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Taming the Mandibles of Death: Secrecy, Disclosure, and Fiduciary Duties in the Revised Uniform Limited Liability Company Act

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ESSAY

TAMING THE MANDIBLES OF DEATH: SECRECY, DISCLOSURE, AND FIDUCIARY DUTIES IN THE REVISED UNIFORM LIMITED LIABILITY COMPANY ACT

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I. INTRODUCTION

In 2001, we wrote an article discussing the secrecy, disclosure, and fiduciary duty provisions of the then-emerging new regimes of business organization law.¹ We argued that the Uniform Limited Liability Company Act (ULLCA) provisions concerning access to and use of firm information were seriously and facially flawed because the drafters combined provisions governing various dissimilar business forms without an adequate underlying theory of the limited liability company (LLC) form.²

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1. J. William Callison & Allan W. Vestal, *“They’ve Created a Lamb with Mandibles of Death”*: *Secrecy, Disclosure, and Fiduciary Duties in Limited Liability Firms*, 76 IND. L.J. 271 (2001).

2. *Id.* at 274; see also Larry E. Ribstein, *A Critique of the Uniform Limited Liability Company Act*, 25 STETSON L. REV. 311, 387 (1995) (criticizing ULLCA for incorporating “rules that are inappropriately borrowed from other business forms”). Others also criticized the fiduciary duty provisions of ULLCA, though some ascribed the weaknesses in the Act to other causes. See, e.g., Rutheford B. Campbell, Jr., *Bumping Along the Bottom: Abandoned Principles and Failed Fiduciary Standards in Uniform Partnership and LLC Statutes*, 96 KY. L.J. 163, 189–90 (2007–2008) (“A public choice analysis suggests that the misdirection [of the fiduciary duty provisions of ULLCA, RUPA, and ULPA (2001)] was the result of the fact that managers of unincorporated business entities as a group were best able to overcome collective action problems and thus bend the uniform acts to their preferences.”); Rutheford B. Campbell, Jr., *The “New” Fiduciary Standards Under the Revised Uniform Limited Liability Company Act: More Bottom Bumping from NCCUSL*, 61 ME. L. REV. 27, 29 (2009) (“The fiduciary standards and the opt-out

As an example of the flawed product, we identified the odd result under ULLCA that members in manager-managed LLCs³ had broad access to company information but were not subject to any fiduciary duties constraining their use of such information.⁴ Borrowing from the works of Bill Watterson, we labeled the unconstrained power of these members the “mandibles of death.”⁵

Seeking to devise a theory of secrecy, disclosure, and fiduciary duties, we identified two competing models for structuring the rights and obligations of participants in unincorporated business organizations.⁶ The first model, which is more individualistic, was based on party autonomy.⁷ The second model, which is more traditional, we termed a community model.⁸ We concluded that a third model, which we termed a structural model and which synthesizes the autonomy and community models, is a more appropriate basis for analyzing the LLC information rights and use restrictions.⁹ At the time, we suggested revisions to the then-new ULLCA that would have, if adopted, conformed its information disclosure and use restrictions to the appropriate structural model, solving the mandibles of death problem.¹⁰

ULLCA proved unsuccessful as a uniform act. It was adopted in only nine jurisdictions, all in the first four years following its promulgation in 1996.¹¹ The only major business jurisdiction to adopt ULLCA was Illinois.¹² In a second attempt to bring uniformity to this important area of the law, the

rights in RUPA, ULPA (2001), and ULLCA are badly flawed. The fiduciary duty provisions in the three acts reflect a pro-management bias that facilitates managers’ pecuniary interest in constructing inefficient transactions with the entity’s investors. The default standards themselves, which are likely to govern most situations, are inefficiently lax and limited.” (citations omitted)).

3. In the following discussion, we shall refer to such non-managing members of manager-managed LLCs simply as “non-manager members.” While one could, we suppose, talk about a “non-manager member” in a member-managed LLC—presumably one who, by agreement, had no meaningful or effective participation in management—the possibility is theoretical enough, and the continual insertion of “in a manager-managed LLC” is cumbersome enough, that we trust the reader to know what we intend.

4. Callison & Vestal, *supra* note 1, at 275–78; *see* UNIF. LTD. LIAB. CO. ACT §§ 408, 409 (1996), 6B U.L.A. 596–98 (2008) (designating section 408 as “Member’s right to information” and section 409 as “General standards of member’s and manager’s conduct”).

5. Callison & Vestal, *supra* note 1, at 279 & n.38 (citing BILL WATTERSON, *THE AUTHORITATIVE CALVIN AND HOBBS: A CALVIN AND HOBBS TREASURY* 116 (1990) (“Yep. Mandibles of death, that’s what he’s got.” (Calvin to Uncle Max, about Hobbes))).

6. Callison & Vestal, *supra* note 1, at 294–95, 298.

7. *Id.* at 294–95.

8. *Id.* at 298.

9. *Id.* at 305–06.

10. *Id.* at 307–09.

11. UNIF. LTD. LIAB. CO. ACT (1996), 6B U.L.A. 545 (2008). ULLCA was adopted by Hawaii, South Carolina, Vermont, and West Virginia in 1996; by Alabama and Illinois in 1997; by South Dakota and the Virgin Islands in 1998; and by Montana in 1999. *Id.* It has not been adopted by any jurisdiction since. *Id.*

12. *See id.*; *see also* 805 ILL. COMP. STAT. 180/1-1 to /60-1 (2004).

National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated a new LLC statute in 2006—the Revised Uniform Limited Liability Company Act (RULLCA).¹³ One might ask whether the RULLCA drafters fixed the mandibles of death problem we pointed out in our 2001 article, and, if they did, whether such a fix was the result of having adopted an underlying theory of the LLC form.

Part II looks to see if the RULLCA drafters fixed the mandibles of death problem in ULLCA. Part III provides a more general review of the RULLCA information disclosure and fiduciary duty sections to see if the drafters adopted such a theory to guide their efforts. Finally, Part IV suggests a course for future business-entity projects in order to avoid the problems of ULLCA.

II. RULLCA AND THE MANDIBLES OF DEATH PROBLEM

The mandibles of death problem in ULLCA arises at the intersection of the Act's fiduciary duty and information disclosure sections.¹⁴ Simply put, ULLCA leaves non-manager members unconstrained by any fiduciary duties but with sweeping information rights.¹⁵ The drafters of RULLCA could have fixed the mandibles of death problem either by imposing fiduciary duties on such members or by restricting their access to information. Below, we review the RULLCA fiduciary duty and access-to-information provisions to see if the mandibles of death problem has been resolved.

What are the duties of non-manager members? Under ULLCA, the fiduciary duties of non-manager members are simple: there are none.¹⁶ Nor do such members appear to owe a duty of good faith and fair dealing under ULLCA.¹⁷ This absence of fiduciary duties is the source of the mandibles of death problem.

13. REVISED UNIF. LTD. LIAB. CO. ACT (2006), 6B U.L.A. 407, 543 (2008). As of October 2008, RULLCA has been adopted by two jurisdictions: Idaho and Iowa. *Id.*; see also 2008 Idaho Sess. Laws 479–522 (adopting RULLCA); 2008 Iowa Acts 616–73 (adopting RULLCA).

14. See *supra* notes 3–4 and accompanying text.

15. See UNIF. LTD. LIAB. CO. ACT §§ 408, 409 (1996), 6B U.L.A. 596–98 (2008).

16. See *id.* § 409(h)(1) (1996), 6B U.L.A. 598 (“In a manager-managed company . . . a member who is not also a manager owes no duties to the company or to the other members solely by reason of being a member.”).

17. See *id.* § 409(d), 6B U.L.A. 598. Section 409(d) states: “A member shall discharge the duties to a member-managed company and its other members under this [Act] or under the operating agreement and exercise any right consistently with the obligation of good faith and fair dealing.” *Id.* The language of section 409(d) can be read in two ways. First, it could be read to apply in full only to member-managed companies. Second, the language, “[a] member shall . . . exercise any right consistently with the obligation of good faith and fair dealing,” can be read to apply to *all* members, including members in manager-managed companies. While we originally accepted the second reading, the placement of the subsection in the middle of six other subsections that, by their terms, deal only with member-managed companies causes us to reconsider our previous position. Callison & Vestal, *supra* note 1, at 276.

With respect to the fiduciary duties of non-manager members, RULLCA reaches the same result as ULLCA—such members owe no fiduciary duties.¹⁸

To the extent ULLCA does not impose an obligation of good faith and fair dealing on a non-manager member, RULLCA makes a change. RULLCA clarifies the good-faith and fair-dealing obligation of non-manager members and clearly makes non-manager members subject to the obligation of good faith and fair dealing, providing that “[a] member in a . . . manager-managed limited liability company shall discharge the duties under this [Act] or under the operating agreement and exercise any rights consistently with the contractual obligation of good faith and fair dealing.”¹⁹

Does the existence of an obligation of good faith and fair dealing on non-manager members answer the mandibles of death problem? As it turns out, the answer is unclear. The analysis starts with the statutory provisions creating the obligation: “A member in a member-managed limited liability company or a manager-managed limited liability company shall discharge the duties under this [Act] or under the operating agreement and exercise any rights consistently with the contractual obligation of good faith and fair dealing.”²⁰ Under RULLCA, as under the Revised Uniform Partnership Act (RUPA) and ULLCA,²¹ the obligation of good faith and fair dealing is not a fiduciary duty,

18. REVISED UNIF. LTD. LIAB. CO. ACT § 409(a), (g) (2006), 6B U.L.A. 488–89 (2008). The statute provides that members in *member-managed* LLCs owe fiduciary duties of loyalty and care. *Id.* § 409(a), 6B U.L.A. 488. It then provides that in *manager-managed* LLCs, the fiduciary duties of loyalty and care apply to managers but not to members. *Id.* § 409(g)(1), 6B U.L.A. 489 (“In a manager-managed limited liability company . . . Subsections (a) [member of member-managed limited liability company owes the fiduciary duties of loyalty and care], (b) [duty of loyalty definition], (c) [duty of care definition], and (e) [fairness of transaction as a defense] apply to the manager or managers and not the members.”).

19. *Id.* § 409(d), 6B U.L.A. 489. Indeed, possibly to atone for the confusion on this point in ULLCA, RULLCA restates the proposition in section 409(g)(3): “[i]n a manager-managed limited liability company . . . Subsection (d) applies to the members and managers.” *Id.* § 409(g)(3), 6B U.L.A. 489.

20. *Id.* § 409(d), 6B U.L.A. 489.

21. Compare REVISED UNIF. LTD. LIAB. CO. ACT § 409(d) & cmt. subsection (d), 6B U.L.A. 489, 491, with UNIF. P’SHP ACT § 404(d) (1997), 6 pt. I U.L.A. 143 (2001) (popularly known as the Revised Uniform Partnership Act (RUPA)), and UNIF. LTD. LIAB. CO. ACT § 409(d) (1996), 6B U.L.A. 598 (2008). See also J. William Callison, *Blind Men and Elephants: Fiduciary Duties Under the Revised Uniform Partnership Act, the Uniform Limited Liability Company Act, and Beyond*, 1 J. SMALL & EMERGING BUS. L. 109, 141–46, 148–53 (1997) (discussing possible variations on the good-faith obligation). RUPA provides in section 404(d): “A partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.” UNIF. P’SHP ACT § 404(d), 6 pt. I U.L.A. 143. The RUPA drafters clearly intended that the obligation of good faith and fair dealing not be a fiduciary or stand-alone duty:

Subsection (d) is . . . new. It provides that partners have an obligation of good faith and fair dealing in the discharge of all their duties, including those arising under the Act, such as their fiduciary duties of loyalty and care, and those arising under the

but rather is a non-fiduciary, non-stand-alone obligation sounding in contract: “[t]his subsection refers to the ‘*contractual* obligation of good faith and fair dealing’ to emphasize that the obligation is not an invitation to re-write agreements among the members.”²² As explained in the comment to section 409 of RULLCA: “[t]he obligation of good faith and fair dealing is not a fiduciary duty, does not command altruism or self-abnegation, and does not prevent a partner from acting in the partner’s own self-interest.”²³

Would it be a violation of the non-fiduciary obligation of good faith and fair dealing for a non-manager member to use information gained pursuant to the member’s status as a member for his personal benefit and to the detriment of the limited liability company? Perhaps.

If, as the official commentary provides, “the obligation is not an invitation to re-write agreements among the members,” if the obligation “does not command altruism or self-abnegation, and does not prevent a partner from acting in the partner’s own self-interest,” and if courts do “not use the obligation to change ex post facto the parties’ or this Act’s allocation of risk and power,”²⁴ then it would seem difficult to argue that a non-manager member who uses information to his benefit would be violating the duty of good faith and fair dealing. If we accept the RULLCA drafters’ analogy between a limited partner in a limited partnership and a non-manager member, then the official commentary provides that the obligation of good faith and fair dealing “should be used only to protect agreed-upon arrangements from conduct that is manifestly beyond what a reasonable person could have contemplated when the arrangements were made.”²⁵ The RULLCA drafters should have been aware of the mandibles of death problem.²⁶ They made a

partnership agreement. The exercise of any rights by a partner is also subject to the obligation of good faith and fair dealing. . . .

The obligation of good faith and fair dealing is 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.

Id. § 404 cmt. 4, 6 pt. 1 U.L.A. 145 (citations omitted). ULLCA similarly provides: “A member shall discharge the duties to a member-managed company and its other members under this [Act] or under the operating agreement and exercise any rights consistently with the obligation of good faith and fair dealing.” UNIF. LTD. LIAB. CO. ACT § 409(d) (1996), 6B U.L.A. 598 (2008).

22. REVISED UNIF. LTD. LIAB. CO. ACT § 409 cmt. subsection (d) (2006), 6B U.L.A. 491 (2008).

23. *Id.* (quoting UNIF. LTD. P’SHP ACT § 305 cmt. subsection (b) (2001), 6A U.L.A. 425 (2008) (popularly known as RUPA)).

24. *Id.* (quoting UNIF. LTD. P’SHP ACT § 305 cmt. subsection (b), 6A U.L.A. 425).

25. *Id.*

26. See Callison & Vestal, *supra* note 1, at 312 (“There simply is no reason to set a uniform act in concrete until it is right ULLCA’s information rules are inferior and should be changed”). The *Mandibles* article was published in 2001, far in advance of the initiation of

clear policy choice in RULLCA that fiduciary duties do not apply to non-manager members.²⁷ It would therefore seem difficult to argue that the use of LLC information by a non-manager member for the member's benefit and to the detriment of the LLC constitutes "conduct that is manifestly beyond what a reasonable person could have contemplated when the arrangements were made."²⁸

The RULLCA drafters opted not to define the obligation of "good faith and fair dealing," and this partially explains the uncertainty as to whether the self-serving use of company information by a non-manager member could be a violation of this obligation. In this way, the drafters of RULLCA are consistent with the drafters of both RUPA and ULLCA.²⁹

The "good-faith and fair-dealing" obligation can be conceptualized in a number of ways. We can start by rejecting the Uniform Commercial Code (UCC) definition of "good faith," as did the drafters of RUPA.³⁰ The UCC defines "good faith" as "honesty in fact and the observance of reasonable commercial standards of fair dealing."³¹ When applied to members of an LLC, as opposed to merchants in commercial transactions, this definition is, as the drafters of RUPA likewise concluded, "too narrow or not applicable."³²

If the UCC definition of good faith as honesty in fact is not adopted, then how should the term be defined? A number of alternatives have been suggested to define the obligation of good faith and fair dealing.³³ In all candor, they do not greatly help resolve the mandibles problem, but rather seem to suggest that the obligation of good faith and fair dealing does not

the work leading to RULLCA. Nat'l Conference of Comm'rs on Unif. State Laws, Proceedings in the Committee of the Whole: Uniform Limited Liability Company Act 1 (2003) (statement of H. Lane Kneeder, Chairperson, Nat'l Conference of Comm'rs on Unif. State Laws) (noting that the RULLCA Drafting Committee "had its first and only meeting" in the spring of 2003).

27. See *supra* notes 16, 17 & 20 and accompanying text.

28. REVISED UNIF. LTD. LIAB. CO. ACT § 409 cmt. subsection (d) (2006), 6B U.L.A. 491 (2008) (quoting UNIF. LTD. P'SHIP ACT § 305 cmt. subsection (b) (2001), 6A U.L.A. 425 (2008)).

29. See UNIF. P'SHIP ACT § 404 cmt. 4 (1997), 6 pt. I U.L.A. 145 (2001) ("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."); see also UNIF. LTD. LIAB. CO. ACT (1996), 6B U.L.A. 545-652 (2008).

30. See UNIF. P'SHIP ACT § 404 cmt. 4 (1997), 6 pt. I U.L.A. 145 (2001) ("The UCC definition of 'good faith' is honesty in fact and, in the case of a merchant, the observance of reasonable commercial standards of fair dealing in the trade. Those definitions were rejected as too narrow or not applicable." (citation omitted)).

31. U.C.C. § 1-201 (1995).

32. See UNIF. P'SHIP ACT § 404 cmt. 4 (1997), 6 pt. I U.L.A. 145 (2001) ("The UCC definition of 'good faith' is honesty in fact and, in the case of a merchant, the observance of reasonable commercial standards of fair dealing in the trade. Those definitions were rejected as too narrow or not applicable." (citation omitted)).

33. See Callison, *supra* note 21, at 141-48.

provide a promising basis upon which to challenge a non-manager member who uses LLC information for personal benefit and to the company's detriment.³⁴

Viewed narrowly, the good-faith and fair-dealing obligation may be seen as simply a gap filler.³⁵ Here, the question is "whether the parties would have agreed to prohibit the complained-of action, had they thought to negotiate the point."³⁶ Under this interpretation, it would be hard to challenge the non-manager member who used LLC information for personal advantage and to the detriment of the LLC: RULLCA clearly excludes non-manager members from owing fiduciary duties and therefore there is no gap to be filled in the non-manager member's obligations.

Another possible interpretation views the good-faith and fair-dealing obligation as testing whether the member acted in knowing breach of the agreement.³⁷ Here, the question is whether the member knows that he is breaching the agreement.³⁸ This interpretation does not appear helpful to a potential plaintiff, because there does not seem to be a breach of the agreement of which the member would, or would not, be aware.

A third possible interpretation of the good-faith and fair-dealing obligation would only protect against the non-manager member's actions taken with a tortious state of mind.³⁹ Under this interpretation, the question is whether the party acted in bad faith—with a tortious state of mind—presumably even if the specific action was permitted under the applicable agreement.⁴⁰ This tortious state of mind requires that "the defendant possessed an intent to harm, or the defendant's actions constituted reckless and wanton misconduct or willful and wanton misconduct."⁴¹ This interpretation could be seen to focus on the wrong question. It would seem an odd result for the question of liability to turn on whether a non-manager member tortiously intended to benefit himself or harm the LLC, as opposed to focusing on the result of the non-manager's actions.

A final possibility involves looking beyond the partnership cases to develop a general understanding of the concept of good faith and fair dealing by reviewing case law involving closely held corporations.⁴² Given the

34. *Id.*

35. *Id.* at 141–43; see *Katz v. Oak Indus. Inc.*, 508 A.2d 873, 880 (Del. Ch. 1986); Larry E. Ribstein, *The Revised Uniform Partnership Act: Not Ready for Prime Time*, 49 BUS. LAW. 45, 55 (1993–1994).

36. Callison, *supra* note 21, at 145.

37. See, e.g., *U.S. Cellular Inv. Co. v. Bell Atl. Mobile Sys., Inc.*, 677 A.2d 497, 504 (Del. 1996).

38. See *id.*

39. See *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund II, L.P.*, 624 A.2d 1199, 1207–08 (Del. 1993).

40. *Id.* at 1202, 1207–08.

41. Callison, *supra* note 21, at 147; see *Rose Acre Farms, Inc. v. Cone*, 492 N.E.2d 61, 70 (Ind. Ct. App. 1986).

42. Callison, *supra* note 21, at 148–53.

similarities between LLCs and close corporations, it is appropriate to consider how courts address good faith and fair dealing in closely held corporation cases. The famous trio of Massachusetts cases—*Donahue v. Rodd Electrotype Co.*,⁴³ *Wilkes v. Springside Nursing Home, Inc.*,⁴⁴ and *Smith v. Atlantic Properties, Inc.*⁴⁵—suggests a two-part test: when a non-manager member uses LLC information for his own benefit and to the detriment of the LLC, the non-manager member bears the initial burden of “demonstrat[ing] a legitimate business purpose for [his] action.”⁴⁶ If this burden is satisfied the burden would shift to the LLC and its other members “to demonstrate that the same legitimate objective could have been achieved through [a less harmful] alternative course of action.”⁴⁷ This burden-shifting test, applied in the closely held corporation context, would help a member of an LLC prevent a fellow non-manager member from using LLC information for his own benefit and to the detriment of the LLC by imposing the initial burden on the fellow non-manager member to establish that he had a business-related purpose for using the information. This would help avoid a mandibles of death situation.

In all of the discussions of how the obligation of good faith and fair dealing should be interpreted, one element seems to get less attention than it merits. NCCUSL made a deliberate choice to fashion the obligation as one of “good faith and fair dealing” and not simply as an obligation of “good faith.”⁴⁸ It is generally accepted that “fair dealing” is an objective test and “good faith” is a subjective test.⁴⁹ It is not clear how a non-manager member’s use of LLC information for his benefit and to the detriment of the LLC would measure up under an objective fair-dealing test.

Therefore, it is not clear whether the RULLCA drafters solved the mandibles of death problem by imposing duties on non-manager members to protect the LLC. If they did not, the question becomes whether they solved it by restricting the access of such members to company information. As it turns out, they did indeed.⁵⁰

One of the most significant changes from ULLCA to RULLCA was a revision in the information rights of non-manager members.⁵¹ ULLCA did not

43. *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505 (Mass. 1975).

44. *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657 (Mass. 1976).

45. *Smith v. Atl. Props., Inc.*, 422 N.E.2d 798 (Mass. App. Ct. 1981).

46. *Wilkes*, 353 N.E.2d at 663.

47. *Id.*

48. Nat’l Conference of Comm’rs on Unif. State Laws, Proceedings in the Committee of the Whole: Revised Uniform Limited Liability Company Act 120 (2006).

49. UNIF. P’SHP ACT § 404 cmt. 4 (1997), 6 pt. I U.L.A. 145 (2001).

50. See *infra* notes 59–66 and accompanying text.

51. Compare UNIF. LTD. LIAB. CO. ACT § 408 (1996), 6B U.L.A. 596 (2008) (failing to distinguish the information rights in member-managed and manager-managed LLCs), with REVISED UNIF. LTD. LIAB. CO. ACT § 410 (2006), 6B U.L.A. 492–93 (2008) (differentiating between member-managed and manager-managed LLCs).

differentiate the information rights of members in member-managed and manager-managed LLCs.⁵² This was true with respect to records,⁵³ information required to be furnished absent demand,⁵⁴ information required to be furnished on demand,⁵⁵ and rights to obtain a copy of the operating agreement.⁵⁶ This failure to differentiate between members in member-managed LLCs (who have fiduciary duties that would presumably limit the improper use of such information)⁵⁷ and non-manager members (who do not owe fiduciary duties that would limit the improper use of information) created the mandibles of death problem.⁵⁸

All of this changed in the evolution from ULLCA to RULLCA. Following the lead of the Uniform Limited Partnership Act (2001) (ULPA) in differentiating between general partners and limited partners,⁵⁹ RULLCA differentiates between members in member-managed LLCs and members in manager-managed LLCs by providing separate statutory provisions for each.⁶⁰ Within the member-managed subdivision, in which fiduciary duties constrain the member's use of information, members have access to records,⁶¹ to a range

52. See UNIF. LTD. LIAB. CO. ACT § 408, 6B U.L.A. 596.

53. *Id.* § 408(a), 6B U.L.A. 596 (“A limited liability company shall provide members and their agents and attorneys access to its records, if any, at the company’s principal office or other reasonable locations specified in the operating agreement. The company shall provide former members and their agents and attorneys access for proper purposes to records pertaining to the period during which they were members. The right of access provides the opportunity to inspect and copy records during ordinary business hours. The company may impose a reasonable charge, limited to the costs of labor and material, for copies of records furnished.”).

54. *Id.* § 408(b)(1), 6B U.L.A. 596 (“A limited liability company shall furnish to a member, and to the legal representative of a deceased member or member under legal disability: (1) without demand, information concerning the company’s business or affairs reasonably required for the proper exercise of the member’s rights and performance of the member’s duties under the operating agreement or this [Act] . . .”).

55. *Id.* § 408(b)(2), 6B U.L.A. 596 (“A limited liability company shall furnish to a member, and to the legal representative of a deceased member or member under legal disability: . . . (2) on demand, other information concerning the company’s business or affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.”).

56. *Id.* § 408(c), 6B U.L.A. 596 (“A member has the right upon written demand given to the limited liability company to obtain at the company’s expense a copy of any written operating agreement.”).

57. *Id.* § 409(a)–(g), 6B U.L.A. 597–98.

58. *Id.* § 409(h)(1), 6B U.L.A. 598.

59. See Carol R. Goforth, *Why Arkansas Should Adopt the Revised Uniform Limited Liability Company Act*, 30 U. ARK. LITTLE ROCK L. REV. 31, 66 (2007).

60. REVISED UNIF. LTD. LIAB. CO. ACT § 410(a), 6B U.L.A. 492–93 (providing rules for member managed LLCs); *id.* § 410(b), 6B U.L.A. 493–94 (providing rules for manager-managed LLCs).

61. *Id.* § 410(a)(1), 6B U.L.A. 492–93 (“In a member-managed limited liability company, the following rules apply: (1) On reasonable notice, a member may inspect and copy during regular business hours, at a reasonable location specified by the company, any record maintained by the company regarding the company’s activities, financial condition, and other circumstances,

of information without demand,⁶² and to additional information on demand.⁶³ In the manager-managed subdivision in which no fiduciary duties constrain the use of information by the member,⁶⁴ members' rights to information are sharply restricted.⁶⁵ First, the informational rights of members in member-managed LLCs are specifically denied to members in manager-managed LLCs.⁶⁶ Next, the non-manager members' rights to information extend only to that which "is just and reasonable" and is sought "for a purpose material to the member's interest as a member," and where "the information sought is directly connected to the member's purpose."⁶⁷ In addition, RULLCA provides that an LLC may, in the ordinary course of its activities, impose additional restrictions and conditions on the availability of information.⁶⁸

to the extent the information is material to the member's rights and duties under the operating agreement or this [Act] . . .").

62. *Id.* § 410(a)(2)(A), 6B U.L.A. 492–93 ("In a member-managed limited liability company, the following rules apply: . . . (2) The company shall furnish to each member: (A) without demand, any information concerning the company's activities, financial condition, and other circumstances which the company knows and is material to the proper exercise of the member's rights and duties under the operating agreement or this [Act], except to the extent the company can establish that it reasonably believes the member already knows the information . . .").

63. *Id.* § 410(a)(2)(B), 6B U.L.A. 492–93 ("In a member-managed limited liability company, the following rules apply: . . . (2) The company shall furnish to each member: . . . (B) on demand, any other information concerning the company's activities, financial condition, and other circumstances, except to the extent the demand or information demanded is unreasonable or otherwise improper under the circumstances.").

64. *Id.* § 409(g), 6B U.L.A. 489.

65. Compare *id.* § 410(a), 6B U.L.A. 492–93 (providing members in member-managed LLCs with broad access to information), with *id.* § 410(b), 6B U.L.A. 493–94 (restricting the rights to information of members in manager-managed LLCs).

66. *Id.* § 410(b), 6B U.L.A. 493 (stating that in a manager-managed LLC, "[t]he informational rights stated in subsection (a) and the duty stated in subsection (a)(3) apply to the managers and not the members").

67. *Id.* RULLCA clearly delineates the rules relating to the informational rights of members in manager-managed LLCs, providing that

[i]n a manager-managed limited liability company, the following rules apply: . . . (2) During regular business hours and at a reasonable location specified by the company, a member may obtain from the company and inspect and copy full information regarding the activities, financial condition, and other circumstances of the company as is just and reasonable if: (A) the member seeks the information for a purpose material to the member's interest as a member; (B) the member makes a demand in a record received by the company, describing with reasonable particularity the information sought and the purpose for seeking the information; and (C) the information sought is directly connected to the member's purpose.

Id.

68. *Id.* § 410(g), 6B U.L.A. 494.

In addition to any restriction or condition stated in its operating agreement, a limited liability company, as a matter within the ordinary course of its activities, may impose reasonable restrictions and conditions on access to and use of information to be furnished under this section, including designating information confidential and

Thus, the drafters of RULLCA solved the mandibles of death problem by restricting the availability of information to non-manager members and, possibly, by subjecting the non-manager members to the non-fiduciary obligations of good faith and fair dealing. This brings us to the larger issue: did the RULLCA drafters adopt an underlying theory of secrecy, disclosure, and fiduciary duties?

III. RULLCA AND A GENERAL THEORY OF SECRECY, DISCLOSURE, AND FIDUCIARY DUTIES

We have previously suggested that in drafting statutory language for a new business form it would be helpful to start with a well-articulated theory of how the information rights and use provisions should be structured.⁶⁹ Indeed, had ULLCA been drafted from such a clearly articulated theory, the mandibles of death problem would have been avoided. We identified three promising approaches to such a theory: party autonomy, communitarianism, and structuralism.⁷⁰

The party autonomy model we suggested “would conceive of the associating parties as atomistic contracting agents engaged in individual wealth-maximizing behavior with constant recalculation of individual advantage.”⁷¹ This model does not require the parties to subordinate immediate individual advantage in order to realize long-term collective-wealth gains.⁷² With respect to information rights, the party autonomy model would resemble “arm’s-length commercial negotiations.”⁷³ Parties would not be frequently required to disclose information, and they certainly would be free to elect *not* to disclose information when that information is the product of the party’s deliberate effort.⁷⁴

imposing nondisclosure and safeguarding obligations on the recipient. In a dispute concerning the reasonableness of a restriction under this subsection, the company has the burden of proving reasonableness.

Id.

69. Callison & Vestal, *supra* note 1, at 292.

70. *Id.*

71. *Id.* at 294.

72. *Id.* at 294–95.

73. *Id.* at 295.

74. In our previous article, we suggested an example of how this might work in a typical partnership setting:

Partner A would not be required to disclose valuable information to Partner B if the information were the product of A’s efforts to produce the information. For example, if Partner A expended resources to obtain information concerning oil and gas deposits in the area surrounding partnership property, he would not be required to disclose such information to Partner B when negotiating to acquire partnership property or when negotiating to acquire B’s partnership interest. Similarly, Partner A would not be required to disclose the information to Partner B, and Partner B would not have the right to demand disclosure, even when the information is significant to the partnership’s business activities.

The communitarian model we suggested “would conceive of the associating parties as members of a community who are engaged in individual wealth-maximizing behavior with temporally restricted recalculation of individual advantage.”⁷⁵ This model prohibits the instantaneous recalculation of individual wealth-maximization and requires the parties to “subordinate immediate [individual] advantage in order to maximize long-term collective-wealth gains.”⁷⁶ The restrictions on instantaneous recalculation of individual wealth-maximization are a function of status, not of contract.⁷⁷ This model also demands broad disclosure and information rights in contract-based businesses to prevent partners from personally gaining at the expense of the collective partnership or co-partner interests.⁷⁸ Such disclosure requirements would be coupled with robust fiduciary duties.⁷⁹ We suggested that this communitarian model was the traditional basis for the information disclosure requirements of partnership law under the common law, the Uniform Partnership Act (UPA), and RUPA, although RUPA adopted a fiduciary duty formulation different from that called for by the communitarian model.⁸⁰

The structuralist model we suggested attempted to avoid both the atomistic aspects of the party autonomy model and the self-abnegation of the communitarian model.⁸¹ This pragmatic model combines the party autonomy model’s wealth-maximization concept and communitarianism’s recognition of the social dimensions of the firm.⁸² The structuralist model provides base-line default rules rooted in communitarianism, but which may be modified to meet the particular needs and values of each firm.⁸³

Within the structuralist model, the information disclosure provisions are more nuanced than those under the party autonomy or communitarian models.⁸⁴ The default information-access rules would be directly proportional

Id. at 297 (footnotes omitted). We have acknowledged that the party autonomy model does not describe the outcome of the broad sweep of partnership cases. *Id.* at 297 (footnotes omitted).

75. *Id.* at 298.

76. *Id.*

77. As we have previously noted:

The community model views the participants not simply as autonomous wealth-maximizing individuals banding together for transitory advantage, but rather as members of a community pursuing collective goals. In this view, even in the absence of express contractual provisions mandating individual sharing and sacrifice, individuals should not be permitted unduly to prefer their interests over the interests of others. Once the collective identity is realized, it becomes possible to consider the existence of duties to the collective and to the other members.

Id.

78. *Id.* at 299.

79. *Id.*

80. *Id.* at 299–303.

81. *Id.* at 305.

82. *Id.*

83. *Id.*

84. *See id.* at 305–06.

to the level of the member's involvement—the more involved a member is in the firm's operation, the more information he will be entitled to.⁸⁵ This aspect of the structuralist model explains historical levels of fiduciary duties and information rights among various types of unincorporated firms.⁸⁶

In 2001, we called for a structuralist theory to undergird the law of LLCs and suggested that future drafting projects for uniform unincorporated business entity acts should adopt the structuralist approach.⁸⁷ We suggested, among other things, that the application of a structuralist model to LLCs would result in differences in fiduciary duties and information rights based on differences in each particular member's participation in the LLC.⁸⁸ We also suggested three different member classifications: members in member-managed LLCs, member-managers in manager-managed LLCs, and non-manager members in manager-managed LLCs.⁸⁹ Members in member-managed LLCs would have broad information rights and fiduciary duties,⁹⁰ members who are managers in manager-managed LLCs would also have broad information rights and fiduciary duties,⁹¹ and non-manager members in manager-managed LLCs

85. As we have mentioned:

[T]he general disclosure rules which operate in the absence of a particular contract would take into account the other aspects of the parties' legal relationship to one another and, in doing so, would recognize that in different circumstances members can have different participation levels in the business community they create. When there is greater member participation, such as when ownership and management authority converge, the law should assume greater information disclosure rights and increased fiduciary duties. On the other hand, when there is little or no convergence between ownership and management authority, such as when certain members merely contribute capital and share only in the firm's reward attributes, the law should assume reduced information disclosure rights and reduced fiduciary duties.

Callison & Vestal, *supra* note 1, at 306.

86. *See id.*

87. *Id.* at 307–10. In 2001, we focused our discussion of the structuralist model on the NCCUSL project to draft a successor to the Revised Uniform Limited Partnership Act (RULPA), known as Re-RULPA. *Id.* at 309–12.

88. *Id.* at 307.

89. *Id.*

90. *Id.* at 307 (“Members in member-managed LLCs should have the broad information rights and fiduciary duties of partners in general partnerships. Using RUPA as the standard, such members would have unrestricted right of access to LLC books and records, the right without predicate demand to information reasonably required for them to exercise any rights and duties relating to the LLC, and the right upon reasonable and proper demand to all information concerning the LLC. As to fiduciary duties under RUPA, such members would have statutory fiduciary duties of loyalty and care together with a nonfiduciary obligation of good faith and fair dealing.”).

91. *Id.* at 307–08 (“[M]embers who also are managers in manager-managed LLCs should have the broad information rights and fiduciary duties of general partners in limited partnerships. . . . [S]uch member-managers would have the unrestricted right of access to LLC books and records, the right without predicate demand to information reasonably required to exercise their rights and duties relating to the LLC, and the right upon reasonable and proper demand to all information concerning the LLC. As to fiduciary duties, such member-managers

would have the lowest level of information rights and fiduciary duties.⁹²

Against this template, how did the RULLCA drafters do? As mentioned above, the application of a structuralist model to LLCs would result in differences in fiduciary duties and information rights based on differences in the characteristics of a member's participation in the LLC. The model suggests that members in member-managed LLCs should have broad information rights and fiduciary duties, using the information rights and fiduciary duties of partners in general partnerships as a template.⁹³ RULLCA matches this scheme exactly:

- The model calls for members in member-managed LLCs to have an “unrestricted right of access to LLC books and records,”⁹⁴ and RULLCA provides such access in section 410(a)(1), so long as “the information is material to the member’s rights and duties under the operating agreement or this [Act].”⁹⁵
- The model calls for members in member-managed LLCs to have a “right without predicate demand to information reasonably required for them to exercise any rights and duties relating to the LLC,”⁹⁶ and RULLCA provides it in section 410(a)(2)(A), “except to the extent the company can establish that it reasonably believes the member already knows the information.”⁹⁷
- The model calls for members in member-managed LLCs to have a “right upon reasonable and proper demand to all information concerning the LLC,”⁹⁸ and RULLCA provides it in section

would have statutory fiduciary duties of loyalty and care, together with a nonfiduciary obligation of good faith and fair dealing.”).

92. *Id.* at 308–09. “[N]onmanager members in manager-managed LLCs should have the narrow and weaker information rights and fiduciary duties of limited partners in limited partnerships.” *Id.* The rights of such nonmanager members would be limited to the following upon demand: “true and full information regarding the state of the business and financial condition of the [LLC]”; “a copy of the [LLC’s] federal, state, and local income tax returns for each year”; and “other information regarding the affairs of the [LLC] as is just and reasonable.” UNIF. LTD. P’SHP ACT § 1105 (2001), 6A U.L.A. 302 (2008).

This nonmanager-member information right would be substantially narrower than that for members who participate in LLC management. Instead of access to all books and records, the member would be given access to only a short list of basic documents. Instead of receiving some information without a predicate demand, information is received only following a reasonable demand. Instead of access to all LLC information, such members would have access only to limited information. On the fiduciary duty side . . . a nonmanager member would have no statutory fiduciary duties.

Callison & Vestal, *supra* note 1, at 309.

93. *Id.* at 307.

94. *Id.*

95. REVISED UNIF. LTD. LIAB. CO. ACT § 410(a)(1) (2006), 6B U.L.A. 492–93 (2008).

96. Callison & Vestal, *supra* note 1, at 307.

97. REVISED UNIF. LTD. LIAB. CO. ACT § 410(a)(2)(A), 6B U.L.A. 493.

98. Callison & Vestal, *supra* note 1, at 307.

410(a)(2)(B), “except to the extent the demand or information demanded is unreasonable or otherwise improper under the circumstances.”⁹⁹

- The model calls for members in member-managed LLCs to “have [a] statutory fiduciary dut[y] of loyalty,”¹⁰⁰ and RULLCA provides it in sections 409(a) and 409(b).¹⁰¹
- The model calls for members in member-managed LLCs to “have statutory fiduciary duties of . . . care,”¹⁰² and RULLCA provides it in sections 409(a) and 409(c).¹⁰³
- The model calls for members in member-managed LLCs to have “a nonfiduciary obligation of good faith and fair dealing,”¹⁰⁴ and RULLCA provides it in section 409(d).¹⁰⁵

As a general matter, the model suggests that member-managers in manager-managed LLCs “should have the broad information rights and fiduciary duties of general partners in limited partnerships.”¹⁰⁶ RULLCA matches this scheme exactly:

- The model calls for member-managers in manager-managed LLCs to have an “unrestricted right of access to LLC books and records,”¹⁰⁷ and RULLCA provides it in section 410(b)(1).¹⁰⁸
- The model calls for member-managers in manager-managed LLCs to have a “right without predicate demand to information reasonably required to exercise their rights and duties relating to the LLC,”¹⁰⁹ and RULLCA provides it in section 410(b)(1), “except to the extent the company can establish that it reasonably believes the member already knows the information.”¹¹⁰
- The model calls for member-managers in manager-managed LLCs to have a “right upon reasonable and proper demand to all information concerning the LLC,”¹¹¹ and RULLCA provides it in section 410(a)(2)(B), “except to the extent the demand or information

99. REVISED UNIF. LTD. LIAB. CO. ACT § 410(a)(2)(B), 6B U.L.A. 493.

100. Callison & Vestal, *supra* note 1, at 307.

101. REVISED UNIF. LTD. LIAB. CO. ACT § 409(a)–(b), 6B U.L.A. 488–89.

102. Callison & Vestal, *supra* note 1, at 307.

103. REVISED UNIF. LTD. LIAB. CO. ACT § 409(a), (c), 6B U.L.A. 488–89.

104. Callison & Vestal, *supra* note 1, at 307.

105. REVISED UNIF. LTD. LIAB. CO. ACT § 409(d) & cmt. subsection (d), 6B U.L.A. 489, 491.

106. Callison & Vestal, *supra* note 1, at 307.

107. *Id.* at 307–08.

108. REVISED UNIF. LTD. LIAB. CO. ACT § 410(a)(1), (b)(1), 6B U.L.A. 493.

109. Callison & Vestal, *supra* note 1, at 307–08.

110. REVISED UNIF. LTD. LIAB. CO. ACT § 410(a)(2)(A), (b)(1), 6B U.L.A. 493.

111. Callison & Vestal, *supra* note 1, at 307–08.

demanded is unreasonable or otherwise improper under the circumstances.”¹¹²

- The model calls for member-managers in manager-managed LLCs to “have [a] statutory fiduciary dut[y] of loyalty,”¹¹³ and RULLCA provides it in section 409(g).¹¹⁴
- The model calls for member-managers in manager-managed LLCs to “have [a] statutory fiduciary dut[y] . . . of care,”¹¹⁵ and RULLCA provides it in section 409(g)(1).¹¹⁶
- The model calls for member-managers in manager-managed LLCs to have “a nonfiduciary obligation of good faith and fair dealing,”¹¹⁷ and RULLCA provides it in sections 409(d) and 409(g)(3).¹¹⁸

With respect to members who are not managers in manager-managed LLCs, the model suggests that they should have limited information rights and fiduciary duties, using the information rights and fiduciary duties of limited partners in limited partnerships as a template.¹¹⁹ RULLCA partially matches this scheme:

- The model calls for non-manager members in manager-managed LLCs to have a “right to inspect and copy basic firm records,”¹²⁰ and to have a right to obtain from the LLC “upon reasonable demand,” the following information: (1) “true and full information regarding the state of the business and financial condition of the [LLC]”; (2) “a copy of the [LLC’s] federal, state, and local income tax returns for each year”; and (3) “other information regarding the affairs of the [LLC] as is just and reasonable.”¹²¹ RULLCA does not track this formulation, but rather provides non-manager members in manager-managed LLCs the ability to “obtain from the company and inspect and copy full information regarding the activities, financial condition, and other circumstances of the company as is just and reasonable”¹²² provided: (1) “the member seeks the information for a purpose material to the member’s interest as a member,”¹²³ (2) “the member makes a demand . . . describing with

112. REVISED UNIF. LTD. LIAB. CO. ACT § 410(a)(1), (b)(1), 6B U.L.A. 493; *id.* § 410(a)(2)(B).

113. Callison & Vestal, *supra* note 1, at 308.

114. REVISED UNIF. LTD. LIAB. CO. ACT § 409(a)–(b), (g)(1)–(2), 6B U.L.A. 488–89.

115. Callison & Vestal, *supra* note 1, at 307–08.

116. REVISED UNIF. LTD. LIAB. CO. ACT § 409(a), (c), (g)(1), 6B U.L.A. 489.

117. Callison & Vestal, *supra* note 1, at 307–08.

118. REVISED UNIF. LTD. LIAB. CO. ACT § 409(d), (g)(3) & cmt. subsection (d), 6B U.L.A. 489, 491.

119. Callison & Vestal, *supra* note 1, at 308.

120. *Id.* at 308.

121. *Id.* (quoting UNIF. LTD. P’SHIP ACT § 305(2) (amended 1985), 6A U.L.A. 167 (2008)).

122. REVISED UNIF. LTD. LIAB. CO. ACT § 410(b)(2), 6B U.L.A. 493.

123. *Id.* § 410(b)(2)(A), 6B U.L.A. 493.

reasonable particularity the information sought and the purpose for seeking the information,”¹²⁴ and (3) “the information sought is directly connected to the member’s purpose.”¹²⁵ Although the formulation is not identical to the model, both the model and RULLCA provide that non-manager members in manager-managed LLCs should have limited access to private LLC information.

- The model calls for non-manager members in manager-managed LLCs to “have no statutory fiduciary duties,”¹²⁶ and RULLCA provides that a “member does not have any fiduciary duty to the company or to any other member solely by reason of being a member.”¹²⁷

Thus, RULLCA substantially adopts the structuralist model for the fiduciary duties and information disclosure rights of members and managers in LLCs.

IV. CONCLUSION

In 2001, we suggested that under the structuralist model for LLCs, “ULLCA’s dangerous mismatch between the community model’s information rights regime and the autonomy model’s fiduciary duty regime would be eliminated.”¹²⁸ Indeed, the drafters of RULLCA adopted the structuralist model and tamed the mandibles of death.¹²⁹

In their good work, the RULLCA drafters fixed the mandibles of death problem and adopted a far more coherent and theoretically grounded regime of fiduciary duties and disclosure obligations. They also returned the fiduciary duty formulation to its historic foundation, but that is a story for another time. Not a bad day’s work. Thus, while some writers have cautioned against the adoption of and use of RULLCA,¹³⁰ we disagree. Although we continue to disagree with some of the bright-line categorizations in RULLCA, such as those stating that non-manager members in manager-managed LLCs never have duties of loyalty or care and that the duty of care is limited to gross negligence,¹³¹ we recognize that RULLCA contains provisions of value. That said, we differ on the ultimate issue of adoption. Vestal, whose personal

124. *Id.* § 410(b)(2)(B), 6B U.L.A. 493.

125. *Id.* § 410(b)(2)(C), 6B U.L.A. 493.

126. Callison & Vestal, *supra* note 1, at 309.

127. REVISED UNIF. LTD. LIAB. CO. ACT § 409(g)(5), 6B U.L.A. 489.

128. Callison & Vestal, *supra* note 1, at 309.

129. *See supra* notes 93–127 and accompanying text.

130. *See, e.g.,* Larry E. Ribstein, *An Analysis of the Revised Uniform Limited Liability Company Act*, 3 VA. L. & BUS. REV. 35, 39 (2008) (“RULLCA imposes enough risks on limited liability companies that state legislators should hesitate to adopt it, and lawyers should consider carefully the pitfalls of advising clients to form LLCs under RULLCA.”).

131. J. William Callison, “*The Law Does Not Perfectly Comprehend . . .*”: *The Inadequacy of the Gross Negligence Duty of Care Standard in Unincorporated Business Organizations*, 94 KY. L. J. 451, 485 (2005–2006) (critiquing gross negligence duty of care formulation); J. William Callison & Allan W. Vestal, *The Want of a Theory, Again*, 37 SUFFOLK U. L. REV. 719, 727–33 (2004) (critiquing fiduciary duties and information rights provisions of ULPA (2001)).

calculus places substantial value on uniformity, concludes that the product is good enough and would recommend RULLCA's adoption. Callison—though he supports many of the statutory solutions in RULLCA—is less certain of wholesale adoption, but he believes that, at a minimum, state legislatures can look to RULLCA to solve numerous problems, including that of the mandibles of death.

Where do we go from here? There is no conceptual reason why the structuralist model animating the fiduciary duty and information disclosure provisions of RULLCA should not be applied to a new generation of unincorporated business entity statutes—one for partnerships and limited liability partnerships, and the other for limited partnerships. Such a path would bring our uniform statutes back into alignment on this important point.