



Florida's Revised Limited Liability Company ("LLC") Act

James A Marx, Esq., Marx Rosenthal PLLC, Miami, Florida

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This article provides an overview of the Revised LLC Act (revised act).

The revised act took full effect January 1, 2015,¹ and is a comprehensive and outstanding rewrite of the prior act. It was written during a four year period by a committee formed by the Florida Bar (LLC Drafting Committee), with significant participation and collaboration by members of the Florida Bar Business Law, Real Property, Probate and Trust Law, and Tax sections. It incorporates important updated provisions from the revised uniform LLC act (promulgated by the Uniform Law Commission, and as amended in 2011), as well as provisions from Delaware, other states, and Florida corporate and partnership law (as LLCs are a hybrid between corporations and partnerships), and this new and improved chapter of the Florida Statutes² is likely to facilitate the use of more LLCs.

Florida LLCs have become the entity of choice.

There are more active Florida LLCs than corporations, and each year that is becoming more so, with new Florida LLCs now being formed at almost twice the rate of corporations. Florida has more LLCs than any State in the nation, including Delaware, and LLCs are increasingly being used more and more for real estate and other transactions, as it offers a more flexible management structure, "pass through" taxation, exemption from Florida's corporate income tax, the same limited liability protections for owners (members) as received by owners of corporations, and additional asset protection for multi-member LLCs.

The revised act is a default statute, and as in the prior act, the relationship is governed primarily by the operating agreement (which is strongly encouraged, but not legally required). The revised act strengthens freedom of contract (items permissible in an operating agreement), expands definitions, expands nonwaivable provisions, clarifies agency and authority rules, provides for new statements of authority, eliminates the title/concept of "managing member," and retains the distinction for asset protection purposes between single member and multi-member LLCs (Olmstead Patch). It provides the ability to reduce but not eliminate fiduciary duties, permits new members with no participation interest, permits members to dissociate, expands dissolution provisions, clarifies service of process, and liberally permits the entity to be combined with other entities by way of merger or conversion.

Authority; "Manager Managed" or "Member Managed"

Although permitted but not explicitly required by the revised act, in order to electronically file articles of organization, the articles of organization must include the name and address of one or more individuals or entities that are authorized to manage and control the LLC.³ The articles of organization can also include a statement as to whether the LLC is manager managed or member managed,⁴ and this is typically recommended to establish the party or parties that are authorized to act on behalf of the LLC.



When contracting or otherwise dealing with LLCs, third parties (other than members, dissociated members, transferees, and managers), are entitled to rely on Florida Department of State records unless otherwise advised.

If authority is not clearly stated in the articles of organization, it will be necessary to review the operating agreement to determine authority, and it's important to note that the revised act provides that in the event of conflict between the articles of organization and operating agreement, the operating agreement shall control.

Upon determining whether the company is member managed or manager managed, the revised act provides important authority and guidance for real estate transactions:

“Unless a certified statement of authority recorded in the applicable real estate records limits the authority of a member or a manager, a member of a member-managed company or a manager of a manager-managed company may sign and deliver an instrument transferring or affecting the limited liability company’s interest in real property. **The instrument is conclusive in favor of a person who gives value without knowledge of the lack of authority of the person signing and delivering the instrument.**”⁶ [Emphasis added.]

The revised act, in contrast to the revised uniform limited liability company act, provides statutory apparent authority as described above, which is particularly important for real estate transactions.

Manager or Member

Often the manager(s) and members(s) are the same person(s), and it is generally best (and it is common practice) to be manager managed so the company will disclose in State records who is authorized to act on behalf of the company, as it is required to do so, but not disclose its ownership. This is also generally preferable because of deemed notice rules, and provisions related to the delegation of rights and powers.⁷

The terms manager managed and member managed are not interchangeable. The revised act clearly provides that a member does not have any authority to act for a manager managed LLC, and the revised act does not empower a manager with any powers to act for a member managed LLC.⁸

Statement of Authority

The revised act allows the company to file a statement of authority in order to limit the apparent authority of one or more members or managers, or in order to provide authority for a member, manager or other party to act on behalf of the LLC.⁹

These statements fall into two categories. A properly filed statement of authority (filed with the Florida Department of State)¹⁰ that **does not pertain to transfers of real property** will be **conclusive in favor of any person who gives value in reliance on the grant**, provided that the



person giving value doesn't have knowledge to the contrary, or that the statement was subsequently canceled or amended to terminate the authority at issue.¹¹

A statement of authority to grant authority to **transfer real property** held in the name of the LLC, however, **requires a second step** in addition to filing with the Florida Department of State; which is the **recording of the certificate of authority in the applicable real property records** where the property is located: “[A] certified copy of which statement if recorded in the office for recording transfers of real property, is conclusive in favor of a person who gives value in reliance on the grant without knowledge to the contrary...”¹²

The company can also amend or cancel the statement of authority,¹³ and persons granted authority are entitled to file a statement of denial of such authority.¹⁴

Thus, third parties that are dealing with an LLC in the real estate context, should review Florida Department of State records both to determine authority and to determine if there are any statements of authority, any amendments or cancellations thereto, or any statements of denial, and as stated above, to determine who is authorized to act on behalf of the LLC and whether it's *member managed* **or** *manager managed*. Although third parties are entitled to rely on the State records unless otherwise advised,¹⁵ it is better practice for practitioners to also review the operating agreement, with the understanding that the revised act provides that in the event of conflict between the articles of organization and operating agreement that the operating agreement shall control.

Title Insurance; Affidavits

Prior to insuring any conveyance of title, for marketability of title purposes title underwriters are requiring confirmation that persons executing instruments to be insured have the authority to bind the LLC **either** under a **statement of authority** filed with the Florida Department of State and recorded in the official records of the county where the property lies, or **confirmation with the Florida Department of State** that a person identified as a manager is in a *manager managed* LLC, or a person identified as a member is in a *member managed* LLC, as applicable, are **properly authorized**, and that there is **no recorded statement to the contrary**. Where there is knowledge that the information filed with the Florida Department of State is inconsistent with the operating agreement, there will be additional requirements which may include the requirement for all or a majority of the members in interest¹⁶ to provide their consent, or for the proper party or parties to execute an affidavit consenting to the transaction and establishing the names of all current members and their respective interests. Title underwriters are also requiring a determination (often in the form of an affidavit) that the member or manager that is authorizing the transaction has not become a debtor in bankruptcy since becoming a member or manager, and if the LLC is a single member LLC, a determination should be made that there are no creditors who have acquired or are attempting to acquire control of the LLC by executing upon the member's interest.

Additional Important Considerations

Operating Agreement. An LLC is a creature of contract, and it is recommended to have a written operating agreement setting forth the existence of the entity and members, whether the company is manager managed or member managed, as well as important agreements and



protocol concerning rights, duties and indemnification, and many other provisions. The revised act strengthens freedom of contract, and although it also adds many new default rules, the vast majority of these rules can be over-ridden or otherwise modified (except to the extent prohibited by the nonwaivable provisions of the revised act).¹⁷

Integration. It is particularly important to include an integration/merger clause in the operating agreement (i.e. this agreement constitutes the entire agreement between the parties ... and no waiver, consent, modification or change shall bind the parties unless in writing and signed), as an operating agreement may be implied; that is, it may be written or oral, or a combination of both.¹⁸

Effective Date. When filing articles of organization, the revised act permits a prior effective date that is within five business days before the date of filing.¹⁹ This is particularly helpful for real estate transactions, enabling a party to sign a contract prior to the formation of the LLC (as permitted for Florida corporations).

Elimination of term – “Managing Member.” Although this terminology may not immediately appear to be problematic, it is confusing because it is unclear whether this term is meant to create a manager managed or a member managed LLC, and as such, **this term has been eliminated in the revised act**, and by default those LLCs with this terminology will be deemed to be member managed.²⁰ Thus, it is recommended for those entities that use this terminology (which likely were created prior to the revised act), to file articles of amendment to their articles of organization and/or revise the terminology utilized in the annual report (that is, to designate one or more individuals as either MGR (indicating manager) or AMBR (indicating authorized member), but certainly not MGRM, and to revise their operating agreement to clearly designate that the entity is either manager managed or member managed.

Duties. Duties may be shifted among members.²¹

Admission of New Members. Unlike the prior act, the revised act provides that absent anything to the contrary in the operating agreement, new members may **only be admitted by unanimous vote of the members**, rather than by a majority.²² The revised act also provides that the operating agreement is binding upon a manager or transferee even when not signed or formally accepted by such person.²³

Amendment. Unless otherwise provided in the operating agreement, a unanimous vote of the members is required to amend the articles of organization or operating agreement.²⁴

Standards of Conduct. The revised act provides standards of conduct for members in member managed LLCs and for managers in manager managed LLCs²⁵



Judicial Dissolution. This was one of the topics most debated by the LLC Drafting Committee and has been significantly revised. The grounds for a member to seek a judicial dissolution still include a finding that it's not reasonably practicable to carry on the company's activities, and this has been expanded in the revised act to also include substantial unlawful conduct, misappropriation or waste causing injury, and deadlock that is causing or likely to cause irreparable injury.²⁶ In addition, taking a cue from the Florida corporate statutes, the revised act provides a right to the LLC or its members to elect to purchase the interest of a member who has brought an action for judicial dissolution.²⁷

Right to withdraw / dissociate. Unlike the prior act, the revised act provides a member with the right to withdraw (dissociate) from the LLC at any time, for whatever reason, though a member who wrongfully dissociates is liable for any damages to the LLC caused by the dissociation.²⁸

Non-Economic Member. Any person can become a non-economic member, with no right to distributions.²⁹ Non-members may be given a veto power over amendments to the operating agreement. This may be requested by lenders or other third parties dealing with the LLC.³⁰

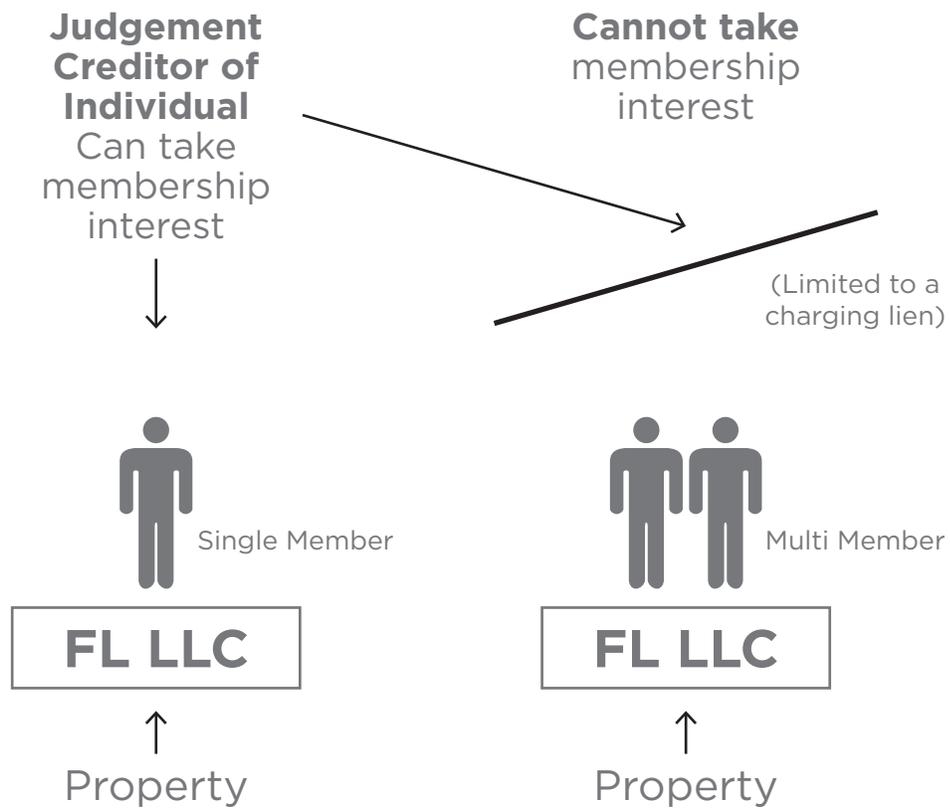
Salary. For those that have a member managed LLC, there is a potential trap as the revised act states that *"a member is not entitled to remuneration for services performed for a member-managed limited liability company, except for reasonable compensation for services rendered in winding up the activities and affairs of the company, in the absence of agreement to the contrary."*³¹

Charging Orders. Not long before the enactment of the revised act, the Florida Supreme Court (in the 2010 seminal "Olmstead Case")³² ruled that a judgment creditor of a single member LLC could execute on the debtor's entire right, title and interest in the LLC to satisfy the judgment. This was a groundbreaking case that inspired extensive consideration by the LLC Drafting Committee, and other committees of the Florida Bar, and with their assistance the Florida legislature (in 2011) adopted the "Olmstead Patch" to clarify that **the holding in Olmstead does not apply to multi-member LLCs and that the exclusive remedy for a judgment creditor of a multi-member LLC is a charging order on the member's transferable interest.** This is one of the most important distinctions in the Florida LLC laws (and is more fully illustrated below), and has not been changed in the revised act.³³ Practitioners should carefully consider this distinction when structuring LLCs for their clients.



ASSET PROTECTION CONSIDERATIONS

**DIFFERENCE BETWEEN SINGLE MEMBER & MULTI MEMBER LLC
IN THE CASE OF A "REVERSE PIERCING"**





Comparison to corporations

Corporation = Creature of Statute

LLC = Creature of Contract

A limited liability company is a hybrid between a corporation and partnership

ITEM	CORPORATION	LIMITED LIABILITY COMPANY
Document to Form Entity	Articles of Incorporation	Articles of Organization
Governing Documents	Bylaws / Shareholders Agreement	Operating Agreement
Owners (Ownership Interest)	Shareholder(s) (Shares, Capital Stock)	Member(s) (Membership / Participation Interest)
Authorized Parties	Director(s); President, VP, Treasurer, Secretary, Chief Executive Officer, Chief Financial Officer	Member(s) or Manager(s), but not both

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James A. Marx, Marx Rosenthal PLLC, Miami, FL.

James is a Florida Board Certified Real Estate attorney with over 28 years of experience. His practice is concentrated in the areas of real estate and corporate law, and he frequently works with entity selection and governance issues. James participated in several drafting sessions of the LLC Drafting Committee, and he serves on the *Executive Council of both the Real Property and Business Law Sections of the Florida Bar*, and James is the past *Chairman of the Florida Realtor Attorney Committee* which prepares the FR/BAR contract documents that have become the standard documents customarily used for real estate transactions in Florida.



1 The revised act was signed into law on June 14, 2013 and took effect on January 1, 2014, but with a grace period for all LLCs formed prior to that date. The revised act took full effect this January 1, 2015, so that all LLCs are now be governed by the revised act rather than the prior act.

2 As of January 1, 2015, Florida Chapter 605 (the revised act) entirely supersedes Chapter 608 (the prior act).

3 Section 605.0201(3), F.S., Formation of limited liability company; articles of organization.

4 Section 605.0201(3), F.S., Id.

5 Section 605.0107(4), F.S., Operating agreement; effect on third parties and relationship to records effective on behalf of limited liability company. Special care should be taken, however, by anyone who files information with the department of state, such as an annual report, to make sure that the information is accurate. In the event of inaccurate information, the revised act provides that a person who suffers a loss by reliance on the inaccurate information may recover damages not only from the person who knew it was inaccurate but also from the member or manager, as applicable, on whose behalf the record was filed. Section 605.0205, F.S., Liability for inaccurate information in filed record.

6 Section 605.04074(3), F.S., Agency rights of members and managers.

7 Sections 605.0103, 605.04071, F.S. Knowledge; notice; and Delegation of rights and powers to manage.

8 Section 605.04074(2)(a), F.S. Agency Rights of Members and Managers.

9 Section 605.0302, F.S., Statement of authority.

10 To be effective, the statement must include the name of the company, the street and mailing address of its principal office, and the status or position of the person or persons. Section 605.0302(1), F.S., Id.

11 Section 605.0302 (6), F.S., Id.

12 Section 605.0302(6), F.S., Id.

13 Section 605.0302(2), F.S., Id.

14 Section 605.0303, F.S., Statement of denial.

15 Section 605. 0107(4), F.S., Operating agreement; effect on third parties and relationship to records effective on behalf of limited liability company.

16 Section 605.0102(37), F.S., Definitions.

17 Section 605.0105, F.S., Operating agreement; scope, function, and limitations.

18 Section 605.0102(45), F.S., Definitions.

19 Section 605.0207, F.S., Effective date and time.

20 Section 605.0407, F.S., Management of limited liability company.

21 Section 605.0105(4), F.S., Operating agreement; scope, function, and limitations.

22 Section 605.0401, F.S., Becoming a member.

23 Section 605.0106(4), F.S., Operating agreement; effect on limited liability company and person becoming member; preformation agreement; other matters involving operating agreement.

24 Section 605. 04073, F.S., Voting rights of members and managers.

25 Section 605.04091, F.S., Standards of conduct for members and managers.

26 Section 605.0702, F.S., Grounds for judicial dissolution.

27 Section 605.0706, F.S., Election to purchase instead of dissolution.

28 Section 605.0601, F.S., Power to dissociate as member; wrongful dissociation.

29 Section 605.0401(4), F.S., Becoming a member.

30 Section 605.0107(1), F.S., Operating agreement; effect on third parties and relationship to records effective on behalf of limited liability company.

31 Section 605.0407(4), F.S., Management of limited liability company.

32 Olmstead, et al v The Federal Trade Commission, Fla. Sup. Ct., No. SC08-1009 (2010).

33 Section 605.0503, F.S., Charging order.



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