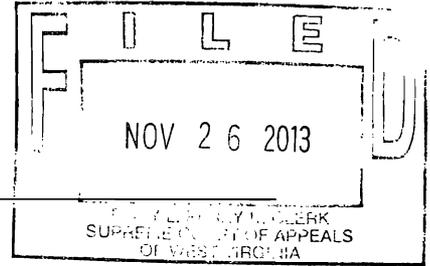


No. 13-0290



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**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS**

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

Petitioner,

v.

RIPLEY ASSOCIATES, LLC., et al.

Respondents.

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

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**RESPONDENT'S BRIEF**

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## I. STATEMENT OF THE CASE

This appeal concerns an issue of first impression in West Virginia. Specifically, Petitioners ask this Court to determine when interest begins to accrue on the fair value of the distributional interest of a member of a limited liability company that chooses to disassociate from the company where such value is determined by a circuit court pursuant to West Virginia Code §31B-7-702. The Circuit Court of Preston County concluded that §31B-7-702(e) requires that interest accrue from the date a circuit court establishes the value of the dissociating member's distributional interest. Petitioner argues on appeal that interest should accrue from the date on which a member dissociates from a limited liability company. Respondent asserts that the Circuit Court correctly applied §31B-7-702(e).

Petitioner The Domenick Marrara, Jr. Trust seeks review and reversal of a portion of the order of the Circuit Court of Preston County entered February 20, 2013 establishing the terms whereby the Petitioner Trust's distributional interest in Ripley would be purchased by Respondent Ripley.<sup>1</sup> Ripley is a family owned, at will limited liability company formed under West Virginia law and headquartered in Kingwood, West Virginia. Ripley owns a commercial shopping center located in Jackson County, West Virginia. Petitioner Trust owned a 25% interest in Ripley Associates, LLC. Appx. 37. Prior to the dispute that gave rise to this litigation, Petitioner Dominick Marrara, Jr. acted as Ripley's manager.

Because of disagreements over the operation of Ripley, pursuant to West Virginia Code §31B-6-601, on November 4, 2011, Petitioner Trust gave notice of its dissociation from Ripley. Ripley had no operating agreement that controlled how the distributional interest of a dissociating member was to be valued and retired. Thus, as required by West Virginia Code

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<sup>1</sup>. While the Petition identifies all of the Plaintiffs below as Petitioners in this present proceeding, the February 20, 2013 order from which Petitioners appeal only granted relief to Petitioner The Domenick Marrara, Jr. Trust.

§31B-7-101(b), Ripley formulated an offer to purchase Petitioner Trust's distributional interest. Ripley's offer to purchase Petitioner Trust's interest for \$413,727.35 was communicated to Petitioner Trust by correspondence dated December 2, 2011.<sup>2</sup> In conformity with section 31B-7-701(b), Respondent's offer was accompanied by a balance sheet and income statement for Ripley and an explanation regarding how the purchase price was calculated. The parties could not agree on the value of Petitioner Trust's distributional interest in Ripley. Therefore, within the 120 day period provided in section 31B-7-701(d), on March 5, 2012, Petitioners filed suit in the Circuit Court of Preston County. Per the procedure established by West Virginia Code §31B-7-702, Petitioners requested that the Circuit Court determine the value of Petitioner Trust's distributional interest and the terms on which Ripley would be required to purchase that interest.<sup>3</sup>

On January 15, 2013, the Circuit Court held a bench trial to determine the value of Petitioner Trust's distributional interest in Ripley. At the conclusion of the bench trial, the Circuit Court ruled from the bench that the Petitioner Trust's distributional interest in Ripley was worth \$500,000.00. Per West Virginia Code §31B-7-702(a)(3), the Circuit Court further ordered that within 60 days of January 15, 2013, Petitioner Trust was to transfer its distributional interest to Ripley in exchange for Ripley's payment of \$500,000.00. Appx. 35-40.

On February 12, 2013, counsel for Petitioners submitted a proposed order regarding the January 15, 2013 bench trial. Appx. 01. Petitioners' proposed order included language requiring that the value of Petitioner Trust's distributional interest established by the Circuit Court would

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<sup>2</sup>. Plaintiffs' Complaint, ¶21. While not included in the record designated by Petitioner, a copy of Plaintiffs' Complaint was attached as an exhibit to Respondent's Motion to Dismiss Petitioners' appeal filed on August 5, 2013. Moreover, Rule 6 of the Rules of Appellate Procedure provides that the entire record before the lower tribunal is available to this Court on appeal it should believe additional portions of the record are important to a full understanding of the issues presented on appeal.

<sup>3</sup>. Preston County Circuit Judge Lawrence Miller recused himself from Petitioners' action. Senior status Justice Larry Starcher was thereafter assigned to preside over the case by the Chief Justice of the Supreme Court of Appeals. Justice Starcher presided over all proceedings at issue in this appeal.

bear interest from November 4, 2011, that being the date Petitioner Trust gave notice of its dissociation from Ripley. Appx. 07. By letter dated February 13 2013, Respondent's then counsel objected to the inclusion of Petitioners' proposed prejudgment interest language, noting that the Circuit Court had made no ruling regarding the payment of interest at the January 15, 2013 hearing. Appx. 09-13.

By letter dated February 16, 2013, Justice Starcher advised counsel that he had considered their respective arguments regarding interest payable on the value of Petitioner's distributional interest in Ripley and had determined that "a fair reading of W.Va. Code 31B-7-702(e)..." led the Circuit Court to find that said Code provision required that interest on Petitioner Trust's distributive share accrue from January 15, 2013, that being the date the Circuit Court determined the value of said Petitioner's interest. Appx. 33-34. The Circuit Court entered an order to that effect dated February 20, 2013. Appx. 35-39. On April 19, 2013, Ripley acquired Petitioner's distributional interest in Ripley on the terms provided for in the Circuit Court's February 20, 2013 order with interest paid through April 19, 2013.<sup>4</sup>

On March 18, 2013, Petitioner filed its notice of appeal indicating that Petitioner intended to seek reversal of the Circuit Court's February 20, 2013 order as it related to the award of

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<sup>4</sup>. As indicated in Respondent's Motion to Dismiss Petitioners' appeal filed on August 5, 2013, on March 1, 2013, the parties and their counsel met in a failed attempt to finalize the transfer of Petitioner Trust's distributional interest in Ripley as ordered by the Circuit Court in its February 20, 2013 order. Respondent thereafter filed a motion seeking to toll the accrual of interest while Petitioner filed a motion seeking a declaration that Ripley's purchase of Petitioner Trust's interest in Ripley would not foreclose future claims by Petitioners against Ripley. On April 16, 2013, the Circuit Court convened a hearing on the parties' cross motions. No written order resulted from the April 16, 2013 hearing.

In light of proceedings before the Circuit Court on April 16, 2013, the parties agreed on the terms of an assignment of Petitioner Trust's distributional interest to Ripley. The parties further agreed on additional interest payable to Petitioner Trust accruing after March 1, 2013. A meeting of the parties and their counsel was convened on April 19, 2013 to close the transaction. Petitioner there exchanged an assignment of its distributional interest in Ripley for Ripley's check for \$500,000.00; a check for \$4,315.07 in payment of interest due from January 15, 2013 to March 1, 2013; and a check for \$2,349.32 representing interest accruing from March 1, 2013 through April 19, 2013 calculated as directed by the Circuit Court at the April 16, 2013 hearing.

interest on the value of Petitioner Trust's distributional share in Ripley. Respondent's current counsel formally appeared in this matter on April 10, 2013. Appx. 45. On June 18, 2013, Petitioner perfected its appeal. On August 5, 2013, Respondent filed its Motion to Dismiss Petitioners' appeal. By order entered October 15, 2013, this Court denied Respondent's Motion to Dismiss and directed that Respondent's brief be filed by November 26, 2013.

## **II. SUMMARY OF ARGUMENT**

The Circuit Court of Preston County correctly found that where a member of a limited liability company dissociates from that company and, pursuant to West Virginia Code §31B-7-701(a), thereafter files suit seeking a judicial determination of the value of his or her distributive interest in the company, West Virginia Code §31B-7-702(e) requires that interest on the value of said distributive interest accrue from the date on which the circuit court establishes said value.

West Virginia's Uniform Limited Liability Company Act (hereafter "the ULLCA" or "the Act") was enacted in March 1996 and became effective on July 1, 1996. West Virginia's Uniform Limited Liability Company Act is based on the 1996 Model Uniform Limited Liability Company Act drafted by the National Conference of Commissioners of Uniform State Laws.

In enacting West Virginia's version of the ULLCA, the West Virginia Legislature chose not to adopt Model Act language providing that interest on the value of the distributive interest of a dissociating member accrued from the date of dissociation. This fact, coupled with the language chosen by the Legislature as contained in West Virginia Code §31B-7-702(e), clearly establishes that the Legislature intended that when a dissociated member of a limited liability company seeks judicial determination of the value of his or her distributive interest in the company, interest on the value so established accrues from the date on which a circuit court establishes such value.

### **III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

By order entered October 15, 2013 denying Respondent's Motion to Dismiss the appeal, this Court determined that oral argument was appropriate in this matter and scheduled oral argument on February 4, 2014. Since this case involves an issue of first impression, Respondent does not believe that a memorandum decision is appropriate in this matter.

### **IV. ARGUMENT**

#### **A. STANDARD OF REVIEW**

Petitioner Trust seeks review of the Circuit Court's interpretation and application of §31B-7-702(e) and reversal of the Circuit Court's February 20, 2013 order awarding interest on the value of Petitioner Trust's distributive interest in Ripley. This Court applies a *de novo* standard of review for a circuit court's decision interpreting statutory law. *Kester v. Small*, 217 W.Va. 371, 618 S.E.2d 380 (2005). The *de novo* review standard is applicable to the review of a circuit court's interpretation of a statute authorizing an award of judgment interest. *See, e.g., Polly v. Gilbert*, 206 W.Va. 114, 522 S.E.2d 208 (1999).

#### **B. COURT ACTION TO DETERMINE THE VALUE OF A DISSOCIATED MEMBER'S DISTRIBUTIONAL INTEREST IN A LIMITED LIABILITY COMPANY**

This appeal arises in the context of a statutorily created judicial proceeding whereby a circuit court establishes the terms and conditions on which a limited liability company must acquire the distributional interest of a dissociated member of the company. As such, a summary of pertinent provisions of West Virginia's Uniform Limited Liability Company Act is necessary to frame the issue to be resolved by this Court.

A limited liability company is owned by its members. West Virginia Code §31B-6-602(a) states that "[u]nless otherwise provided in the company's operating agreement, a member has the

power to dissociate from a limited liability company at any time, rightfully or wrongfully, by express will pursuant to section 6-601(1).” West Virginia Code §31B-6-601 provides:

A member is dissociated from a limited liability company upon the occurrence of any of the following events:

- (1) The company’s having notice of the member’s express will to withdraw upon the date of notice or on a later date specified by the member;...

Pursuant to the foregoing Code sections, on November 4, 2011, Petitioner Trust gave notice of its intent to withdraw and thereby disassociate as a member of Respondent Ripley effective immediately. Appx. 37.

West Virginia Code §31B-6-603 addresses the effect of the dissociation of a member of a limited liability company. Section 31B-6-603 provides, in relevant part:

(a) If under section 8-801 a member's dissociation from a limited liability company results in a dissolution and winding up of the company's business, article eight of this chapter applies. If a member's dissociation from the company does not result in a dissolution and winding up of the company's business under section 8-801:

- (1) In an at-will company, the company must cause the dissociated member's distributional interest to be purchased under article seven of this chapter; ...

Here, none of the events identified in West Virginia Code §31B-6-801(b) requiring the wind up and dissolution of Ripley had occurred.<sup>5</sup> In that event, West Virginia Code §31B-7-701 required that Ripley purchase the distributional interest of its dissociated member, Petitioner Trust. West

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<sup>5</sup>. West Virginia Code §31B-8-801(b) provides, in pertinent part:

A limited liability company is dissolved, and its business must be wound up, upon the occurrence of any of the following events:

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- (3) Dissociation of a member who is also a manager or, if none, a member of an at-will company, and dissociation of a member who is also a manager...

Ripley is an at will limited liability company. Petitioner Dominick Marrara, Jr. Trust was the member that gave notice of its dissociation from Respondent Ripley. However, Petitioner Dominick Marrara, Jr., in his individual capacity, was evidently the manager of Ripley at the time of Petitioner Trust’s dissociation. As such, Petitioner Trust’s dissociation did not require the dissolution and winding up of Ripley per §31B-8-801(b)(3). Nor were any of the other events requiring dissolution and winding up described in §31B-8-801(b) present.

Virginia Code §31B-1-101(8) provides that “[d]istributional interest’ means all of a member’s interest in distributions by the limited liability company”. West Virginia Code §31B-1-101(7) provides that “[d]istribution’ means a transfer of money, property or other benefit from a limited liability company to a member in the member’s capacity as a member or to a transferee of the member’s distributional interest.”

West Virginia Code §31B-7-701 controls the disposition of the distributional interest of a member of a limited liability company that has chosen to dissociate from the company and provides, in relevant part:

(a) A limited liability company shall purchase a distributional interest of a:

- (1) Member of an at-will company for its fair value determined as of the date of the member's dissociation if the member's dissociation does not result in a dissolution and winding up of the company's business under section 8-801;

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(b) A limited liability company must deliver a purchase offer to the dissociated member whose distributional interest is entitled to be purchased not later than thirty days after the date determined under subsection (a) of this section. The purchase offer must be accompanied by:

- (1) A statement of the company's assets and liabilities as of the date determined under subsection (a) of this section;
- (2) The latest available balance sheet and income statement, if any; and
- (3) An explanation of how the estimated amount of the payment was calculated.

Where the limited liability company and dissociated member cannot agree on the terms whereby the limited liability company will acquire the dissociated member’s distributional interest, West Virginia Code §31B-7-701(d) allows the dissociated member to commence a judicial proceeding to establish the value of the member’s distributional interest and terms on which the limited liability company is to acquire such interest. Sections 31B-7-701(d) and (e) state, in relevant part:

- (d) If an agreement to purchase the distributional interest is not made within one hundred twenty days after the date determined under subsection (a) of this section, the dissociated member, within another one hundred twenty days, may commence a proceeding against the limited liability company to enforce the purchase....The jurisdiction of the court in which the proceeding is commenced under this subsection is plenary and exclusive.
- (e) The court shall determine the fair value of the distributional interest in accordance with the standards set forth in section 7-702 together with the terms for the purchase. Upon making these determinations, the court shall order the limited liability company to purchase or cause the purchase of the interest.

In this regard, West Virginia Code §31B-7-702 provides, in relevant part:

- (a) In an action brought to determine the fair value of a distributional interest in a limited liability company, the court shall:
  - (1) Determine the fair value of the interest, considering among other relevant evidence the going concern value of the company, any agreement among some or all of the members fixing the price or specifying a formula for determining value of distributional interests for any purpose, the recommendations of any appraiser appointed by the court, and any legal constraints on the company's ability to purchase the interest;
  - (2) Specify the terms of the purchase, including, if appropriate, terms for installment payments, subordination of the purchase obligation to the rights of the company's other creditors, security for a deferred purchase price and a covenant not to compete or other restriction on a dissociated member; and
  - (3) Require the dissociated member to deliver an assignment of the interest to the purchaser upon receipt of the purchase price or the first installment of the purchase price.

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- (e) **Interest must be paid on the amount awarded from the fair market value determined under section 7-701(a) to the date of payment.** (emphasis added)

Petitioner Trust seeks reversal of the Circuit Court's decision that West Virginia Code §31B-7-702(e) requires that interest awarded on the fair market value of a dissociated member's distributional interest accrues from the date on which that value is established by a circuit court pursuant to the procedure established in section 31B-7-702(a).

**C. WEST VIRGINIA CODE §31B-7-702(E) REQUIRES THAT INTEREST BE AWARDED ON THE DISTRIBUTIONAL INTEREST OF A DISSOCIATED MEMBER OF A LIMITED LIABILITY COMPANY FROM THE DATE ON WHICH THE VALUE OF THAT INTEREST IS ESTABLISHED BY A CIRCUIT COURT**

At the January 15, 2013 bench trial, the Circuit Court found that the fair value of Petitioner Trust's distributional interest in Ripley as of November 4, 2011, that being the date of Petitioner Trust's dissociation from Ripley, was \$500,000.00. Petitioner's counsel thereafter submitted a proposed order regarding the bench trial which included language providing that said \$500,000.00 award would bear interest at the judgment rate from November 4, 2011, that being the date Petitioner Trust dissociated from Ripley. Respondent's counsel objected. By letter dated February 16, 2013, the presiding judge advised counsel that he had considered their respective arguments regarding interest payable on the value of Petitioner's distributional interest in Ripley.

In this regard, Justice Starcher stated:

The court recognizes that there are three possible dates for consideration for the beginning date of interest. First, as counsel for Plaintiffs suggests, November 4, 2011, the date of dissociation. Second, the date of the "award" (orally stated by the court), January 15, 2013, and third, the date by which the court required the payment of the award to be paid, March 18, 2013.

There is some logic for (sic) that argues for each of these dates, but the court is of the opinion that a fair reading of *W.Va. Code 31B-7-702(e)*, which clearly states that "[i]nterest must be paid on the amount awarded...", in conjunction with *W.Va. Code 31B-7-101(a)(1)*. The latter code provision simply tells us the date which is to be considered when making the value determination; it says nothing about interest beginning on an award from this date. And, there was no "award" until January 15, 2013; and in this provision the language *is* clear that interest is to be paid on the *amount awarded*.

Therefore, the court will modify the recommended order to provide that interest, at the current legal rate of 7%, begins to run on the date of the *award*-January 15, 2013.... (emphasis in original)

On February 20, 2013, the Circuit Court entered an order concerning the January 15, 2013 bench trial. Regarding the award of interest, Paragraph 20 of the order stated:

The Court further FINDS that the fair market value of the distributional interest of Plaintiff, Domenick Marrara Jr., Trust, in Ripley Associates, LLC, as of November 4, 2011, is five hundred thousand dollars (\$500,000.00). As such, pursuant to West Virginia Code §31B-7-701, et seq., the Court hereby ORDERS Defendant Ripley

Associates, LLC, to pay Plaintiff, Domenick Marrara Jr., Trust, five hundred thousand dollars (\$500,000.00), plus interest at the statutory rate of seven percent (7%) per annum, running from January 15, 2013, the date the court determined the interest share and orally made the award, with interest running until the date said payment is made in full with interest, to Plaintiff, Domenick Marrara, Jr. Trust, the same to be paid within sixty (60) days of the date of the January 15, 2013, hearing in this matter. Said interest shall continue to accrue until said judgment is paid in full, along with any accrued interest.

Appx. 39-40.

Petitioners acknowledge that the plain language of West Virginia Code §31B-7-702(e) does not state that interest on the court determined value of the distributional interest of a dissociated member is to run from the date of the member's dissociation. Rather, said Code subsection 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. Thus, section 31B-7-702(e) mandates that interest be awarded on the value of the distributional interest established by a circuit court. However, Respondent asserts that the date from which such interest is to accrue cannot be determined by a fair reading of section 31B-7-702(e).

While making scant reference to the rules of statutory construction, Petitioner Trust encourages this Court to conclude that section 31B-7-701 provides the date from which interest awarded pursuant to 31B-7-702(e) is to accrue. In this regard, Petitioner argues:

While Section 702(e) might, when read on its own, appear somewhat unclear as it never specifically states a date certain for when interest is to begin to accrue, Section 701(a), which is explicitly referenced in Section 702(e), resolves any ambiguity and makes clear that interest began to accrue on Petitioner's distributional interest on November 4, 2011, the date of Petitioner's dissociation from Ripley Associates, LLC. Section 701(a) provides, in pertinent part, that:

A limited liability company shall purchase a distributional interest of a:  
(1) Member of an at-will company for its fair value determined as of the date of the member's dissociation if the member's dissociation does not result in a dissolution and winding up of the company's business under section 8-801;

Petitioners' Brief, pp. 8-9. Respondents assert that as found by the Circuit Court of Preston County, section 31B-7-701(a) plainly and unambiguously provides that the value of a dissociated

member's distributional interest in a limited liability company is to be established as of the date of the member's dissociation. Respondents further assert that said section provides no indication regarding when the date from which interest as required by section 31B-7-702(e) is to accrue.

In *Newark Insurance Company v. Brown*, 218 W.Va. 346, 624 S.E.2d 783 (2005), this Court summarized the rules of construction to be employed to determine the meaning of a statute enacted by our Legislature.

Traditionally, when this Court is asked to resolve a question regarding a matter of statutory construction, we first consider the intent of the Legislature in enacting the subject provision. 'The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.'... Then, '[o]nce the legislative intent underlying a particular statute has been ascertained, we proceed to consider the precise language thereof.'... When the language chosen by the Legislature is plain, we apply, rather than construe, such legislative language. 'A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.' (citations omitted)

218 W.Va. at 351, 624 S.E.2d at 788. Following the foregoing formulation, the threshold inquiry that must be made by this Court concerns the intent of our Legislature in enacting §31B-7-702 and, in particular, subsection (e) thereof.

On March 8, 1996, the West Virginia Legislature enacted the Uniform Limited Liability Company Act. The West Virginia Uniform Limited Liability Company Act became effective on July 1, 1996. In so doing, the Legislature repealed the West Virginia Limited Liability Act, the former West Virginia Code §31-1A-1, *et seq.* that had been enacted only four years earlier.<sup>6</sup> While the former Limited Liability Act permitted members of a limited liability company to withdraw, the former Act provided no mechanism whereby a circuit court could determine the value of a withdrawing member's interest in a limited liability company or to compel the limited

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<sup>6</sup> For an overview of the adoption and subsequent repeal of the West Virginia Limited Liability Act, see Debra R. Cohen, *West Virginia Corporate Law: Is It "Broke?",* 100 W. Va. L. Rev 5 (1997-1998).

liability company to acquire a withdrawing member's interest.<sup>7</sup> This Court has stated that the Legislature is presumed to know the language it had employed in former acts and further that if the Legislature uses different language regarding the same subject matter in subsequent legislation, this Court must presume that a change in law was intended. *Butler v. Rutledge*, 174 W.Va. 752, 329 S.E.2d 118 (1985). In enacting the West Virginia Uniform Limited Liability Company Act, the Legislature apparently intended to correct shortcomings it perceived in the former Limited Liability Act, including the lack of a judicial mechanism whereby a withdrawing member of a limited liability company could receive value for his or her membership interest.<sup>8</sup>

West Virginia's ULLCA is based on the 1996 Model Uniform Limited Liability Company Act drafted by the National Conference of Commissioners of Uniform State Laws.<sup>9</sup> West Virginia did not enact the Model Uniform Limited Liability Company Act wholesale and without alteration. Of particular interest to the issue before the Court is our Legislature's decision to reject Model Act language concerning the payment of interest on the judicially determined value of the distributional interest of dissociated member of a limited liability company. Section 701 of the Model Act is identical to the statute enacted by our Legislature and contained in West

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<sup>7</sup>. See Ann Maxey, *West Virginia's Limited Liability Company Act: Problems With The Act*, 96 W.Va. L. Rev. 905 (1993-1994)

<sup>8</sup>. West Virginia Code §31-1A-27 (repealed effective July 1, 1996)

<sup>9</sup>. The history of this and other uniform acts proposed by the National Conference of Commissioners of Uniform State Laws appear on the Conference's website. [www.uniformlaws.org](http://www.uniformlaws.org).

A complete copy of the 1996 ULLCA is available at <http://www.uniformlaws.org/shared/docs/limited%20liability%20company/ullca96.pdf> (last visited November 25, 2013).

In addition to West Virginia, the states of Alabama, Hawaii, Montana, South Carolina, South Dakota and Vermont adopted limited liability company legislation based in whole or part on the 1996 Model Uniform Limited Liability Company Act. See Cornell University Law School Legal Information Institute, Uniform Commercial Code Locator <http://www.law.cornell.edu/uniform/vol7.html#llc> (last visited November 25, 2013).

Virginia Code §31B-7-701. Section 702 of the Model Act creates a judicial procedure to determine the fair value of the distributional interest of a dissociated member of a limited liability company. However, the statute enacted by our Legislature deviates from Model Act Section 702 in one critical respect. While West Virginia Code §31B-7-702(e) requires 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”, Model Section 702(e) provides that “[i]nterest must be paid on the amount awarded **from the date determined under Section 701(a)** to the date of payment.” Thus, in enacting the ULLCA, **our Legislature expressly rejected** Model Act language that would have required the result that Petitioner Trust seeks; namely that interest on the value of the distributional interest of a dissociated member as established via the judicial proceeding set forth in the ULLCA accrue from the date of dissociation.<sup>10</sup>

Given that our Legislature rejected Model Act language requiring that interest accrue from the date of dissociation, West Virginia Code §31B-7-702(e)’s requirement 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” must refer to a date other than the date of dissociation. This conclusion is consistent with the oft cited rule of statutory construction *expressio unius est exclusio alterius*; that is, the express mention of one thing implies the exclusion of another. *Phillips v. Larry’s Drive-in Pharmacy, Inc.*, 220 W.Va. 484, 647 S.E.2d 920 (2007). Given the rejection of Model Act language requiring that interest run from the date of dissociation, the only other date from which interest was to accrue on the value of a dissociated member’s

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<sup>10</sup>. Of the states that adopted limited liability company acts based in whole or part on the 1996 version of Uniform Limited Liability Company Act, Hawaii, Montana, South Carolina and Vermont enacted the Model Act’s language requiring that interest be paid on the value of a dissociated member’s distributional interest from the date of dissociation. Haw. Rev. Stat. 428-702(f) (2013); Mont. Code Ann. §35-8-809(b)(5) (2013); S.C. Code Ann. §33-44-702(e) (2013). Alabama and South Dakota opted not to include a judicial proceeding to determine the value of a dissociated member’s interest in a limited liability company in their respective Limited Liability Company Acts.

distributional interest that the Legislature could have intended in enacting §31B-7-702(e) is the date upon which the circuit court determined the value of that interest. Thus, in selecting the date on which it had determined the value of Petitioner Trust's distributional interest in Ripley as the date from which interest would accrue on that award, the Circuit Court of Preston County correctly interpreted and applied section 31B-7-702(e).

**D. PETITIONERS' POLICY ARGUMENTS IN SUPPORT OF THEIR INTERPRETATION OF SECTION 31B-7-702(E) MUST BE REJECTED**

Petitioners make two policy arguments in support of their interpretation of West Virginia Code §31B-7-702(e). First, Petitioners argue that “the scope and purpose of Article 7 of West Virginia’s Uniform Limited Liability Company Act would be frustrated by the Circuit Court’s interpretation of Section 702(e).” Petitioners’ Brief, p. 10. Petitioners contend that the purpose of Article 7 of West Virginia’s Uniform Limited Liability Company Act is to “appropriately compensate a dissociated member for its distributional interest in a limited liability company at the time of his dissociation”.<sup>11</sup> *Id.* By Petitioners’ reckoning, this purpose can only be accomplished if section 31B-7-702(e) is read to require that interest be paid on the distributional interest from the date of a member’s dissociation. This contention must be rejected for several reasons. First and foremost, the language chosen by the Legislature when enacting section 31B-7-702(e) plainly does not support Petitioners’ interpretation of that section. Moreover, Petitioners’ fail to acknowledge that a dissociated member remains entitled to receive distributions from the limited liability company after dissociation and until that member’s distributional interest is acquired by the limited liability company. Upon dissociating from the company, the dissociating member loses the right to participate in the day-to-day management of

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<sup>11</sup>. Respondent asserts that the Legislature's decision to repeal the Uniform Limited Liability Act and simultaneously adoption of the Uniform Limited Liability Company Act was motivated in part by the desire to create a procedure whereby a member of the limited liability company could withdraw from the company, receive compensation for his or her membership interest, and allow the remaining members of the limited liability company to continue the business of the company.

the company while retaining in full the economic advantages of membership in the company. In this regard, West Virginia Code §31B-6-603(b) defines the effect of a member's dissociation and states, in relevant part:

Upon a member's dissociation from a limited liability company:

- (1) The member's **right to participate in the management and conduct of the company's business terminates...** and the member ceases to be a member **and is treated the same as a transferee of a member;** (emphasis added)

West Virginia Code §31B-5-501(b) provides that a member's distributional interest is transferable personal property. West Virginia Code §31B-5-502 provides that the transfer of a distributional interest does not entitle the transferee to become a member of the limited liability company. Rather, West Virginia Code §31B-5-503(e) provides that a transferee of the distributional interest who does not otherwise become a member of the limited liability company is entitled to the following:

(e) A transferee who does not become a member is entitled to:

- (1) Receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled;
- (2) Receive, upon dissolution and winding up of the limited liability company's business:
  - (i) In accordance with the transfer, the net amount otherwise distributable to the transferor;...

West Virginia Code §31B-1-101(7) provides that “[d]istribution’ means a transfer of money, property or other benefit from a limited liability company to a member in the member’s capacity as a member **or to a transferee of the member’s distributional interest.**” (emphasis added).

In light of the foregoing Code provisions, it is plain that a dissociating member of the limited liability company does not suffer any economic disadvantage *vis-à-vis* the remaining members of the company as a result of the decision to dissociate. After dissociation, a dissociated member remains entitled to receive distributions of money, property or other benefits

from the company to the same extent as its remaining members. Moreover, before or after dissociation, the dissociated member could sell his or her distributional interest to a third party, thereby receiving immediate value for the distributional interest.

Here, Petitioner Trust chose to dissociate from Ripley. The effect of that dissociation was to terminate Petitioner Trust's right to participate in the management of Ripley. Rather than sell its remaining distributional interest to a third party, Petitioner Trust chose to sell it to Ripley. As required by law, within 30 days of receiving Petitioner's notice of dissociation, Ripley made an offer to purchase Petitioner Trust's distributional interest for \$413,727.35. Petitioner Trust chose not to accept that offer. Instead, Petitioner Trust chose to commence the judicial valuation proceeding created by West Virginia Code §31B-7-702. In so doing, Petitioner Trust accepted the delay inherent in any judicial proceeding. At any point during that proceeding, Petitioner Trust could have sold his distributional interest to the remaining members of Ripley or to a disinterested third party at an agreed-upon price and thereby obtain the "appropriate compensation" to which Petitioner Trust claims it is entitled. If, at any point following the Trust's dissociation and prior to the sale of the Trust's interest to Ripley, Ripley's remaining members had chosen to take a distribution from Ripley, Petitioner Trust would also have been entitled to receive a distribution. Thus, Petitioner Trust was in no way economically disadvantaged by its decision to disassociate from Ripley and from the Trust's decision to commence a judicial proceeding to establish the value of its distributional interest.

Petitioners next argue if West Virginia Code §31B-7-702(e) is interpreted as requiring payment of interest from the date on which a circuit court determines the value of a dissociated member's distributional share, such interpretation would "create perverse incentives for limited liability companies ... NOT to come to an agreement for the purchase of a dissociated member's

interest...” (emphasis in original) Petitioners’ Brief, p. 14. Again, such policy arguments have no place where, as here, the language chosen by the Legislature plainly requires that interest accrue from the date of the judicial determination of the value of a dissociated member’s distributional interest. Moreover, as discussed in the preceding paragraphs and as demonstrated in this case, it is the dissociating member who has no incentive to agree on the terms on which it will sell its distributional interest. A dissociated member of a limited liability company retains his or her distributional interest in the company and suffers no economic disadvantage *vis-à-vis* the remaining members as a result of his or her voluntary dissociation. Petitioners’ claim that a limited liability company somehow enjoys an economic “windfall” as it attempts to satisfy its obligations to acquire the dissociated member’s distributional interest is specious.

Upon receiving notice of dissociation, a limited liability company is required to make an offer to purchase the distributional interest of the dissociating member within 30 days. The dissociating member may choose, without explanation, to reject that offer. The dissociating member may choose to sell his or her distributional interest to an unrelated third party at whatever price the dissociated member can negotiate for the interest. As occurred here, the dissociating member can choose to commence a judicial proceeding to establish the terms on which the limited liability company must acquire the distributional interest of the dissociated member. At every step in the process, from the decision to disassociate from the company to the terms on which distributional interest is to be sold, all decisions regarding the disposition of the distributional interest are controlled by the dissociating member.

Finally, the Legislature specifically provided a mechanism to prevent either party using the judicial valuation procedure to economically disadvantage either the dissociating member or the company. In this regard, West Virginia Code §31B-7-702(d) provides:

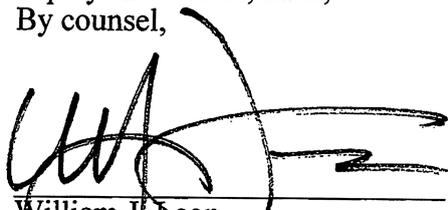
If the court finds that a party to the proceeding acted arbitrarily, vexatiously or not in good faith, it may award one or more other parties their reasonable expenses, including attorney's fees and the expenses of appraisers or other experts, incurred in the proceeding. The finding may be based on the company's failure to make an offer to pay or to comply with section 7-701(b).

Section 31B-7-702(d) is identical to language contained in the 1996 Model Act. Comments accompanying the proposed model language stated "the power of the court to award all costs and attorney's fees incurred in the suit under subsection (d) is incentive for both parties to act in good faith...." Here, Petitioners do not contend, nor could they, that Respondent acted arbitrarily, vexatiously or in bad faith in responding to Petitioner Trust's dissociation from Ripley. Had such conduct occurred, Petitioners would surely have requested relief pursuant to West Virginia Code §31B-7-702(d).

## V. CONCLUSION

For the reasons stated herein, the Circuit Court of Preston County correctly found that West Virginia Code §31B-7-702(e) requires that interest awarded on the distributional interest of Petitioner Dominick Marrara, Jr. Trust accrue from the date of judicial determination of the value of such interest. Respondent respectfully asserts that the order of the Circuit Court of Preston County entered February 20, 2013 must therefore be affirmed and Petitioners' appeal from said order be denied.

Respectfully submitted,  
Ripley Associates, LLC,  
By counsel,

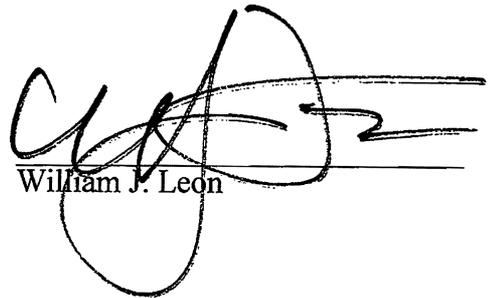


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**CERTIFICATE OF SERVICE**

I hereby certify that I served a true copy of Respondent Brief on counsel for Petitioners via facsimile transmission and the United States Mail, first class and postage prepaid, at the address listed below on November 25, 2013

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