¶ 4.3 (July 25, 1995) (on file with Wyoming.com LLC).

138. *Lieberman II*, 82 P.3d at 281-82.

139. *Id.* at 282.

140. *Id.* ("We have long held that it is the duty of this Court to construe contracts made between parties, not to make a contract for them.").

141. Brief of Appellant E. Michael Lieberman at 4, Lieberman v. Wyoming.com LLC, 11 P.3d 353 (Wyo. 2000) (No. 99-97).

142. *Id.* at 10-14. *See supra* note 16.

LLC elects to continue, rather than dissolve, upon a member's withdrawal.[143] This argument relied heavily on section 17-15-120 of the WLLCA, entitled "Withdrawal or Reduction of Members' Contributions to Capital," being interpreted as pertaining to all of a member's interest.[144] Thus, Lieberman initially advocated his capital account, as synonymous with "contributions to capital" in representing the fair market value of his entire interest in the LLC, should be liquidated according to Wyoming.com's Operating Agreement Article VI, entitled "Capital Accounts, Distribution of Profits and Losses."[145]

In clarifying that a member's capital contribution is only one type of LLC member interest, the unanimous decision of *Lieberman I* made clear that provisions relating to the "capital contribution" of a member did not apply to a member's equity interest.[146] As advocated by Wyoming.com, a member's "capital contribution" was not found to be synonymous with, but rather a subset of, a member's "capital account."[147] This finding, coupled

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143. Brief of Appellant at 4, 9-11, *Lieberman* (No. 99-97). Lieberman's brief here cited the Uniform Partnership Act adopted in Wyoming Statute §17-21-701:

> The buyout price of a dissociated partner's interest is the amount that would have been distributable to the dissociating partner . . . if, on the date of dissociation, the assets of the partnership were sold at a price equal to the greater of the liquidation value or the value based on a sale of the entire business as a going concern without the dissociated partner . . . . In either case, the sale price of the partnership assets shall be determined on the basis of the amount that would be paid by a willing buyer to a willing seller . . . . Interest shall be paid from the date of dissociation to the date of payment.

Id. at 13 (citing WYO. STAT. ANN. § 17-21-701 (LexisNexis 2004)). *See supra* notes 63 and accompanying text. This effect of dissociation in a partnership is also reflected in Wyoming Statute section 17-15-123. *See* WYO. STAT. ANN. § 17-15-123 (LexisNexis 2004). *See supra* note 16.

144. Brief of Appellant at 16, *Lieberman* (No. 99-97). *See* WYO. STAT. ANN. § 17-15-120 (LexisNexis 2004); *supra* note 16.

145. Brief of Appellant at 16-17, *Lieberman* (No. 99-97). Lieberman's first brief argued:

> The Operating Agreement Articles 6.1 and 6.2 show that the Appellant's capital account consists of the fair market value of his interest in the Company. The District Court failed to recognize this section of the Operating Agreement. This provision in the Operating Agreement is consistent with the Act's provision allowing a withdrawing Member the return of the fair market value of his capital.

Id. at 16.

146. Lieberman v. Wyoming.com LLC, 11 P.3d 353, 357-61 (Wyo. 2000).

147. Brief of Appellee Wyoming.com LLC at 14, Lieberman v. Wyoming.com LLC, 11 P.3d 353 (Wyo. 2000) (No. 99-97). "Contributions to capital," the LLC maintained, is defined by section 17-15-115 of the WLLCA as "consist[ing] of cash or other property, promissory notes or services rendered or to be rendered," which does not include all aspects, but a component, of a member's capital account as defined in Wyoming.com's Operating Agree-

with the fact that the Wyoming Supreme Court would not look to partnership law or other states' law for applicable default rules, rendered the basis of Lieberman's initial argument irrelevant.[148] Nonetheless, when the Wyoming Supreme Court remanded the question of what had become of Lieberman's equity interest, the district court applied the calculation required upon liquidation of the LLC in Wyoming.com's Operating Agreement Article VI—the same valuation which would have occurred had Lieberman been treated as a dissociating member of a partnership.[149]

Despite the fact the district court's calculation method on remand was what Lieberman had initially advocated to the Wyoming Supreme Court, Lieberman appealed from the resulting negative value of his interest in a successful LLC.[150] In his second brief to the Wyoming Supreme Court, Lieberman maintained he was not required to sell his equity interest for the LLC to continue.[151] Rather, Lieberman maintained that without acceptance of his "offer to withdraw and sell his interest for $400,000" outlined in his "Notice of Withdrawal of Member Upon Expulsion: Demand for Return of Contributions to Capital," he was not required to sell his equity interest based on any contract or statutory provision.[152] Therefore, Lieberman argued, he maintained his equity interest as both a member and an "economic interest holder" of Wyoming.com.[153]

Wyoming.com also linked equity interest ownership to membership.[154] As such, the LLC agreed with the district court's calculation on remand, and maintained in its second brief that Lieberman did not retain his

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ment paragraph 6.1. *Id.* at 11-12. *See* WYO. STAT. ANN. § 17-15-115 (LexisNexis 2004). Furthermore, Wyoming.com argued, "[i]f a member's capital account was equal to the member's contribution to capital, the articles of organization would need to be amended daily due to the changes in the account. This is clearly not the outcome that the legislature intended." Brief of Appellee at 14, *Lieberman* (No. 99-97). *See* WYO. STAT. ANN. § 17-15-129 (LexisNexis 2004). Hence, in its second brief, Wyoming.com agreed with the district court's holding on remand, resulting in no amount due Lieberman for his equity interest. Brief of Appellee Wyoming.com LLC at 8, Lieberman v. Wyoming.com LLC, 82 P.3d 274 (Wyo. 2004) (No. 01-193).

148. *Lieberman I*, 11 P.3d at 357; Brief of Appellant at 13-14, *Lieberman* (No. 99-97). Lieberman's first brief also cited Minnesota and Indiana LLC case law. Brief of Appellant at 12, 18-19, *Lieberman* (No. 99-97).

149. *Lieberman II*, 82 P.3d at 278-79. *See supra* notes 23-24 and accompanying text.

150. Brief of Appellant E. Michael Lieberman at 8, Lieberman v. Wyoming.com LLC, 82 P.3d 274 (Wyo. 2004) (No. 01-193). The calculation resulted in him actually owing the company $8,800. *Id.*

151. *Id.* at 9.

152. *Id.*

153. *Id.* Lieberman now agreed with the Wyoming Supreme Court that the return of the face value of Lieberman's capital contribution was all that was necessary for Wyoming.com to continue under WLLCA section 17-15-120. *Id.* at 18. *See supra* note 16.

154. Brief of Appellee Wyoming.com LLC at 15, Lieberman v. Wyoming.com LLC, 82 P.3d 274 (Wyo. 2004) (No. 01-193) ("The valuation of the equity interest of Lieberman must be determined upon the date of his withdrawal from the company.").

equity interest upon his withdrawal.[155] Supporting a plain language interpretation of the parties' agreements, the LLC focused on paragraphs 6.2 and 6.1 of its Operating Agreement.[156] These provisions do not call for "appraisals, market values, estimates and other parole evidence" to be used in calculating capital account balances to be distributed upon the liquidation of a "member's interest."[157]

Lieberman maintained a book value calculation of a member's equity interest under the WLLCA was inequitable to both minority and majority interest holders.[158] Should an LLC increase in value, the majority would essentially be able to "steal" the minority's interest; and, should an LLC decrease in value, the return of a set initial contribution could debilitate the LLC.[159] To avoid such oppression of a minority interest holder, Lieberman consistently argued fiduciary duties found in both Wyoming corporate and partnership law should be extended to LLCs.[160] In response, Wyoming.com maintained the legislative intent of the WLLCA indicated a minority interest holder should not be able to hold an LLC hostage by threatening a withdrawal which would trigger effective dissolution by forcing a buyout of his interests.[161]

The dissent was mainly concerned with the unfairness of the majority's opinion.[162] Wyoming Chief Justice Lehman, who had written the

155. *Id.* at 11, 3-4.
156. *Id.* at 9-10.
157. *Id.* at 9-11.
158. Brief of Appellant E. Michael Lieberman at 20, Lieberman v. Wyoming.com LLC, 11 P.3d 353 (Wyo. 2000) (No. 99-97).
159. *Id.* at 20-21.
160. *Id.* at 21; Reply Brief of Appellant E. Michael Lieberman at 5, Lieberman v. Wyoming.com LLC, 11 P.3d 353 (Wyo. 2000) (No. 99-97) (arguing injustice and that "[t]he interpretation argued by Appellee encourages majority Members of successful companies to run off the minority Members and pick up their equity for a fraction of its value, a result clearly not intended by the legislature"); Brief of Appellant E. Michael Lieberman at 16, Lieberman v. Wyoming.com LLC, 82 P.3d 274 (Wyo. 2004) (No. 01-193).
161. Brief of Appellee Wyoming.com LLC at 15, Lieberman v. Wyoming.com LLC, 11 P.3d 353 (Wyo. 2000) (No. 99-97).
162. Lieberman v. Wyoming.com LLC, 82 P.3d 274, 284 (Wyo. 2004) (Lehman, C.J., dissenting). As Chief Justice Lehman explained,

> In fact, the majority's resolution has created a situation where the remaining members are in a position of power to dictate the terms of any negotiations for a buyout. The remaining members are now conceivably in a position to retain earnings and avoid distributions, but as an equity owner Lieberman would still be required to pay taxes on those earnings. Additionally, Lieberman is no longer a member. He will not be drawing the salary of the member or controlling his equity interest in any manner. While it could be said that this situation arose because of Lieberman's withdrawal, it should be noted that under the majority's analysis the result would apply equally to an expelled member. In such an instance, some of the members could expel a member and then refuse to negotiate for a

unanimous opinion in *Lieberman I*, noted reasonable expectations of investors would indicate it is intuitive that "a withdrawing member does not envision that his withdrawal will result in this split in his interest."[163] Furthermore, the majority's decision legitimized a power shift to the remaining members which "begs the oppression of one party."[164] Under the majority's holding, Lieberman remained obligated to pay taxes on his portion of the LLC's earnings while no longer receiving a salary or likely to receive distributions since the remaining members were prone to retain earnings instead.[165] Such a scenario decreases the minority interest holder's ability to negotiate a fair buyout.[166] In addition, the dissent noted both the WLLCA and Wyoming.com's Operating Agreement make no distinction between a member's withdrawal or expulsion, such that the majority's holding can be extended to allow for LLC members to expel a member and subsequently refuse to negotiate a buyout.[167] Although the dissent agreed with the majority that the court should not create contractual provisions for parties, it found greater importance in not fostering opportunistic behavior.[168]

Hence, the dissent advocated WLLCA section 17-15-126, "Distribution of assets upon dissolution," be used to calculate a withdrawing member's equity interest on the date of his withdrawal.[169] This "valuation tool"

> buyout. Such a result begs for the oppression of one party. While I agree with the majority that it is not our duty to write contract provisions for parties that have failed to do so, I believe it would be much worse to fail to provide a remedy.

Id. (Lehman, C.J., dissenting).

163. *Id.* (Lehman, C.J., dissenting). The dissent did not use the term "reasonable expectations." *Id.* (Lehman, C.J., dissenting). While the parties' agreement did not expressly call for a buyout, the dissent noted it also did not expressly identify the actualization of a former member becoming only an equity owner; thus, a buyout would be expected more than the other alternatives. *Id.* at 283-84 (Lehman, C.J., dissenting).

164. *Id.* at 284 (Lehman, C.J., dissenting). *See supra* note 162.

165. *Lieberman II*, 82 P.3d at 284 (Lehman, C.J., dissenting). *See supra* note 162 and *infra* notes 238-39 and accompanying text.

166. *Lieberman II*, 82 P.3d at 284 (Lehman, C.J., dissenting). *See supra* note 118.

167. *Lieberman II*, 82 P.3d at 284 (Lehman, C.J., dissenting); *Lieberman I*, 11 P.3d at 358.

168. *Lieberman II*, 82 P.3d at 284 (Lehman, C.J., dissenting).

169. *Id.* (Lehman, C.J., dissenting). Wyoming statute § 17-15-126 addresses the order of asset distribution upon dissolution:

> In settling accounts after dissolution, the liabilities of the limited liability company shall be entitled to payment in the following order:
>
> (i) Those to creditors, in the order of priority as provided by law, except those to members of the limited liability company on account of their contributions;
>
> (ii) Those to members of the limited liability company in respect of their share of the profits and other compensation by way of income on their contributions; and

was supported not because dissolution would be triggered by a member's withdrawal, but as a default rule implicit in the WLLCA when parties did not contract otherwise.[170] In the interest of fairness, the dissent advocated Lieberman be compensated with the estimated value of his share had the LLC dissolved on the date of his withdrawal and, if such approximations were not available, the value of his interest in the LLC "could be based to some extent on estimates and appraisals" on the date of his withdrawal.[171] Furthermore, if the LLC could not pay the member his or her interest because of existing obligations as a continuing business, then payment could occur over a "reasonable" period rather than in a lump sum.[172]

The dissent favored such a forced buyout triggered by a member's withdrawal based on the history of the WLLCA as well.[173] The LLC combi-

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> (iii) Those to members of the limited liability company in respect of their contributions to capital.
>
> (b) Subject to any statement in the operating agreement, members share in the limited liability company assets in respect to their claims for capital and in respect to their claims for profits or for compensation by way of income on their contributions, respectively, in proportion to the respective amounts of the claims.

Wyo. Stat. Ann. § 17-15-126 (LexisNexis 2004).

170. *Lieberman II*, 82 P.3d at 284 (Lehman, C.J., dissenting). A decision in this area could, arguably, serve as "preventive justice" in dissuading future litigation. *Id.* at 280. In addressing how a withdrawing member's equity interest should be valued under the parties' agreement, the dissent provided essentially the same answer as the district court on remand. *Id.* at 278-79, 284-85 (Lehman, C.J., dissenting). The dissent noted it was not acting to create a valuation standard but to see if there was a provision which could be understood to be "logically" applicable as consented to under the WLLCA. *Id.* at 284 (Lehman, C.J., dissenting). Recognizing this choice paralleled partnership default rules, the dissent advocated the use of WLLCA section 17-15-126, as if the LLC had dissolved, but without requiring actual dissolution. *Id.* at 283-84 (Lehman, C.J., dissenting).

171. *Id.* at 284-85 (Lehman, C.J., dissenting). Chief Justice Lehman noted that Wyoming statute section 17-15-126 provides:

> [T]he proceeds upon dissolution are used to extinguish debt and then are used not only to return a member's capital contribution but also to provide for the member's share of profits and other compensation by way of income on that contribution. Such a provision can encompass many things including the increase in value of any assets, any retained profits, and the goodwill of the company. Therefore, fair market value, which generally accounts for these relevant factors, would be a reasonable alternative estimate of the departing member's share.

Id. (Lehman, C.J., dissenting) (citing Wyo. Stat. Ann. § 17-15-126 (LexisNexis 2004)).

172. *Id.* at 285 (Lehman, C.J., dissenting).

173. *Id.* at 283 (Lehman, C.J., dissenting). Chief Justice Lehman noted:

nation of partnership and corporation characteristics implies partnership exit rules should apply when the LLC follows the partnership approach to continuity of life.[174] Such a default rule dictates that the LLC would dissolve should a member leave and, upon dissolution, a member would be compensated for his equity interest.[175] The traditional exception to this partnership exit rule is that the withdrawing member is compensated for his equity interest even when the company should elect to continue.[176]

ANALYSIS

The Wyoming Supreme Court decision in *Lieberman v. Wyoming.com LLC* was a disservice to the state and its business investors. More conscientious scrutiny of parties' agreements is expected from a court which extols freedom to contract as the "paramount public policy" and the "[t]he primary purpose in interpreting or construing a contract is to determine the intent and understanding of the parties."[177] The majority completely disre-

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> At the time the legislature enacted the original LLC statutes, an important consideration was the tax ramifications of the newly created entity. At that time, in order to obtain taxation as a partnership, an LLC could have no more than two of four corporate characteristics: limited liability, central management, free transferability of interests, and continuity of life. The LLC entity provided for limited liability and central management. Therefore, to avoid corporate taxation, the typical LLC statutes choose to utilize partnership principles, rather than corporate principles, for exiting members in order to avoid the LLC having continuity of life.

Id. (Lehman, C.J., dissenting) (citations omitted).

174. *Id.* (Lehman, C.J., dissenting).

175. *Id.* at 284 (Lehman, C.J., dissenting).

176. *Id.* (Lehman, C.J., dissenting). As Chief Justice Lehman explained:

> Partnership exit rules ordinarily allow for any partner to dissolve the firm at any time and demand liquidation and accordingly be paid for his equity interest. The legislature clearly recognized this as the normal partnership rule and impliedly endorsed such a rule by providing for an exception to this rule if the members agreed otherwise in their operating agreement. In a sense, carrying on the business following a terminating event became the exception to the general rule that the business would cease when a member left for any reason. Thus, the resulting implication is a member may terminate his membership in an LLC and must be paid for this interest unless otherwise provided.

Id. at 283 (Lehman, C.J., dissenting) (citations omitted).

177. *Id.* at 281-82. The Wyoming Supreme Court quoted Sir George Jessel, M.R.,

> [I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of

garded clear indicators of Lieberman and Wyoming.com's understanding of their agreement.[178] Had the majority taken into consideration the culmination of such factors as the plain language of the parties' agreement, the parties' behavior, the WLLCA, and the parties' fiduciary duties to one another, the majority's contractual approach would have yielded the dissent's more equitable outcome.[179]

The majority focused on paragraph 4.3 of the Operating Agreement.[180] Finding a logical corollary from the express provision that a transferee buying into the LLC could have an equity interest without being a member, the majority held that such a provision indicated it was understood by the parties that a withdrawing member would also maintain his equity interest while no longer being a member.[181] There are two problems with this justification for the majority's decision.[182] First, acting under the guideline of "[w]here an agreement is in writing and the language is clear and unambiguous, the parties' intent is to be secured from the four corners of the contract" the Wyoming Supreme Court acted as if this inference was clear and unambiguous language of intent and declined to consider extrinsic evidence.[183] This ignores the obvious argument that a person buying an interest

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> justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.

Id. at 282 (internal citations omitted). The Wyoming Supreme Court indicated it would start with, and then look no further than the four corners of the parties' written agreements only if clear and unambiguous writing could be secured therein of the parties' intent and understanding. *Id.* at 281. The case cited by the majority herein goes on to say, "We consider the contract as a whole, taking into consideration the relationship between the various parts. 'We turn to extrinsic evidence and rules of contract construction only when the contract language is ambiguous and its meaning is doubtful or uncertain.'" Collins v. Finnell, 29 P.3d 93, 99 (Wyo. 2001) (internal citations omitted).

178. *See infra* notes 197-99, 202, 225-32 and accompanying text.

179. *See infra* notes 180-235 and accompanying text.

180. *Lieberman II*, 82 P.3d at 281-82. Justice Golden discerned,

> The operating agreements clearly anticipate a situation where a person could be an equity owner in Wyoming.com but not a member. Provision 4.3 of the Operating Agreement . . . provides that, if a transferee of an ownership interest is not unanimously approved by the remaining members, the transferee maintains the rights of equity ownership but will not be a member. Logically, given the absence of any contractual provision to the contrary, there is no reason to treat a withdrawing member any differently from someone who buys into Wyoming.com without becoming a member. Thus, Lieberman is not a member of Wyoming.com, but he maintains his equity interest and all rights and obligations attendant thereto.

Id.

181. *Id.*

182. *See infra* notes 183, 185 and accompanying text.

183. *Lieberman II*, 82 P.3d at 281.

as a transferee would be on express notice of the conditions of his or her investment, whereas an initial investor, who may not have anticipated business relations to go awry, would not have realized his or her investment could be frozen in such a manner given the relationship between the founding members at the beginning of their business venture.[184] Such reasoning also ignores the fact that at the time of contracting, the parties did not only not know if a member would withdraw, but which member might withdraw, and with this uncertainty they probably would have agreed to a more fair solution than the outcome of *Lieberman v Wyoming.com LLC.*

The second problem with the majority's justification for its decision is that it acted as if not having a written agreement on what was to happen to a member's equity interest upon his withdrawal was the same as agreeing to not have a change in a member's equity interest upon his withdrawal.[185] The majority proclaimed both, "[w]e decline to alter the contract as written and accepted by these parties in the name of contract interpretation. We will enforce the contract as written and accepted by the parties. Lieberman maintains his equity interest in Wyoming.com," and, "[u]pon careful review of all the agreements entered into by the parties regarding Wyoming.com, we determine that the agreements contain no provision regarding the equity interest of a dissociating member."[186] This decision by the Wyoming Supreme Court is not only somewhat self-contradictory, but fails to address the parties' concerns.[187] Had a gap not existed in the parties' agreement and the WLLCA, Wyoming.com and Lieberman would not have come to court with the question of how Lieberman's equity interest should be valued.[188]

In this case initiated as consolidated actions for summary judgment, both parties' actions indicated a mutual assent to the return of Lieberman's equity interest upon his withdrawal.[189] As surmised by the majority itself, "Obviously, the parties proceeded under the assumptions that: Lieberman had withdrawn as a member and an equity owner; that he was entitled to his equity interest; and a valuation and buyout was necessary."[190] Lieberman's notice of withdrawal indicated the expectation of the return of both his capital contribution and equity interest in Wyoming.com by his estimation of an amount due of $400,000, not $20,000.[191] In advocating he maintain his equity interest in his second brief to the Wyoming Supreme Court, Lieberman

184. *See infra* notes 215, 227 and accompanying text.
185. *See infra* note 186 and accompanying text.
186. *Lieberman II*, 82 P.3d at 282, 275.
187. *Id.* at 284 (Lehman, C.J., dissenting); *see supra* note 162 and accompanying text.
188. *Lieberman II*, 82 P.3d at 276-77, 282.
189. Lieberman v. Wyoming.com LLC, 11 P.3d 353, 356 (Wyo. 2000). Summary judgment is "granted on a claim about which there is no genuine issue of material fact." BLACK'S LAW DICTIONARY 679 (2d pocket ed. 2001). *See infra* notes 190-94 and accompanying text.
190. *Lieberman II*, 82 P.3d at 277.
191. *Id.* at 279.

referred to his "notice" of withdrawal as an "offer."[192] As surmised by the majority, "Wyoming.com argues that Lieberman's withdrawal as a member mandates his withdrawal as an equity owner, thus triggering a liquidation of his equity interest."[193] Wyoming.com seemingly accepted that Lieberman's equity interest should be returned because it filed a motion for partial summary judgment on remand asking the district court to determine not if it should return Lieberman's equity interest, but when and how it should value his equity interest.[194] Regardless of these facts, the court maintained Lieberman would keep his equity interest and a buyout would not occur.[195] Despite the Wyoming Supreme Court's strong public policy interest in construing, not creating, contractual terms, the majority appeared to create a situation that neither party agreed to at the time of contracting, or would agree to today.[196]

Wyoming.com was created in September 1994, before federal tax regulations lifted the requirement that an LLC may have only two of four corporate characteristics in order to be taxed as a partnership.[197] At that time, in order for an LLC such as Wyoming.com with corporate aspects of centralized management and limited liability to be taxed as a partnership it had to comply with federal taxation rules necessitating it follow partnership law in regards to continuity of life and transferability of interests.[198] Hence, at the time of contracting, Wyoming.com members more than likely understood their LLC would follow partnership law in regards to its continuity of life characteristic since, like a partnership, Wyoming.com was to exist for a specified term.[199] The dissent noted and applied this underlying partnership structure of the WLLCA.[200] Again, a more conscientious investigation of the

192. *See Lieberman I*, 11 P.3d at 355; Brief of Appellant E. Michael Lieberman at 9, Lieberman v. Wyoming.com LLC, 82 P.3d 274 (Wyo. 2004) (No. 01-193).
193. *Lieberman II*, 82 P.3d at 281.
194. *Id.* at 277.
195. *Id.* at 275-76.
196. *See supra* notes 189-95 and accompanying text. It was only after the district court's calculation resulted in a negative balance that Lieberman advocated keeping his equity interest. Brief of Appellant E. Michael Lieberman at 8-9, Lieberman v. Wyoming.com LLC, 82 P.3d 274 (Wyo. 2004) (No. 01-193).
197. Wyoming.com Articles of Organization (Sept. 28, 1994) (on file with the Wyoming Secretary of State). *See supra* notes 47-48 and accompanying text.
198. *See supra* notes 42, 47 and accompanying text. The LLC did not have freely transferable shares. Wyoming.com Operating Agreement ¶ 4.3 (July 25, 1995) (on file with Wyoming.com LLC). The LLC had centralized management. *Id.* ¶ 7.1-7.6.
199. Wyoming.com Articles of Organization ¶ 2 (Sept. 28, 1994) (on file with the Wyoming Secretary of State) ("Its period of duration is [thirty] years from the date of filing the Articles of Organization with the Wyoming Secretary of State, unless sooner dissolved by the members or as provided by statute."). Wyoming.com was to exist until September 30, 2024 unless otherwise dissolved. *Id. See supra* notes 197-98 and accompanying text.
200. *Lieberman II*, 82 P.3d at 283-84 (Lehman, C.J., dissenting).

parties' understanding at the time of contracting would have resulted in the outcome advocated by the dissent.[201]

The dissent also noted the realities of member perspectives in a small company: "While a member's interest does in fact consist of an economic and non-economic interest, a withdrawing member does not envision that his withdrawal will result in this split in his interest."[202] The dissent's concerns with the resulting unfairness and encouragement of opportunistic behavior by the majority's decision support consideration of the default rules among fiduciaries.[203] As a new state entity with little case law and no statutorily imposed fiduciary duty requirements, however, the question arises as to what fiduciary duties should apply to LLC members.[204] This issue is perhaps best answered with consideration as to why fiduciary duties have become well established in other business entities.[205]

Fiduciary relationships are dependent on reliable bonds of confidence and trust.[206] If the law were to ignore the obligations inherent in fiduciary interactions, such bonds would be weakened so that fiduciaries could not be relied upon to the full extent necessitated by their function, and both business inefficiency as well as unfairness would occur.[207] Hence, ethical behavior is supported in the law out of both economic and equitable concerns.[208] The same reasoning that established fiduciary relationships between corporate officers/directors and their corporation's shareholders, between shareholders in a close corporation, and between partners in a partnership, justifies LLC members as co-owners and managers to be fiduciaries to one another.[209] Fiduciary duties are necessary to such a relationship because

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201. *See supra* notes 189-200 and accompanying text.

202. *Lieberman II*, 82 P.3d at 283-84 (Lehman, C.J., dissenting). While the dissent does not use the word "fiduciary," it concerns itself with the majority's decision begging "the oppression of one party." *Id.* at 284 (Lehman, C.J., dissenting). *See supra* note 162.

203. *Lieberman II*, 82 P.3d at 284 (Lehman, C.J., dissenting). *See supra* notes 164-68 and accompanying text.

204. Miller, *supra* note 5, at 1621-22. *See supra* note 2 and accompanying text.

205. *See infra* notes 206-20 and accompanying text.

206. Miller, *supra* note 5, at 1622.

207. Gelb, *supra* note 126, at 548. As noted by Professor Gelb,

> It is important that fiduciary principles of loyalty and care be utilized to safeguard investments of money and time. Nevertheless, there is more to this issue than concern for economic considerations. There is the great personal and psychological hurt felt by those who have been wronged by their fiduciary allies in their business relationships. The law should take this into account.

Id.

208. *Id.* at 547-48.

209. Anest v. Audino, 773 N.E.2d 202, 209-10 (Ill. App. 2d. 2002). *See supra* notes 110-11, 125 and accompanying text.

while the LLC entity is relatively new, human behavior has not changed.[210] "Fundamental notions of fairness" call for courts to recognize and enforce obligations inherent in fiduciary relationships when one's trust and confidence has been abused.[211]

There are a number of policy reasons supporting the enforcement of fiduciary duties regardless of whether or not they are formally recognized in a party's plain language agreement.[212] Recognizing the inherent obligations of fiduciaries encourages business growth because such enforcement provides security to investors: Investors are more apt to join a business when they feel they can trust those involved.[213] Furthermore, it is unrealistic to expect investors to contract for every possible scenario in lieu of enforcing inherent default rules among fiduciaries.[214] Investors are generally optimistic in joining a new business venture and less likely to consider negative scenarios.[215] Should they be aware of such concerns, investors may nonetheless not wish to negotiate exit strategies up front because doing so may jeopardize a business opportunity.[216] Requiring negotiation for protection from abusive behavior is not only inefficient because it increases up-front transaction costs, but also favors the wealthy who are better able to hire an attorney to customize and review their LLC agreement.[217] Requiring written recognition of fiduciary duties is also unfair to novice investors who are more apt to be unfamiliar with what contractual provisions they would thereby need to negotiate.[218] In sum, the recognition and enforcement of default rules inherent in fiduciary relationships is reflective of societal values: Duties owed business entities and those affected by business decisions are emphasized over one's pure self-interest.[219] Courts should not encourage business partners to look for loopholes in their contractual agreements which technically allow them to disregard the effect of their actions on their business partner's interests.[220]

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210. Miller, *supra* note 5, at 1612. It can easily be predicted that LLCs, like close corporations, after years of experience, will require special statutory protections from abusive and opportunistic majority behavior. Miller, *supra* note 34, at 439.

211. Miller, *supra* note 5, at 1650.

212. *See infra* notes 213-20 and accompanying text.

213. Moore, *supra* note 6, at 197.

214. *Id.*

215. *Id*; Karjala, *supra* note 114, at 477.

216. Moore, *supra* note 6, at 197.

217. *Id.*; Karjala, *supra* note 114, at 477.

218. Miller, *supra* note 5, at 1620.

219. *Id.* at 1621.

220. *See* Lieberman v. Wyoming.com LLC, 82 P.3d 274, 284 (Wyo. 2004) (Lehman, C.J., dissenting). For example, Chief Justice Lehman noted,

> While it could be said that this situation arose because of Lieberman's withdrawal, it should be noted that under the majority's analysis the result would apply equally to an expelled member. In such an instance, some of

It is, thus, not surprising that some courts have already recognized a fiduciary relationship as inherent between members, as interest holders, of an LLC.[221] While contractarians support the recent statutory trend of limiting broad interpretations of fiduciary duties as preventing spurious litigation, Delaware, as a state with an LLC statute which provides little guidance other than that the contractual obligation of good faith cannot be eliminated, has actually seen a substantial rise in majority-minority lawsuits.[222] It is possible for Wyoming, like the Delaware court in *Walker v. Resource Development Co. Ltd., L.L.C.*, to find at a minimum that the contractual obligation of good faith protects a minority LLC member subject to the opportunistic behavior of a squeeze-out.[223] Just as not having formally contracted for what was to happen to a member's equity interest upon a member's withdrawal does not mean the parties agreed for nothing to happen to such an equity interest, the fact that the members of Wyoming.com did not address their fiduciary duties or inherent contractual obligations of good faith and fair dealing in their written contracts does not mean they agreed to eliminate or reduce their existence.[224]

Like a close corporation and a partnership, Wyoming.com had a small number of interest holders who were also the members managing, directing, and operating the company, with no ready market existing for the sale of their LLC interests.[225] Started by Lieberman, Steven A. Mossbrook

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> the members could expel a member and then refuse to negotiate for a buyout. Such a result begs for the oppression of one party. While I agree with the majority that it is not our duty to write contract provisions for parties that have failed to do so, I believe it would be much worse to fail to provide a remedy.

Id. (Lehman, C.J., dissenting).

221. *See* Anest v. Audino, 773 N.E.2d 202, 209-11 (Ill. App. 2d. 2002) (recognizing when fiduciary duties in an LLC were not explicitly established by statute, they nonetheless existed as paralleling corporate director responsibilities due to the similar nature of LLC member-manager roles); McConnell v. Hunt Sports Enterprises, 725 N.E.2d 1193, 1214 (Ohio Ct. App. 1999) (acknowledging fiduciary duties exist between LLC members as if they are partners in the court's focus on whether such duties could be limited in an operating agreement).

222. Miller, *supra* note 34, at 449; Miller, *supra* note 5, at 1617-20; Del. Code Ann. tit. 6, § 18-1101 (2004). *See supra* notes 76-81, 94-96, 98-104 and accompanying text. In a recent study, Delaware had more than twice as many of such lawsuits than other states reviewed. Miller, *supra* note 5, at 1619-20. *See generally* Sandra K. Miller, A New Direction for LLC Research in a Contractarian Legal Environment, 76 S. CAL. L. REV. 351 (2003).

223. *See supra* notes 76-81 and accompanying text.

224. *See supra* note 185 and accompanying text.

225. 1 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL AND THOMPSON'S CLOSE CORPORATIONS AND LLCS: LAW AND PRACTICE § 1.2 (Rev. 3d ed. 2004). *See supra* note 125 and accompanying text. Wyoming.com never consisted as an LLC of more than ten members at one time, with never more than five natural persons. Amendment to the Articles of Organization of Wyoming.com LLC (Dec. 29, 1998) (on file with the Wyoming Secretary of State); Amendment to the Articles of Organization of Wyoming.com LLC (Jan. 20, 1996) (on file with the Wyoming Secretary of State); Amendment to the Articles of Organization of Wyoming.com LLC (Aug. 14, 1995) (on file with the Wyoming Secretary of State).

and Sandra S. Mossbrook, Wyoming.com provided a source of employment for Lieberman as vice-president and Steven A. Mossbrook as president.[226] It seems unlikely these three founding co-owners began their small business expecting to have a purely contractual, arms-length relationship.[227] Rather, the fiduciary principles of a close corporation or partnership would be expected to apply to Lieberman and the Mossbrooks.[228] The duty of loyalty between partners and shareholders of a close corporation would indicate Lieberman was due the "utmost good faith and loyalty" from the Mossbrooks, and should be fairly compensated for his equity interest.[229] Even if corporate principles were applied to Lieberman's situation, corporate directors' duty to "deal openly and honestly" with one another in all transactions and to avoid oppressive behavior as fiduciaries to the company's shareholders lead to the dissent's more equitable outcome.[230] Furthermore, the Wyoming Business Corporation Act indicates directors and controlling officers may consider the interests of employees and long-term interests of the shareholders in determining what is in the best interest of the company.[231] Lieberman was an interest holder and an employee of Wyoming.com to whom Steven Mossbrook, as a manager under corporate law, would owe a

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226. Lieberman v. Wyoming.com LLC, 11 P.3d 353, 355 (Wyo. 2000); Wyoming.com Operating Agreement ¶ 7.6 (July 25, 1995) (on file with Wyoming.com LLC); Brief of Appellant E. Michael Lieberman at 7, Lieberman v. Wyoming.com LLC, 11 P.3d 353 (Wyo. 2000) (No. 99-97).

227. Gelb, *supra* note 126, at 567. As described by Professor Gelb,

> Take the typical situation in which three people enter a business together as co-owners and co-workers. It is beyond the imagination to conceive of them as plotting to use the employment-at-will doctrine against each other. It is far more likely they expect and hope to have good, honest, and fair relations with each other. Using an employment-at-will doctrine to automatically trump the fiduciary claims of the co-owners of a business seems thoroughly inappropriate. Similarly, readily interpreting contracts of co-owners to embody intent by them to waive fairness and normal decency standards seems unrealistic at best.

Id. Additionally, by opting for the limited liability aspects of a corporation, Lieberman and the Mossbrooks did not also indicate a desire to have the personal relationships of corporate directors with no fiduciary duties to one another. *See* Gelb, *supra* note 126, at 569. As further explained by Professor Gelb,

> In many situations, persons go or have gone into business together thinking like partners, but based on legal or accounting advice, choose a form that is not a true partnership. They may opt for a corporate or other form for tax or limited liability reasons, but not for differing perceptions on power, ownership, or sharing in the fruits of the business.

Id.

228. *See supra* notes 110, 125 and accompanying text.

229. *See supra* note 110 and accompanying text.

230. *See* Anest v. Audino, 773 N.E.2d 202, 209 (Ill. App. 2d 2002).

231. *See supra* note 102.

fiduciary duty, if not, at a minimum, a good faith and fair dealing contractual obligation.[232]

As an oppressed member in a situation likened to a "squeeze-out," the reality of Lieberman's situation after the Wyoming Supreme Court's decision in *Lieberman II* is that while he was no longer receiving the income of a salary as vice-president, he was expected to pay taxes on 40 percent of the LLC's earnings, which are only theoretically, not actually, passed-through to LLC equity interest holders under federal tax law.[233] Hence, an investment in a profitable business could become a liability, rather than an asset, to a minority member who finds himself subject to oppressive behavior.[234] This creates an incredibly inequitable outcome, as such a former member not only loses his job but may become forced to sell his equity interest at a greatly reduced rate.[235]

Ramifications

Investor insecurity in the Wyoming LLC is likely to result from the Wyoming Supreme Court's decision in *Lieberman v. Wyoming.com LLC.* Lawyers and LLC members are strongly advised to review their operating agreements to ensure a gap regarding rights and obligations upon an LLC member's withdrawal does not similarly exist in their contractual agreements. Whereas once uncertainty existed as to whether the state would follow partnership law, corporation law, or create a separate LLC standard in interpreting the WLLCA, it is now understood the Wyoming Supreme Court will take a strict, albeit none too conscientious, contractual approach in construing parties LLC agreements.[236] Hence, the Wyoming State Legislature is encouraged to enact an LLC statute similar to section 17-17-140 of the close corporation supplement, which provides for a remedy upon the oppression of a shareholder.[237]

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232. Lieberman v. Wyoming.com LLC, 82 P.3d 274, 275-76 (Wyo. 2004). *See supra* notes 102, 111 and accompanying text.

233. *Lieberman II*, 82 P.3d at 284 (Lehman, C.J., dissenting). *See supra* notes 38-40 and accompanying text. While Lieberman's withdrawal of his membership in Wyoming.com was technically voluntary, it was a result of his termination as vice-president by the LLC majority shareholder, Steven A. Mossbrook. *Id.*; Brief of Appellant E. Michael Lieberman at 6, Lieberman v. Wyoming.com LLC, 11 P.3d 353 (Wyo. 2000) (No. 99-97). Mossbrook had police remove Lieberman from the LLC's Riverton office as a trespasser. Brief of Appellant at 6, Lieberman (No. 99-97). Lieberman was not included in subsequent LLC owners' meetings wherein he was voted off as vice-president. *Id.*

234. *See supra* note 233 and accompanying text.

235. *See supra* note 118.

236. *See supra* notes 180-235 and accompanying text.

237. *See* Wyo. Stat. Ann. § 17-17-140 (LexisNexis 2004). This statute recognizes a fiduciary relationship between those in control of close corporations and close corporation shareholders:

The holding in *Lieberman v. Wyoming.com LLC* also encourages the formation of limited liability partnerships ("LLP") over LLCs.[238] An LLP follows the well-established default rules of partnership law including principles of fiduciary duties among partners.[239] Since both LLPs and LLCs are pass-through entities for federal taxation purposes, if the limited liability aspects of a Wyoming LLP were found to be equal to that of a Wyoming LLC, the Wyoming LLC could become obsolete.[240] Savvy investors seeking a more flexible business structure may take their "LLC business" to a state which recognizes default fiduciary duties among LLC members rather than

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> [A] shareholder of a statutory close corporation may petition the district court for any of the relief described in W.S. 17-17-141 through 17-17-143 if:
>
> > (i) The directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, fraudulent or unfairly prejudicial to the petitioner, whether in his capacity as shareholder, director or officer of the corporation.

Wyo. Stat. Ann. § 17-17-140 (Lexis 2004).

238. *Lieberman II*, 82 P.3d at 275-76. *See infra* notes 239-42 and accompanying text.

239. *See* Wyo. Stat. Ann. § 17-21-1102 (LexisNexis 2004) ("A partnership that has registered pursuant to this article is for all purposes of the laws of this state the same entity that existed before the registration."). *See also supra* notes 38-40 and accompanying text.

240. *See* Wyo. Stat. Ann. §§ 17-21-1102, 17-15-113 (LexisNexis 2004). Comparing Wyoming statute 17-21-306 to section 17-15-113 of the WLLCA, Wyoming statute 17-21-306 appears to have a more narrow scope of limited liability:

> [A]ll or specified partners of a registered limited liability partnership may be liable in their capacity as partners for all or specified debts, obligations or liabilities of a registered limited liability partnership to the extent at least a majority of the partners shall have agreed unless otherwise provided in any agreement between the partners. Any such agreement may be modified or revoked to the extent at least a majority of the partners shall have agreed, unless otherwise provided in any agreement between the partners, provided, however, that:
>
> > (i) Any such modification or revocation shall not affect the liability of a partner for any debts, obligations or liabilities of a registered limited liability partnership incurred, created or assumed by the registered limited liability partnership prior to the modification or revocation; and
> >
> > (ii) A partner shall be liable for debts, obligations and liabilities of the registered limited liability partnership incurred, created or assumed after such modification or revocation only in accordance with this article and, if the agreement is further modified, the agreement as so further modified but only to the extent not inconsistent with . . . this section.

Wyo. Stat. Ann. § 17-21-306 (LexisNexis 2004). *See supra* note 44, for section 17-15-113 of the WLLCA.

risk an unknown outcome from a possible gap in their operating agreement. This could lead to a heavy toll on Wyoming, as a state with little business infrastructure which nonetheless generated $1.2 million in LLC license taxes and almost half a million in LLC filing fees in fiscal year 2004 alone.[241]

CONCLUSION

While the decision in *Lieberman v. Wyoming.com LLC* recognizes the modern view of the LLC as a flexible, contractual-based business entity, the majority does not present a thorough analysis of the parties' contractual agreement.[242] The long-standing fiduciary principles of partnership law are inherent in non-public LLC member relationships because of their parallel role as co-owners in a small business with no ready market available for their interests.[243] Although fiduciary duties and the contractual obligations of good faith and fair dealing were not specifically stated in Wyoming.com's Operating Agreement or stipulated in the WLLCA, they remain an inherent presence due to public policy concerns of fairness and efficiency.[244] One should keep in mind "that the contractarian model can be reconciled with the mandatory core of duties emerging in LLC case law by recognizing that at the heart of the private contract is the notion that there is a legally enforceable bargain subject to the many mandatory constraints of the legal environment."[245] By limiting its analysis to the plain language of the parties' written documents, which did not address Lieberman's situation, the majority ignored other valuable indicators of the parties' intent and understanding.[246] As such, while the majority prided itself on the public policy interest in the court's role as construing, not creating, contractual agreements, the court created a situation neither Wyoming.com nor Lieberman was likely to have agreed upon at the time of contract.[247] *Lieberman v. Wyoming.com LLC* serves as a strong warning to current members of LLCs and those looking to form an LLC in Wyoming.

CATHERINE M. ROGERS

241. Interview with Jeanne Sawyer, Corporations Division Director, Wyoming Secretary of State Office, in Cheyenne, Wyo. (Oct. 4, 2004). In fiscal year 2004 domestic LLCs generated $770,997 and foreign LLCs generated $436,630 in license taxes, and LLC filing fees generated $483,212 in state income. *Id.*

242. *See supra* notes 51-54, 180-202, 225-232.

243. *See supra* note 110 and accompanying text.

244. *See supra* notes 206-20 and accompanying text.

245. Miller, *supra* note 5, at 1613.

246. *See supra* notes 180-202, 225-32 and accompanying text.

247. *See supra* notes 180-235 and accompanying text.