

Practice Update

2015 Legislative Changes to Florida's Limited Liability Company Act

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During the 2015 legislative session, the Florida legislature adopted amendments to Chapter 605 of the Florida Statutes. Chapter 605 is the Florida Revised Limited Liability Company Act (Florida Revised LLC Act). The bill containing the amendments to Chapter 605 was signed by Governor Scott on June 11, 2015 and, except as provided below, the amendments to Chapter 605 will become effective on July 1, 2015. ([Click here](#) to view a copy of the amendment as adopted.) The Florida Revised LLC Act was originally adopted in 2013 and became effective for all Florida limited liability companies on January 1, 2015 (whether organized before or after that date).

Highlights of the changes made to the Florida Revised LLC Act during the 2015 legislative session are as follows:

Dissociation

The amendment removes from the list of non-waivable provisions under §605.0105 a provision that prohibits an LLC's operating agreement from varying the power of a person to dissociate from the LLC. Section 605.0601(1) of the Florida Revised LLC Act provides, as a default rule, that a person has the power to dissociate as a member of an LLC at any

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time. The Florida Revised LLC Act, as adopted in 2013, made that provision a non-waivable provision. The amendment will allow members of LLCs to enter into operating agreements that prohibit a member from dissociating from the LLC.

This amendment brings the current Florida LLC Act into conformity with the prior Florida LLC act, which allowed members to agree in an operating agreement that no member could dissociate from the LLC until a date certain or the happening of an enumerated event. It also reconciles the Florida Revised LLC Act with the final version of the Revised Uniform Limited Liability Company Act (Uniform Act), upon which the Florida Revised LLC Act is largely modeled and that was finalized after the Florida Revised LLC Act was adopted in 2013. Finally, it resolves an issue that had become controversial among some Florida lawyers after the Florida Revised LLC Act was adopted in 2013.

Of course, the default rule (if the operating agreement does not deal with this issue) remains that a member can withdraw from an LLC at any time without consent, so if that is a concern for the members of a particular LLC, they need to ensure the operating agreement that governs their LLC prohibits dissociation by members at will – or, if dissociation is to be permitted, they should be sure that their operating agreement reflects the consequences of such dissociation.

Default Fiduciary Duties

Section 605.04091 provides that members and managers of an LLC owe fiduciary duties of loyalty and care to the LLC and to members of the LLC. These rules are default rules and may be modified in certain respects.

The current Florida Revised LLC Act follows a “cabined-in” approach to fiduciary duties, meaning the default fiduciary duties contained in the Florida Revised LLC Act are limited to those enumerated in

the act. The current Florida Revised LLC Act *limits* the duty of loyalty to accounting to an LLC and holding as trustee any property, profit, or benefit derived in certain circumstances, refraining from dealing with the LLC with an interest adverse to the LLC and refraining from competing with the company. The current Florida Revised LLC Act also provides that the duty of care in the conduct or winding of the LLC is *limited* to refraining from engaging in grossly negligent or reckless conduct, willful or intentional misconduct, or a knowing violation of law.

The amendment takes a different approach to default fiduciary duties, “un-cabining” them in the manner that is set forth in the Uniform Act. Under the amendment, the default fiduciary duty of loyalty now *includes*, but is no longer limited to, the matters set forth above, and the default fiduciary duty of care now provides that it is the duty “to refrain from engaging” in the conduct described above (removing the word “*limited*”).

Further, the amendment adds two additional provisions to §605.0111 of the Florida Revised LLC Act on this subject. The first adds new subsection (2), which states to the extent that, at law or in equity, a member, manager, or other person has duties, including fiduciary duties, to an LLC or to another person that is a party to or bound by an operating agreement, the duties of the member, manager, or other person may be restricted, expanded, or eliminated by the operating agreement, to the extent allowed under §605.0105. The second modifies old subsection (2) [renumbering it as subsection (3)] to expand its coverage to provide that unless displaced by particular provisions of Chapter 605, the principles of law and equity, *including the common law principles relating to the fiduciary duties of loyalty and care*, supplement Chapter 605.

This change was made, in part, because courts in Florida have inconsistently followed the “cabined-in” approach to default fiduciary duties that has been

part of Florida's LLC act for many years, with some courts following the statutory limitations and others expanding default fiduciary duties to include those that may arise in appropriate circumstances under the common law. The amendment recognizes this inconsistency by expanding the default fiduciary duties to include those duties that may arise under common law.

Additionally, and importantly, the amendment does not eliminate the ability of the members of an LLC to limit, expand, or eliminate fiduciary duties (including common law fiduciary duties) in their operating agreement, to the extent permitted in §605.0105. Under §605.0105(4)(c), if not manifestly unreasonable, an LLC's operating agreement may alter or eliminate the duty of loyalty under §605.04091, identify specific activities that do not violate the duty of loyalty and alter the duty of care, but it may not authorize willful or intentional misconduct or a knowing violation of law. The amendment also expressly allows an LLC's operating agreement to eliminate other fiduciary duties that may arise under common law.

Appraisal Rights Are the Exclusive Remedy

Current §605.1072 states that, except in certain situations, the legality of a proposed or completed appraisal may not be enjoined, set aside, or rescinded in an equitable or legal proceeding by a member after the members have approved the appraisal event, unless the appraisal event was not properly authorized, was procured as a result of fraud, a material misrepresentation, or omission of a material fact, or is an interested transaction, unless it has been approved under §605.04092, which deals with the approval of conflict of interest transactions, or is fair to the limited liability company.

The amendment removes the third exception regarding interested transactions. As a result of the change, appraisal rights are the sole and exclusive remedy in most transactions in which appraisal

rights are available, including interested party transactions. This change makes Florida's LLC statute identical to Florida's current corporate statute, although different from the corresponding provision of the Revised Model Business Corporation Act (RMBCA) upon which Florida's corporate statute is modeled.

At present, a task force on which both authors are active members is working on updating Florida's corporate statute to, in part, bring it into conformity with the current version of the RMBCA. If the corresponding section of Florida's corporate statute covering this issue is updated to follow the RMBCA provision, it is likely that this provision in the Florida Revised LLC Act will be proposed for modification to harmonize the two provisions.

Knowledge and Notice in the Context of a Real Estate Transaction

Section 605.0103(4) imputes knowledge of certain aspects of a limited liability company's business on third parties in certain situations. Under §605.0103(4)(b)(5), a third party is deemed to have knowledge of a grant of authority or limitation imposed on the authority of a person holding a position or having a specified status in a company if the grant of authority or limitation is described in the LLC's articles of organization.

The amendment limits the provisions of this section in the context of a real estate transaction. It provides that, in amended §605.0103(4), grants or limitations of authority contained in the LLC's articles of organization are not effective to put third parties on notice of that limitation of authority unless the limitation of authority appears in an affidavit, certificate, or other instrument that bears the name of the limited liability company and is recorded in the office for recording transfers of such real property.

This clarification was requested by the Real Property, Probate, and Trust Law Section of The Florida Bar, and is important for real estate practitioners, since the first place one looks when dealing with real property and determining who has authority to transfer real estate is the real estate records in the county where the property is located.

Other Changes to the Florida Revised LLC Act Made in the Amendment

The amendment rectifies glitches in the Florida Revised LLC Act as adopted in 2013 and also makes certain clarifying changes, including:

- Section 605.04073 (Voting rights of members) was modified, in subsection (4), to clarify the language dealing with actions by the written consent of members, making clear that an action by members taken without a meeting must be approved by members with at least the minimum number of votes necessary to take the action at a meeting.
- Section 605.0410 (Records to be kept; rights of member, manager, and person dissociated to information) was modified, to add a new subsection (2)(c), which requires that in a member-managed LLC, the LLC that has received a demand for information must respond within 10 days of the demand with the information demanded or with an explanation as to why the LLC will not provide the information. This change makes the requirements for response in a member-managed LLC the same as the statutory requirements for the required response by a manager-managed LLC.
- Sections 605.0715 and 605.0909 have been modified to specify information that administratively dissolved LLCs (both foreign and domestic) must include in their application when applying for reinstatement and also provides an alternative to filing an application for such reinstatement.

- When the Florida Revised LLC Act was adopted in 2013, Florida LLCs organized prior to January 1, 2014 remained, with limited exception, subject to the old Florida LLC act (Chapter 608). To deal with entities formed under the old Florida LLC act, §605.1108(3)(b) was added to the Florida Revised LLC Act in 2013, which provided that the management structure language in an LLC’s articles of organization operates as if such language was in the LLCs operating agreement (even if it is not). Since all Florida LLCs are now governed by the Florida Revised LLC Act, to avoid confusion if an LLC’s articles of organization differ from its operating agreement, this provision has been eliminated from Florida’s Revised LLC Act. The effect of this change is that if there is an inconsistency between an LLC’s articles of organization and operating agreement as to whether the LLC is member-managed or manager-managed, or as to the manner in which the LLC will be managed, the terms of the operating agreement will prevail as between the members, managers, and transferees of the LLC.
- The amendment rectifies technical issues involving the definition of “majority-in-interest” that was contained in subsection (37) of §605.0102. The amendment clarifies that “majority-in-interest” means those members who hold “more than 50 percent of the then-current percentage or other interest in the profits of the limited liability company owned by all of its members.”

Repeal of Chapter 608

Under the Florida Revised LLC Act, as adopted in 2013, the new act became effective for all Florida LLCs (regardless of when they were organized) on January 1, 2015. The amendment formally repeals Chapter 608, but does not change the effective date of the repeal (which is January 1, 2015).

The amendment also deletes references in other chapters of the Florida Statutes to Chapter 608 and

replaces them with references to Chapter 605.

Effective Date

The amendments become effective on July 1, 2015, except for the repeal of Chapter 608, which is effective retroactive to January 1, 2015.

Recommendation for Members and Managers of Florida LLCs

Members and managers of Florida LLCs should review their operating agreements to determine whether they wish to make changes in light of the changes to the default rules made in the amendment and in the Florida Revised LLC Act as adopted in 2013.

About the Authors

Philip B. Schwartz and Andrew E. Schwartz were active participants in the task force that proposed the Florida Revised LLC Act to the Florida legislature in 2013. In addition, Philip was an active participant in the ad hoc task force that worked with members of the Florida legislature to draft the amendment to the Florida Revised LLC Act that was adopted in 2015.

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