

**THIRD-PARTY DELAWARE OPINIONS  
FOR STRUCTURED FINANCE AND OTHER COMMERCIAL TRANSACTIONS**

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Part II of III:  
Customary Delaware State Law Opinions

**Opinions Provided**

The Delaware LLC and DST opinion letters generally include multiple opinions on Delaware law.

**The Duly Formed, Validly Existing and Good Standing Opinion.**

Opinions regarding the valid formation and good standing of the LLC and DST borrowers are always requested. These opinions require careful review of the Entity Documents.

**EXAMPLE:**

*Each of the Delaware Entities is a limited liability company that has been duly formed and is validly existing and in good standing under Delaware law and is a legal entity separate and apart from its Members.*

LLCs are hybrid entities that combine desirable characteristics of corporations, limited partnerships and general partnerships.<sup>2</sup> LLC's may have one or more members (the "Single Member LLC").<sup>3</sup> Although not as common as the Single Member LLC, LLCs may have a series of members, managers or limited liability interests with separate interests each of which can be held separate from the assets and liabilities of other series.<sup>4</sup>

Formation of an LLC in Delaware is a simple procedure. LLCs are formed by filing a certificate of formation with the Delaware Secretary of State *by an authorized person*.<sup>5</sup> This presumes that the limited liability company agreement, i.e., the agreement that sets forth the details of the operations of the entity, pre-dates the

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<sup>2</sup> *Great Lakes Chem. Corp. v. Monsanto Co.*, 96 F. Supp. 2d 376 (D. Del. 2000).

<sup>3</sup> 6 Del. C. § 18-101(6).

<sup>4</sup> 6 Del. C. § 18-215.

<sup>5</sup> 6 Del. C. § 18 204.

filing. The certificate of formation must include:

- name of the LLC;
- address of registered office; and
- name and address of registered agent.<sup>6</sup>

The Certificate of Formation may include other matters determined by the members. Occasionally, lenders will ask to include additional provisions (such as SPE provisions) in the Certificate of Formation as well as the LLC Agreement. This practice is not recommended as it provides no additional protection to the Lender (unlike a corporation, there is no provision that must be included in an LLC's Certificate of Formation, as opposed to its LLC Agreement, in order to be effective, and the inclusion of such provisions are not considered notice under the Delaware LLC Act).<sup>7</sup> Moreover, inclusion of such provisions in the Certificate of Formation will result in unnecessary additional expense for the Borrower should they wish to engage in other business after the satisfaction of the Loan (as they will have to file a revised Certificate).

Filing of the certificate is effective legal notice of the entity's existence. No other filing or publication is required. One of the advantages of a Delaware LLC is confidentiality. An LLC is not required to publicly file its limited liability company agreement, its membership roster, and/or its capital and organizational structure. It need only file sufficient information publicly to put the public on notice of its formation, *i.e.*, the certificate of formation.

A DST is formed pursuant to a written governing instrument, *i.e.*, the trust agreement, and the filing of a certificate of trust with the Delaware Secretary of State. There are only three requirements in a certificate of trust.

- name of the DST;
- address of at least one trustee; and
- date of effectiveness if different from the date of filing.<sup>8</sup>

The DST must always have at least one Trustee residing, incorporated, or otherwise situated in the State of Delaware.<sup>9</sup> This requirement is sometimes met by having a person or entity in Delaware serve as a nominal "Delaware Trustee" with limited or no management authority.

The DST has perpetual existence unless a finite time-frame is specified in its organizing

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<sup>6</sup> 6 *Del. C.* § 18-201.

<sup>7</sup> Moreover, because the LLC Agreement is often the subject of negotiation right up until the date of closing, such provisions may further complicate matters if they do not match exactly with the language of the final LLC Agreement.

<sup>8</sup> 12 *Del. C.* § 3810.

<sup>9</sup> 12 *Del. C.* § 3807.

papers. Death, incapacity, dissolution, termination or bankruptcy of the beneficial owner will not terminate the DST.<sup>10</sup>

Unlike LLCs and corporations, the DST requires no franchise or other annual tax. However, the fees associated with engaging a professional Delaware trustee are typically dramatically higher than those for a Delaware registered agent of an LLC or corporation.

While the statute requires no specifics in the governing instrument, the document is generally lengthy and contains detailed provisions regarding the management and existence of the trust.

When validly formed and in good standing, both a Delaware LLC and a DST are separate and apart from their respective members, managers, beneficial owners and trustees. *E.g.*, 6 *Del. C.* §18-201(b); 12 *Del. C.* § 3810.

#### Opinions Regarding Due Authority and Authorization.

Opinions that the subject LLC and/or DST has the authority to enter into the transaction, has authorized entry into the transaction and execution and delivery of the Loan Documents and no other action by anyone is required, are almost always requested. Again these opinions require careful review of the Entity Documents and review of the Loan Documents to be certain that this transaction has been duly authorized.

#### EXAMPLES:

*Each of the Delaware Entities has power and authority under Delaware law and the Entity Documents to execute, deliver and perform its respective obligations under the respective Loan Documents to which it is a party.*

*Under Delaware law and the Limited Liability Company Agreement of each Delaware Entity, the execution and delivery by such Delaware Entity of each of the Loan Documents to which it is a party, and the performance by each Delaware Entity of its respective obligations thereunder, have been duly authorized by all necessary limited liability company action on the part of such Delaware Entity.*

*No consent, approval or other authorization of or registration, declaration or filing with, any court or governmental agency or commission of the State of Delaware is required in connection with the execution or delivery by each of the Delaware Entities of the respective Loan Documents to which it is a party, or the performance by such Delaware Entity of its respective obligations thereunder.*

*The execution and delivery by each Delaware Entity of the respective Loan Documents to which it is a party, will not (i) result in a breach or violation of*

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<sup>10</sup> 12 *Del. C.* § 3808.

*any law or governmental rule or regulation of Delaware applicable to the parties thereto and now in effect, or (ii) conflict with or violate the applicable Entity Documents of such Delaware Entity.*

The authority opinions require a review of the entity's governing instrument or operating agreement. The member or members of an LLC enter into a limited liability company agreement which governs the management of the company.<sup>11</sup> While the limited liability company agreement can be oral or written, a written limited liability company agreement is a prerequisite for any opinion.

The limited liability company agreement delineates the power and authority of the LLC to enter into a given transaction. The limited liability company agreement is granted almost plenary deference by both the statutes and the courts. Almost all provisions of the LLC Act permit the limited liability company agreement to establish procedures and structures different from those set out in the LLC Act itself. Only on rare occasion does the statute trump the limited liability company agreement. Absent any illegal provisions in the limited liability company agreement, or provisions that are void for public policy reasons (which see further below), the courts generally view the limited liability company agreement as a contract and accord it the same regard that they traditionally grant other contractual agreements.

Management is generally in the hands of members; however, members may at their discretion establish managers and other governing entities to control day-to-day functions. Such managers are vested with whatever powers are granted in the limited liability company agreement. Different managers or classes/groups of managers may be vested with different spheres of authority. A board of directors is not required; however, it may be utilized as a management body. This was frequently done when LLCs were a relatively new form of entity because investors were familiar and comfortable with the traditional corporate structure, but today is quite rare as most people are comfortable with the member/manager structure envisioned in the LLC Act. The limited liability company agreement may also designate officers or agents to carry out the functions of the LLC.<sup>12</sup>

The beneficial owners and the trustee(s) of a DST enter into a written "governing instrument," consisting of one or more documents, which creates the trust or provide for the governance of its business affairs and conduct of business.<sup>13</sup> Like the limited liability company agreement for LLCs, the governing instrument is granted almost plenary deference by both the statutes and the courts. Almost all provisions of the DST Act permit the governing instrument to establish procedures and structures different from those set out in the DST Act itself or the Certificate of Trust.<sup>14</sup> With rare

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<sup>11</sup> 6 Del. C. § 18-201(d).

<sup>12</sup> 6 Del. C. § 18-402.

<sup>13</sup> 12 Del. C. §3801, 3808.

<sup>14</sup> *E.g.*, 12 Del. C. §3801.

exceptions, the governing instrument defines the power and authority of the DST to enter into the transaction that is the subject of the opinion.

The Management of a DST is typically conducted by trustees; however, as with LLCs, the DST Act allows almost limitless flexibility. Each DST may design a management organization that best meets its needs, with officers, managers, etc. Such organization members are vested with whatever powers are granted in governing instrument. Different trustees or classes/groups of trustees may be vested with different spheres of authority.<sup>15</sup>

### Opinions Regarding Limitations on Authority.

Subsumed in the opinions on authority are opinions regarding the legality of limitations on the LLC's or DST's authority. Sometimes, however, a lender will request an opinion as to a specific limitation. Such limitations are generally inserted into the limited liability company agreement or governing instrument as required by lenders and underwriters. Most common are the Single Purpose Entity ("SPE") limitations. Some examples of SPE provisions in a limited liability company agreement are discussed in more detail below. These provisions should be carefully reviewed when proffering an opinion.

#### EXAMPLE:

*If properly presented to a Delaware court, a applying Delaware law, would conclude that (i) for as long as any obligation is outstanding, in order for a person to file a voluntary bankruptcy petition on behalf of the Company, the written consent of the Independent Manager as provided for in section \_\_\_ of the limited liability company agreement, is required, and (ii) such provision, contained in section \_\_\_ of the limited liability company agreement, that require, for as long as any obligation is outstanding, the unanimous written consent of the Independent Manager in order for a person to file a voluntary bankruptcy petition on behalf of the Company, constitutes a legal, valid and binding agreement of the Member, and is enforceable against the Member in accordance with its terms.*

While Delaware LLCs and DSTs may be organized for any lawful purpose (except some insurance-related purposes as to LLCs) lenders and underwriters often require that the LLC or DST be restricted to having only a single purpose. Thus SPE provisions are imposed to set limitations on how business is conducted. Some common SPE provisions include:

- Prohibitions against the acquisition or ownership of any material asset other than (i) the property that is the subject of the proposed transaction (the "Property"), and (ii) such incidental personal property as may be necessary for the operation of the Property.
- Prohibitions or restrictions on the company's ability to take on additional debt.
- Requirements that the company at all times maintain its separate

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<sup>15</sup> 12 Del. C. §3806.

existence and good standing and refrain from certain types of amendments to its governing documents, fail to preserve its existence as an entity duly organized.

- Restrictions or outright prohibition of the company acquiring any subsidiaries, merging with or consolidating with another entity, or commingling any of its assets with those of any other entity, including parent companies and affiliates.
- Requirements that the company pay its own debts from its own assets and maintain its own separate books and records.
- Provisions forbidding the company from serving as guarantor for another entity's debts or obligations.<sup>16</sup>

Some restrictions are not permissible. For example, blanket prohibitions against filing bankruptcy or requiring the Lender's consent before seeking or consenting to a bankruptcy petition is void (as to both LLCs and DSTs) on public policy grounds.<sup>17</sup> As outlined below, some restrictions on the right to file bankruptcy are permitted.

There was for many years some question as to whether a Delaware limited liability company agreement can bar or state that the LLC waives the right to seek judicial dissolution under 6 *Del. C.* § 18-802. The wording of the statute does not contain the "unless otherwise specified in the LLC Agreement" language common among other provisions in the Act. In 2008, the Chancery Court held that a waiver of the right to seek judicial dissolution under 6 *Del. C.* § 18-802 could be enforceable if it did not interfere with the rights of third parties.<sup>18</sup> Many Delaware practitioners are still uncomfortable opining on the enforceability of such provisions.

If the governing instrument or operating agreement contains any impermissible clauses and after negotiation the clauses cannot be removed or modified, the Delaware opinion must carve out the enforceability of such clauses from the opinion.

#### The Continued Existence and Remoteness of the Property Opinion.

Lenders and underwriters require that the LLC or DST continue for so long as the loan remains outstanding and that the collateral for the loan is not tied up in protracted bankruptcy or other proceedings. Thus, the non-dissolution and continued existence of the LLC or DST is the subject of many Delaware opinions and are generally governed by the respective Act and the Entity Documents. Opinions are also frequently required regarding whether the assets of the LLC or DST may be attached in the event of a bankruptcy of the member or beneficial owner, as the case

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<sup>16</sup> A DST's governing instrument may require approval of a particular trustee or beneficial owner to amend, merge, consolidate, sell, lease, transfer assets or dissolve. 12 *Del. C.* §3806(b).

<sup>17</sup> See, e.g. *In re Tru Block Concred Products, Inc.*, 27 B.R. 486 (Bankr. S.D. Cal. 1983).

<sup>18</sup> *R & R Capital, LLC v. Buck & Doe Run Valley Farms, LLC*, 2008 Del. Ch. LEXIS 115 (Del. Ch.).

may be.

#### EXAMPLES:

*Under Delaware law, the respective existence of each Delaware Entity as a separate legal entity shall continue until the cancellation of its respective Certificate of Formation.*

*Under the LLC Act, on application to a court of competent jurisdiction, a judgment creditor of the Delaware Entity's Member may be able to charge the Member's share of any profits and losses of the Delaware Entity and the Member's right to receive distributions of assets of the Delaware Entity (the "Member's Interest") with payment of the unsatisfied amount of the judgment, and the judgment creditor of the Member may not attach specific assets of the Delaware Entity directly. Thus, under the LLC Act, a judgment creditor of the Member may not satisfy its claims against the Member by asserting directly a claim against the assets of the Delaware Entity.*

*Under Delaware law and the Limited liability company agreement of each Delaware Entity, the bankruptcy or dissolution of the Member of such Delaware Entity will not, by itself, cause such Delaware entity to be dissolved or its affairs to be wound up.*

#### The LLC

Membership interest in an LLC is personal property.<sup>19</sup> It gives the member a right to proportional share of LLC income, unless otherwise specified in the limited liability company agreement.<sup>20</sup> It is freely assignable unless stated otherwise in the limited liability company agreement.<sup>21</sup> Members have no individual property interest in LLC-owned property.<sup>22</sup>

Judgment creditors of a member may only charge (*i.e.*, place a lien upon) the member's membership interest in the LLC to obtain any distribution payable to the debtor but may not directly seize specific property owned by the LLC.<sup>23</sup> A charging order may result in causing the debtor to cease to be a member in the LLC. Delaware's Court of Chancery has jurisdiction to hear any determine any matter relating to the charging

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<sup>19</sup> 6 Del. C. § 18-701.

<sup>20</sup> 6 Del. C. § 18-503.

<sup>21</sup> 6 Del. C. § 18-702.

<sup>22</sup> Note that the defense of usury is not available with respect to any obligation of a member or manager arising under the limited liability company agreement or any note or instrument. 6 Del. C. § 18-505.

<sup>23</sup> 6 Del. C. §18-703. (§18-703 was amended in 2005, adding the term "charge" to clarify the lien status of such a claim).

order.

Bankruptcy is broadly defined in 6 *Del. C.* 18-101 as "an event that causes a person to cease to be a member as provided in § 18-304 of this title." Under 6 *Del. C.* § 18-304, a person or entity ceases to be a member upon (except if permitted in operating agreement or approved by all other members): (1) Making an assignment for the benefit of creditors; (2) filing a voluntary petition in bankruptcy; (3) being adjudged bankrupt or insolvent; (4) filing a petition or answer seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief for the member entity; (5) filing an answer or other pleading admitting or failing to contest the material allegations of a petition filed against the member in any bankruptcy or insolvency proceeding; (6) seeking, consenting to or acquiescing in the appointment of a trustee, receiver or liquidator of the member.<sup>24</sup> Should the person cease to be a member, the membership interest converts to an economic interest only.<sup>25</sup>

Members may resign and be replaced in any manner consistent with the limited liability company agreement.<sup>26</sup> However, if no manner of resignation is given in the limited liability company agreement, a member may not resign prior to dissolution and winding up of the LLC's affairs. On resignation, a member cannot demand a distribution in kind.<sup>27</sup> Instead, a member is entitled to fair market value of his ownership interest. Members of the LLC may assign all or part of their interest except where prohibited by the limited liability company agreement.<sup>28</sup> However, an assignee may not participate in management of the company unless authorized in the limited liability company agreement or by consent of all non-assigning members.

An LLC can be dissolved either as specified in the limited liability agreement, by two thirds (2/3) vote of the members, at such time as there are no remaining members; or when ordered by the Court of Chancery. Distribution of assets on dissolution of an LLC proceeds first to creditors (including members and managers who are creditors), to the extent permitted by law and then to members and former members.<sup>29</sup>

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<sup>24</sup> The death of a member who is a natural person will not, under the LLC Act, result in that person ceasing to be a member; the membership interest will be part of his or her estate.

<sup>25</sup> *Milford Power Co., v. PDC Milford Power, LLC*, 866 A.2d 738 (Del. Ch. 2004). As a result, the ipso facto bankruptcy default provision in an agreement was held to be unenforceable. *Northrop Grumman Tech. Servs. v. Shaw Group Inc. (In re IT Group, Inc)*, 302 B.R. 483 (D. Del. 2003).

<sup>26</sup> 6 *Del. C.* § 18-603.

<sup>27</sup> 6 *Del. C.* § 18-605.

<sup>28</sup> 6 *Del. C.* §§ 18-701-18-705.

<sup>29</sup> 6 *Del. C.* §§ 18-801-18-805.



## The Special Member

The provisions of 6 *Del. C.* § 18-304 may cause a member to cease to be a member by operation of law under certain circumstances. This is particularly worrisome in situations where the LLC has only one member (as is frequently the case in commercial structured finance deals). Since an LLC with no members is dissolved automatically by operation of law, a mechanism must be put in place to continue the LLC's existence and prevent the liquidation of assets in the event of a sole member's resignation, "bankruptcy" (as broadly defined in the LLC Act), and/or assignment of interests. This is accomplished by having the Special Member "spring" into the shoes of the last remaining member of the LLC upon the occurrence of any event that would cause that person or entity to cease to be a member by operation of law or contract. Without a Special Member Delaware counsel may not opine that dissolution or bankruptcy of the Member(s) will not lead to dissolution of the LLC.<sup>30</sup>

The LLC Act permits the use of a Special Member (sometimes referred to as a "Springing Member") who is named in the limited liability company agreement and who must execute it in order to be bound to its terms. The Special Member is given specific rights and responsibilities to prevent the dissolution of the LLC caused by such a resignation or assignment. The Special Member's function is to continue the LLC until a new member is admitted.

Among the typical rights and responsibilities are that the Special Member:

- may not resign or transfer its rights unless a successor Special Member has been admitted;
- may have no interest in the profits, losses and capital of the Company;
- may have no right to receive any distributions of Company assets;
- may not be required to make any capital contributions to the Company, 6 *Del. C.* § 18-301(d);
- may not bind the Company and except as required by any mandatory provision of the Act; and
- may have no right to vote on, approve or otherwise consent to any action by, or matter relating to, the Company, including, without limitation, the merger, consolidation or conversion of the Company.

The Special Member is a creature of contract, and there is no statutory restriction on who may serve (except that, in order to be effective, it should be someone other than the Member(s)). Some lenders have their own such restrictions; for example, some lenders will refuse to permit a relative of the LLC's Member or the Member's principle to serve as Special Member. These restrictions are not based on any considerations relating to Delaware statute or common law.

## The Independent Manager

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<sup>30</sup> There is some controversy over how the LLC and the Special Member are taxed under federal tax statutes and regulations. The issue is, at the present time, unsettled.

**EXAMPLE:**

*The provision, contained in Section \_\_\_ of the LLC Agreement, that requires the consent of the Member and the Independent Manager in order for a Person to file a voluntary bankruptcy petition on behalf of the Company, constitutes a legal, valid and binding agreement of the Member, and is enforceable against the Member, in accordance with its terms.*

The position of Independent Manager (sometimes referred to as an "Independent Director" when a "Board of Directors" provides management of the LLC) is designed to address the unenforceability of a clause prohibiting the seeking of bankruptcy without the lender's consent. It provides the lender some comfort that certain drastic actions, *e.g.*, seeking bankruptcy, may not be taken without consideration and review by a dispassionate outsider.

Generally the Independent Manager is a disinterested third party. An Independent Manager generally may not be a creditor, supplier, employee, officer, director, member or manager of the LLC; or be an employee or affiliate of the Lender (though it may take the rights of the lender and other creditors into consideration).<sup>31</sup> The law permits the granting of authority over bankruptcy and dissolution issues to the Independent Manager because it, unlike the Lender, is presumed not to have any interest adverse to the LLC with regard to these matters.

While no such statutory restriction exists, most lenders will prohibit a family member of an LLC's member or affiliate from acting as Independent Manager. The Independent Manager is normally restricted in the scope of its authority to granting approval for bankruptcy or dissolution. Like the Special Member, the Independent Manager exercises no proprietary interest in the LLC, nor may it make any capital contributions. As with the Special Member, an Independent Manager may not normally resign until a successor is found. The rights of an Independent Manager are strictly limited to those set forth in the LLC Agreement.

The DST

The DST is a legal entity separate and apart from its trustees and its beneficial owners.<sup>32</sup> Ownership interests are considered "securities" under Article 8 of Delaware's UCC.<sup>33</sup> However, under *Revenue Ruling 2004-86*, they are treated as interests in real estate. Ownership may be acknowledged with trust certificates or by any other method.<sup>34</sup> The

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<sup>31</sup> *In re General Growth Properties*, 409 B.R. 43 (Bankr. S.D.N.Y. 2009). For a full discussion of independent managers and their rights and duties, *see, e.g.*, Forrest Pearce, *Bankruptcy-Remote Special Purpose Entities*, 28 Emory Bankr. Developments J. 507 (2012).

<sup>32</sup> 12 Del. C. § 3810.

<sup>33</sup> 6 Del. C. § 8-103(a).

<sup>34</sup> 12 Del. C. § 3801(b).

defense of usury is not available with respect to any obligation of a trustee or beneficiary arising under the governing instrument or any note or instrument.<sup>35</sup>

Beneficial interests in a DST may be assigned a wide array of rights and responsibilities, depending on the terms of the trust instrument. Under Delaware law, they are considered personal property and are freely transferable unless prohibited under the trust agreement. Beneficial owners have no interest in the specific property of the DST, unless otherwise provided in the governing instrument. No creditor of a beneficial owner or trustee has any right to obtain possession of or exercise legal or equitable remedies with respect to a DST's property.<sup>36</sup>

DST's are often formed for fixed periods of time. However, while frequently formed for a fixed term, unless otherwise specified in the trust instrument, the DST has perpetual existence.<sup>37</sup> Dissolution of a DST may occur upon the occurrence of a time or event specified in the trust instrument. Unless otherwise provided in the governing instrument, distribution of assets on dissolution are to creditors first and then to beneficial owners for the fair market value of their ownership interest.<sup>38</sup> A DST is a bankruptcy-remote vehicle which does not expire upon its beneficial owners' or trustee's bankruptcy (unlike the default rule for LLCs).<sup>39</sup>

#### The Springing LLC.

In order to qualify for favorable tax treatment, the trustee of a DST cannot have any power to renegotiate the loan documents.<sup>40</sup> As a practical matter this creates an obvious issue in the event of a loan default. One solution has been developed using a "springing LLC" identified in the trust instrument with a pre-approved operating agreement and manager. The springing LLC is formed at the time of the creation of the DST and "springs" into power on a default. The springing LLC has the ability to negotiate the restructuring, refinance, etc., of the loan, and then is required to enter a further transaction to assure the continuation of the tax treatment to the investor.

#### Opinions Relating to the Member or Manager or Beneficial Owner of the Entity.

Sometimes when an LLC is the member or manager of (or is somehow otherwise related to) an LLC or is the beneficial owner under a DST, an opinion is requested

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<sup>35</sup> 6 *Del. C.* § 3803(d).

<sup>36</sup> 12 *Del. C.* § 3805.

<sup>37</sup> 12 *Del. C.* § 3810.

<sup>38</sup> 12 *Del. C.* § 3808(e).

<sup>39</sup> 12 *Del. C.* § 3808(b).

<sup>40</sup> *Revenue Ruling* 2004-86.

regarding the member or manager's liability for the debts of the LLC or DST, as the case may be. Such liability is governed by the respective Act or the Entity Documents.

Members and managers of an LLC are generally not liable for debts of the LLC, whether in tort or contract, solely by virtue of being members or managers.<sup>41</sup> The LLC Act permits broad authority to indemnify members or managers (including the authority to advance legal fees) in the limited liability company agreement.<sup>42</sup> The LLC Act provides that a limited liability company agreement may restrict or eliminate (or expand) fiduciary duties of a member or manager and limit or eliminate liability for breaches of contract or fiduciary duties, provided that it may not eliminate the implied covenant of good faith and fair dealing or liability for a bad faith violation of that covenant.<sup>43</sup>

Similarly, no beneficial owner, simply by virtue of his ownership, is personally liable for the debts of the DST, whether in contract or in tort.<sup>44</sup> A DST may indemnify and hold harmless any trustee or beneficial owner or other party from and against any and all claims and demands whatsoever, unless prohibited in the trust agreement.<sup>45</sup> Trust law applies unless otherwise specified in the trust instrument. 12 *Del. C.* § 3809. Therefore unless defined differently in the trust instrument of a DST, trustees of a DST will have the same fiduciary duties to the trust and to beneficial owners as would apply in a standard trust situation.<sup>46</sup> The right to give direction to trustees, or the exercise of that right, does not create fiduciary duties on the part of the exerciser, even if he is a beneficial owner.<sup>47</sup>

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<sup>41</sup> 6 *Del. C.* § 18-303. This is not to say that they might not have some liability in a separate contractual capacity; for example, as guarantors of a debt.

<sup>42</sup> *Senior Tour Players 207 Mgmt. Co v. Golftown 207 Holding Co., LLC*, 853 A.2d 124 (Del. Ch. 2004).

<sup>43</sup> 6 *Del. C.* § 18-1101.

<sup>44</sup> 12 *Del. C.* § 3803.

<sup>45</sup> 12 *Del. C.* § 3817.

<sup>46</sup> *See, e.g.*, 12 *Del. C.* §§ 3805-3806.

<sup>47</sup> 12 *Del. C.* § 3806(a).