

Fiduciary Duties of Members in Georgia LLCs

By Tom Sowers

1. Introduction.

If one or more business partners intend to enter into a new business venture in Georgia and the choice of entity that the business partners decide upon is a limited liability company, they should be mindful of how Georgia law views the fiduciary duties of members to their limited liability companies. In general, whether a member will have fiduciary duties to the company and to the other members will depend on whether the member has management responsibilities for the company. In Georgia, members of limited liability companies can by agreement in the articles of organization or operating agreement expand, restrict or eliminate the fiduciary duties they have to the limited liability company and to each other. Thus, the members' understanding of the fiduciary duties that each member has under Georgia law is important because it will impact certain agreements that the members may or may not want to include in a written operating agreement or the articles of organization for the company.

2. Fiduciary Duties of Members to a Limited Liability Company and to Other Members.

The fiduciary duties that members and managers have to a limited liability company are set forth in the Georgia Limited Liability Company Act (the "Act"). Specifically, the Act states that, "In managing the business or affairs of a limited liability company...a member or manager shall act in a manner her or she believes in good faith to be in the best interests of the limited liability company and with the care an ordinarily prudent person in a like position would exercise under similar circumstances....Except as otherwise provided in the articles of organization or a written operating agreement, a person who is a member of a limited liability company in which management is vested in one or more managers, and who is not a manager, shall have no duties to the limited liability company or to the other members solely by reason of acting in his or her capacity as a member." The fiduciary duties described above in the language of the Act are known as the duty of care and the duty of loyalty.

There are several key points for members in a Georgia limited liability company to be aware of with respect to the fiduciary duties each of the members has to the other members and to the company as described in the Act. First, in general, a member of a Georgia limited liability company will only have fiduciary duties to the company and to the other members if the member has management responsibilities for the company¹. Thus, in general, for member-managed limited liability companies each member has a duty of care and a duty of loyalty to the company and the other members. In general, for manager-managed limited liability companies, only the manager has a duty of care and a duty of loyalty to the

¹ This is different from other business forms in Georgia, such as corporations and general partnerships. Under Georgia law, majority shareholders in closely-held corporations have a fiduciary duty of utmost good faith and loyalty to the minority shareholders. Similarly, the partners in a general partnership owe fiduciary duties to the partnership and to the other partners.

company, and the other non-manager members owe no fiduciary duties to the company or the other members².

Second, even in manager-managed limited liability companies, a member will have fiduciary duties to the other members and to the company if the member has been delegated management responsibilities by the manager or the other members.

Third, members who are employed by the limited liability company will have fiduciary duties to the company by virtue of their employment. In general, Georgia employees have duties of loyalty, faithful service and regard for an employer's interest. These fiduciary duties prohibit employees, while employed by an employer, from soliciting customers of the employer for a rival business, and from engaging in other acts of direct competition with the employer.

Finally, with few exceptions, the members can by agreement in the articles of organization or operating agreement expand, restrict or eliminate the fiduciary duties they have to the limited liability company and to each other. Thus, the members could agree that a manager has no duty of loyalty to the limited liability company or the other members, and the members could also agree that all members in a manager-managed limited liability company have specified fiduciary duties to the other members to the company or both.

The members' understanding of the above points is important because as they negotiate the terms of the operating agreement they may want to include certain provisions in the operating agreement if the general rule (that a member does not have fiduciary duties to the company and to the other members unless the member has management responsibilities for the company) is not adequate for the members with respect to their particular business venture. Two issues that the members may want to address in an operating agreement are whether each member has an obligation to have to present business opportunities to the company, and whether the members and any manager may participate in ventures outside of the limited liability company, including ventures that compete with the business of the company.

In a manager-managed limited liability company, absent language to the contrary, the members would be able to participate in a business venture that directly competes with the business of the company, and the members would not be required to have to present business opportunities to the other members relating to the business of the company. This is often at odds with what members in a limited liability company want.

² Limited liability companies are either managed by one or more managers, or by the members of the limited liability company. Under the Act, a limited liability company will be member-managed unless otherwise stated in the limited liability company's articles of organization or written operating agreement. In general, manager-managed limited liability companies place the responsibility for management of the day-to-day operations of the limited liability company in a single person, whereas in member-managed limited liability companies the responsibility for management of the day-to-day operations of the company will reside in all of the members. The manager of a manager-managed limited liability company is typically a member of the limited liability company, but Georgia law does not require the manager to be a member of the company.

3. Conclusion.

The fiduciary duties that business partners may have to each other in a new business venture is not generally a consideration that will dictate the choice of entity for the business. If business partners are concerned about fiduciary issues, and the fiduciary duties that they will have to one another, they should seek legal advice for a detailed explanation as to how the different entity forms differ in this regard.

If business partners ultimately decide upon a limited liability company as their choice of entity, the members should be aware that Georgia law allows members to expand, restrict or eliminate the fiduciary duties they have to the limited liability company and to each other in a written operating agreement or the articles of organization for the company. In general, absent any agreement to the contrary, a member in a Georgia limited liability company will only have fiduciary duties to the company and the other members if the member has management responsibilities for the company. This general rule is oftentimes not what members in a limited liability company want and the members have the ability to alter the general rule with respect to their company by written agreement. Regardless of what is agreed to by the members as to their fiduciary duties, members who are employed by the limited liability company will have fiduciary duties to the company by virtue of their employment.