

Bleakley Business Law Report

Bleakley Platt & Schmidt, LLP

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Recovery Act Offers Business Owners Potential Tax Savings in Tough Times

by Joseph M. Incorvaia

With the recent passage of the Administration's stimulus package – known as the American Recovery and Reinvestment Act of 2009 (the Recovery Act) – Congress has provided the owners of small to mid-size businesses an expanded array of tax benefits that should help business owners weather the uncertainties of the current economy. The Recovery Act's remedial business tax provisions fall into two broad categories: the first eases the cash drain posed by the current tax burden on business income (such as an expanded availability of net operating loss deductions) while the second provides incentives to invest for future growth (such as the election to currently deduct the full value of certain capital investments and the separate election to depreciate up to 50% of new capital investment). This article focuses on these provisions and offers observations on how they may be used alone and together for effective corporate tax planning.

Longer and More Flexible Small Business Net Operating Loss Carryback Rules: The net operating loss (NOL) deduction is a familiar tool for smoothing the tax burden on uneven levels of business income over past and future years. NOLs generated by current year operations can be used to reduce tax already paid on business income generated in prior years or tax that will be payable in future years on future taxable income. Before the Recovery Act, the NOL rules limited the carryback period to the two immediately prior taxable years, but allowed NOLs to be carried forward for up to twenty taxable years.

To provide relief for small businesses, starting with the 2008 tax year, the Recovery Act increases from two to five the number of earlier taxable years to which the NOL deduction may be carried back. Just as important, small business taxpayers may elect to start the



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Time to Renegotiate your Commercial Lease?

By Peter N. Bassano

A Company's lease obligations have a direct and long term impact on that Company's profitability. In the past, conventional wisdom dictated that tenants should begin considering renegotiating their commercial leases 12 to 18 months prior to the lease expiration or renewal dates. Such renegotiations commonly included the tenant's commitment to a lease renewal in exchange for tenant concessions which were often equal in value to the money that the landlord had budgeted for finding a replacement tenant. This 12 to 18 month time period gave the tenant ample time to find alternative space should negotiations with the current landlord fail.

In today's economic climate, however, the supply and demand realities of the rental market have changed the rules. As commercial tenants go out of business or downsize, inventories of vacant commercial space are rising. The amount of "shadow space," in which a tenant is remaining in possession of its leased space but has asked the landlord to seek out a replacement tenant, is also increasing. These unfortunate market factors have changed the relative economic strengths and prospects of landlords and tenants and have provided sufficient leverage for tenants to consider lease renegotiations much

Corporate Tax Planning Under Recovery Act *(Continued)*

carryback period for the NOL deduction at either the fifth, fourth, third or second prior taxable years. The expanded carryback period and the “pick and choose” provision for starting the NOL carryback period allows a taxpayer to fine-tune its tax planning for using the NOL carryback. If there is a particular taxable year among the fifth, fourth or third of the prior five taxable years that was comparatively less profitable and resulted in tax paid at a lower rate than others years, the Recovery Act permits the taxpayer to start the NOL carryback after the less profitable year and concentrate the NOL deduction on the subsequent more profitable (and higher tax) years that will yield the greatest refund of tax. This new flexibility is in addition to existing provisions which allow the taxpayer to forego an NOL carryback entirely, and to take the losses only against future income.

The Recovery Act also significantly liberalized the definition of small business – the key to use of the expanded NOL provisions. Now, businesses with up to \$15 million annually of gross receipts (based on the average of the gross receipts for each of the three taxable years prior to the year the NOL arose) will qualify as small businesses for purposes of the new NOL provisions.

The NOL deduction is generally available to C Corporations, S Corporation shareholders, partners in a general or limited partnership or an LLC treated as a partnership, sole proprietors, single member LLCs treated as sole proprietorships, and in certain cases, estates and trusts conducting ongoing active businesses. In the case of partners and shareholders in S Corporations, however, although the tax results of the partnership and S Corporation flow-through to their owners, the NOL deduction available to partners and S Corporation shareholders is limited to their adjusted basis in their partnership or S Corporation interests. Adjusted basis is essentially a measure of the partner’s or shareholder’s current investment in the flow-through entity, as adjusted by a share of certain of the entity’s liabilities, prior distributions and prior taxable results.

Converting an NOL carryback to a cash refund of tax is a straightforward process, accomplished in one of two ways: either amended returns (Form 1040X for individuals or 1120X for C Corporations) are filed for the prior years to which the NOL deduction will be carried back, or an application is filed for a tentative allowance of the NOL carryback (Form 1045 for individuals and 1139 for C Corporations). The 1045/1139 route is sometimes called a “quick refund” application.

The quick refund route earns its name from the minimal amount of information required by the application and the statutory directive that the IRS act on the refund application within the later of 90 days of filing the application or the end of the month when the return is due for the year the loss

arose. Where prompt access to a cash refund is important, the quick refund route is preferable to amending returns for the carryback years. But there is a time limit on a taxpayer’s ability to file a quick refund claim: if it is not filed within the 12 months after the end of the tax year in which the loss arose, the taxpayer can only claim the NOL carryback by filing amended returns for the earlier years – generally involving more work and a slower refund check.

Even though the NOL carryback period is now five years, NOL carryback claims can be filed as late as three years after the due date of the tax return for the year the loss arose (or longer if the taxpayer extends the statute of limitations by agreement with the IRS). For example, let’s say Jack, the sole shareholder of a single member LLC, in filing his 2008 federal income tax return on April 15, 2009, fails to claim business deductions to which he is clearly entitled that would have generated a significant net operating loss in 2008 for tax purposes if Jack had claimed the deductions on his 2008 return. If the overlooked business deductions had been claimed on his original 2008 1040, Jack could have filed a quick refund application by December 31, 2009, to carry his NOL deduction back to his 2003 tax year and received his refund within 90 days. Jack discovers the 2008 tax return error early in March, 2012. As long as Jack amends his 2008 1040 by April 15, 2012, to claim the business deductions he overlooked when he originally filed the 2008 return, and files amended returns for 2003 (and 2004, 2005, 2006 and 2007 if necessary) also by April 15, 2012, his NOL carryback claim will be considered filed in time.

Full First Year Expensing of Capital Investment and Bonus Depreciation: As the expanded NOL provisions provide cash relief for small business by spreading current “excess” business deductions back to recover tax paid on earlier, profitable business operations, the Recovery Act seeks to stimulate current business investment by providing more generous deductions for 2009 business investment, and, where deductions won’t provide a current benefit, a refund of tax credits for prior years’ activities. In evaluating the most effective use of these investment incentives in the current economic climate, it is important to consider past years’ tax results as part of the planning mix.

For businesses that invest in depreciable equipment (essentially any tangible equipment used in the business, including computer software) in 2009, the Recovery Act permits an expanded current deduction of up to \$250,000 of that equipment (called a section 179 deduction). The 179 deduction is phased out on a dollar-for-dollar basis for each investment dollar exceeding \$800,000 (e.g., if the investment in depreciable property is \$1,050,000 million, none of the investment may be currently deducted under the special expensing provisions, although it will remain eligible for bonus depreciation). Also, the 179 deduction is

“any investment in depreciable property in 2009 is eligible for “bonus” depreciation of 50% of the investment.”

limited to current year's taxable income (so it cannot generate or increase an NOL carryback). If the 179 deduction can't be used currently, because of the taxable income limitation, the deduction can be carried forward to future years. A taxpayer can also elect not to take advantage of the 179 deduction. Specifically, it might be advantageous to forego the election and take depreciation deductions instead of the 179 deduction if you're trying to maximize a 2009 NOL carryback, since 2009 depreciation deductions will increase an NOL carryback and potentially increase the tax refund from the carryback.

Finally, separate from the 179 deduction, the Recovery Act provides that any investment in depreciable property in 2009 is eligible for “bonus” depreciation of 50% of the investment. The balance of the investment is subject to the normal depreciation rules. Under this provision, for example, using a simplified case, a 2009 investment of

\$10,000 in depreciable equipment with a five year life would generate a \$6,000 deduction (\$5,000 in bonus depreciation and one fifth of the balance or \$1,000 on a straight-line basis). The bonus depreciation provisions are elective, and, with the availability of a five year NOL carryback period, electing bonus depreciation provides an opportunity to maximize tax refunds attributable to NOL carrybacks arising from current year (2009) operations.

In addition to the remedial NOL, capital investment expensing and bonus depreciation provisions, the Recovery Act offers a broad array of tax planning opportunities tailored for our current economic times. A review of the circumstances of your company to maximize tax planning opportunities presented by this new legislation may result in substantial tax savings.

Time to Renegotiate your Commercial Lease? *(Continued)*

earlier in the term of their commercial lease. In some cases, changing business conditions for tenants may compel lease renegotiations even in the early stages of a lease term.

Preparing to renegotiate your lease is a two step process. Step one is to understand your current lease terms and determine if they are aligned with your long term business plans. This careful legal and economic analysis is crucial to the success of the process. This analysis should not only identify those lease provisions which you will seek to renegotiate but it will also assist you in determining the value of your lease, both to yourself as the tenant, and to the landlord. Space size, rent and escalations, free rent periods and work allowances are the most obvious components to consider in examining a commercial lease, however, there can be numerous additional lease provisions which, if modified, could positively affect a tenant's bottom line. Tenants should also carefully consider the physical condition of the space and how much work will be required either for a long term lease renewal or a new tenant. Of course, a tenant should not ignore the costs of relocation, both in terms of out-of-pocket expenses and loss of productivity and customer base.

Step two is to evaluate the current leasing market in your area. A landlord will not seriously negotiate a lease modification with an existing tenant unless that landlord believes that the tenant might very well relocate. In addition, the identification of viable alternative lease sites with more favorable leasing terms will be a strong negotiating tool and provide a solid point of reference for your discussions with the landlord.

Here it is important to step into the shoes of the landlord and appreciate their priorities and motivation. For example, a landlord who is looking to sell or refinance a building may seek to keep stated rents high in order to make the property appealing to a potential buyer or lender but may be much more amenable to significant free rent periods. A long term building owner may, however, be more inclined to lock in long term credit tenants at a lower rent.

“market factors ... have provided sufficient leverage for tenants to consider lease renegotiations much earlier in the term of their commercial lease.”

While it may seem that a lease renegotiation benefits only the tenant, keep in mind that commercial landlords fail if their buildings are not occupied. Lease renewals with existing tenants are typically the most profitable transactions for a commercial landlord. Knowing this, savvy landlords will welcome the opportunity to renegotiate a lease if it means retaining a viable tenant.

While the current economic downturn has caused businesses to reevaluate every expenditure, softening leasing markets have created new leverage for commercial tenants, particularly those with leases nearing termination or renewal. Properly handled, the renegotiation of an existing commercial lease can be a win/win situation, significantly affecting a tenant's bottom line while simultaneously providing the stability commercial landlords covet.

How to Combat Rising Property Taxes

by Hugh D. Fyfe and James W. Glatthaar

Most of us have come to resent municipal budget season, that time of year when we hear once again that rising costs beyond the government's control require yet another increase in our property taxes. We have grown so accustomed to these hardship pleas that we are "relieved" when the increase is "only" in the 4-5% range.

Whether you are a property owner or a tenant obligated to pay the taxes under a net lease, there is something you can do to reduce your property taxes. It is a process commonly known as a tax certiorari proceeding. Tax certiorari proceedings offer the taxpayer the ability to obtain a refund of taxes paid while the proceeding is pending as well as a reduction in tax payments in future years. You cannot obtain a refund of taxes paid if you have not contested the tax assessment each year.

How Property Taxes Are Calculated: Your property tax bill is the result of two items. The first is the municipal tax rate, which is identical for all properties in the municipality, whether the county, city, town, village or the school district. The second is the assessed value of your property. Most municipalities assess property at a small fraction of the full property value. Therefore, do not be deceived if your assessment is much lower than what you think your property is worth. Your property could still be significantly over assessed. In addition, assessed values can vary widely for similar properties within the same municipality. Only by targeting the assessed value of your property can you successfully reduce your property taxes.

The Tax Certiorari Process: To properly start the tax certiorari process, you must file a tax protest with the local assessor's office. The protest cannot be filed before an established date. Nor can it be filed after an established date. The filing window is very short: only two to three weeks. Since the filing period can differ from one municipality to the next, you should consult your attorney to make sure that this important, but limited, filing window is not missed. The purpose of the protest is to (1) state that your property is not fairly assessed and (2) claim the amount of the reduction in assessed value which you are seeking. The protest must

be carefully and correctly completed. An incorrect protest can limit the amount of your reduction or even prevent you from obtaining any reduction whatsoever.

After you have properly filed the protest, you or your representative may be required to meet with the local Board of Assessment Review to demonstrate why your property is unfairly assessed. You may be required to submit certain proof of your property's value, such as insurance policies, recent appraisals, mortgages, repair costs and other similar items. In the case of a commercial property, you will also be required to submit a rent roll showing all rent billed during the prior year and an income and expense statement for the property. Failure to provide this information can preclude you from prosecuting your claim. The Board of Assessment Review is empowered to reduce the assessed value of your property, but most commonly it will deny your protest. Although appearing before the

Board of Assessment Review seems like an exercise in futility, this administrative proceeding is a jurisdictional prerequisite to a judicial proceeding. You cannot proceed in Court if you have not filed the protest and appeared before the Board of Assessment Review.

Upon denial of your protest, you must proceed to the next step, which is to commence a Court proceeding to challenge the Board of Assessment Review's decision not to reduce your property's assessed value. The proceeding must be brought within 30 days after the assessment roll is finalized. While tax certiorari proceedings in Westchester, Rockland, Putnam, Dutchess and Orange Counties are filed in the County in which the property is located, all tax certiorari proceedings in these counties are prosecuted in Supreme Court, Westchester County, in White Plains.

If your property is a one, two or three family owner occupied house, you can proceed by way of a Small Claim Assessment Review (SCAR) proceeding rather than a full Court proceeding. The SCAR proceeding is quicker, less formal and less expensive.

Once you have commenced the Court proceeding, you must have your property appraised. This appraisal is far different from an appraisal for a purchase, sale or loan. Your attorney should recommend an appraiser who is familiar with the tax certiorari process so they know how to properly prepare their appraisal report to comply with the Court rules. A defective appraisal can result in dismissal of your Court proceeding. Because tax certiorari appraisals are costly,

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it often makes economic sense to repeat the tax certiorari process for three or four years before obtaining the appraisal.

When both the taxpayer and the municipality have their appraisals, the attorneys can try to negotiate a settlement. If no settlement is reached, the attorneys can request that the Court schedule a trial of the proceeding. The Court will often push the parties to negotiate a settlement, which is often beneficial to the property owner.

If a settlement is reached, the legislative body in each municipality (e.g. the city, town, village and the school district) must approve the settlement. If refunds are due to the property owner, which are generally part of any settlement, the refunds must usually be paid within 60 days after the Court order is entered approving the settlement. If a trial is necessary, the Court will hear the two appraisers testify and will render a written decision.

Although the process is cumbersome and can be lengthy, the results can be rewarding: a refund of taxes already paid and a reduction of your future property tax bills.

“do not be deceived if your assessment is much lower than what you think your property is worth. Your property could still be significantly over assessed.”

EFCA Could Jeopardize Management Control

By Lester Berkelhamer

Pending legislation would substantially enhance the power of unions to organize private sector employers. The Employee Free Choice Act (“EFCA”) was introduced in the House of Representatives and the Senate on March 10, 2009. If enacted in its present form, not only would it strengthen the power of employees to unionize, but it could give employees a substantial say in an employer’s business operations.

The proposed EFCA legislation would amend the National Labor Relations Act (“NLRA”) covering employers engaging in interstate commerce by providing that a union could obtain representation status by soliciting and signing up a majority of the employer’s employees with or without the employer’s knowledge. This would circumvent the current procedure that has been in place since the enactment of the NLRA over seventy years ago of obtaining such representation status through the conduct of a secret ballot election. The bill’s name is misleading because it will likely result in greater intimidation and coercion of employees in the voting process, and employee free choice could be compromised rather than increased. The card check procedure is the forum unions would eagerly adopt rather than

“The bill’s name is misleading because it will likely result in greater intimidation and coercion of employees in the voting process, and employee free choice could be compromised rather than increased.”

the secret ballot. This procedure is likely to increase intimidation and coercion by enabling union organizers to unilaterally mislead and pressure employees into signing union authorization cards. If a majority of workers at a facility sign cards, the NLRB would certify the union, requiring the employer to negotiate a contract.

Not only would this obliterate a long accepted tradition of secret ballot elections, but the EFCA, as currently proposed, provides that if the parties are not able to reach a first contract within ninety days after the union obtained its majority status, unresolved contract issues would be referred to the Federal Mediation and Conciliation Service. If mediation fails, the matter would then be referred to binding arbitration for a third party to determine contract terms and conditions – something unimaginable from a traditional entrepreneurial business viewpoint. This means that an outside arbitrator, who may have no understanding of the business, could impose a binding contract deciding critical workplace terms, reducing business flexibility and competitiveness at a time of economic stress.

While the business community was not seriously concerned about passage of such legislation under the Bush administration, its passage is a strong possibility under President Obama. President Obama has committed to strengthening the union movement and enhancing the ability of workers to form a union and bargain collectively. He has vowed to sign the measure if it reaches his desk. Confirmation of Hilda L. Solis as Secretary of Labor

EFCA Could Jeopardize Management Control *(Continued)*

gives the agency a decided pro-union tilt after years of business-friendly leadership under the Bush administration. Her background as an advocate for organized labor makes her a favorite of union leaders seeking more clout against employers through EFCA. It is likely that EFCA will pass in some form to significantly enhance the ability of unions to organize employees and obtain greater powers at the bargaining table.

Employer Strategies to Respond to EFCA: Unorganized employers who ignore EFCA's pending enactment do so at their peril. Under current NLRA procedures, employers have a thirty-plus day window from the filing of an election petition to conduct an election campaign and lawfully present their views opposing unionization. Under EFCA, an employer could first learn of a union's representation status when presented with authorization cards secretly signed by a majority of employees leading to a binding union contract.

It is imperative to counteract such a possibility by knowing what is happening with your employees and not find out from an outside union organizer. Simply put, the main employer defense is employee communications, something far too many employers fail to do. Such communications can take many forms: (1) employee meetings encouraging open discussions and gripe sessions with appropriate responses; (2) management walking the "floor" familiarizing themselves with employees, their jobs and concerns; (3) developing solid relationships with employees identified with leadership qualities; (4) group lunch gatherings on or off site; and (5) employer sponsored activities and other similar type employee interactions.

Unfortunately, because of the current economic difficulties, employers are confronted with the need to curtail costs often through the necessity of layoffs or reduction in the work week. Such actions are clearly a red flag and often lead employees to seek outside help - a union. The best way to minimize this risk is to candidly explain to employees the business reasons for the action taken. Constant rumors can be extremely harmful to conducting business. While an employer should not over commit, it

should objectively set forth its position to the remaining employees regarding their job security.

If at all possible, layoffs should be implemented on a one-time basis rather than by repeated small group layoffs to avoid the constant fear as to when the axe will next fall. Careful consideration should be given to objective criteria for determining those selected for layoff because the decisions could implicate potential discrimination claims. While seniority based layoffs may not be applicable to a particular situation, it is generally perceived as the most objective criteria. Consideration should also be given to severance payments and obtaining releases which must satisfy statutory requirements to be binding.

If EFCA is passed, business owners are likely to face increased efforts by union organizers to form unions at their companies. Once employees have or

Management Strategies to Prepare for EFCA

In addition to improving communication with employees, employers may also take the following steps to reduce the chances that employees will seek to unionize:

- (1) implement and publish reasonable personnel policies fairly and uniformly followed;
- (2) remain competitive through awareness of area wages and benefits of other comparable employers;
- (3) evaluate hiring procedures and conduct exit interviews for departing employees;
- (4) publish employee benefits either in writing or meeting announcements; and
- (5) adopt an employee handbook emphasizing the benefits of working for the employer rather than highlighting negative employment actions, such as listing disciplinary procedures.

ganized a union, the employer faces higher compliance costs, reduced management control, and decreased business flexibility. In these difficult economic times, for some businesses, this can mean the difference between survival and closing. Accordingly, employers should develop a strategy to address the increased risks of unionizing activity in their businesses that would result from the passage of EFCA or some version of this proposed legislation.

Courts Strengthen Right of Minority Members to Sue Managers of LLCs

by Michael P. Benenati

Two recent New York cases now permit a minority LLC member to commence a derivative suit on behalf of the LLC and to seek an equitable accounting under common law. See *Tzolis v. Wolff* and *Gottlieb v. Northriver Trading Co.*, respectively. Such remedies, neither of which was expressly permitted in the New York LLC Law, expand the weapons available to minority LLC members to protect their investments. They also offer a potent check on overreaching managers or controlling members who divert LLC assets for their personal gain. They may also result in increased liability risk to majority or managing members when the business suffers losses in an economic downturn.

Derivative Actions on Behalf of LLCs: A derivative suit is a lawsuit generally brought by a shareholder on behalf of a corporation against a third party. Typically, the defendant is an executive officer or director of a corporation or the manager or controlling member-managers of an LLC, who has acted to advance his own personal interests at the expense of the company. Management is responsible for bringing lawsuits and defending the corporation against suit. Shareholder derivative suits, however, permit a shareholder to initiate a suit when management has failed to do so. The minority interest holder must make a demand on management or demonstrate the futility of a demand and bring the action to protect the LLC's interests, rather than his interests as a minority member.

Tzolis involved a derivative shareholder action that arose in the real estate business context. The underlying facts underscore the fairness of affording a minority LLC member the right to commence a derivative action. In *Tzolis*, the plaintiffs were twenty-five percent minority owners in a limited liability company that owned a hotel and were "frozen out" when the seventy-five percent majority owners of the company transferred the hotel asset for below market value to a different entity owned by the majority owners and their family members and friends. The method of transfer was a thirty-year, below-market lease from the original limited liability company to the new entity, which was kept secret from the plaintiffs. Later, the majority owners sold the hotel itself to yet another entity that was owned by their family members and friends. The plaintiffs

discovered what was occurring only when the seller attempted to obtain consent to the sale from all of the members of the original limited liability company.

The New York Court of Appeals ruled that the derivative action was essential for preventing the

"[Derivative Actions and Accounting Actions] offer a potent check on overreaching managers or controlling members who divert LLC assets for their personal gain. They may also result in increased liability risk to majority or managing members when the business suffers losses in an economic downturn."

dissipation of the limited liability company's sole asset by resale. One of the plaintiffs' remedies in *Tzolis* was a notice of pendency upon the hotel, so that any transfer of title was subject to the derivative action brought on behalf of the limited liability company concerning its real estate assets. Because LLC's are a preferred form of entity in the real estate industry and real estate values are plummeting, these types of claims can be expected to arise with increasing frequency.

Right to Accounting: An accounting action generally permits a partner to compel a fiduciary (usually the controlling member in the LLC context) entrusted with property to render an account of his or her actions and for the recovery of any balance found to be due. The right to an accounting generally requires a showing of some wrongdoing, such as the misallocation and/or misappropriation of funds or a breach of the duty of loyalty. If a court grants an accounting, it may order the fiduciary to prepare a "long accounting" with detailed schedules of income and expenses over a defined period. This is followed by the filing of objections to the accounting by affected members of the LLC, and then proceedings before a court-appointed referee to hear and determine the accounting.

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Courts Strengthen Rights of Minority LLC Members *(Continued)*

In *Gottlieb*, the plaintiff sought to compel the defendants to provide her with an accounting of the financial affairs of Northriver Trading Company, a New York LLC (“Northriver”). According to the complaint, Northriver was engaged in trading securities from 1994 through 2000. From 1995 to 1999, the plaintiff held a 50% interest, which was later reduced to 20.6% in 1999. Defendant Steven Schlam was the managing member.

When it stopped doing business, the complaint alleged that Northriver possessed assets, which the plaintiff believed had a value in excess of \$2 million. Since 2001 the plaintiff had sought from the managing members of Northriver an accounting of its financial affairs and the net amount that she was due. The complaint further alleged that the defendants wrongfully failed and refused to provide plaintiff with the requested accounting and that they imposed onerous and unreasonable preconditions on an accounting, including that any accounting must be conducted by an accountant approved in advance by the defendants.

At the trial court level, the defendants asked the court to dismiss the complaint, arguing that Northriver provided the plaintiff with all documents pertaining to its finances and thus, satisfied its obligations under New York LLC law § 1102 to provide member access to company records. Such records, however, did not satisfy the plaintiff. The court agreed with the defendants and dismissed the complaint, finding that Northriver “provided all of the documents that it is required to provide” under New York LLC law § 1102. The trial court also held that the “plaintiff is not entitled to an accounting merely by virtue of her status as a member of the limited liability company” and that “there is nothing in the LLC Law to suggest otherwise.”

On appeal, the Appellate Division, First Department, reversed and granted plaintiff her demand for an accounting. Citing *Tzolis*, the Appellate Court stated that contrary to the trial court’s ruling, members of a limited liability company may seek an equitable accounting under common law.

By giving minority LLC members the right to bring derivative actions and the right to commence an accounting, LLC member relations will be greatly impacted. Without such rights, as the facts in *Tzolis v. Wolff* demonstrate, minority LLC members had little recourse against majority abuses. These cases clarify that under New York common law minority LLC members have substantial remedies against perceived abuses by majority or managing members.