

This Week in Real Estate: LLC and LLP Asset Protection

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Pursuant to most LLC and LLP statutes, there are three types of asset protection provisions— a liability shield provision, “pick-your-partner” provisions, and charging order provisions.

Essentially:

1. Liability shield provisions protect the personal assets of partners, members and managers (except contributions to the entity) from liability for claims by third parties against their LLC or LLP.
2. “Pick-your-partner” provisions protect the management rights of members and partners from the members' or partners' creditors.
3. Generally, charging order provisions limit a judgment creditor's recourse to a members' or partners' basic economic rights, in other words, their right to allocations of income and losses and their right to distributions of cash and other assets.

As *This Week in Real Estate* has discussed numerous times, the Delaware LLC Act is the preeminent act in the country. Section 18-303 of the Delaware LLC Act provides in its entirety as follows:

18-303 LIABILITY TO THIRD PARTIES

- (a) Except as otherwise provided by this chapter, the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company, and no member or manager of a limited liability company shall be obligated personally for any such debt, obligation or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company.
- (b) Notwithstanding the provisions of subsection (a) of this section, under a limited liability company agreement or under another agreement, a member or manager may agree to be obligated personally for any or all of the debts, obligations and liabilities of the limited liability company.

See 6 Del. C. § 18-303.

Similarly, for LLPs, Section 15-306 of the Delaware RUPA. This provision provides in its entirety as follows:

15-306 PARTNER'S LIABILITY

- (a) An obligation of a partnership arising out of or related to circumstances or events occurring while the partnership is a limited liability partnership or incurred while the partnership is a limited liability partnership, whether arising in contract, tort or

otherwise, is solely the obligation of the partnership. A partner is not personally liable, directly or indirectly, by way of indemnification, contribution, assessment or otherwise, for such an obligation solely by reason of being or so acting as a partner.

- (b) Notwithstanding the provisions of subsection (c) of this section, under a partnership agreement or under another agreement, a partner may agree to be personally liable, directly or indirectly, by way of indemnification, contribution, assessment or otherwise, for any or all of the obligations of the partnership incurred while the partnership is a limited liability partnership.

See 6 Del. C. § 15-306.

Here are the most important things regarding statutory liability shields:

- Statutory liability shields do not confer limited liability on LLCs or LLPs themselves, but only on their members or partners. In any claim against an LLC or an LLP, all of its assets will be at risk, and the most important way for an LLC or LLP to protect against this risk is by acquiring and maintaining adequate liability insurance.
- Statutory liability shields do not protect LLC members or managers or LLP partners from liability for personal misconduct.
- LLC members or LLP partners may be personally liable for claims against their entity on veil-piercing grounds.
- Liability shields do not protect partners, members and managers from claims by members that they have breached their fiduciary or contractual duties to the entity.
- Under many acts, including the above Delaware LLC Act § 18-303(b) and Delaware RUPA § 15-306(e), members and partners may waive their limited liability in their operating or partnership agreements or otherwise.