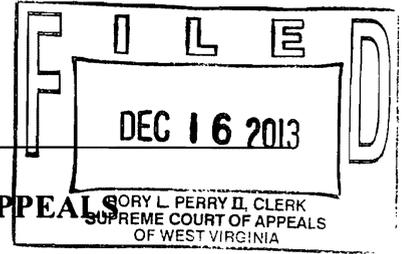


No. 13-0290



IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

DOMENICK MARRARA, JR., individually and
as co-Trustee of the DOMENICK MARRARA, JR. TRUST,
SANDRA JEAN MARRARA, individually and
and co-Trustee of the DOMENICK MARRARA, JR., TRUST,
and DOMENICK Marrara, Jr., TRUST,

Plaintiffs Below, Petitioners,

v.

RIPLEY ASSOCIATES, LLC,

Defendant Below, Respondent.

On Petition for Appeal
From the Circuit Court of
Preston County, West Virginia
Civil Action No. 12-C-59

PETITIONERS' REPLY TO RESPONDENT'S BRIEF

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PETITIONERS' REPLY TO RESPONDENT'S BRIEF

Petitioners¹ submit this Reply to Respondent's Brief, pursuant to Rule 10(g) of the West Virginia Rules of Appellate Procedure.

I. STATEMENT OF THE CASE

Petitioners adopt by reference the Statement of the Facts and Procedural History which were set forth in the Brief of Petitioners, and Assignments of Error (hereinafter "Petitioners' Brief"), pp.1-5.

II. STANDARD OF REVIEW

"Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, Chrystal R.M. v. Charlie A. L., 194 W.Va. 138, 459 S.E.2d 415 (1995).

III. STATEMENT REGARDING ORAL ARGUMENT

Petitioners reiterate their previous request that they be permitted to present Oral Argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure. *See* Petitioners' Brief, p. 16. Furthermore, Petitioners note that this matter is currently scheduled for Oral Argument on February 4, 2014.

IV. ARGUMENT

A. The date on which interest begins to accrue under West Virginia Code Section 31B-7-702(e) on the value of a dissociated limited liability company member's distributional interest must be the date of dissociation.

At issue in this case, is the date from which interest begins to accrue on the value of a dissociated member's distributional interest in a limited liability company ("LLC"), when such value is determined by a Circuit Court pursuant to Article 7 of Chapter 31B of the West Virginia

¹ "Petitioner," as used herein, refers to Domenick Marrara, Jr. Trust. "Petitioners," as used herein refers to Domenick Marrara, Jr. Trust, Domenick Marrara, Jr., and Sandra Jean Marrara.

Code. W. Va. Code § 31B-7-701 *et seq.* West Virginia Code Section 31B-7-702(e) (hereinafter, at times, referred to as “West Virginia Section 702(e)”) provides in pertinent part: “[i]nterest must be paid on the amount awarded from the fair market value determined under section 7-701(a) to the date of payment.” W. Va. Code § 31B-7-702(e). In this matter, the Circuit Court ruled that interest begins to accrue on a dissociated member’s distributional interest in an LLC on the date of the judicial hearing determining such value.² Petitioners appealed such ruling, and assert that the applicable date from which interest begins to accrue on a dissociated member’s distributional interest in an LLC is the date of the member’s dissociation from the LLC.

As set forth in Petitioners’ original Brief, a narrow reading of Section 702(e) leaves the date from which interest begins to accrue somewhat unclear. Petitioner’s Brief, p. 8. However, a complete analysis of Article VII of Chapter 31B of the West Virginia Code compels the conclusion that the applicable date is, and must be, the date of dissociation. W. Va. Code § 31B-7-701 *et seq.* Specifically, West Virginia Code Section 31B-7-701(a), as well as the spirit and purpose of Article VII, dictate that interest must begin to accrue on a dissociated member’s distributional interest in an LLC on the date of dissociation. *See* Petitioners’ Brief, p. 7-13. Petitioners further assert that the Circuit Court’s ruling creates perverse incentives for limited liability companies to mistreat dissociated members. *See* Petitioners’ Brief, p. 13-16.

In its Brief, Respondent concedes that the date from which interest is to accrue, “cannot be determined by a fair reading of section 31B-7-702(e).” Respondent’s Brief, p. 10. Respondent correctly asserts that the specific language of Section 702(e) deviates, slightly, from the 1996 Model Uniform Limited Liability Company Act drafted by the National Conference of commissioners of Uniform State Laws. However, Respondent asserts, incorrectly, that such deviation indicates that the West Virginia Legislature necessarily intended that interest must

² *See Exhibit 4*, p. RIP-APP35-40 of the Appendix.

accrue from a different date “other than the date of dissociation” when it enacted Section 702(e). Respondent’s Brief, p. 13. Respondent further argues, without providing support, that the only “other date” that the West Virginia Legislature could have intended is “the date upon which the circuit court determined the value of [the dissociated member’s] interest.” Respondent’s Brief, p. 14.

There are several fallacies in Respondent’s argument. Respondent asserts that our Legislature’s modification of Model Section 702(e) necessitates a conclusion that interest should begin to accrue on a dissociated member’s distributional interest in an LLC on a date other than the date of such member’s dissociation from the LLC. The Model Act provides in pertinent part: “interest must be paid on the amount awarded from the date determined under Section 701(a) to the date of payment.” Model Uniform Limited Liability Company Act, Section 702(e), p. 74³. W. Va. Code 31B-7-702(e) provides that “[i]nterest must be paid on the amount awarded from the fair market value determined under section 7-701(a) to the date of payment.” As such, West Virginia Section 702(e) essentially substitutes the phrase “fair market value” for the term “date” in Model Act Section 702(e).

Petitioners agree with Respondent that the Model Act language is clear and unambiguous, and that under the Model Act interest begins to accrue on the date of dissociation. The question is whether our Legislature’s alteration of the language contained in the Model Act was intended to alter the date on which interest begins to accrue, and, inject a different date into the analysis, or whether our Legislature’s modification of the Model Act was made for some other purpose. An examination of Article 7 of Chapter 31B of the West Virginia Code and the

³ A full copy of the 1996 ULLCA Model Uniform Limited Liability Company Act is available at: <http://www.uniformlaws.org/shared/docs/limited%20liability%20company/ullca96.pdf>. Petitioners’ references to page numbers regarding said Model Uniform Limited Liability Company Act are intended to cite to the corresponding page number in the above-referenced document.

Comments to the Model Act, which were available to the West Virginia Legislature at the time of the enactment of § 31B-7-702(e), show that the modification of said statute was not intended to alter the date from which interest begins to accrue and, that such modification was made for an entirely different purpose. W. Va. Code § 31B-7-701 *et seq.*

If the West Virginia Legislature had indeed intended for a different date to be inserted into the analysis, it easily could have done so. **Yet West Virginia Section 702(e) does not mention any other date!** One would think that if the sole purpose of West Virginia Code Section 702(e)'s deviation from Model Section 702(e) was to change the date from which interest was to accrue, as Respondent assumes, then our Legislature would have explicitly stated an alternate date in West Virginia Section 702(e). Instead, and as conceded by Respondent, West Virginia Section 702(e) does not explicitly state the date from which interest begins to accrue. Respondent's reliance on the statutory construction canon "*expression unius est exclusion alterius*" ("express mention of one thing implies the exclusion of another") is completely misguided. Respondent's Brief, p. 13. First, said rule of statutory construction generally applies when a statute contains a list of expressed provisions. See Gibson v. Northfield Ins. Co., 219 W. Va. 40, 47, 631 S.E.2d 598, 605 (2005); State ex rel. Roy Allen S. v. Stone, 196 W.Va. 624, 630 n. 11, 474 S.E.2d 554, 560 n. 11 (1996). No such list exists in West Virginia Section 702(e). Second, and more importantly, there is no "express mention of one thing" in West Virginia Section 702(e) as no beginning date for interest accrual is expressed! Therefore, the above-referenced rule of statutory construction is completely inapplicable to West Virginia Section 702(e).

An examination of West Virginia Section 701 provides further evidence that the West Virginia Legislature did not intend to change the date from which interest begins to accrue.

Respondent's Brief focuses solely on our Legislature's modification of the Model Act.

However, Respondent completely ignores an important portion of West Virginia Section 702(e) that remains unchanged from the Model Act. Specifically, Respondent completely ignores that **both** the Model Act and in West Virginia Code Section 31B-7-702(e) relate the calculation of interest back to the value "determined under Section 7-701(a)[.]" *See* W. Va. Code § 31B-7-702(e) and Model Uniform Limited Liability Company Act, Section 702(e), p. 74. As set forth in greater detail in Petitioners' original Brief, **everything** in Section 701 relates to determining the value of a dissociated member's interest, relates to a single date: the date of the member's dissociation from the LLC. *See* W. Va. Code § 31B-7-701. Accordingly, given that the West Virginia Legislature chose to leave the reference to Section 701 from the Model Act unmodified, and Section 701 relates only to the date of dissociation, and no other date is mentioned in West Virginia Section 702(e), it is clear that Respondent's claim that the West Virginia Legislature must have intended to utilize a different date, by modifying the Model Act language, is without merit.

However, a fair question remains. If the Legislature did not intend to alter the date from which interest begins to accrue when it deviated from the Model Act in enacting West Virginia Section 702(e), what was the purpose of the Legislature's deviation? The answer can likely be found by examining the Comments to the Model Rules 702. Specifically Model Rule 702 is annotated with the following comment:

The default valuation standard is fair value. Under this broad standard a court is free to determine the fair value of a distributional interest on a fair market, liquidation, or any other method deemed appropriate under the circumstances. **A fair market value is not used, because it is too narrow, often inappropriate,** and assumes a fact not contemplated by this section – a willing buyer and a willing seller.

Model Uniform Limited Liability Company Act, Comments to Section 702, p. 75 (emphasis added).

As set forth above, West Virginia Section 702(e) differs from Model Section 702(e) because it inserts the words “fair market value” into Section 702(e). No reference to “fair market value” is made in Model Section 702(e), and the only reference to “fair market value” at all in the Model Act is made in the above quoted comment.

From said Comment, the intention of our Legislature in modifying Model Section 702(e) can be gleaned. The West Virginia Legislature explicitly disagreed with the Model Act drafters that “fair market value” is an inappropriate measure of a dissociated member’s interest. Such conclusion is obvious given that the West Virginia Legislature chose to deviate from the Model Act by inserting the phrase “fair market value” into West Virginia Section 702(e). Indeed, the insertion of “fair market value” into West Virginia Section 702(e) is almost certainly a direct repudiation by the West Virginia Legislature of the Model Act drafters Comment that the term “fair market value” is “too narrow” and “inappropriate” for determining the value of a dissociated member’s interest.

Even under Respondent’s flawed theory that the Legislature intended to change the date from which interest begins to accrue, Respondent’s subsequent argument that “the only other date” the Legislature could have intended is “the date upon which the circuit court determined the value of that interest” is completely baseless. Respondent’s Brief, p. 13-14. While Respondent spends roughly five (5) pages of its Brief arguing that the Legislature must have intended to change the date from which interest begins to accrue pursuant to the Model Act, Respondent devotes exactly one sentence, and no substantive analysis, to what this allegedly alternative date should be. *See* Respondent’s Brief p. 9-13; 13-14. Notably, Respondent provides no support for its claim that “the

only other date” is the date on which a final determination of the value of a member’s distributional interest is made. Indeed, nowhere in West Virginia Section 702(e), nor anywhere else in Article 7, is there evidence that the date of the Circuit Court’s determination of value is relevant.

Indeed, and as argued more thoroughly in Petitioners’ Brief, it is extremely unlikely that the Legislature would have enacted West Virginia Section 702(e) at all if it only intended for interest to begin to accrue on the date of the trial determining the value of a member’s distributional interest. Since Petitioner is already entitled to post-judgment interest under W.Va. Code § 56-6-31, West Virginia Section 702(e) could only serve to provide a dissociated member of a limited liability company interest from the date of the trial to the date of the entry of the Order determining the value of a member’s distributional interest. Under the West Virginia Trial Court Rules, Orders are typically to be submitted to a Circuit Court within eleven (11) days of the oral ruling regarding the same. *See* West Virginia Trial Court Rule 24.01. Petitioners find it extremely unlikely that the Legislature’s sole purpose in enacting West Virginia Section 702(e) was to provide for the accrual of interest for eleven (11) days. Petitioners also do not find it coincidental that Respondent argues, without providing support, that the only other potential date the Legislature could have intended interest to begin accruing happens to be the date under which Respondent would have to pay the smallest amount of interest. Respondent is simply attempting to rewrite West Virginia Section 702(e) in a manner which is most beneficial for it.

Accordingly, Respondent’s assertion that by deviating from Model Act Section 702(e) in crafting West Virginia Section 702(e), the Legislature must have intended to

alter the date from which interest on the value of a dissociated member's distributional interest begins to accrue is without merit. If the Legislature had intended to insert a different date into the analysis, it would have explicitly stated an alternative date. Furthermore, Respondent fails to give due attention to the language in Section 702(e) specifically referencing Section 701, which Section wholly relates to compensating dissociated LLC members **as of the date of dissociation**. Additionally, as set forth above, the West Virginia Legislature likely deviated from the Model Act in an effort to clarify that, in West Virginia, "fair market value" is appropriate to consider when evaluating a dissociated LLC member's interest. Finally, Respondent fails to provide any evidence as to why the date of the hearing determining the value of a dissociated member's distributional interest is the appropriate date from which interest should begin to accrue. Accordingly, under W. Va. Code § 31B-7-702(e), the date from which interest begins to accrue on the value of a dissociated member's distributional interest must be the date that such member dissociated from the limited liability company.

II. Respondent's Interpretation of West Virginia Section 702(e) would lead to adverse policy consequences and perverse incentives for Limited Liability Companies.

In their original brief, Petitioners set forth the likely practical results of upholding the Circuit Court's interpretation of Section 702(e). Specifically, Petitioners submitted that LLCs would be incentivized to use litigation and waste judicial resources, and, similarly, that LLCs would have little to no incentive to offer to pay full value for a dissociated member's distributional interest. Ultimately, the value of a dissociated member's distributional interest is locked in at the date of dissociation. As such, if interest only begins to accrue after a the hearing determining the value of such interest is

held by a Court, then it would clearly be advantageous for an LLC to delay the hearing as long as possible, as the LLC has an incentive NOT to reach a speedy agreement with the dissociated member.

Respondent devotes the final section of its Brief to an attack Petitioners' policy arguments. Respondent first claims that dissociated members are entitled to receive distributions from limited liability companies after dissociation. Petitioners agree. However, Respondent next makes a completely inappropriate leap in logic that a dissociated member "does not suffer any economic disadvantage" if he does not receive interest on the value of his distributional interest between the time period of dissociation and the hearing determining the value of such distributional interest. Such argument fails because an LLC can willingly choose **not** to make any distributions during this time period, and unlike dissociated members, active members know that their interest in the company is being used to increase/improve the value of their company and/or interest. The facts of the instant case illustrate this point.

Petitioner dissociated from Respondent Ripley Associates, LLC on November 4, 2011. The final determination of the value of Petitioner's distributional interest in Ripley Associates, LLC was not made by the Preston County Circuit Court until an evidentiary hearing was held on January 15, 2013. From November 4, 2011 to January 15, 2013, Respondent did not make a single distribution, nor did Respondent pay any other monies to Petitioner.⁴ Thus, Petitioner received absolutely nothing for the value of its distributional interest in Respondent during this time period. While the other members of Respondent might be content with the lack of distributions, knowing that their capital is

⁴ To the best of Petitioners' knowledge, Respondent also did not make any distributions to Respondent's remaining members during this time period.

increasing the value of Respondent, (perhaps investing in some future endeavor or perhaps simply with cash in an interest bearing account), the value of Petitioner's distributional interest is "locked in" as of November 4, 2011. Unlike other members of Respondent, Petitioner had no access, control, or incentive for its distributional interest to be utilized, invested or increased for this time period. Accordingly, Petitioner does not receive any benefits during the time period between dissociation and the final hearing determining the value of Petitioner's distributional interest, even though all other members of Respondent receive benefits during said time period as a result of their capital/distributional interests in Respondent. As such, Respondent's argument that dissociated members are in the same position as continuing members must fail.

Respondent also argues that Petitioner could have sold its interest in Respondent to a third party and, that by "choosing" not to sell such interest to a third party, Petitioner accepted a loss of access to any tangible benefit for its distributional interest for some undefined period of time. *See* Respondent's Brief, p. 16. This argument neglects the fact that the enactment of West Virginia Code Section 701 is, in and of itself, a complete acknowledgment that third parties are likely not interested in purchasing non-controlling interests in small limited liability companies as it specifically **requires** that a limited liability company purchase a dissociated member's distributional interest. W. Va. Code § 31B-7-701. Respondent presents the issue as if there is a stock market for Petitioner's interest in Respondent, and that Petitioner can readily unload such interest to a public buyer for its full value.

Again, the facts of this case are illustrative of the flaws in Respondent's argument. In this case, the two other members of Respondent voted Petitioner Domenick

Marrara, Jr., out of management of a business he had run his whole life, and appointed what almost any third party would perceive was an inexperienced, unqualified and wholly inadequate manager. Under these circumstances, it is doubtful any third party would be willing to purchase Petitioner's twenty-five percent (25%) interest in Respondent for its fair value as of November 4, 2011. Indeed, Petitioner submits that if any third party purchaser had been willing to pay the fair value of Petitioner's interest as of November 4, 2011, which was determined to be five hundred thousand dollars (\$500,000.00) by the Circuit Court, then Petitioner gladly would have accepted such an offer. Yet, as illustrated by the facts of this case, a twenty five percent (25%) interest in a family owned LLC run by an inexperienced manager is not very attractive to potential buyers. The West Virginia Legislature prudently acknowledged the potential difficulty of selling one's interest in an LLC by enacting Section 701, which **mandates** that an LLC must purchase a dissociated member's distributional interest. W.Va. Code § 31B-7-701(a).

Respondent also argues that by rejecting Respondent's offer to purchase Petitioner's distributional interest for four hundred thirteen thousand, seven hundred twenty five dollars, and thirty five cents (\$413,727.35), Petitioner somehow "accepted the delay inherent in any judicial proceeding" and that Petitioner willingly chose to delay being paid for such distributional interest. Respondent's Brief, p. 16-17. Once again, the facts of the case prove illustrative of the errors in Respondent's argument. Respondent did NOT offer Petitioner fair value for Petitioner's distributional interest. The issue was adjudicated by the Circuit Court, and the fair value of Petitioner's distributional interest in Respondent was found to be five hundred thousand dollars

(\$500,000.00).⁵ Respondent only offered Petitioner four hundred thirteen thousand, seven hundred twenty five dollars, and thirty five cents (\$413,727.35), which is approximately eighty-two percent (82%) of the actual value of Petitioner's distributional interest. Respondent's argument that Petitioner should have to accept Respondent's lowball offer of approximately eighty-two percent (82%) of the fair value of Petitioner's distributional interest, or choose to have a Court fairly determine the value of said distributional interest and receive no interest, or other tangible benefit, on the actual value of said distributional interest for a period of over one (1) year makes little sense. Clearly, Petitioner should not be penalized by utilizing the judicial proceedings provided for in West Virginia Section 701(d) and Section 702 in order to obtain a judicial determination of the full value of its interest. W.Va. Code §§ 31B-7-701(d); 31B-7-702.

In summary, all of the policy consequences raised in Petitioners' original brief are not "specious," but rather quite real. An interpretation of West Virginia Code Section 702(e) that does not allow for an accrual of interest between the date of dissociation and the date of the final hearing determining the value of a dissociated member's distributional interest creates incentives for LLC's to delay and waste judicial resources, and further grants LLC's a windfall in relation to dissociated members. Under Respondent's interpretation of West Virginia Section 702(e), it is undisputed that LLC's can: 1) unilaterally offer any below-market value price for the dissociated member's interest; 2) place the principal sum of said member's interest into an interest-bearing account (or utilize the capital however it sees fit); 3) await final determination of value by the circuit court; and 4) then distribute the principal sum to the dissociated member, while pocketing the interest or investment gains accrued over this time period.

⁵ See Exhibit 4, p. RIP-APP35-40 of the Appendix.

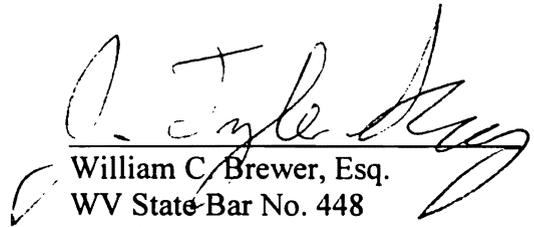
Indeed, the foregoing fact-pattern is exactly what happened in the present case if Respondent's interpretation of West Virginia Code 702(e) is upheld. Respondent apparently fails to see any problem with the above-listed facts, but said facts clearly violate the underlying purpose of West Virginia Code Sections 701 and 702, which is to fairly compensate dissociated LLC members for their distributional interests.

CONCLUSION

WHEREFORE, for the reasons set forth herein, and for the reasons set forth in Petitioners' original Brief, Petitioners respectfully request that this Court hereby reverse and/or vacate, in part, the Circuit Court's February 20, 2013, Order Regarding Evidentiary Hearing on Value of Plaintiff Domenick Marrara, Jr. Trust's Interest in Ripley Associates, LLC. More specifically, Petitioners request that this Court reverse the Circuit Court's ruling that interest on Petitioner Domenick Marrara, Jr. Trust's distributional interest in Ripley Associates, LLC, did not begin to accrue until January 15, 2013, and that this Court rule that, pursuant to West Virginia Code § 31b-7-702(e), interest on the value of Petitioner Domenick Marrara, Jr. Trust's distributional interest in Ripley Associates, LLC, began to accrue on November 4, 2011, the date of Petitioner Domenick Marrara, Jr. Trust's dissociation from Ripley Associates, LLC, at the rate of seven percent (7%) per annum, and that said interest runs until payment has been made in full to Petitioner.

RESPECTFULLY SUBMITTED,
PETITIONERS, BY COUNSEL.

BREWER
&
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A handwritten signature in black ink, appearing to read "W. C. Brewer", is written over a horizontal line. The signature is fluid and cursive.

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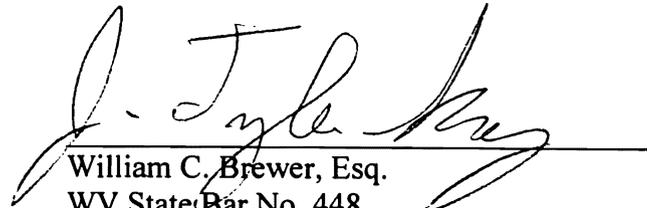
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CERTIFICATE OF SERVICE

The undersigned does hereby certify that he served a true copy of the within
PETITIONERS' REPLY TO RESPONDENT'S BRIEF, on the 13th day of December, 2013,
via United States mail, postage prepaid, upon the following:

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