Murray State University

From the Selected Works of Allan W. Vestal

April 14, 2009

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

Allan W. Vestal, University of Kentucky
J. William Callison

Available at: https://works.bepress.com/allan_vestal/1/
TAMING THE MANDIBLES OF DEATH:
SECRET, DISCLOSURE, AND FIDUCIARY DUTIES IN THE
REVISED UNIFORM LIMITED LIABILITY COMPANY ACT

By J. William Callison* and Allan W. Vestal**

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 the use of information were seriously and facially flawed and that these flaws were the result of the drafters combining provisions from dissimilar business organization forms without an adequate underlying theory of the limited liability company (“LLC”) form.2

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 used 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

---

2 Callison and Vestal, Mandibles, supra note 1, at 274; 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.”). A number of others criticized the fiduciary duty provisions of ULLCA, some ascribing the weaknesses in the act to other causes. Rutheford B. Campbell, Bumping Along the Bottom: Abandoned Principles and Failed Fiduciary Standards in Uniform Partnership and LLC Statutes, 96 KY. L.J. 163, 189 (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.”).
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 annoying enough, that we trust the reader to know what we intend.
4 UNIF. LTD. LIAB. CO. ACT §§ 408, 409 (1996), 6B UNIF. LAWS ANN. at 596-98 (§ 408 is “Member’s right to information;” § 409 is “General standards of member’s and manager’s conduct.”).
5 Callison and Vestal, Mandibles, supra note 1, at 279 n. 38 (citing BILL WATTERSON, THE AUTHORITATIVE CALVIN AND HOBBES: A CALVIN AND HOBBES TREASURY 116 (1990)(“Yep, mandibles of death that’s what he’s got” (Calvin to Uncle Max, with reference to Hobbes)).
in unincorporated business organizations. The first, more traditional, model we termed a community model. The second, more individualistic, model was based on party autonomy. We concluded that a third model, which we termed a structural model and which synthesized the autonomy and community models, is a more appropriate basis for analyzing the LLC information rights and use restrictions. At the time, we suggested revisions to the then-new ULLCA which would have, if adopted, conformed its information disclosure and use restrictions to the appropriate structural model and solved the mandibles of death problem.

ULLCA proved unsuccessful as a uniform act. It was adopted by only nine jurisdictions, all in the first four years following its promulgation in 1996. The only major business jurisdiction to adopt ULLCA was Illinois. Trying again to bring uniformity to this important area of the law, in 2006 the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) promulgated a new LLC statute, the Revised Uniform Limited Liability Company Act (“RULLCA”). It is appropriate to review the provisions of RULLCA to see whether the drafters fixed the mandibles of death problem by incorporating an underlying theory of secrecy, disclosure and fiduciary duties.

Part II looks to see if the RULLCA drafters fixed the mandibles of death problem in ULLCA. Part III is a more general review of the RULLCA information disclosure and fiduciary duty sections, to see if the drafters adopted an appropriate underlying theory to guide their efforts. Part IV, the conclusion, suggests a course for future business entity projects 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. Simply put, ULLCA leaves non-manager members unconstrained by any fiduciary duties but with sweeping information rights. 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. We review the fiduciary duty provisions of RULLCA and then its information provisions to see if the mandibles of death problem has been resolved.

---

6 Callison and Vestal, Mandibles, supra note 1, at 298-305.
7 Callison and Vestal, Mandibles, supra note 1, at 294-98.
8 Callison and Vestal, Mandibles, supra note 1, at 305-06.
9 Callison and Vestal, Mandibles, supra note 1, at 307-09.
10 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. 6B Unif. Laws Ann. at 545. It has not been adopted by any jurisdiction since.
11 805 ICS 180/1-1 to 180/60-1.
What are the duties of non-manager members? Under ULLCA the fiduciary duties of such non-manager members are simply stated: they have none. "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 . . ."\(^{13}\) Nor do such members have a good faith and fair dealing obligation under ULLCA.\(^{14}\) This absence of fiduciary duties allows the mandibles of death problem to arise.

With respect to the fiduciary duties of non-manager members, RULLCA reaches the same result as ULLCA – such members have no fiduciary duties – but does so in a rather more complicated way. The statute provides that members in member-managed LLCs have fiduciary duties of loyalty and care.\(^{15}\) It then provides that in manager-managed LLCs §409(a) – and thus the fiduciary duties of loyalty and care – apply to managers but not to members.\(^{16}\)

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 subject to the obligation of good faith and fair dealing: "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."\(^{17}\)

Does the existence of an obligation of good faith and fair dealing on the part of non-manager members answer the mandibles of death problem? As it turns out, the answer is not clear. 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

---

\(^{13}\) UNIF. LTD. LIAB. CO. ACT § 409(h)(1) (1996), 6B UNIF. LAWS ANN. at 598.

\(^{14}\) UNIF. LTD. LIAB. CO. ACT § 409(d) (1996), 6B UNIF. LAWS ANN. at 598 ("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."). The language of § 409(d) admits two readings. The first is that it applies in full only to member-managed companies. The second is that the language, "A member shall . . . exercise any right consistently with the obligation of good faith and fair dealing," applies to all members, including members in manager-managed companies. While we tended to earlier accept the second reading (Callison and Vestal, Mandibles, supra note 1, at 276), the placement of the subsection in the middle of six subsections which by their terms deal only with member-managed companies is confusing.

\(^{15}\) REV. UNIF. LTD. LIAB. CO. ACT § 409(a) (2006), 6B UNIF. LAWS ANN. at 488.

\(^{16}\) REV. UNIF. LTD. LIAB. CO. ACT § 409(g)(1) (2006), 6B UNIF. LAWS ANN. at 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.").

\(^{17}\) REV. UNIF. LTD. LIAB. CO. ACT § 409(d) (2006), 6B UNIF. LAWS ANN. at 489. Indeed, possibly to atone for the confusion on this point in ULLCA, RULLA restates the proposition. REV. UNIF. LTD. LIAB. CO. ACT § 409(g)(3) (2006), 6B UNIF. LAWS ANN. at 489 ("In a manager-managed limited liability company . . . Subsection (d) applies to the members and managers.").

3
under the operating agreement and exercise any rights consistently with the contractual obligation of good faith and fair dealing.\textsuperscript{18}

Under RULLCA (as under the Revised Uniform Partnership Act\textsuperscript{19} (“RUPA”) and ULLCA\textsuperscript{20}) the obligation of good faith and fair dealing is not a fiduciary duty, but rather is a non-fiduciary, non-stand alone obligation sounding in contract:

This 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. As explained in the Comment to ULPA (2001), § 305(b):

The 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. Courts should not use the obligation to change ex post facto the parties’ or this Act’s allocation of risk and power. To the contrary, in light of the nature of a limited partnership, the obligation 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 . . . . In sum, the purpose of the obligation of good faith and fair dealing is to protect the arrangement the partners have chosen for themselves, not to restructure that arrangement under the guise of safeguarding it.\textsuperscript{21}

\textsuperscript{18} REV. UNIF. LTD. LIAB. CO. ACT § 409(d) (2006), 6B UNIF. LAWS ANN. at 489.

\textsuperscript{19} REV. UNIF. P’SHIP ACT § 404(d) (1997), 6 Unif. Laws Ann. (Pt. I) at 143 (“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.”). 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 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.

\textsuperscript{20} UNIF. LTD. LIAB. CO. ACT § 409(d) (1996), 6B UNIF. LAWS ANN. at 598 (“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.”).

\textsuperscript{21} REV. UNIF. LTD. LIAB. CO. ACT § 409 cmt. (2006), 6B UNIF. LAWS ANN. at 491 (citing official commentary to ULPA (2001).
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 through the member’s status as member for the member’s benefit, to the detriment of the LLC? Perhaps.

If, as the official commentary provides, “the obligation is not an invitation to rewrite 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 “[c]ourts should not use the obligation to change ex post facto the parties’ or this Act’s allocation of risk and power,” then it would seem difficult to argue that for a non-manager member to use information to the member’s benefit would be a violation. If we accept the 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.” The RULLCA drafters were presumably aware of the mandibles of death problem. They made a clear policy choice in RULLCA that fiduciary duties do not apply to non-manager members. It would therefore seem very 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.”

Part of the uncertainty as to whether the self-serving use of company information by a non-manager member could be a violation of the obligation of good faith and fair dealing comes from the decision of the RULLCA drafters to not define the term. In this, they are consistent with the drafters of RUPA and ULLCA. There are a number of ways in which the “good faith and fair dealing” obligation could be conceptualized. Assuming the RULLCA drafters intended to follow the lead of the RUPA drafters on this point, we can start by rejecting the Uniform Commercial Code definition of “good faith:”

---

24 Callison and Vestal, Mandibles, 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 the work leading to RULLCA.
25 REV. UNIF. LTD. LIAB. CO. ACT § 409(a), (g)(1) (2006), 6B UNIF. LAWS ANN. at 488-89.

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.

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.\(^{28}\)

If not the UCC definition of honesty in fact, then what? A number of alternatives have been suggested to define the obligation of good faith and fair dealing. In all candor, they do not greatly help resolve the mandibles problem, but seem overall to suggest that the obligation of good faith and fair dealing does not provide a promising basis upon which to challenge a non-manager member in the mandibles of death situation.

A narrow view sees the good faith and fair dealing obligation as a gap filler.\(^{29}\) Here the question is “whether the parties would have agreed to prohibit the complained-of action, had they thought to negotiate the point.”\(^{30}\) Under this interpretation it would seemingly be hard to challenge the non-manager member who used LLC information for the member’s advantage and to the detriment of the LLC. The drafters were aware of the mandibles problem and RULLCA clearly excludes non-manager members from fiduciary duties. There does not seem to be a gap to be filled.

Another possible interpretation sees the good faith and fair dealing obligation as testing whether the member acted in knowing breach of the agreement.\(^{31}\) Here the question is “whether a [member] knows that it is breaching its contract.”\(^{32}\) This interpretation does not appear helpful to a potential plaintiff, since 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 goes to the actor’s state of mind. Here 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.\(^{33}\) This tortious state of mind is seen as proof that “the defendant possessed an intent to harm, or the defendant’s actions constituted reckless and wanton misconduct or willful and wanton misconduct.”\(^{34}\) This could be seen to focus on the wrong question – it would seem an odd result for the question of liability to turn on whether our non-manager member intends to benefit herself or harm the LLC.

A final possibility is found in the suggestion that it would be valuable to look past the partnership cases in developing an understanding of the concept of good faith and fair dealing, and to review the cases involving closely held corporations.\(^{35}\) Especially when addressing the obligation of good faith and fair dealing in the limited liability company context, given the blending of partnership and close corporation provisions inherent in the form, it would seem appropriate to consider the closely held corporation cases.

\(^{28}\) REv. Unif. P’ship Act § 404 cmt. 4 (1997), 6 Unif. Laws Ann. (Pt. I) at 145 (citing UCC §§ 1-201(19) and 2-103(b)). Callison, Blind Men and Elephants, supra note 19, at 141.

\(^{29}\) Callison, Blind Men and Elephants, supra note 19, at 141-43.

\(^{30}\) Callison, Blind Men and Elephants, supra note 19, at 145.

\(^{31}\) Callison, Blind Men and Elephants, supra note 19, at 143-44.

\(^{32}\) Callison, Blind Men and Elephants, supra note 19, at 145.

\(^{33}\) Callison, Blind Men and Elephants, supra note 19, at 144-45.

\(^{34}\) Callison, Blind Men and Elephants, supra note 19, at 147.

\(^{35}\) Callison, Blind Men and Elephants, supra note 19, at 148-53.
Looking at the famous trio of Massachusetts cases, Donahue v. Rodd Elecrotype Co.,\textsuperscript{36} Wilkes v. Springside Nursing Home, Inc.,\textsuperscript{37} and Smith v. Atlantic Properties, Inc.,\textsuperscript{38} this analysis suggests a two part test, in the LLC context paraphrased as: “the acting [members] would need to indicate a [company] business purpose for their action, and the burden would then shift to the complaining [member] to demonstrate that the business purpose could be attained by a less harmful means.”\textsuperscript{39} It is not clear how this interpretation of the obligation of good faith and fair dealing would be applied to the situation at issue here. One could require the non-manager member to demonstrate a business purpose personal to the member, and then shift the inquiry to let the LLC demonstrate that the non-manager member’s business purpose could have been attained by a less harmful means. Such an interpretation does not seem destined to assist a plaintiff in 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.”\textsuperscript{40} The official commentary suggests that “fair dealing” is an objective test, as opposed to the subjective test of good faith.\textsuperscript{41} It is not clear how a non-manager member’s use of LLC information to the benefit of the member and the detriment of the LLC would measure up under an objective fair dealing test.

It is, therefore, not clear whether the RULLCA drafters solved the mandibles of death problem on the fiduciary duty / obligation of good faith and fair dealing side. If they did not solve the mandibles of death problem by imposing fiduciary duties or an obligation of good faith and fair dealing on non-manager members, did they solve it by restricting the access of such members to company information? As it turns out, they did indeed.

One of the most significant changes from ULLCA to RULLCA was a revision in the information rights of non-manager members. Under ULLCA no differentiation in information rights was made between members in member-managed and manager-

\textsuperscript{36} Donahue v. Rodd Elecrotype Co., 328 N.E.2d 505 (Mass., 1975).
\textsuperscript{39} Callison, \textit{Blind Men and Elephants}, supra note 19, at 152.
\textsuperscript{40} The “fair dealing” component was eliminated, at the request of the ABA conferees, and then restored, over their objection, because of comments from the floor at a plenary session of NCCUSL. Allan W. Vestal, \textit{Fundamental Contractarian Error in the Revised Uniform Partnership Act of 1992}, 73 B. U. L. Rev. 523, 549 n. 102 (1993) (citing \textsc{Proceedings of the National Conference of Commissioners on Uniform State Laws, Uniform Partnership Act, Proceedings of the Committee of the Whole} (July 31 – Aug. 6, 1992), at 179-80). The clear intent, as confirmed by the official commentary, was to expand the obligation beyond what it would be under a “good faith” formulation. \textit{Id}, \textsc{Rev. Unif. P’Ship Act} § 404 cmt. 4 (1997), 6 Unif. Laws Ann. (Pt I) at 145. ROBERT W. HILLMAN, ALLAN W. VESTAL & DONALD J. WEIDNER, \textit{The Revised Uniform Partnership Act}, at 275 (Thomson West, 2008).
\textsuperscript{41} \textsc{Rev. Unif. P’Ship Act} § 404 cmt. 4 (1997), 6 Unif. Laws Ann. (Pt I) at 145.
managed LLCs. This was true as to records,\textsuperscript{42} information required to be furnished absent demand,\textsuperscript{43} information required to be furnished on demand,\textsuperscript{44} and a copy of the operating agreement.\textsuperscript{45} This failure to differentiate between members in member-managed LLCs – who had fiduciary duties which would presumably limit the improper use of such information – and non-manager members – who had no fiduciary duties to limit the improper use of information – led to the mandibles of death problem.\textsuperscript{46}

All 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,\textsuperscript{47} RULLCA differentiates between members in member-managed and manager-managed LLCs, having separate statutory provisions for each.\textsuperscript{48} Within the member-managed subdivision, where fiduciary duties constrain the use of information by the member, members have access to records\textsuperscript{49} and to ranges of information without demand\textsuperscript{50} and upon demand.\textsuperscript{51} Within the manager-managed

\textsuperscript{42} UNIF. LTD. LIAB. CO. ACT §408(a) (1996), 6B UNIF. LAWS ANN. at 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.”).

\textsuperscript{43} UNIF. LTD. LIAB. CO. ACT §408(b) (1996), 6B UNIF. LAWS ANN. at 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]. . .”).

\textsuperscript{44} UNIF. LTD. LIAB. CO. ACT §408(b)(2) (1996), 6B UNIF. LAWS ANN. at 596 (“A limited liability company shall furnish to a member, and to the legal representative of a deceased member or member under legal disability: . . . 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.”).

\textsuperscript{45} UNIF. LTD. LIAB. CO. ACT §408(c) (1996), 6B UNIF. LAWS ANN. at 596ULLCA 408(c) (“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.”).

\textsuperscript{46} Callison and Vestal, Mandibles, supra note 1, at 279-80.


\textsuperscript{48} REV. UNIF. LTD. LIAB. CO. ACT § 410(a) (2006), 6B UNIF. LAWS ANN. at 492-93 (member-managed LLCs); REV. UNIF. LTD. LIAB. CO. ACT § 410(b) (2006), 6B UNIF. LAWS ANN. at 493 (manager-managed LLCs).

\textsuperscript{49} REV. UNIF. LTD. LIAB. CO. ACT § 410(a)(1) (2006), 6B UNIF. LAWS ANN. at 492-93 (“(a) 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, to the extent the information is material to the member's rights and duties under the operating agreement or this [act].”).

\textsuperscript{50} REV. UNIF. LTD. LIAB. CO. ACT § 410(a)(2)(A) (2006), 6B UNIF. LAWS ANN. at 493 (“(a) 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
subdivision, where no fiduciary duties constrain the use of information by the member, members have sharply restricted rights to information. First, the informational rights of members in member-managed LLCs are specifically denied members in manager-managed LLCs. Next, the members in manager-managed LLCs have specific rights to information “as is just and reasonable” if the information is sought “for a purpose material to the member’s interest as a member,” and if “the information sought is directly connected to the member’s purpose.” Finally, RULLCA provides that a LLC may, in the ordinary course, impose additional restrictions and conditions on the availability of information.

Thus the drafters of RULLCA solved the mandibles of death problem by restricting the availability of information to non-manager members, and possibly by making the non-manager member subject to the non-fiduciary obligation 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? Section III. looks at the provisions of RULLCA to see.

III. RULLCA and a General Theory of Secrecy, Disclosure and Fiduciary Duties.

In our prior discussion of these issues, we suggested that “it would be helpful to proceed from a clearly articulated theory of how information rights and use provisions

---

51 REV. UNIF. LTD. LIAB. CO. ACT § 410(a)(2)(B) (2006), 6B UNIF. LAWS ANN. at 493 (“(a) 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.”).

52 REV. UNIF. LTD. LIAB. CO. ACT § 410(b) (2006), 6B UNIF. LAWS ANN. at 493 (“In a manager-managed limited liability company, the following rules apply: . . . (1) The informational rights stated in subsection (a) and the duty stated in subsection (a)(3) apply to the managers and not the members.”).

53 REV. UNIF. LTD. LIAB. CO. ACT § 410(b) (2006), 6B UNIF. LAWS ANN. at 493 (“In a manager-managed limited liability company, the following rules appy: . . . (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.”).

54 REV. UNIF. LTD. LIAB. CO. ACT § 410(g) (2006), 6B UNIF. LAWS ANN. at 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 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.”).
should be structured.”\(^{55}\) We identified three approaches that we felt showed some promise: party autonomy, communitarianism, and structuralism.

The party autonomy model we suggested\(^ {56}\) “would conceive of the associating parties as atomistic contracting agents engaged in individual wealth-maximizing behavior with constant recalculation of individual advantage.”\(^ {57}\) This model allows for instantaneous recalculation of individual wealth-maximization, and does not require the parties to subordinate immediate individual advantage in order to realize long-term collective-wealth gains. In terms of information rights, the party autonomy model would resemble arm’s-length commercial negotiations. Parties would not frequently be required to disclose information, and parties certainly would be free to not disclose information when the information is the product of the party’s deliberate effort. We suggested an example of how this might work in a typical partnership setting:

If this individualist model were to be used in a 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.\(^ {58}\)

It is acknowledged that the party autonomy model does not describe the outcome of the broad sweep of partnership cases.

The communitarian model we suggested\(^ {59}\) “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.”\(^ {60}\) This model prohibits the instantaneous recalculation of individual wealth-maximization, and requires the parties to subordinate immediate individual advantage in order to realize long-term collective-wealth gains. The restrictions on instantaneous recalculation of individual wealth-maximization are a function of status, not of contract:

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

---

\(^{55}\) Callison and Vestal, *Mandibles*, supra note 1, at 292.

\(^{56}\) Callison and Vestal, *Mandibles*, supra note 1, at 294-98.

\(^{57}\) Callison and Vestal, *Mandibles*, supra note 1, at 294.

\(^{58}\) Callison and Vestal, *Mandibles*, supra note 1, at 297.

\(^{59}\) Callison and Vestal, *Mandibles*, supra note 1, at 298-305.

\(^{60}\) Callison and Vestal, *Mandibles*, supra note 1, at 298.
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.\footnote{Callison and Vestal, \textit{Mandibles}, supra note 1, at 298.}

In terms of information rights, within the communitarian model “there should be broad disclosure rights in contract-based business communities such that partners cannot obtain personal benefit at the expense of either the collective interests of the partnership or the interests of their copartners.”\footnote{Callison and Vestal, \textit{Mandibles}, supra note 1, at 299.} Such disclosure rights would be coupled with robust fiduciary duties.\footnote{Callison and Vestal, \textit{Mandibles}, supra note 1, at 299.} We suggest that the communitarian model was the traditional basis for the information disclosure provisions of partnership law, surely under the common law and the UPA, and continuing with the advent of RUPA with the caveat that RUPA adopted a fiduciary duty formulation different from that under the communitarian model.\footnote{Callison and Vestal, \textit{Mandibles}, supra note 1, at 305-06.}

The structuralist model we suggested\footnote{Callison and Vestal, \textit{Mandibles}, supra note 1, at 306.} attempted to avoid both the atomistic aspects of the party autonomy model and the self-abnegation of the communitarian model in a pragmatic model which combined the regard for party autonomy's regard for party wealth maximization and communitarianism's recognition of the social dimensions of the firm. The structuralist model provides for socially regarding default rules with a range within which private ordering can provide for modification by contract. Within the structuralist model the information provisions are more nuanced than under either the party autonomy or communitarian models. The default information rules would be a function of the level of participant involvement:

\[\ldots\text{the general disclosure rules which operate in the absence of a particular contract would take into account the other aspects of the parties' legal relationship to one another and, in doing so, would recognize that in different circumstances members can have different participation levels in the business community they create. When there is greater member participation, such as when ownership and management authority converge, the law should assume greater information disclosure rights and increased fiduciary duties. On the other hand, when there is little or no convergence between ownership and management authority, such as when certain members merely contribute capital and share only in the firm's reward attributes, the law should assume reduced information disclosure rights and reduced fiduciary duties.}\]

The structuralist model, we suggested, explains historical levels of fiduciary duties and information rights among various types of unincorporated firms.

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 be drafted from a structuralist approach. We suggested that the application of a structuralist model to LLCs would result in differences in fiduciary duties and information rights based on differences in participation characteristics. We suggested three different classifications for members in member-managed LLCs, members who are managers in manager-managed LLCs, and members who are not managers in manager-managed LLCs. Members in member-managed LLCs would have broad information rights and fiduciary duties:

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 the RUPA, such members would have statutory fiduciary duties of loyalty and care together with a nonfiduciary obligation of good faith and fair dealing.

Members who are managers in manager-managed LLCs would also have broad information rights and fiduciary duties:

. . . members who are also manages in manager-managed LLCs should have the broad information rights and fiduciary duties of general partners in limited partnerships. . . . such 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 statutory fiduciary duties of loyalty and care, together with a nonfiduciary obligation of good faith and fair dealing.

Non-manager members in manager-managed LLCs would have the lowest level of information rights and fiduciary duties:

. . . nonmanager members in manager-managed LLCs should have the narrow an weaker information rights and fiduciary duties of limited partners in limited partnerships. . . . such nonmanager members would have a somewhat restricted statutory right to information, which includes the right to inspect and copy basic firm records and the right to obtain from the managers from time to time upon reasonable demand (i) true and full information regarding the state of the business and financial condition of the [LLC], (ii) promptly after becoming available, a copy of the [LLC’s] federal, state, and local income tax returns for each year, and (iii) other information regarding the affairs of the [LLC] as is just and reasonable.

---

67 Callison and Vestal, Mandibles, supra note 1, at 307-09, 309-12. At that point, we were looking to the NCCUSL project to draft a successor to RULPA.
68 Callison and Vestal, Mandibles, supra note 1, at 307.
69 Callison and Vestal, Mandibles, supra note 1, at 307-08.
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. One the fiduciary duty side . . . a nonmanager member would have no statutory fiduciary duties.70

Against this template, how did the RULLCA drafters do? The application of a structuralist model to LLCs would result in differences in fiduciary duties and information rights based on differences in participation characteristics. As a general matter, the model suggests that members in member-managed LLCs should have broad information rights and fiduciary duties, using as a template the information rights and fiduciary duties of partners in general partnerships. 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,71 and RULLCA provides it with only a materiality condition.72

☞ 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,73 and RULLCA provides it.74

☞ The model calls for members in member-managed LLCs to have a right upon reasonable and proper demand to all information concerning the LLC,75 and RULLCA provides it.76

☞ The model calls for members in member-managed LLCs to have a statutory fiduciary duty of loyalty,77 and RULLCA provides it.78

☞ The model calls for members in member-managed LLCs to have a statutory fiduciary duty of care,79 and RULLCA provides it.80

70 Callison and Vestal, Mandibles, supra note 1, at 308-09.
71 Callison and Vestal, Mandibles, supra note 1, at 307.
73 Callison and Vestal, Mandibles, supra note 1, at 307.
75 Callison and Vestal, Mandibles, supra note 1, at 307.
77 Callison and Vestal, Mandibles, supra note 1, at 307.
78 REV. UNIF. LTD. LIAB. CO. ACT § 409(a) (2006), 6B UNIF. LAWS ANN. at 492-93.
79 Callison and Vestal, Mandibles, supra note 1, at 307.
80 REV. UNIF. LTD. LIAB. CO. ACT § 409(a) (2006), 6B UNIF. LAWS ANN. at 492-93.
The model calls for members in member-managed LLCs to have a nonfiduciary obligation of good faith and fair dealing, and RULLCA provides it.\textsuperscript{82}

As a general matter, the model suggests that member-managers in manager-managed LLCs should have broad information rights and fiduciary duties, using as a template the information rights and fiduciary duties of partners in general partnerships. 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, and RULLCA provides it.\textsuperscript{84}

- 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, and RULLCA provides it.\textsuperscript{86}

- 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, and RULLCA provides it.\textsuperscript{88}

- The model calls for member-managers in manager-managed LLCs to have a statutory fiduciary duty of loyalty, and RULLCA provides it.\textsuperscript{90}

- The model calls for member-managers in manager-managed LLCs to have a statutory fiduciary duty of care, and RULLCA provides it.\textsuperscript{92}

- The model calls for member-managers in manager-managed LLCs to have a nonfiduciary obligation of good faith and fair dealing, and RULLCA provides it.\textsuperscript{94}

---

\textsuperscript{81} Callison and Vestal, \textit{Mandibles}, supra note 1, at 307.
\textsuperscript{82} \textit{REV. UNIF. LTD. LIAB. CO. ACT} § 409(d) (2006), 6B UNIF. LAWS ANN. at 492-93.
\textsuperscript{83} Callison and Vestal, \textit{Mandibles}, supra note 1, at 308.
\textsuperscript{84} \textit{REV. UNIF. LTD. LIAB. CO. ACT} § 410(b)(1) (2006), 6B UNIF. LAWS ANN. at 493.
\textsuperscript{85} Callison and Vestal, \textit{Mandibles}, supra note 1, at 308.
\textsuperscript{86} \textit{REV. UNIF. LTD. LIAB. CO. ACT} § 410(b)(1) (2006), 6B UNIF. LAWS ANN. at 493.
\textsuperscript{87} Callison and Vestal, \textit{Mandibles}, supra note 1, at 308.
\textsuperscript{88} \textit{REV. UNIF. LTD. LIAB. CO. ACT} § 410(b)(1) (2006), 6B UNIF. LAWS ANN. at 493.
\textsuperscript{89} Callison and Vestal, \textit{Mandibles}, supra note 1, at 308.
\textsuperscript{90} \textit{REV. UNIF. LTD. LIAB. CO. ACT} § 409(g)(1) (2006), 6B UNIF. LAWS ANN. at 489.
\textsuperscript{91} Callison and Vestal, \textit{Mandibles}, supra note 1, at 308.
\textsuperscript{92} \textit{REV. UNIF. LTD. LIAB. CO. ACT} § 409(g)(1) (2006), 6B UNIF. LAWS ANN. at 489.
\textsuperscript{93} Callison and Vestal, \textit{Mandibles}, supra note 1, at 308.
\textsuperscript{94} \textit{REV. UNIF. LTD. LIAB. CO. ACT} § 409(d),(g)(3) (2006), 6B UNIF. LAWS ANN. at 489.
As a general matter, the model suggests that members who are not managers in manager-managed LLCs should have narrow and weak information rights and fiduciary duties, using as a template the information rights and fiduciary duties of limited partners in limited partnerships. RULLCA matches this scheme to some measure:

The model calls for non-manager members in manager-managed LLCs to have a right to inspect and copy basic firm records, and to have a right to obtain from the managers “from time to time upon reasonable demand (i) true and full information regarding the state of the business and financial condition of the [LLC], (ii) promptly after becoming available, a copy of the [LLC’s] federal, state, and local income tax returns for each year, and (iii) other information regarding the affairs of the [LLC] as is just and reasonable.” 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” subject to the limitations that such right contains the limitations that it may only be exercised to obtain information “as is just and reasonable,” that “the member seeks the information for a purpose material to the member’s interest as a member,” that the member makes the demand “describing with reasonable particularity the information sought and the purpose for seeking the information,” and that “the information sought is directly connected to the member’s purpose.” Although the formulation is not identical to the model, the end result is certainly an approximation of the result called for in the model.

The model calls for non-manager members in manager-managed LLCs to have no statutory fiduciary duties, and RULLCA provides this result.

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

IV. Conclusion.

95 Callison and Vestal, Mandibles, supra note 1, at 308.
96 Callison and Vestal, Mandibles, supra note 1, at 308 (quoting REVISED UNIF. LTD. P’SHP. ACT § 305(2), 6A U.L.A. 167 (1995)).
102 Callison and Vestal, Mandibles, supra note 1, at 309.
103 REV. UNIF. LTD. LIAB. CO. ACT § 409(g)(1) (2006), 6B UNIF. LAWS ANN. at 489.
In 2001 we suggested that under the structuralist model for LLCs “the ULLCA’s dangerous mismatch between the community model’s information rights regime and the autonomy model’s fiduciary duty regime would be eliminated.”\textsuperscript{104} Indeed, the drafters of RULLCA adopted the structuralist model and tamed the mandibles of death.

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.\textsuperscript{105} Not a bad day’s work. Thus while some writers have cautioned against the adoption of and use of RULLCA,\textsuperscript{106} we disagree. While 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,\textsuperscript{107} we recognize that RULLCA contains provisions of value. We differ on the ultimate issue of adoption. Vestal, whose personal calculus places substantial value on uniformity, concludes the product is good enough and would recommend RULLCA’s adoption. Callison, while he supports many of the statutory solutions in RULLCA, is less certain of wholesale adoption but believes that, at a minimum, state legislatures can look to RULLCA to solve numerous problems, including the mandibles of death problem.

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 shouldn’t be applied to a new generation of unincorporated business entity statutes, one for partnerships and limited liability partnerships, the other for limited partnerships. Such a path would bring our uniform statutes back into alignment on this important point.

\textsuperscript{104} Callison and Vestal, \textit{Mandibles}, supra note 1, at 309.
\textsuperscript{106} Larry E. Ribstein, \textit{An Analysis of the Revised Uniform Limited Liability Company Act}, \textit{3 Va. L. & Bus. Rev.} 35 (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.”).