

Recent Publication Law Adversely Affecting Limited Liability Entities in New York Amended before Effective Date; Penalties Softened, But Uncertainty Remains

June 1, 2006

On May 24, 2006, the New York Legislature passed Senate Bill S06831-B as a chapter amendment to Chapter 767 of the Laws of 2005 (signed February 3, 2006). Chapter 767 of the Laws of 2005 had substantially increased the publication requirements applicable to foreign and domestic limited liability companies, limited partnerships and limited liability partnerships, and increased the penalties. (This was the subject of a February 2006 Client Alert.) The chapter amendment substantially reduces the adverse publication requirements enacted by Chapter 767 and reduces the penalties. On May 31, the Governor signed S06831-B into law as Chapter 44 of the laws of 2006, and it became effective, together with Chapter 767, today, June 1, 2006.

Chapter 767 of the Laws of 2005 required disclosure of the "ten persons" actively engaged in the business and affairs of the entity, and imposed a "suspension of authority" as the penalty for failure to comply with the publication requirements. This legislation had been strongly opposed by major bar associations and others in New York State for the invasion of privacy with respect to the "ten persons" disclosure requirement, and the uncertainty with respect to the consequences of the "suspension of authority."

The principal consequences of a "suspension of authority" identified by commentators were (i) possible invalidity of contracts entered into during the "suspension," and (ii) possible personal liability for members or partners for actions taken during the "suspension." In response to these objections, the Senate S06831 bill was introduced, which eliminated the "ten persons" requirement, and eliminated the "uncertainty" regarding possible liability by expressly imposing joint and several liability on members or partners for the debts of the entity failing to publish. This unlimited personal liability resulted in even greater opposition and outrage by major bar associations, business groups and civic organizations.

S06831 was amended by S06831-B to eliminate the unlimited personal liability provisions, and make other important changes to Chapter 767, namely:

- The "ten persons" disclosure requirement has been deleted.
- The penalty for failure to publish remains suspension of the authority of the entity to carry on, conduct or transact any business. However, invalidity of contracts and personal liability of the members, managers, partners or agents of the entity are now expressly excluded as consequences of failure to publish or of suspension.
- The suspension penalty will also apply to preexisting entities (i.e., formed before the effective date of June 1, 2006) that had not published under the law as it previously existed. The cure period for compliance is now 12 months (as compared with 18 months) from the effective date, or June 1, 2007. For new entities, the prescribed period of filing the affidavit of publication is 120 days from the date of formation.
- The requirement that the notice of formation be published once a week for a period of four weeks in a daily and weekly newspaper has been restored to once a week for six weeks.
- The text of the notice has been restored to the notice requirements that existed prior to Chapter 767 with no significant changes.

Suspension of authority will be automatic and without notice and will be automatically annulled upon compliance with the publication requirements.

Notwithstanding the specific exclusion of "invalidity of contracts" and "personal liability" as consequences resulting from a suspension of authority, it remains unclear whether there may be other consequences.

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