

C.42:2C-11 Operating agreement; scope, function, and limitations.

11. Operating Agreement; Scope, Function, and Limitations.

a. Except as provided in subsections b. and c. of this section, the operating agreement governs:

(1) relations among the members as members and between the members and the limited liability company;

(2) the rights and duties under this act of a person in the capacity of manager;

(3) the activities of the company and the conduct of those activities; and

(4) the means and conditions for amending the operating agreement.

b. To the extent the operating agreement does not otherwise provide for a matter described in subsection a. of this section, this act governs the matter.

c. An operating agreement may not:

(1) vary a limited liability company's capacity under section 5 of this act to sue and be sued in its own name;

(2) vary the law applicable under section 6 of this act;

(3) vary the power of the court under section 21 of this act;

(4) subject to subsections d. through g. of this section, eliminate the duty of loyalty, the duty of care, or any other fiduciary duty;

(5) subject to subsections d. through g. of this section, eliminate the contractual obligation of good faith and fair dealing under subsection d. of section 39 of this act;

(6) unreasonably restrict the duties and rights stated in section 40 of this act;

(7) vary the power of a court to decree dissolution in the circumstances specified in paragraphs (4) and (5) of subsection a. of section 48 of this act;

(8) vary the requirement to wind up a limited liability company's business as specified in

subsection a. and paragraph (1) of subsection b. of section 49 of this act;

(9) unreasonably restrict the right of a member to maintain an action under Article 9

(sections 67 through 72 of this act);

(10) restrict the right to approve a merger, conversion, or domestication under section 86 of this act to a member that will have personal liability with respect to a surviving, converted, or domesticated organization; or

(11) except as otherwise provided in subsection b. of section 13 of this act, restrict the rights under this act of a person other than a member or manager.

d. If not manifestly unreasonable, the operating agreement may:

(1) restrict or eliminate the duty:

(a) as required in paragraph (1) of subsection b. and subsection g. of section 39 of this act, to account to the limited liability company and to hold as trustee for it any property, profit, or benefit derived by the member in the conduct or winding up of the company's business, from a use by the member of the company's property, or from the appropriation of a limited liability company opportunity;

(b) as required in paragraph (2) of subsection b. and subsection g. of section 39 of this act, to refrain from dealing with the company in the conduct or winding up of the company's business as or on behalf of a party having an interest adverse to the company; and

(c) as required by paragraph (3) of subsection b. and subsection g. of section 39 of this act, to refrain from competing with the company in the conduct of the company's business before the dissolution of the company;

(2) identify specific types or categories of activities that do not violate the duty of loyalty;

(3) alter the duty of care, except to authorize intentional misconduct or knowing violation of law;

(4) alter any other fiduciary duty, including eliminating particular aspects of that duty; and

(5) prescribe the standards by which to measure the performance of the contractual obligation of good faith and fair dealing under subsection d. and subsection g. of section 39 of this act.

e. The operating agreement may specify the method by which a specific act or transaction that would otherwise violate the duty of loyalty may be authorized or ratified by one or more disinterested and independent persons after full disclosure of all material facts.

f. To the extent the operating agreement of a member-managed limited liability company expressly relieves a member of a responsibility that the member would otherwise have under this act and imposes the responsibility on one or more other members, the operating agreement may, to the benefit of the member that the operating agreement relieves of the responsibility, also eliminate or limit any fiduciary duty that would have pertained to the responsibility.

g. The operating agreement may alter or eliminate the indemnification for a member or manager provided by section 38 of this act and may eliminate or limit a member or manager's liability to the limited liability company and members for money damages, except for:

(1) breach of the duty of loyalty;

(2) a financial benefit received by the member or manager to which the member or manager is not entitled;

(3) a breach of a duty under section 36 of this act;

(4) intentional infliction of harm on the company or a member; or

(5) an intentional violation of criminal law.

h. The court shall decide any claim under paragraph (1) of subsection d. of this section that a term of an operating agreement is manifestly unreasonable. The court:

(1) shall make its determination as of the time the challenged term became part of the operating agreement and by considering only circumstances existing at that time; and

(2) may invalidate the term only if, in light of the purposes and activities of the limited liability company, it is readily apparent that:

(a) the objective of the term is unreasonable; or

(b) the term is an unreasonable means to achieve the provision's objective.

i. This act is to be liberally construed to give the maximum effect to the principle of freedom of contract and to the enforceability of operating agreements.