

January 2022

## IDAHO'S LLC ACT: ORAL OPERATING AGREEMENTS AND THE STATUTE OF FRAUDS

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### Recommended Citation

Marcus H. Waterman, *IDAHO'S LLC ACT: ORAL OPERATING AGREEMENTS AND THE STATUTE OF FRAUDS*, 58 IDAHO L. REV. (2022).

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# IDAHO'S LLC ACT: ORAL OPERATING AGREEMENTS AND THE STATUTE OF FRAUDS

MARCUS H. WATERMAN\*

*Writing is nature's way of letting you know how sloppy your thinking is.*

R. Guindon

## ABSTRACT

*Laws meant to increase certainty for contracting parties are only effective if clearly communicated to the public. Where the statutory landscape sends mixed messages, uncertainty often results. The Idaho Code contains both a statute of frauds and an express authorization of oral operating agreements. It is silent, however, on how those provisions interrelate. The legislative comments provide little clarification, alluding only inconclusively to a Delaware court decision from 2009. The result is perplexing: told expressly by statute that operating agreements may be oral, LLC members are left wholly unprepared for a potentially devastating uppercut from the state's statute of frauds. To promote flexibility, certainty, and fundamental fairness, Idaho should move to completely exempt LLC operating agreements from the statute of frauds.*

*While critics have long doubted the general efficacy of statutes of fraud, this article focuses specifically on the amplification of those concerns in the LLC operating agreement context. Case law from both the LLC and partnership contexts reveals the often-inequitable results of applying statutes of fraud to otherwise highly flexible and familiar entity forms. Rather than waiting for disputes to arise under Idaho's silent approach, we should act preemptively by adopting a new way forward.*

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\* J.D., University of Idaho College of Law. Special thanks to my faculty and student advisors, Professor John Hinton and Clayton Boeckel, for their assistance with this article. And, of course, I am forever grateful to my wife, Janessa, for her constant support throughout law school.

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I. INTRODUCTION

The limited liability company (LLC) entity form has become increasingly popular in the last thirty years. Proprietors are attracted to the LLC form because of the high degree of flexibility that it provides. Expanding that flexibility, many states have recently moved to permit purely oral operating agreements. By failing to exclude operating agreements from the statute of frauds, however, states like Idaho put unsophisticated LLC members at risk of stumbling into a surprising conundrum. Told in plain terms that operating agreements may be oral, members are left wholly unprepared for the potentially devastating effects of the statute of frauds invalidating central terms of their agreements. Idaho, which is currently silent on the matter, should amend its LLC Act to exempt operating agreements from the statute of frauds. Doing so would promote flexibility, certainty, and fundamental fairness.

This article proceeds in several parts. In Part II, the stage is set with a review of the modern trend to permit oral LLC operating agreements. Part III, divided into several sections, explores important contextual matters: sections A and B consider the purpose and scope of statutes of fraud in general, section C summarizes some common criticisms of statutes of fraud, and section D explores the three provisions of Idaho’s statute of frauds that are most relevant to LLC operating agreements. Part IV is comprised of three sections, each identifying and evaluating a different approach to the statute of frauds in the LLC context. Finally, Part V contains a succinct recommendation for Idaho’s legislature moving forward.

II. THE MODERN TREND: PERMITTING ORAL LLC OPERATING AGREEMENTS

A growing number of United States jurisdictions have, in the last two decades, moved to permit oral LLC operating agreements.<sup>1</sup> In doing so, state legislatures

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1. See, e.g., Gregory Brockwell, *The New Alabama LLC Act: Impact on Members’ Rights and Internal Disputes*, 35 ALA. ASS’N JUST. J. 66, 66–67 (2015) (permitting oral operating agreements in Alabama as of 2014); John L. Grossman, *New Laws Soon to Govern New Jersey Limited Liability Companies*, FOX ROTHSCHILD (Dec. 2012), <https://www.foxrothschild.com/publications/new-laws-soon-to-govern-new-jersey-limited-liability-companies/> (permitting oral operating agreements in New Jersey as of 2012); John Cunningham, *The Rules are Changing for Operating Agreements*, N.H. BUS. REV. (Aug.

have sought a proper balance between two key policy objectives: certainty and flexibility.<sup>2</sup> On one hand, the terms of an oral agreement are less certain than those of a written one and are consequently more likely to “invite litigation.”<sup>3</sup> This is especially true where a third party joins an existing LLC and is deemed—as many LLC acts establish—to have assented to all terms of the operating agreement.<sup>4</sup> This kind of certainty can be called “certainty of terms” and weighs in favor of requiring a writing. On the other hand, rejecting oral agreements decreases the flexibility of parties to form and amend an agreement, especially in informal, familiar arrangements.<sup>5</sup> Further, selectively enforcing terms of an agreement depending upon form tends to decrease the parties’ certainty as to enforceability of the agreement, which can “frustrat[e] the parties’ intent.”<sup>6</sup> This kind of certainty can be called “certainty of parties” and weighs in favor of enforcing oral agreements.

The primary legislative intent behind permitting oral operating agreements was aptly described by John Cunningham soon after he helped to draft New Hampshire’s New LLC Act which permitted oral agreements.<sup>7</sup> Primarily, Cunningham described that the intent of the change was to avoid “tramp[ing] on the expectations of LLC members unaware of the Old Act’s writing requirement.”<sup>8</sup> In practice, many of New Hampshire’s LLCs function informally, based on “handshake agreements,” not written operating agreements.<sup>9</sup> Thus, for the sake of flexibility, the legislature forfeited the increased certainty inherent in written agreements.

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24, 2012), <https://www.nhbr.com/the-rules-are-changing-for-operating-agreements/> (permitting oral operating agreements in New Hampshire as of 2012); *Washington’s Amended LLC Statute—Should You Amend Your LLC Agreement?*, PERKINS COIE (Oct. 13, 2015), <https://www.perkinscoie.com/en/news-insights/washington-s-amended-llc-statute-should-you-amend-your-llc.html> (permitting oral agreements in Washington as of 2016); Leanne Fuith, *The New Minnesota LLC Act: Flexibility and Control for Minnesota Business Owners*, 9 WM. MITCHELL J. L. PRAC. 1, 6 (2016) (permitting oral operating agreements in Minnesota as of 2015); Nicholas G. Karambelas, *New D.C. Business Organizations Code: Major Overhaul for Better Business Climate: Part Two*, WASH. LAW. MAG. 30, 32 (Dec. 2011), <https://www.dcbbar.org/getmedia/57b18cd3-7975-4706-8784-d26a8e4e2ee1/WashingtonLawyerDecember2011.pdf> (permitting oral operating agreements in the District of Columbia as of 2012).

2. Larry Ribstein, *An Analysis of the Revised Uniform Limited Liability Company Act*, 3 VA. L. & BUS. REV. 35, 45 (2008).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Peter Mahler, *The Oral LLC Agreement: Boon or Bane?*, FARREL FRITZ (February 3, 2014), <https://www.nybusinessdivorce.com/2014/02/articles/delaware/laurel-hill/>; see also Cunningham, *supra* note 1.

8. Cunningham, *supra* note 1.

9. Cunningham, *supra* note 1.

Today, the vast majority of states have concurred with Cunningham's conclusion and permit oral LLC operating agreements.<sup>10</sup> The primary method of doing so is defining "operating agreement" (or the state's equivalent term) broadly, to include oral and implied agreements. Under the Delaware Limited Liability Company Act, for example, "limited liability company agreement" is defined as "any agreement . . . written, oral or implied."<sup>11</sup> There are exceptions, however, including New York which defines "operating agreement" as "any written agreement of the members"<sup>12</sup> and requires that members "shall adopt a written operating agreement."<sup>13</sup> Altogether, only eight states require LLC operating agreements to be in writing.<sup>14</sup>

In 2008, the State of Idaho became the first jurisdiction to adopt the Revised Uniform Limited Liability Company Act (2006).<sup>15</sup> Like Idaho's existing 1994 LLC statute, "RULLCA permit[ted] the members to adopt an operating agreement orally, in writing, or through course of conduct."<sup>16</sup> Idaho is thus in the majority with respect to oral LLC operating agreements.

Applying Idaho's prior and current LLC laws, the Idaho Supreme Court has not hesitated to enforce unwritten operating agreements.<sup>17</sup> In *Estate of Collins v. Geist*, for example, the Idaho Supreme Court held that an operating agreement existed where the conduct of a father and son demonstrated their agreement that the son

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10. CARTER G. BISHOP & DANIEL KLEINBERGER, LIMITED LIABILITY COMPANIES: TAX AND BUSINESS LAW ¶ 5.06, at 4 (2021); *id.* at 5–7 [hereinafter *Appendix*] (forty-two states define "operating agreement" to include oral agreements).

11. DEL. CODE ANN. tit. 6, § 18–101(9) (West 2020); *see also* GA. CODE ANN. § 14-11-101(18) (West 2009) ("'Operating agreement' means any agreement, written or oral, of the member or members."); UTAH CODE ANN. § 48-3a-102(16) (West 2014) ("'Operating agreement' means the agreement, whether or not referred to as an operating agreement and whether oral, implied, in a record, or in any combination thereof, of all the members of a limited liability company. . . .").

12. N.Y. LTD. LIAB. CO. LAW § 34-102(u) (McKinney 2006).

13. *Id.* § 34-417; *see also* WIS. STAT. ANN. § 183.0102(16) (West 2021) ("'Operating agreement' means an agreement in writing, if any, among all of the members as to the conduct of the business of a limited liability company and its relationships with its members.").

14. *Appendix, supra* note 10 (Alaska, Arizona, Michigan, Nevada, New Mexico, New York, Vermont, and Wisconsin).

15. Rex Blackburn & Dale G. Higer, *New LLC Act Preserves Idaho's Traditions*, *ADVOCATE*, Sep. 2009, at 16, 16.

16. *Id.*; *see also* Nicole C. Trammel, *Fiduciary Duties in Limited Liability Companies*, *ADVOCATE*, Sep. 2009 at 20, 20 ("This new definition of 'operating agreement' is expansive - based on this definition, an operating agreement could be written or oral, express or implied, and could even be formed unintentionally. An LLC is bound by its operating agreement; and a person who becomes a member of the LLC is deemed to assent to the operating agreement, whether or not she or he manifestly assented.").

17. *Estate of Collins v. Geist*, 153 P.3d 1167, 1170, 143 Idaho 821, 824 (2007).

would conduct the business and affairs of the LLC.<sup>18</sup> Recently, in *Johnson v. Crossett*, the court expressly recognized the validity of an oral LLC operating agreement.<sup>19</sup>

The Idaho Legislature's and courts' support for oral operating agreements reveals an underlying policy judgment: flexibility outweighs certainty-of-terms in the LLC operating agreement context. However, while flexibility is clearly encouraged by Idaho's willingness to enforce oral operating agreements, the Code contains a serious limitation toward that end. Hidden behind a purported policy of flexibility, and in contradiction to it, is an archaic and active statute of frauds.

### III. ORAL OPERATING AGREEMENTS AND THE STATUTE OF FRAUDS

As Professor Daniel Kleinberg described in two recent American Bar Association (ABA) articles, oral operating agreements create several concerns.<sup>20</sup> To address the concerns, he explained that lawyers should consider “three principal bulwarks” of contract law: “statutes of frauds, ‘no oral modification’ provisions, and the parol evidence rule.”<sup>21</sup> The first, statutes of fraud, are independent creatures of state law that apply regardless of the parties' assertions.

#### A. Statutes of Fraud in General

Like many doctrines woven into modern American law, statutes of fraud trace back to English common law. In 1677, Parliament passed the first Statute of Frauds “[f]or prevention of many fraudulent Practices which are commonly endeavored to be upheld by Perjury and Subornation of Perjury.”<sup>22</sup> In plain English—that is, plain American English—the “statute was enacted to prevent fraud by requiring certain enumerated contracts to be evidenced in writing.”<sup>23</sup> At the time, perjury was “a widespread and serious problem” and was Parliament's primary concern when drafting the 1677 Statute of Frauds.<sup>24</sup>

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18. *Id.* at 826; see also Ann K. Wooster, *Annotation, Construction and Application of Limited Liability Company Acts – Issues Relating to Formation of Limited Liability Company and Addition or Disassociation of Members Thereto*, 43 A.L.R. 6th 611 (2009).

19. *Johnson v. Crossett*, 408 P.3d 1272, 1278, 163 Idaho 200, 206 (2018).

20. Daniel S. Kleinberger, *Protecting the Sacred Writing: The Operating Agreement*, A.B.A. (Feb. 15, 2018), [https://www.americanbar.org/groups/business\\_law/publications/blt/2018/02/agreement/](https://www.americanbar.org/groups/business_law/publications/blt/2018/02/agreement/) [hereinafter *Sacred Writing*]; Daniel S. Kleinberger, *Like Great Britain, a Limited Liability Company May Have an Unwritten Constitution*, A.B.A.: BUS. L. TODAY (Sept. 28, 2017), <https://businesslawtoday.org/2017/09/like-great-britain-a-limited-liability-company-may-have-an-unwritten-constitution/>.

21. *Sacred Writing*, *supra* note 20.

22. An Act for Prevention of Frauds and Perjuries, 1677, 29 Car. 2, c. 3 (Eng.).

23. 9 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 21:1 (4th ed. 2021) [hereinafter *WILLISTON*]; see *Nagle v. Nagle*, 633 S.W.2d 796, 799 (Tex. 1982) (“The Statute of Frauds is the Legislature's directive that courts enforce promises covered by the statute only if such promises are in writing.”); see also David G. Epstein et al, *Reliance on Oral Promises: Statute of Frauds and “Promissory Estoppel”*, 42 TEX. TECH L. REV. 913, 929 (2010).

24. *WILLISTON*, *supra* note 23.

Today, most American states have adopted incarnations of that original statute of frauds that are almost identical in operation and purpose.<sup>25</sup> While prevention of fraud is still one objective of the statutes, however, many jurisdictions focus more on the general benefit of ensuring reliable evidence.<sup>26</sup> Written testimony is, after all, generally considered more reliable than oral testimony.

#### B. Scope of the Statute of Frauds

All states have adopted some form of statute of frauds.<sup>27</sup> Since these statutes originated as a common law doctrine, adopted over time into state law, their scope varies widely across the country.<sup>28</sup> Nonetheless, many states have adopted similar, if not identical, components.<sup>29</sup> Some of the most common terms covered, as set out in Section 110 of the Restatement (Second) of Contracts, are (a) an executor's promise "to answer for a duty of his decedent (the executor-administrator provision)," (b) any promise "to answer for the duty of another (the suretyship provision)," (c) agreements upon "consideration of marriage (the marriage provision)," (d) contracts for "sale of an interest in land (the land contract provision)," and (e) promises that cannot be "performed within one year from the making thereof (the one-year provision)."<sup>30</sup>

Idaho's statute of frauds, codified in Idaho Code § 9-505, can be accurately characterized as plain old vanilla.<sup>31</sup> Aside from mere verbiage, it differs from the Restatement's list only in replacing the executor-administrator provision with what

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25. James J. O'Connell, Jr., *Boats Against the Current: The Courts and the Statute of Frauds*, 47 EMORY L.J. 253, 267 (1998) ("Most American incarnations of the Statute of Frauds are essentially unchanged from the original statute enacted by Parliament in 1677."); see also WILLISTON, *supra* note 23 ("[T]he statute nonetheless remains the law virtually everywhere in the United States.").

26. See, e.g., WILLISTON, *supra* note 23, at n.8 (citing *Jacobson v. Gulbransen*, 623 N.W.2d 84 (S.D. 2001) ("[T]he statute of frauds serves an evidentiary purpose, designed to prevent uncertainty by providing written evidence of an enforceable obligation")); *id.* at n.11 (citing *Valdez Fisheries Dev. Ass'n, Inc. v. Alyeska Pipeline Serv. Co.*, 45 P.3d 657 (Alaska 2002)) ("The statute of frauds serves many purposes. First, it provides certain, consistent, and predictable principles to guide negotiators. It recognizes the inherent evidentiary worth of written evidence, and the potential injustice created by relying on the memories of interested parties to provide the exact language of an agreement, which is necessary to discern the limits of the promise."); see also *General Dynamics Corp. v. United States*, 131 S. Ct. 1900 (2011).

27. Epstein et al, *supra* note 23 ("All states have statutes of fraud providing that certain kinds of agreements are not legally enforceable unless set out in a signed writing.").

28. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.7 (AM. L. INST. 2000) ("[T]he Statutes of Frauds adopted in the various American states differ in their wording and stated coverage."); see Epstein et al, *supra* note 23 ("Again, statutes of fraud vary from state to state.").

29. RESTATEMENT (SECOND) OF CONTRACTS § 110 (AM. L. INST. 1981) ("In many states other classes of contracts are subject to a requirement of a writing.").

30. *Id.*

31. IDAHO CODE ANN. § 9-505 (West 2021).

I will call the “business-of-lending provision.”<sup>32</sup> Like many other states, Idaho’s law on commercial transactions adds its own components to the statute of frauds, namely that “a contract for the sale of goods for the price of \$500 or more is not enforceable . . . unless there is some writing . . .”<sup>33</sup>

### C. Criticisms of the Statute of Frauds

Despite the widespread adoption of statutes of fraud in United States jurisdictions, there are—and have always been—vocal critics.<sup>34</sup> Even England, critics note, repealed the Statute of Frauds in the twentieth century over concerns that “assertion of the technical defense of the statute aids a person in breaking a contract and effects immeasurable harm upon those who have meritorious claims.”<sup>35</sup> Such fairness concerns were thought to outweigh the diminishing value of writing to bolster certainty-of-terms.<sup>36</sup>

Critiques of statutes of frauds are not a new phenomenon. Early in the twentieth century, Columbia University professor Francis M. Burdick leveled a wholesale denunciation in a Columbia Law Review article titled, *A Statute for Promoting Fraud*.<sup>37</sup> In his view—even a century ago—statutes of fraud were a “relic of times when parties to a lawsuit were excluded as witnesses.”<sup>38</sup> Through imposition of amorphous and counterintuitive writing requirements, statutes of fraud frustrate the expectations of contracting parties. This, in turn, often leads to inequitable outcomes. Instead of preventing fraud, Burdick asserted, the statute of frauds creates a “highly artificial rule” that complicates what is simple, resulting in decreased certainty of parties and thereby increasing the risk of fraud.<sup>39</sup>

Many critics of statutes of fraud argue that the original need for the law has diminished due to changes in the legal system. For example, one reason for the magnitude of the perjury problem in seventeenth century England was that “courts did not allow parties to a lawsuit to testify.”<sup>40</sup> Consequently, victory at trial often depended upon one’s ability to find a friend willing to testify in his favor.<sup>41</sup> Since

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32. *Id.* (“A promise or commitment to lend money or to grant or extend credit in an original principal amount of fifty thousand dollars (\$50,000) or more, made by a person or entity engaged in the business of lending money or extending credit.”).

33. IDAHO CODE ANN. § 28-2-201 (West 2021); *but see* Jennifer Camero, *Zombieland: Seeking Refuge From the Statute of Frauds in Contracts for the Sale of Services or Goods*, 82 UMKC L. REV. 1, 3 (2013) (“Every state except Louisiana adopted Article 2 and, thus, applies the Statute of Frauds to contracts for the sale of moveable goods.”).

34. O’Connell, *supra* note 25.

35. *Azevedo v. Minister*, 471 P.2d 661, 663–64 (Nev. 1970).

36. O’Connell, *supra* note 25, at 260; *Azevedo*, 471 P.2d at 663–64.

37. Francis M. Burdick, *A Statute for Promoting Fraud*, 16 COLUM. L. REV. 273 (1916).

38. *Id.* at 273; *see also* Robert E. Ireton, *Should We Abolish the Statute of Frauds*, 72 U.S. L. REV. 195, 196 (1938).

39. Burdick, *supra* note 37, at 273–74.

40. *Thompson Printing Mach. Co. v. B.F. Goodrich Co.*, 714 F.2d 744, 746 (7th Cir. 1983); Burdick, *supra* note 37, at 273.

41. *See, e.g., Thompson Printing*, 714 F.2d at 746.



parties are no longer excluded as witnesses, critics argue, statutes of fraud are unnecessary.<sup>42</sup> Such changes in the legal system have prompted some scholars to direct impressive lists of adjectives at modern incarnations of the statute of frauds, such as: “ambiguous, archaic, arbitrary, uneven, unwieldy, unnecessary and unjust.”<sup>43</sup> Put succinctly by the Connecticut Supreme Court in a 1991 decision, “[t]he statute has been found wanting because it serves none of its purported functions very well.”<sup>44</sup>

Even at the time of enactment, some of the statute of frauds’ provisions produced utterly nonsensical outcomes. The one-year provision, for instance, was ostensibly enacted to address the unreliability of witnesses’ memories over more than one year.<sup>45</sup> Because application of the one-year provision does not turn on the actual course of subsequent events, however, the provision produces perplexing outcomes.<sup>46</sup> For example, one unwritten agreement—capable of performance in less than a year but actually taking ten years—is enforceable upon purely oral testimony.<sup>47</sup> Another unwritten agreement—requiring one year and one day to perform and actually occurring in that time—is unenforceable upon purely oral testimony.<sup>48</sup> If evidentiary reliability is the end, the one-year provision appears to be a seriously flawed means.

Ultimately, the efficacy of statutes of fraud in today’s world is doubtful. Beyond failing to accomplish their purported goals, these statutes tend to frustrate parties’ expectations and ironically, decrease certainty.

#### D. Where the Statute of Frauds Meets LLC Operating Agreements

Not all components of Idaho’s statute of frauds are relevant in the LLC context. For example, it is undoubtedly a rare occasion (although possible) where an LLC’s operating agreement includes a promise in consideration of marriage. Other components, however, are likely to arise with some frequency and deserve attention.

According to professors Bishop and Kleinberger, “[t]he three statutes most likely to be relevant pertain respectively to the sale of an interest in real property, the sale of goods, and contracts that cannot be performed within one year of their

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42. Hugh E. Willis, *The Statute of Frauds—A Legal Anachronism*, 3 IND. L.J. 427, 430–31 (1928).

43. Ireton, *supra* note 38, at 196 (“[W]hatever reasons led to its passage in the seventeenth century, the resistless and progressive march of time and events up to the present has swept from view their last vestige.”).

44. RICHARD A. LORD, WILLISTON ON CONTRACTS § 24:1 (4th ed. 2020) (quoting C.R. Klewin, Inc. v. Flagship Properties, Inc., 220 Conn. 569, 574 (1991)).

45. *See* RESTATEMENT (SECOND) OF CONTRACTS § 130 cmt. a (Am. L. Inst. 1981).

46. *See id.*

47. *See id.*

48. *See id.*

making.”<sup>49</sup> We will explore circumstances in which each of these could arise, or has arisen, in the LLC context.

i. Land Sale Provision

Under Idaho Code § 9-505(4), “[a]n agreement for the leasing, for a longer period than one (1) year, or for the sale, of real property, or of an interest therein . . . is invalid, unless the authority of the agent be in writing.”<sup>50</sup> It is not difficult to imagine a scenario where Idaho’s land sale provision might invalidate a term of an LLC operating agreement.

Imagine that Alice, Ben, and Carl decide to start a dairy farm and form as an LLC. The primary startup costs are acquiring land and animals. Because Alice already owns several acres of rural property, the three agree that Alice’s initial contribution will be to lease her acreage, for three years and at a good price, to the LLC. Meanwhile, Ben and Carl will each contribute \$20,000 to purchase animals. Because the three are well acquainted and lack business experience, they do not reduce the agreement to writing. If Ben or Carl fails to provide their \$20,000 contribution, Alice will have a valid cause of action to enforce the promise. If, on the other hand, Alice decides after one year that she wants to use her land for something else, neither Ben nor Carl will be able to enforce Alice’s promise. Under Idaho Code § 9-505(4), Alice’s promise is an unenforceable oral promise to lease real property for more than one year.<sup>51</sup>

Case law reveals that similar scenarios have occurred in the real world. In *East Piedmont 120 Associates v. Sheppard*, a Georgia court invalidated an oral partnership agreement because the promise to transfer real property was not in writing.<sup>52</sup> A landowner and entity had formed an oral partnership agreement with the object of developing a shopping mall.<sup>53</sup> The landowner would contribute her property and the entity its “expertise” and “services.”<sup>54</sup> When the landowner changed her mind, the entity brought suit for breach of contract.<sup>55</sup> Under Georgia’s statute of frauds, however, promises to transfer interests in property are not enforceable unless in writing.<sup>56</sup> The court consequently rejected the entity’s claim

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49. CARTER G. BISHOP & DANIEL KLEINBERGER, LIMITED LIABILITY COMPANIES: TAX AND BUSINESS LAW ¶ 5.06, at 2 (2020).

50. IDAHO CODE ANN. § 9-505 (West 2021).

51. *Id.* § 9-505(4).

52. *E. Piedmont 120 Assoc., Ltd. P’ship v. Sheppard*, 434 S.E.2d 101, 102 (Ga. Ct. App. 1993).

53. *Id.*

54. *Id.*

55. *Id.*

56. GA. CODE ANN. § 13-5-30 (West 2021) (“To make the following obligations binding on the promisor, the promise must be in writing and signed . . . [a]ny contract for sale of lands, or any interest in, or concerning lands.”).

because the landowner's oral promise to transfer her property was unenforceable.<sup>57</sup>

In *Filippi v. Filippi*, three children testified that their deceased father had orally agreed to convey real property to a partnership.<sup>58</sup> The partnership was composed of the father and children and had the sole purpose of developing and selling the land.<sup>59</sup> While other terms of the partnership agreement were not subject to the statute of frauds, the court held that the father's oral promise to transfer the land was unenforceable.<sup>60</sup> Further, because the partnership agreement "mingled" the land transfer provision with all other provisions, the court held that the *entire* partnership agreement was unenforceable.<sup>61</sup>

These examples clearly illustrate the relevance of the State's land sale provision to LLC formation. Where an LLC is formed for the purpose of developing, acquiring, or dealing in real property, the land contract provision of Idaho's statute of frauds may strike important terms of the operating agreement.<sup>62</sup> Further, where a member orally agrees to lease her real property to an LLC for a term greater than one year, the statute of frauds may render that promise unenforceable.<sup>63</sup> Ultimately, the result is often invalidation of well-evidenced agreements, frustrating the clear intention of the founding parties.

#### ii. Sale of Goods for More Than \$500

Under Idaho Code § 28-2-201, "a contract for the sale of goods for the price of \$500 or more is not enforceable . . . unless there is some writing. . . ."<sup>64</sup> Like with transfers of interests in real property, LLCs formed in consideration of a member providing goods to the LLC are subject to surprising invalidations. Case law is, again, illustrative.

In *Fillmore LLC v. Fillmore Machine & Tool Co.*, members of an LLC claimed ownership of certain machines and equipment, pointing to another member's oral agreement to transfer those goods to the LLC.<sup>65</sup> The parties stipulated the value of the goods at \$275,000, well over the statute of frauds' \$500 floor.<sup>66</sup> Applying Indiana law, the court found that an oral promise to sell equipment to the LLC would

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57. *E. Piedmont*, 434 S.E.2d at 102 ("Although partnership or joint venture agreements need not be in writing as a general matter, see *Vitner v. Funk*, 182 Ga.App. 39(2), 354 S.E.2d 666 (1987), the fact that promises covered by the Statute of Frauds are made in the context of a partnership or joint venture agreement does not render the statute inapplicable.").

58. *Filippi v. Filippi*, 818 A.2d 608, 617 (R.I. 2003).

59. *Id.*

60. *Id.* at 618.

61. *Id.* at 619.

62. See BISHOP & KLEINBERGER, *supra* note 49, at 3 (promising to contribute land to the LLC would be subject to the statute of frauds pertaining to land transfers).

63. IDAHO CODE ANN. § 9-505 (West 2021).

64. IDAHO CODE ANN. § 28-2-201 (West 2021).

65. *Fillmore LLC v. Fillmore Mach. & Tool Co.*, 783 N.E.2d 1169, 1174 (Ind. Ct. App. 2003).

66. *Id.*

be unenforceable under the statute of frauds.<sup>67</sup> That is, although Indiana law expressly permitted oral operating agreements, it simultaneously—in a separate area of the code—struck any terms providing for the sale of goods over \$500.<sup>68</sup> In *Fillmore*, that meant the LLC and its members had no recourse to seek enforcement of an oral agreement to convey machines and equipment to the LLC.<sup>69</sup>

Where, as is common, the founders of an LLC bring personal property into the venture, terms of their agreement may be entirely unenforceable under Idaho's sale-of-goods writing requirement.

### iii. One-Year Provision

Under Idaho Code § 9-505(1), an oral agreement is unenforceable if it is “[a]n agreement that by its terms is not to be performed within a year from the making thereof.”<sup>70</sup> At least two kinds of operating agreement terms might be affected by the one-year provision.

First, terms relating directly to an LLC's duration are susceptible to invalidation. Unless otherwise agreed by the members, in Idaho “[a] limited liability company has perpetual duration.”<sup>71</sup> This, like partnership laws default to partnerships at-will, effectively means that members can continue the LLC as long as they wish. Such an arrangement is not subject to the statute of frauds because it could be performed within a year upon dissolution.<sup>72</sup> However, where members orally agree to a duration longer than one year, section 9-505(1) will invalidate the term.<sup>73</sup>

Second, operational terms that require more than a year to perform are susceptible to invalidation.<sup>74</sup> One common agreement of this kind relates to

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67. *Id.* at 1178.

68. *Id.* at 1177–78; IND. CODE ANN. 23-18-1-16 (West 1993).

69. *Fillmore LLC*, 783 N.E.2d at 1178.

70. IDAHO CODE ANN. § 9-505 (West 2021).

71. IDAHO CODE ANN. § 30-25-108 (West 2021).

72. *Mackay v. Four Rivers Packing Co.*, 179 P.3d 1064, 1067–68, 145 Idaho 408, 411–12 (2008) (“Idaho cases are in accord. A contract which is capable of being performed and might have been fully performed and terminated within a year does not fall within the Statute.”); TERENCE W. THOMPSON ET AL., 6 ARIZONA CORPORATE PRACTICE § 12:39 (2020) (“While one might contend that an operating agreement lasts in perpetuity and cannot be performed within one year, precedent suggests that the one-year provision should not apply, as it is conceivable that all members' lives could terminate within a year and that the company thereby dissolves.”); *see also* *Abbot v. Hurst*, 643 So. 2d 589, 592 (Ala. 1994) (“[A] contract establishing a partnership terminable at the will of any partner is generally held to be capable of performance by its terms within one year of its making and, therefore, to be outside the Statute of Frauds.”).

73. *See* CARTER G. BISHOP & DANIEL KLEINBERGER, LIMITED LIABILITY COMPANIES: TAX AND BUSINESS LAW ¶ 5.04, n.440.4 (2020) (“[A] promise that by its terms requires performance that extends beyond one year from the making of the contract would be subject to the one-year provision of the statute of frauds.”).

74. I use the expression “operating terms” to refer to those terms of an operating agreement that establish the relationship between the LLC and its members, rather than terms speaking to the duration of the LLC itself.

members' terms of service with the LLC. For example, an oral promise by an LLC member to perform some service or serve in some capacity for a term exceeding one year would be subject to invalidation.

The most pertinent example of an operational term being invalidated under a one-year provision is in *Olson v. Halvorsen*, a Delaware Supreme Court case decided in 2009.<sup>75</sup> There, the court invalidated an earn-out provision of an unsigned LLC operating agreement.<sup>76</sup> Though the term did not expressly refer to a date beyond one year, the court determined that calculation of the earn-out amount required more than a year.<sup>77</sup> Therefore, because the term was never agreed to in writing, it was unenforceable under the statute of frauds.<sup>78</sup>

The one-year provision is the most likely to invalidate terms of LLC operating agreements. Whereas the sale of goods or transfer of real property is generally identifiable, it is not always easy to determine whether a term requires more than one year to be performed. The less clear it is that a term is subject to the statute of frauds, the more unreasonable it becomes to assume that unsophisticated parties will be aware of the writing requirement. The result is often, as in *Olson*, unfair and surprising.

#### IV. THREE APPROACHES TO THE STATUTE OF FRAUDS IN THE LLC CONTEXT

While many states have adopted some version of the Uniform Limited Liability Company Act (ULLCA), differences persist between the laws of each state. One important difference concerns applicability of the statute of frauds to LLC operating agreements. Though the issue has historically received little attention, the decision in *Olson* precipitated movement among state legislatures, reflective of diverging policy goals and priorities.

It is no surprise that the foundational case on statutes of fraud in the LLC context originated in Delaware's Chancery Court.<sup>79</sup> Making its way to the Delaware Supreme Court, the 2009 case and subsequent legislative response set the groundwork for the focus of this article. There, in *Olson*, the chancery court considered Delaware's LLC Act which "expressly allow[ed] oral operating agreements, but d[id] not address whether the statute of frauds would apply to such agreements."<sup>80</sup> The question of whether oral operating agreements were exempt from the statute of frauds was a matter of first impression, both in Delaware and elsewhere, leading to an analysis of legislative intent.<sup>81</sup> In a few brief lines, the Delaware Court of Chancery held that the policy rationale behind the statute of frauds was applicable in the LLC context, therefore the writing

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75. *Olson v. Halvorsen*, 986 A.2d 1150 (Del. 2009).

76. LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN & KEATINGE ON LIMITED LIABILITY COMPANIES § 5:8, at n. 4 (2020).

77. *Id.*

78. *Id.*

79. *Olson v. Halvorsen*, 982 A.2d 286 (Del. Ch. 2008).

80. *Id.* at 290.

81. *Id.* at 287.

requirements persist despite the LLC Act's express acceptance of oral operating agreements.<sup>82</sup> Thus, the earn-out provision at issue, which could not be performed within one year, was unenforceable.<sup>83</sup> On appeal, the Delaware Supreme Court affirmed with an only slightly more comprehensive explanation.<sup>84</sup> The court refused to imply a repeal of the century-old statute of frauds where "the General Assembly did not clearly intend the LLC Act to render the statute of frauds inapplicable."<sup>85</sup> In sum, the court held that "[i]f the General Assembly intends to limit the application of the statute of frauds by removing LLC agreements from its scope, the General Assembly must say so explicitly."<sup>86</sup> The following year, Delaware's legislature responded by doing exactly that.<sup>87</sup>

The important lasting impact of *Olson* is the presumption that when a state's LLC act is silent on the statute of frauds, operating agreements are subject to it. Since the decision, many states (including Idaho) have cited *Olson* in their official legislative comments to suggest the applicability of the statute of frauds.<sup>88</sup> Other states preferred the Delaware legislature's approach, which doubts the efficacy of statutes of fraud in the LLC context.<sup>89</sup> Ultimately, in the wake of *Olson*, states have taken three distinct approaches.

#### A. Complete Exemption Approach

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82. *Id.* at 291.

83. *Id.* at 293.

84. *Olson*, 986 A.2d at 1162; *see also* BISHOP & KLEINBERGER, *supra* note 49, at ¶¶ 14.02, 18.

85. *Olson*, 986 A.2d at 1162.

86. *Id.*

87. 2010 Del. Legis. Serv. Ch. 287 (H.B. No. 372) (West) (codified as amended at DEL. CODE ANN. tit. 6, § 18-101(9) (West 2020)); *see also* NICHOLAS G. KARAMBELAS, LIMITED LIABILITY COMPANIES: LAW, PRACTICE AND FORMS § 5:1 (2d ed. 2021) ("The Delaware legislature subsequently amended the LLC statute to state that an operating agreement is not subject to the statute of frauds.").

88. IDAHO CODE ANN. § 30-25-102 (West 2021) ("This article states no rule as to whether the statute of frauds applies to operating agreements. Case law suggests that the answer is yes. *Olson v. Halvorsen*, 986 A.2d 1150, 1161 (Del. 2009)..."); KARAMBELAS, *supra* note 87, § 2:3 ("The RULLCA is silent on how or whether the Statute of Frauds applies to operating agreements, so presumably the state versions of the Statute of Frauds will apply to operating agreements as it does to any contract. In Delaware, the Statute of Frauds applies to the provisions of an operating agreement.").

89. *See e.g.*, IDAHO CODE ANN. § 30-25-102 (West 2021).

At least five states expressly exempt LLC operating agreements from the statute of frauds.<sup>90</sup> Under this approach, oral operating agreements are wholly enforceable, regardless of whether they contain terms that fall within the statute of frauds.

The most apposite example is Delaware, where the amended LLC act exempts operating agreements from “any statute of frauds.”<sup>91</sup> The change came the year immediately following the Delaware Supreme Court’s ruling in *Olson*, and apparently in direct response.<sup>92</sup> This approach suggests that the LLC landscape materially differs from other regions of contract law. After all, if a writing requirement is not necessary for business formation, why should other contracts be treated differently? This distinction has been met with varying degrees of acceptance.

Doubting the soundness of the distinction, Professor Mohsen Manesh has noted that exempting operating agreements, but *not* other contracts, departs from Delaware’s historically contractarian approach.<sup>93</sup> Manesh asserts that, whereas *Olson* aligned the law with basic contract principles, the legislature’s subsequent amendment—enacted “to the surprise of many”<sup>94</sup> —“diverges from the rest of contract law.”<sup>95</sup> As Gary Rosin, Professor of Law at South Texas College of Law, queried, “what makes LLC agreements more special than other contracts?”<sup>96</sup>

The distinction is more sensible, however, when Delaware’s policy objectives are considered. The Delaware Legislature adheres to the policy of giving “maximum effect” to freedom of contract and the enforceability of LLC operating agreements.<sup>97</sup> In fact, this policy is arguably the “most attractive feature” of Delaware LLC law, making the state “a mecca . . . for the organization of limited

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90. RIBSTEIN & KEATINGE, *supra* note 76, §5:8; *see* COLO. REV. STAT. ANN. § 7-80-108 (West 2016) (“An operating agreement is not subject to any statute of frauds....”); DEL. CODE ANN. tit. 6, § 18-101 (West 2020) (“A limited liability company agreement is not subject to any statute of frauds....”); FLA. STAT. ANN. § 605.0106 (West 2014) (“[A]n operating agreement is not subject to a statute of frauds.”); KAN. STAT. ANN. § 17-7663 (West 2019) (“An operating agreement is not subject to any statute of frauds....”); N.H. REV. STAT. ANN. § 304-C:44 (2013) (“An operating agreement shall not be subject to any statute of frauds.”).

91. DEL. CODE ANN. tit. 6, § 18-101 (West 2020) (“A limited liability company agreement is not subject to any statute of frauds....”).

92. BISHOP & KLEINBERGER, *supra* note 49, at 29; Kleinberger, *supra* note 20.

93. Mohsen Manesh, *Creatures of Contract: A Half-Truth About LLCs*, 42 DEL. J. CORP. L. 391, 413–15 (2018).

94. BISHOP & KLEINBERGER, *supra* note 49, at 49.

95. Manesh, *supra* note 93, at 415.

96. Gary S. Rosin, *2010 Amendments to Delaware LLC Act*, UBE LAW BLOG (June 21, 2010, 3:45 PM), <https://uberlaw.net/2010/06/2010-amendments-to-delaware-llc-act/>.

97. DEL. CODE ANN. tit. 6, § 18-1101 (West 2013); *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 291 (Del. 1999).

liability companies.”<sup>98</sup> When viewed in this light, Delaware’s complete exemption of operating agreements from the statute of frauds seems congruent with its contractarian tendencies.

Florida has also adopted the complete exemption approach.<sup>99</sup> Commentary on the move is illuminating. One Florida Bar article, authored by the chairman and reporter of the legislative drafting committee, explains that the exemption provision was “added to provide certainty for legal advisers and businesses.”<sup>100</sup> Despite the clear benefits of written operating agreements, the Florida legislature grants parties the prerogative to rely on purely oral agreements.<sup>101</sup> Told that doing so is acceptable, many members—whether due to convenience or unwariness—will undoubtedly embrace the oral approach.<sup>102</sup> Having chosen a policy of flexibility and communicated that to LLC members, the Florida drafting committee properly recognized that certainty requires consistently applying that principle.<sup>103</sup>

Ultimately, according to states like Delaware and Florida, permitting oral operating agreements while simultaneously invalidating them in certain circumstances does not promote certainty and freedom of contract.

#### B. Partial Exemption Approach

Some states exempt LLC operating agreements only from specific components of the statute of frauds.<sup>104</sup> In other words, oral operating agreements *may* be enforceable despite the statute of frauds, but only where the LLC act specifically identifies the relevant statute of frauds provision and abrogates it in the LLC context.

Illinois is a salient example. The LLC statute expressly states that “an operating agreement need not be in writing *even if it cannot be performed within a year.*”<sup>105</sup>

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98. Daniel S. Kleinberger & Douglas K. Moll, *The Limited Effect of “Maximum Effect”*, A.B.A. (Aug. 13, 2020), [https://www.americanbar.org/groups/business\\_law/publications/blt/2020/08/maximum-effect/](https://www.americanbar.org/groups/business_law/publications/blt/2020/08/maximum-effect/) (quoting first Nicole M. Sciotto, *Opt-in vs. Opt-Out: Settling the Debate over Default Fiduciary Duties in Delaware LLCs*, 37 DEL. J. CORP. L. 531, 567 (2012); and then David G. Epstein & Jake Weiss, *The Fourth Circuit, “Suem” and Reverse Veil Piercing in Delaware*, 70 S.C. L. REV. 1189, 1198 (2019)).

99. FLA. STAT. ANN. § 605.0106 (West 2014) (“[A]n operating agreement is not subject to a statute of frauds.”).

100. Louis T. M. Condi & Gregory M. Marks, *Florida’s New Revised LLC Act, Part I*, 87 FLA. B.J. 52, 54 (2013).

101. FLA. STAT. ANN. § 605.0106 (West 2014).

102. *See, e.g.*, Cunningham, *supra* note 1.

103. *See generally* Condi & Marks, *supra* note 100.

104. *See, e.g.*, 805 ILL. COMP. STAT. ANN. 180 / 1–46 (West 2017) (“An operating agreement is enforceable whether or not there is a writing signed or record authenticated by a party against whom enforcement is sought, even if the agreement is not capable of performance within one year of its making.”).

105. KARAMBELAS, *supra* note 87, § 5.1 (citing 805 ILL. COMP. STAT. ANN. 180 / 1–46 (West 2017)).



Presumably, however, all other components of the state's statute of frauds are still in force.<sup>106</sup>

Like Delaware's approach, the Illinois rule presumes that LLC operating agreements are distinct from other contracts in some important way. Unlike in Delaware, however, that distinction is only extended to one category of agreement encompassed within Illinois's statute of frauds.<sup>107</sup> Despite the narrowed scope of exemption, both approaches assume the underlying failure of statutes of frauds to promote good policy outcomes in the LLC context.<sup>108</sup>

Illinois's approach does not ignore the potential benefits of writing requirements.<sup>109</sup> In clear terms, the Illinois State Bar Association has affirmed that "[t]he use of oral operating agreements presents obvious risks due to the difficulty of proving (or even ascertaining) their precise terms."<sup>110</sup> Despite those risks, the legislature was bound to the reality of the circumstances; state law permits oral operating agreements, and many LLCs take advantage of that flexibility.<sup>111</sup> If oral operating agreements are going to be utilized anyway, the legislature concluded, "there is little sense in their being subject to possible unenforceability due to other law."<sup>112</sup> Allowing oral operating agreements generally but imposing certain narrowly defined exceptions would tend to "substantially frustrate the reasonable expectations of the parties."<sup>113</sup>

Illinois's 2017 move from the silent approach, discussed below, went almost wholly without comment by academics across the country. Thus, there is almost no scholarship to explain why Illinois exempted operating agreements from the one-year provision but not other components of the statute of frauds. I see two plausible rationales for the distinction. First, that the one-year provision has unique potential to frustrate parties' expectations, beyond that of other provisions of the statute of frauds. And second, the one-year provision may be the only component of Illinois' statute of frauds perceived likely to apply to LLC operating agreements.

First, some legal analysis is often required, as in *Olson*, to identify terms that are not to be performed within one year. In contrast, the sale of property is clearly identifiable, even by unsophisticated parties. Therefore, while unsophisticated members may expect a writing requirement for sales of property, they may not be

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106. *E.g.*, 740 ILL. COMP. STAT. ANN. 80 / 1 (West 2017); Robin Heiss et al., *Comments to The Amendments to the Illinois Limited Liability Company Act Effective July 1, 2017*, INST. ILL. BUS. L. (2017), [https://www.isba.org/sites/default/files/cle/Full%20Program%20Materials%20-%20Single%20Download\\_131.pdf](https://www.isba.org/sites/default/files/cle/Full%20Program%20Materials%20-%20Single%20Download_131.pdf) ("Other portions of the general statute of frauds, however, such as those dealing with contracts of suretyship or the sale of real estate, are unaffected by this section.").

107. 740 ILL. COMP. STAT. ANN. 80 / 1 (West 2017).

108. Heiss et al., *supra* note 106.

109. Heiss et al., *supra* note 106.

110. Heiss et al., *supra* note 106.

111. Heiss et al., *supra* note 106. ; *see also* BRUCE A. RICH ET AL., LLC OVERHAUL PROJECT: REPORTS ON RECOMMENDATIONS FOR CHANGES TO PORTIONS OF THE NEW YORK LIMITED LIABILITY COMPANY LAW 6 (2019) ("the practical reality that, all too often, LLC members do not adopt a written operating agreement.").

112. Heiss et al., *supra* note 106.

113. RICH ET AL., *supra* note 111, at 5.

a capable of identifying terms that fall under the one-year provision. This rationale would explain Illinois' partial exemption of only the one-year provision.

Second, the one-year provision is, undoubtedly, the most likely to arise in the context of LLC operating agreements. After all, the case that originally prompted discussion of the statute of frauds in the LLC context revolved around an operating agreement that was invalidated under the one-year provision of Delaware's statute of frauds.<sup>114</sup> Accordingly, the Illinois legislature may have thought it only necessary to exempt operating agreements from the one-year provision.

Ultimately, the partial exemption approach rests on the same underlying notions as the complete exemption approach but employs a more tailored solution.

### C. Silent Approach

Third and finally, other states are completely silent as to the applicability of the statute of frauds in the LLC context.<sup>115</sup> Under this approach, whether terms of an oral operating agreement are enforceable is left to the courts to decide.<sup>116</sup>

Most relevant is Idaho's LLC Act, which is silent as to the state's statute of frauds.<sup>117</sup> The Official Comments to the statute even include a conspicuous emphasis of that silence, citing *Olson* to "suggest" what result silence will likely produce.<sup>118</sup>

Several questions arise from Idaho's silent approach. Most importantly, what impact does Idaho's silence have on application of the statute of frauds to oral operating agreements? The answer depends upon the continued efficacy and applicability of the *Olson* precedent in Idaho.<sup>119</sup> The precedent will remain efficacious so long as it is not overruled or otherwise repudiated in a court of relevant authority. Having stood without challenge for over a decade, there is every indication that *Olson* will remain untouched for the foreseeable future. The applicability of *Olson* in Idaho, however, is more debatable. To predict what that decision's influence might be on an Idaho court, we must explore the *Olson* court's reasoning and consider whether it is sufficiently applicable in Idaho.

The *Olson* decision rested on the basic principle of statutory interpretation that "[i]f two statutes conflict somewhat, [we] must, if possible, read them so as to give effect to both, unless the text or legislative history of the later statute shows that [the legislature] intended to repeal the earlier one and simply failed to do so

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114. *Olson v. Halvorsen*, 982 A.2d 286, 287–88 (Del. Ch. 2008).

115. KARAMBELAS, *supra* note 87, § 2:3 ("The RULLCA is silent on how or whether the Statute of Frauds applies to operating agreements, so presumably the state versions of the Statute of Frauds will apply to operating agreements as it does to any contract.").

116. See KARAMBELAS, *supra* note 87, § 2:3.

117. IDAHO CODE ANN. § 30-25 (West 2021).

118. IDAHO CODE ANN. § 30-25-102 (West 2021) ("This article states no rule as to whether the statute of frauds applies to operating agreements. Case law suggests that the answer is yes. *Olson v. Halvorsen*, 986 A.2d 1150, 1161 (Del. 2009).").

119. *Olson v. Halvorsen*, 986 A.2d 1150, 1160 (Del. 2009) (citing *State v. Fletcher*, 974 A.2d 188, 194 (Del. 2009)).

expressly.”<sup>120</sup> Applying that principle, the court found that Delaware’s LLC Act and statute of frauds could be construed together.<sup>121</sup> Why? Because the LLC act merely *permitted*, but did not “guarantee enforcement of all,” unwritten operating agreements.<sup>122</sup> Next, the court looked to state legislative intent and history, finding neither to suggest that operating agreements were meant to be impervious to the statute of frauds.<sup>123</sup> The legislature had every opportunity to expressly exclude operating agreements from the statute of frauds, as it had done to other provisions of Delaware’s Code.<sup>124</sup> Without an explicit exclusion, the court refused to presume legislative intent to do so.<sup>125</sup>

While not controlling in Idaho courts, *Olson*’s reasoning is squarely applicable in the Idaho context. First, similar basic principles of statutory interpretation are at play under Idaho law. As the Idaho Supreme Court recently affirmed, the Court must “giv[e] effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant.”<sup>126</sup> The effect of this principle is similar to that of Delaware’s that, where possible, provisions be “construed together.”<sup>127</sup> Parallel to Delaware courts, the Idaho Supreme Court has also found that “[t]he intention of the legislature to repeal must be ‘clear and manifest.’”<sup>128</sup> Second, the text of Idaho’s act does not reveal an intent to make operating agreements impervious to the statute of frauds.<sup>129</sup> Thus, under Idaho’s principle that intent to repeal existing provisions must be “clear and manifest,” there is no explicit or implied repeal of the statute of frauds in the LLC Act. Third and finally, Idaho’s legislative history reveals, if anything, intent to leave the statute of frauds intact and wholly applicable to LLC operating agreements. Whereas in *Olson* Delaware’s legislative history was entirely silent,<sup>130</sup> Idaho’s legislature included a revealing Official Comment: “This article states no rule as to whether the statute of frauds applies to operating agreements. Case law suggests that the answer is yes.”<sup>131</sup> If silence was sufficient to leave the statute of frauds untouched in *Olson*, this legislative intent is certainly sufficient to negate any implied repeal of the statute of frauds by Idaho’s legislature.

In sum, the reasoning from *Olson* applies squarely to Idaho’s context and it is therefore very likely that Idaho courts will arrive at the same conclusion; the statute

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120. *Id.*

121. *Id.* at 1161.

122. *Id.*

123. *Id.* (“[N]either the LLC Act’s text, nor its legislative history supports that intent.”).

124. *Id.* at 1162.

125. *Olson*, 986 A.2d at 1162.

126. *State v. Burke*, 462 P.3d 599, 601, 166 Idaho 621, 623 (2020).

127. *Olson*, 986 A.2d at 1150.

128. *Estate of Stahl v. Idaho State Tax Comm’n*, 401 P.3d 136, 141, 162 Idaho 558, 563 (2017) (quoting *United States v. Borden Co.*, 308 U.S. 188, 198, 60 S.Ct 182, 188 (1939)); *see also Doe v. Durtschi*, 716 P.2d 1238, 1250, 110 Idaho 466, 478 (1986) (“Only when new legislation is irreconcilable with and repugnant to a pre-existing statute may we find an implied repeal.”).

129. *See generally* IDAHO CODE ANN. § 30-25 (West 2021).

130. *Olson*, 986 A.2d at 1161.

131. IDAHO CODE ANN. § 30-25-102 (West 2021).

of frauds does apply to oral LLC operating agreements. Other state courts have illustrated this in following *Olson's* lead. For example, prior to Florida's adoption of the complete exemption approach, its LLC act was silent as to the statute of frauds.<sup>132</sup> Accordingly, in *Araya v. Ward*, "the Court [found] the holding of *Olson* persuasive" and held that the statute of frauds did apply.<sup>133</sup>

Understanding what result Idaho's silence will have, we move now to consider the prudence of that approach. The rationale for applying the statute of frauds to LLC operating agreements rests on one presupposition followed by two suppositions. The presupposition is that statutes of fraud still serve a legitimate purpose in general. Next, it is supposed that LLC operating agreements are materially indistinguishable from other contracts. And finally, it is further supposed that statutes of fraud should apply to LLC operating agreements just like any other contract. Were the presupposition and first supposition correct, the second supposition would indisputably follow. However, in recent years, the correctness of those first components has become increasingly questionable.

First, as explored in detail above, there are serious doubts as to the continued efficacy of statutes of fraud in general. The statutes not only fail to serve their original purposes, but often lead to surprising and unjust results. The purpose of this article is not, however, to advocate for the wholesale repeal of Idaho's statute of frauds. Doing so would require a much deeper review of the many applications of each provision. Rather, the statute's weaknesses are noted simply to show the *de minimis* value that the writing requirements have in today's LLC operating agreement context.

Even assuming the presupposed efficacy of statutes of fraud, the supposition that operating agreements do not materially differ from other contracts is itself doubtful. First and foremost, the expectations of contracting parties are unique in the LLC context. It is the legislature's duty to adopt legal frameworks that comport with the reasonable expectations of society. One important mechanism for accomplishing this task is legislative consistency. By permitting purely oral operating agreements, the Idaho legislature has laid the groundwork upon which future LLC members will construct their reasonable expectations. Told by legal scholars and advisors that LLCs are highly flexible, leaving governance almost entirely to the members, the parties are led to anticipate significant freedom. And, in fact, they generally enjoy such freedom. Terms relating to LLC profits, voting, and interests, for example, may be established informally, with merely oral assent. The expectations that this flexibility prompts, however, are flatly rejected where members stumble upon any of the statute of frauds' enumerations.

The threat of fraud is also less prevalent in the LLC context. Most LLCs are comprised of members who engage in consistent communications with multiple parties, have preexisting relationships with one another, and establish demonstrable courses of conduct. Each serves to fill the evidentiary void that statutes of fraud seek to protect against.

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132. *Araya v. Ward*, No. 2012-CA-013906-O, 2014 WL 12595277, at \*3 (Fla. Cir. Ct. Oct. 1, 2014).

133. *Id.* at \*3.

Ultimately, Idaho's silent approach to the statute of frauds in the LLC context fails to accomplish the dual goals of flexibility and predictability. Thus, it is time for the Idaho State Legislature to consider a new way forward.

#### V. THE WAY FORWARD

That legal disputes have not yet arisen in Idaho is no reason to turn a blind eye to the existing, faulty framework. Effective legislation requires anticipation of future occurrences, especially where potential issues are evident in other jurisdictions. We have seen oral agreements needlessly and unfairly invalidated under land sale provisions identical to Idaho's.<sup>134</sup> We have seen promises to sell goods abandoned with impunity while equally evidenced promises to contribute finances were enforced.<sup>135</sup> We have also seen operating agreement provisions discarded for requiring more than one year to perform with complete disregard for case-specific evidence of the agreement.<sup>136</sup> It is only a matter of time before similar disputes arise in Idaho courts, under Idaho law.

Both the complete and partial exemption approaches have one thing right: the statute of frauds does more harm than good when it comes to LLC operating agreements. The silent approach, in contrast, continues under the fiction that invalidating certain terms of oral operating agreements is necessary to ensure evidentiary reliability.

Idaho should follow Delaware by completely exempting LLC operating agreements from the statute of frauds. While the partial exemption approach secures similar benefits in some cases, it leaves other terms vulnerable to invalidation. By following the complete exemption approach, Idaho can ensure that the reasonable expectations of contracting parties are upheld and can prevent the use of writing requirements to escape clearly evidenced contractual obligations.

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134. *East Piedmont 120 Assoc., L.P. v. Sheppard*, 434 S.E.2d 101 (Ga. Ct. App. 1993); *Filippi v. Filippi*, 818 A.2d 608 (R.I. 2003).

135. *Fillmore LLC v. Fillmore Mach. & Tool Co.*, 783 N.E.2d 1169 (Ind. Ct. App. 2003).

136. *Olson v. Halvorsen*, 986 A.2d 1150 (Del. 2009).