

NEW YORK
CITY BAR

COMMITTEE ON REAL PROPERTY LAW

ANDREA D. ASCHER
CHAIR
551 FIFTH AVENUE
NEW YORK, NY 10176
Phone: (212) 661-5030
Fax: (212) 687-2123
aascher@schoeman.com

October 16, 2012

Hon. Sheldon Silver
Speaker
New York State Assembly
Legislative Office Building 932
Albany, NY 12248

Hon. Dean Skelos
Majority Leader
New York State Senate
330 Capitol Building
Albany, NY 12247

Re: Amending the New York Limited Liability Company Law and New York Revised Limited Partnership Act to Eliminate Newspaper Publication Requirements

Dear Speaker Silver and Senator Skelos:

The Real Property Law Committee of the New York City Bar Association (the “RPL Committee”) is composed of solo, law firm and in-house lawyers with diverse perspectives and experiences in real estate law. Members of the RPL Committee routinely counsel their clients on matters of business-entity structure and formation for the purposes of investing in, and owning and managing real estate assets in New York.

The purpose of this letter is to express the RPL Committee’s continued opposition to the requirements under Section 206 of the New York Limited Liability Company Law and Section 121 – 201 of the New York Revised Limited Partnership Act imposed on newly formed limited liability companies and limited liability partnerships in New York that such domestic entities publish notice of their organization in designated newspapers, and the corresponding requirements under Section 802 of the New York Limited Liability Company Law and Section 121 – 902 of the New York Revised Limited Partnership Act imposed on limited liability companies and limited liability partnerships formed elsewhere but seeking to qualify to do business in New York that such foreign entities publish notice of their application for authority in designated newspapers. Indeed, 48 other States do not impose the burdens associated with the publication requirements under New York law on newly formed limited liability companies and partnerships. It is estimated that the publication requirements add \$1,500 - \$3,000 to startup costs for these entities and disproportionately burden entities required to publish in New York County.

The RPL Committee believes that the publication requirements do not serve their stated objectives of protecting consumers by providing them with necessary information, impose an unnecessary financial cost, which particularly affects smaller New York businesses, entrepreneurs and investors, and discourage the formation of business entities in this State. Since the publication requirements do not result in any meaningful protection for consumers, the only true benefactors of the publication requirements are the newspapers in which the mandatory formation notices are typically published. The amounts received by these publications for the service provided is seven to ten times the amount received by the State in connection with such formation.

PUBLICATION REQUIREMENTS

Section 206 of the Limited Liability Company Law and Section 121-201 of the Revised Limited Partnership Act mandates that every newly formed limited liability company or limited partnership publish, within 120 days after filing of its organizational document, a notice of the formation, for a period of six successive weeks, in one daily and one weekly newspaper designated by the county clerk of the county where the office of the entity is located. The notice must include the following information: (1) the name of the entity; (2) the date of filing of the articles of organization or certificate of limited partnership with the Department of State and, if the date of formation is not the date of filing of the articles or certificate, the date of the formation of the entity; (3) the county in which the office of the entity is located and the street address of the principal business location; (4) a statement that the Secretary of State has been designated as agent of the entity upon whom process against it may be served and the post office address to which the Secretary of State shall mail a copy of any process against it; (5) if the entity is to have a registered agent, his or her name and address within this State and a statement that the registered agent is to be the agent of the entity upon whom process against it may be served; (6) if the entity is to have a specific date of dissolution, the latest date upon which the entity is to dissolve; and (7) the character or purpose of the business. Nearly identical requirements can be found in Section 206 of the Limited Liability Company Law and Section 121-902 of the Revised Limited Partnership Act for foreign limited liability companies and foreign limited partnerships applying to do business in New York. In fact, there are parallel publication requirements for professional service limited liability companies under Section 1203 of the Limited Liability Company Law and for limited liability partnerships under Section 121-902 of the Revised Limited Partnership Act.

Until 2006, the stated penalty for an entity's failure to comply with the publication requirement within 120 days after the filing of its organizational document was to be barred from having access to the New York courts (although permitted to defend actions brought against it) until the publication requirements were satisfied. Since June 1, 2006, however, the statutory penalty for an entity's failure to comply with the publication requirements is stated as the suspension of the entity's authority to carry on, conduct or transact business in New York. This purported sanction is not clearly defined and the statute further provides that such suspension shall not (1) impair or limit the validity of any contract or act of the entity, (2) impair the enforcement of any right or remedy of any other party against the entity including the right to maintain an action or proceeding against the entity or the right of the entity to defend itself in such action or proceeding or (3) result in any member, manager or agent of the entity becoming liable for the obligations of the entity.

PROBLEMS WITH THE CURRENT LAW

Elusiveness of the Stated Benefits of the Publication Requirements

The stated goal of the publication requirement is consumer protection. The Committee is at a loss to understand what protection will be afforded by the publication of this information. In most instances, publication would occur long before a consumer is likely to have commercial dealings with the entity. It is unlikely that any consumer would be reading these notices on a regular basis in anticipation of the possibility that they might deal with some newly formed entity in the future. In addition, since the publication is in newspapers selected by the county clerks of the 62 counties of the state, there could be as many as 62 newspapers to read. It appears unlikely that any consumer would be seeking this information from the newspapers.

The use of the print media for this purpose has become outdated and unnecessary. Most of the information is now available on the website maintained by the New York Department of State or from other internet sources. One of the required disclosure items, "the character or purpose of the business", is routinely answered as "any lawful purpose", an answer which supplies no useful information. A consumer ordinarily seeks information about an entity at a time when the published notice is no longer current. Internet disclosure provides real-time, easily accessible information to the consumer. Indeed, it would be highly unusual for consumers to dig through old newspapers to find information that is readily (and much more easily) available online.

Most significantly, the statutory publication requirements specifically provide that if after the initial publication is accurately made and at any time during the six week consecutive publication period the information disclosed in the initial publication becomes inaccurate, there is no requirement to correct the initial publication copy, nor to commence to publish anew, and the continued publication of the known inaccurate information in the original copy will nevertheless satisfy all publication requirements. With this in mind, one might conclude that since accurate disclosure of information to consumers is not a real or valid objective of the statutory requirement and the reliability to consumers of the information disclosed in the publications is questionable even during the process itself or shortly thereafter, eliminating the publication requirements would be in the best interests of consumers so as to no longer mislead them into a false sense of confidence in the accuracy of the published information.

Financial Burdens

The publication requirements add an additional financial burden on starting businesses. This is a particular burden on low and moderate income people seeking to start a small business with limited liability protection. The cost of publication, estimated at between \$1,500 and \$3,000, depends on the county in which the entity's principal office is located and the publications designated by that county clerk. In the county of New York, publication costs are the highest. The requirement that entities publish the requisite notice daily over a six-week period provides no benefit to the entity, consumers or the state. This, of course, continues to have the effect of discouraging the creation of these entities in New York and thereby a loss of revenue to the State. However, entities formed for the purpose of investing in, and owning and

managing real estate assets in New York, cannot simply avoid these publication costs, because the activities that they will engage in, if formed outside of New York, will require those foreign entities to qualify to do business in New York and the statutory requirements to do so contain identical publication requirements to those established for formation of domestic entities seeking limited liability protections.

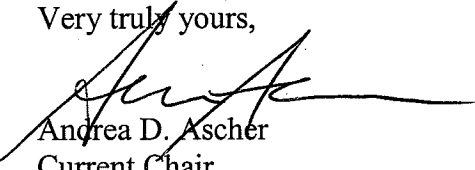
Uncertainty

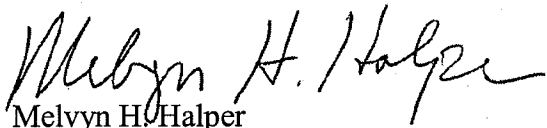
The purported penalty for failure to comply with the publication requirements has caused continuing uncertainty. One of the stated reasons for amending the laws regarding the publication requirements in 2006 was to provide clarity as to the penalty for non-compliance. As indicated above, although the statute states that the failure to comply results in suspension of the entity's authority to carry on, conduct or transact business in the State, it remains unclear what that means, other than that (1) the suspension of authority will not impair or limit the validity of a contract or act of the entity or the right of any other party to seek to enforce obligations in court or otherwise incurred by the entity and, (2) significantly, the suspension does not result in any member manager or agent of the limited liability company becoming liable for the contractual obligations or other liabilities of the limited liability company. It is difficult to discern the real penalty for failure to publish. It may be that, as before the legislation in 2006, an action in a State court by the entity would be subject to dismissal. However, that is unclear. There is also some question about whether title insurance will be issued to a transferee of real property conveyed by an entity that has failed to publish. Furthermore, attorneys representing these entities (often times small firm or solo practitioners) have difficulty issuing legal opinions customarily required in connection with transfers and/or financings of real property by or to such an entity and these transactions frequently get delayed to satisfy the publication requirements. These uncertainties are troubling, and are exacerbated by the fact that the State does not issue an official notice of suspension for failure to meet the publishing requirement.

* * *

For these reasons, the RPL Committee submits that the time is ripe to amend the New York Limited Liability Company Law and New York Revised Limited Partnership Act so as to no longer require publication in newspapers. This would bring New York laws into conformity with most other States.

Very truly yours,


Andrea D. Ascher
Current Chair


Melvyn H. Halper
Former Chair

Cc: Hon. James Brennan
Hon. Micah Kellner
Hon. Liz Krueger
Hon. Michael Ranzenhofer
Mylan Denerstein, Esq.
Sabrina Ty, Esq.