

Date of Hearing: April 18, 2017

ASSEMBLY COMMITTEE ON BUSINESS AND PROFESSIONS

Rudy Salas, Chair

AB 1247 (Chen) – As Introduced February 17, 2017

***NOTE:** This bill is doubled referred, and if passed by this Committee, will be referred to the Assembly Committee on Judiciary.*

SUBJECT: Collateral Recovery Act: repossession agencies: limited liability companies.

SUMMARY: Authorizes, until January 1, 2022, the Bureau of Security and Investigative Services (BSIS) to issue a repossession agency license to a limited liability company (LLC), imposes additional disclosures, and requires the LLC to carry liability insurance, as specified.

EXISTING LAW:

- 1) Establishes, under the California Revised Uniform Limited Liability Company Act (RULLCA), the procedures, requirements, and laws relating to LLCs. (Corporations Code (CORP) §§ 17701.01 - 17701.17)
- 2) Authorizes the formation of a LLC for any lawful purpose, except as specified, and authorizes a domestic or foreign LLC to render services that may be lawfully rendered only pursuant to a license, certificate, or registration authorized by the Business and Professions Code (BPC) if the provisions of that code authorize a LLC or foreign LLC to hold that license, certificate, or registration. (CORP § 17701.04)
- 3) Defines, for purposes of RULLCA, the following:
 - a) “Foreign limited liability company” means an unincorporated entity formed under the law of a jurisdiction other than this state and denominated by that law as a LLC. (CORP § 17701.02(j))
 - b) “Limited liability company,” except in the phrase “foreign limited liability company,” means a domestic entity formed under RULLCA, or an entity that becomes subject to RULLCA, as specified. (CORP § 17701.02(k))
- 4) Applies the following to debts, obligations, or other liabilities of a LLC, whether arising in contract, tort, or otherwise: (CORP § 17703.04(a).)
 - a) They are solely the debts, obligations, or other liabilities of the LLC to which the debts, obligations, or other liabilities relate.
 - b) They do not become the debts, obligations, or other liabilities of a member or manager solely by reason of the member acting as a member or manager acting as a manager for the LLC.
- 5) Requires a LLC to reimburse for any payment made and indemnify for any debt, obligation, or other liability incurred by a member of a member-managed LLC or the manager of a

manager-managed LLC in the course of the member's or manager's activities on behalf of the LLC, if, in making the payment or incurring the debt, obligation, or other liability, the member or manager complied with the fiduciary duties required under RULLCA. (CORP § 17704.08)

- 6) Defines, for purposes of the Moscone-Knox Professional Corporation Act, "professional service" as services that may only be lawfully rendered pursuant to a license, certification, or registration under the BPC, Chiropractic Act, Osteopathic Act, or Yacht and Ship Brokers Act. (CORP §§ 13401, 13401.3)
- 7) Establishes the BSIS within the Department of Consumer Affairs (DCA) to license and regulate repossession agencies under the Collateral Recovery Act. (BPC §§ 7500 – 7511)
- 8) Defines, for purposes of the Collateral Recovery Act, the following:
 - a) "Collateral" means any specific vehicle, trailer, boat, recreational vehicle, motor home, appliance, or other property that is subject to a security agreement. (BPC § 7500.1(e))
 - b) "Licensee" means an individual, partnership, LLC, or corporation licensed under the Collateral Recovery Act as a repossession agency. (BPC § 7500.1(o))
 - c) "Multiple licensee" means a repossession agency holding more than one repossession license under this chapter, with one fictitious trade style and ownership, conducting repossession business from additional licensed locations other than the location shown on the original license. (BPC § 7500.1(p))
 - d) "Person" includes any individual, partnership, LLC, or corporation. (BPC § 7500.1(q))
 - e) "Qualified certificate holder" or "qualified manager" is a person who possesses a valid qualification certificate in accordance with the provisions relating to examination and is in active control or management of, and who is a director of, the licensee's place of business. (BPC § 7500.1(t))
 - f) "Repossession agency" means and includes any person who, for any consideration whatsoever, engages in business or accepts employment to locate or recover collateral, whether voluntarily or involuntarily, including, but not limited to, collateral registered under the provisions of the Vehicle Code which is subject to a security agreement, except for any person registered as an employee. (BPC § 7500.2(a))
- 9) Establishes the procedures for a LLC to apply for a license as a repossession agency but does not authorize the licensure of a LLC as a repossession agency. (BPC § 7503.4)
- 10) Requires every person entering the employ of, or contracting with, a licensee or multiple licensee to register with the BSIS, as specified. (BPC §§ 7506.3-7506.14)

THIS BILL:

- 1) Authorizes the BSIS to issue a repossession agency license to a LLC.

- 2) Requires a managing member or manager of a LLC and its officers, if any, to submit with the application for licensure a specified personal identification form and fingerprints for a background check by federal law enforcement.
- 3) Requires a LLC applicant to include with the application the true names and complete residence addresses of each managing member or manager and any officer and authorizes the BSIS to request a copy of its certified articles of organization.
- 4) Requires the application to state the name and address of the person to be in charge of the LLC.
- 5) Requires the application to be signed under penalty of perjury by a managing member, manager, or officer.
- 6) Authorizes the BSIS to deny a license if a managing member or manager of a LLC has committed specified acts.
- 7) Requires a LLC, as a condition of licensure, to maintain liability insurance, as specified, for damages arising out of claims based on acts, errors, or omissions arising out of the repossession services it provides.
- 8) Requires a Certificate of Liability Insurance, as specified, to be submitted to the BSIS, and would require the insurer issuing the certificate to report specified information to the BSIS related to the policy.
- 9) Authorizes the suspension, as provided, of a license if the licensee fails to maintain sufficient insurance, or fails to provide proof of the required insurance upon request by the BSIS, and would render each member of the LLC personally liable, up to \$1,000,000 each, for damages resulting to third parties in connection with the company's performance during the period of suspension, as specified.
- 10) Sunsets the provisions under the bill on January 1, 2022.

FISCAL EFFECT: Unknown. This bill is keyed fiscal by the Legislative Counsel.

COMMENTS:

Purpose. This bill is sponsored by **California Association of Licensed Repossessors**.

According to the author, “[this bill] will revise the Collateral Recovery Act in the Business and Professions Code to enhance the ability of licensed repossession agencies to be organized as [LLCs].”

Background. California law requires any person performing collateral recovery for a fee to be licensed or registered under a license with the BSIS, except in limited circumstances. In addition to repossession agencies and their employees, the BSIS licenses and regulates security guards, proprietary private security employers and officers, private investigators, alarm companies and employees, locksmith companies and locksmiths, and private patrol operators. The BSIS also has jurisdiction over firearm and baton training facilities and their instructors.

As of the date the DCA's 2016 Annual Report was published, the BSIS regulates 291 licensed repossession agencies, 813 registered repossession agency employees, and 306 certified qualified managers. Similar to other non-healing arts licensing entities, the BSIS does not license individuals (except sole proprietors). Instead, it licenses business entities. While there are provisions relating to the licensure of LLCs under the Collateral Recovery Act, those same provisions provide that nothing under the Act "permits a domestic or foreign [LLCs] to be licensed as a repossession agency" (BPC § 7503.4(c)). This bill, among other things, deletes the prohibition, authorizing LLCs to apply for licensure as a repossession agency.

LLCs. LLCs were first authorized in California under the Beverly-Killea Limited Liability Company Act (SB 469 (Beverly and Killea), Chapter 1200, Statutes of 1994). On January 1, 2014, RULLCA replaced Beverly-Killea. RULLCA was intended to modernize California LLC law.

As such, a LLC is a relatively new form of business organization in California. A LLC is a hybrid business entity formed under the Corporations Code and consists of at least two members who own membership interests. The company has a legal existence distinct from its members, and provides members with limited legal liability to the same extent enjoyed by shareholders of a traditional corporation, but allows the members to actively participate in the management and control of the company. Some benefits of organizing as a LLC include pass-through taxation (which means that money the companies earned is taxed only once at the individual member's personal income tax rate), and protection from individual liability for liability incurred by or judgments against the LLC.

Prior to LLCs, the limited partnership and the subchapter S corporation were the primary forms of business entity used to achieve the tax status and limited liability features now offered by the LLC. However, each of those forms has its drawbacks. S corporations are subject to the additional tax liability and limited liability partnerships still have a liable partner. A LLC can provide the advantages of both without the disadvantages of either — limited liability for its owners (as in a corporation) and freedom to structure management rights and financial interests in the entity in virtually any configuration the parties wish (as in a partnership).

Limited Liability. The DCA licensing entities, including the BSIS, are established to protect the people of California through adequate regulation of businesses and professions that engage in activities that risk harm to the health, safety, and welfare of the public (BPC § 101.6). The entities establish the minimum level of competency required to engage in the occupations they regulate. As a result, an applicant seeking a license to practice from a licensing authority must demonstrate the ability to provide safe and effective services to the public. These requirements are meant to impose greater responsibility on the licensee due to the risk inherently involved in professions that require licensure. This responsibility is meant to be in addition to personal liability under civil and criminal law.

When Beverly-Killea was established in 1994, it excluded professionals from organizing as LLCs. This exclusion was intended to prevent licensees who harm others from being able to limit their liability by operating as a LLC and potentially becoming judgment proof. The limited liability attributes of a LLC (like corporations) prevent a claimant injured by a person operating as a LLC to generally not be able to recover against the individual's personal assets. Further, if the LLC has no assets, the consumer has no recourse for recovering for damages.

In addition, RULLCA further limits the liability of LLC members by requiring LLCs to indemnify members in member-managed limited liability companies and managers of manager-managed limited liability companies for any debt, obligation, or other liability incurred in the course of the members' or managers' activities on behalf of the company, if the member or manager complied with his or her fiduciary duties under RULLCA. Under Beverly-Killea, the indemnities were permissible.

To address that issue, previous legislation authorizing various professions to organize as LLCs also generally included insurance requirements to ensure some recovery by the injured party should the LLC business have little or no assets because profits are regularly distributed to its members. This bill includes mandatory insurance provisions and a sunset date.

Current Related Legislation. SB 559 (Morrell) of the current legislative session extends the sunset on the LLC authorization in the Private Investigator Act by three years. *NOTE: this bill is pending in the Senate Committee on Judiciary.*

AB 580 (Cunningham) of the current legislative session authorizes the BSIS to issue private and proprietary patrol operator licenses to LLCs. *NOTE: this bill is pending in the Assembly Committee on Business and Professions.*

Prior Related Legislation. SB 177 (Wieckowski), Chapter 140, Statutes of 2015 extended the sunset date for BSIS to issue an Alarm Company Operator license to an alarm company organized as a limited liability company from January 1, 2016, to January 1, 2019.

AB 1608 (Olsen), Chapter 669, Statutes of 2014 authorized a licensed private investigator to be organized as a LLC, required a private investigator LLC to maintain an insurance liability policy of at least \$1,000,000, and required BSIS approval to assign a license between business entities, among other things.

SB 1077 (Price), Chapter 291, Statutes of 2012 among other things, authorized an alarm company to be organized as a LLC, required an alarm company LLC to maintain an insurance liability policy of at least \$1,000,000) and required BSIS approval to assign a license between business entities, among other things

SB 392 (Florez), Chapter 698, Statutes of 2010 authorized licensed contractors to organize as a LLC, required a LLC to maintain an insurance liability policy of at least one million dollars (\$1,000,000), as specified, and amended the Corporations Code to authorize a LLC to render services pursuant to a license, certificate, or registration under the BPC if the applicable provisions of the BPC authorize a LLC to hold that license, certificate, or registration.

SB 1225 (Harman), Chapter 114, Statutes of 2008 authorized a licensed cemetery authority to organize as a LLC, and required a LLC to maintain an insurance liability policy or assets of at least \$1,000,000, as specified.

SB 1337 (Correa) of 2008 would have authorized a LLC to render "professional services" prohibited by the Beverly-Killea Limited Liability Company Act if the provisions governing the applicable license authorized a LLC to hold that license, and authorized the issuance of a contractor's license to a LLC. *NOTE: This bill died in the Senate Committee on Judiciary.*

AB 2235 (Parra) of 2006 would have expanded the definition of "person" under the Real Estate Law to include a LLC and would have required the LLC to maintain an insurance liability policy of at least \$500,000, maintain a specified amount in assets, or have a net worth of a specified amount. *NOTE: This bill died in the Senate Committee on Judiciary.*

SB 1022 (Campbell) of 2005 sought to authorize LLCs to provide specified professional services, and defined "professional services" to mean any type of services that may only be lawfully rendered pursuant to a license, certification, or registration under the BPC or the Chiropractic Act. *NOTE: This bill died in the Senate Committee on Judiciary.*

IMPLEMENTATION ISSUES:

This bill allows a managing member to sign the application form for a manager-managed LLC. However, a managing member cannot sign the application form for a member-managed LLC. Under current law, a LLC can be organized as a manager-managed LLC or a member-managed LLC. Under a manager-managed LLC, no managing member can be an agent of the LLC. Therefore no managing member has the authority to bind or execute any instrument on behalf of the LLC; only the managing manager can do so.

In addition, clarification may be needed to note the difference between a "manager" and a "qualified manager" (the individual who is responsible for the active direction and management of licensed business). If this bill passes this Committee, the author may wish to work with the BSIS to clarify these provisions.

REGISTERED SUPPORT:

California Association of Licensed Repossessors (sponsor)

REGISTERED OPPOSITION:

None on file.

Analysis Prepared by: Vincent Chee / B. & P. / 916-319-3301