

**THE TITLE “MANAGING MEMBER” UNDER
THE FLORIDA REVISED LIMITED LIABILITY COMPANY ACT**

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The Florida Revised Limited Liability Company Act, Chapter 605, Florida Statutes (the “New Act”), became effective (a) on January 1, 2014 for each limited liability company formed in Florida (a “FL LLC”) on or after that date and for each FL LLC formed before January 1, 2014 that elected, in the manner provided by its operating agreement or by law for amending its operating agreement, to be subject to the New Act instead of the Florida Limited Liability Company Act, Chapter 608, Florida Statutes (the “Repealed Act”), and (b) on January 1, 2015 for each other FL LLC formed before January 1, 2014 (except that all filings with the Florida Department of State on or after January 1, 2014 must comply with the New Act). The New Act repealed the Repealed Act effective on January 1, 2015.2/

This article examines the viability of the title “managing member” under the New Act.

Both the Repealed Act and the New Act provide that the members of a FL LLC may elect whether the FL LLC is member-managed or manager-managed, and, in default of that election, the FL LLC is member-managed:

The Repealed Act provided that the FL LLC was member-managed unless otherwise provided in its articles of organization or operating agreement.3/

The New Act similarly but more clearly provides that the FL LLC is member-managed unless its operating agreement or articles of organization “(a) Expressly provide [*sic.*] that . . . [t]he company is or will be manager-managed; . . . [t]he company is or will be managed by managers; or [*sic.*] . . . [m]anagement of the company is or will be vested in managers; or . . . (b) [i]nclude [*sic.*] words of similar import to those [above], except that, *unless the context in which the expression is used otherwise requires, the terms ‘managing member’ and ‘managing members’ do not, in and of themselves, constitute words of similar import for this purpose [emphasis supplied].*”4/

The Repealed Act provided, “In a *member-managed FL LLC*, unless otherwise provided in its articles of organization or operating agreement: (a) Management shall be vested in its members *or elected managing members* in proportion to the then-current percentage or other interest of members in the profits of the [FL LLC] owned by all of the members *or elected managing members*. (b) Except as otherwise provided [in the Repealed Act], the decision of a majority-in-interest of the members *or elected managing members* shall be controlling [*emphasis supplied*].”5/ The Repealed Act also defined the term “manager-managed company” as “a [FL LLC] that is designated to be managed by one or more managers”6/, defined the term “member-managed company” as “a [FL LLC] other than a manager-managed company”7/, and defined the term “*managing member*” as “*a member appointed or elected as a managing member of a member-managed [FL LLC] [emphasis supplied].*”8/ Under the Repealed Act, any act of any member of a member-managed FL LLC, or of any manager of a manager-managed FL LLC, “for apparently [*sic.*] carrying on in the ordinary course the [FL LLC]’s business or business of the

kind carried on by the [FL LLC bound the FL LLC], unless [the member or manager, respectively,] had no authority to act for the [FL LLC] in the particular matter and the person with whom [the member or manager, respectively,] was dealing knew or had notice that [the member or manager, respectively,] lacked authority,” but action by a member of a manager-managed FL LLC solely in the capacity of a member did not bind the FL LLC.^{9/}

The New Act references “managing member” only in the provision of Section 605.0407(1), Florida Statutes quoted above (see *supra* text accompanying note 4), does not include a definition of that term, defines the term “manager-managed [FL LLC]” as “a [FL LLC] that is manager-managed by virtue of the operation of [Section 605.0407(1), Florida Statutes],”^{10/} defines the term “member-managed [FL LLC]” as “a [FL LLC] that is not a manager-managed [FL LLC],”^{11/} and defines and uses the term “authorized representative,” which the Repealed Act also defined and used, but the New Act references expressly in that definition a manager of a manager-managed FL LLC, a member of a member-managed FL LLC, or an agent or officer of the FL LLC, in each case authorized to execute and file with the Florida Department of State any document or other record (as the term “record” is defined in the New Act) or to take other action on behalf of the FL LLC.^{12/} Under the New Act, similarly to under the Repealed Act, any act of any member of a member-managed FL LLC, or of any manager of a manager-managed FL LLC, “for apparently [*sic.*] carrying on in the ordinary course of [*sic.*] the [FL LLC]’s activities and affairs or activities and affairs of the kind carried on by the [FL LLC], binds the [FL LLC] unless [the member or manager, respectively,] had no authority to act for the [FL LLC] in the particular matter and the person with whom [the member or manager, respectively,] was dealing knew or had notice that [the member or manager, respectively,] lacked authority,” but action by a member of a manager-managed FL LLC solely in the capacity of a member does not bind the FL LLC.^{13/}

Some attorneys have interpreted the deletion of the definition of “managing member” and express provisions for management of a FL LLC by “elected managing members,” and statements in the White Paper For The Florida Revised Limited Liability Company Act (The Executive Committee of The Florida Bar Florida Revised LLC Act Drafting Committee March 18, 2013 (updated to October 1, 2013)), <http://flabizlaw.org/images/pdf/llcwhitepaper101413.pdf> (the “White Paper”) (i) as to Section 605.0407 (about management of a FL LLC), Florida Statutes in the New Act that “Section 605.04071 [*sic.*] changes [the Repealed Act] by eliminating the concept of a ‘*managing member*’. . . to eliminate the confusion and disparate interpretations under [the Repealed Act] as to the ramifications that having a *managing member* has on the nature of the management structure of the [FL] LLC [*emphasis supplied*],” and (ii) as to Section 605.04093 (about limitation of liability of managers and members of a FL LLC), Florida Statutes in the New Act that “we no longer use the term ‘*managing member*’ in the [New Act] [*emphasis supplied*],”^{14/} as constituting “elimination of the concept [and terms] of ‘*managing-members*’ [*emphasis supplied*]” from the New Act.^{15/}

The provisions of the New Act and other statements in the White Paper do not warrant this interpretation, however.

Two of those attorneys, Stuart R. Cohn, former Chair of the Corporations and Securities Committee of the Business Law Section of The Florida Bar, and Stuart D. Ames, former Chair of

the Business Law Section of The Florida Bar, author a compendium, published annually, of Florida business entity and related statutes, including commentary by Messrs. Cohn and Ames, historical and statutory notes, citations to leading cases and articles concerning the respective statutes and cross references to other related statutes.^{16/} The 2014-2015 edition of that compendium also includes excerpts from the White Paper, albeit not consistently *verbatim*. Except as otherwise indicated in the respective quotations, quotations from the White Paper in this article track the original text linked above (see *supra* text accompanying note 14). That compendium is a trusted handbook for many experienced Florida corporate and business entity attorneys.

Messrs. Cohn and Ames, both of whom participated on the *ad hoc* committee of the Business Law Section of The Florida Bar that drafted the New Act, do not assert that the New Act prohibits members of a member-managed FL LLC to delegate their rights and powers to one or more persons designated as a “managing member” nor that members of a FL LLC cannot lawfully hold the title of “managing member” of that FL LLC. Rather, they explain, “Existing [FL] LLCs whose [*sic.*] articles of organization or operating agreement indicate that the [FL] LLC is managed by ‘*managing-members*’ will be deemed to be member-managed. The term ‘manager’ will be confined to manager-managed [FL] LLCs. [*Emphasis supplied.*]”^{17/}

Acknowledging that, if the “context” in which the expression “managing member” is used in the articles of organization or operating agreement of a FL LLC so requires, persons holding the title “managing member” may be deemed to be managers of a manager-managed FL LLC under Section 605.0407(1), Florida Statutes in the New Act, Messrs. Cohn and Ames also explain that, under that statute and “implied contract principles,” a court construing the New Act may determine that members holding the title “managing member” and constituting fewer than all members of a FL LLC have management authority with respect to that FL LLC, “particularly for [FL] LLCs that used the terms [‘managing member’ and ‘managing members’] in their pre-2015 articles of organization or operating agreement. . . .[and] when the [FL] LLC [became] subject to the [N]ew Act on January 1, 2015, there [was] no change either to the operating agreement or to the continued exercise of managerial authority by the . . . named managing members.”^{18/}

Because Section 605.0105, Florida Statutes in the New Act (a) provides that the operating agreement of a FL LLC governs “[r]elations among the members as members and between the members and the [FL LLC]” to the extent that it does not, “[e]xcept as otherwise provided in [Sections 605.0106 and 605.0107(2), Florida Statutes in the New Act], restrict the rights under [the New Act] of a person other than a member or manager”^{19/} or otherwise contravene Section 605.0105(3) and (4), Florida Statutes (the other provisions of subsections (3) and (4) are not relevant to the analysis underlying this article) and (b) does not preclude that operating agreement from designating one or more managing members of the FL LLC,^{20/} I submit that the better view is that such a designation is enforceable as a contract as among the parties to that operating agreement, particularly if the parties to that operating agreement affirm it or any provision of it in writing or by their conduct under Florida contract law.^{21/}

I further submit that the better view is that each member of a member-managed FL LLC appointed or elected as its “managing member” under the Repealed Act had the same authority,

responsibilities and liabilities as a manager of a manager-managed FL LLC under the Repealed Act albeit not having the title of “manager” except that the manner of designation, appointment, election, removal or replacement of, and the manner of voting to exercise management authority of, “managing members” and “managers” may have differed.22/

A single member FL LLC’s designating, in or in accordance with the provisions of its operating agreement or articles of organization, that member as its “managing member” achieves the same effect as its designating that member as its “manager”: Unless the FL LLC is manager-managed or managed by managers, has management vested in managers or has an operating agreement or articles of organization that “include words of similar import” for the purposes of Section 605.0407(1), Florida Statutes in the New Act, it is clear that the sole member has sole authority to act on behalf of and bind the FL LLC. And the same is true for a multiple member FL LLC’s designating, in or in accordance with the provisions of its operating agreement or articles of organization, each of its members as its “managing member”: Unless the FL LLC is manager-managed or managed by managers, has management vested in managers or has an operating agreement or articles of organization that “include words of similar import” for the purposes of Section 605.0407(1), Florida Statutes in the New Act, it is clear that each member has authority to act on behalf of and bind the FL LLC. For each type of FL LLC described in this paragraph, no confusion is possible that the FL LLC is other than member-managed albeit a person has the title “managing member.”

A multiple member FL LLC’s designating, in or in accordance with the provisions of its operating agreement or articles of organization, less than all of its members as its “managing member” may identify each “managing member” and the authority or limitations on the authority of each “managing member” in its articles of organization under Section 605.0201(3)(d), Florida Statutes or in its statement of authority under Section 605.0302(1)(b), Florida Statutes, both in the New Act, to avert any confusion of persons other than members and any other persons deemed to be parties to the operating agreement under Section 605.0106, Florida Statutes in the New Act.23/

Even if a court determines that a person having the title “managing member” lacks the authority for a member-managed FL LLC of a person having the title “manager” for a manager-managed FL LLC, Section 605.0109(8), Florida Statutes in the New Act states that a FL LLC has the power, among other powers, to “[s]elect managers and appoint officers, directors, employees, and agents of the [FL LLC], define their duties, fix their compensation, and lend them money and credit” and Section 605.04071, Florida Statutes in the New Act, similarly to Section 608.4236, Florida Statutes in the Repealed Act, expressly empowers and authorizes a member of a member-managed FL LLC “to delegate to one or more other persons the member’s . . . rights and powers to manage and control the business and affairs of the [FL LLC], including the power and authority to delegate to agents, boards of managers, members, or directors, officers and assistant officers, and employees . . .”24/ Sections 605.0105 and 605.0201, Florida Statutes in the New Act, like but less explicitly than Section 608.4236, Florida Statutes in the Repealed Act, permit this empowerment and authorization to delegate to be nullified or modified by provisions of the FL LLC’s articles of organization or operating agreement. So, for the reasons stated above (see *supra* text accompanying notes 19-21) as to designating one or more

“managing members,” I submit that whether a member delegates rights and powers should be determined under Florida contract law.

And in 2015, the Florida Department of State continues to permit the designation of “MGRM,” *i.e.* managing member, as the title of a person named in and authorized to file the Annual Report with that Department on behalf of a FL LLC.

Neither the Uniform Limited Liability Company Act approved by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) July 12-July 19, 1996, nor the Revised Uniform Limited Liability Company Act approved by NCCUSL July 7-14, 2006 (the “RULLCA”), nor the American Bar Association Prototype Model Limited Liability Company Act includes either the term or the concept of “managing member.”

The term “managing member” was (i) defined in Section 608.402, Florida Statutes and used in Sections 608.407 (about articles of organization of a FL LLC), 608.4225 (about general standards for managers and managing members of a FL LLC), 608.4227 (about liability of members, managing members, and managers of a FL LLC), 608.4228 (about limitation of liability of managers and managing members of a FL LLC), 608.4229 (about indemnification of members, managers, managing members, officers, employees, and agents of a FL LLC) and 608.426 (about distributions and impairment of capital of a FL LLC), Florida Statutes in the Florida Limited Liability Company Act in effect before October 1, 1999, (ii) used in Sections 608.4226 (about conflicts of interest between a FL LLC and its members, managers, or managing members) and 608.4236 (about delegation of rights and powers to manage a FL LLC), Florida Statutes added to the then Florida Limited Liability Company Act effective on October 1, 1999, and (iii) added to Sections 608.404(8) (about powers of a FL LLC) and 608.422 (about management of a FL LLC), Florida Statutes in the then Florida Limited Liability Company Act effective on October 1, 2002.^{25/}

Although the White Paper comments as to Section 605.0407 (about management of a FL LLC), Florida Statutes in the New Act state, “The term ‘managing member’ is fairly unique to Florida and is not used in RULLCA, the ABA Prototype Model Limited Liability Act [*sic.*] or state LLC statutes in any of the more prominent states,”^{26/} statutes of the United States federal government, Alabama, California, Montana, and New York and at least one judicial opinion recognize the management authority of a person having the title “managing member” of a limited liability company.^{27/}

I conclude that the title “managing member” remains alive and well under the New Act if it is used without restricting the rights of persons other than members, managers, dissociated members and transferees of members of the FL LLC^{28/} and in a manner described above: (1) designating the member of a single member FL LLC as “managing member,” (2) designating each member of a multiple member FL LLC as “managing member,” (3) designating less than all members of a multiple member FL LLC as “managing member” and identifying each managing member and his, her or its authority or limitations on his, her or its authority in the articles of organization or statement of authority of the FL LLC, or (4) delegating rights and powers of the members of a member-managed FL LLC to one or more persons have the title “managing member” (see *supra* text of paragraph preceding text accompanying, and text accompanying, notes 23-24).

Regardless whether any member holds the title “managing member,” however, it remains critically important to draft the articles of organization and operating agreement of the FL LLC with care and close attention to the statute to assure comportment with the intentions of its members for its management and the rights, powers, responsibilities, authority and liabilities of its members and managers, if any.

Also, commentary asserting “elimination of the concept [and terms] of ‘*managing-members*’ [emphasis supplied]” from the New Act^{29/} may motivate leaders of The Florida Bar or other interested persons to urge amendment of the New Act to preclude the use of that title in connection with a FL LLC formed after 2014, or at least after the effective date of that amendment. And if all members of a member-managed FL LLC lack equal authority to act on behalf of the FL LLC and the articles of organization or statement of authority filed by that FL LLC under Section 605.0201 or 605.0302, Florida Statutes in the New Act omits disclosure of that inequality and any division of responsibility among those members, the resulting uncertainty may result in disputes or litigation.

A Florida LLC may avoid amending its organizational documents in response to such a statutory amendment, and also avoid confusion, misunderstanding and litigation about the rights, powers, responsibilities and authority of each member of a multi-member, member-managed FL LLC, by assigning titles to persons intended by the members to have management authority that are similar to the titles of officers of a Florida corporation (*e.g.*, President, Vice President, Secretary and Treasurer) instead of the title “managing member.”^{30/}

NOTES

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^{2/} Section 605.1108, Florida Statutes.

^{3/} Sections 608.422(1), Florida Statutes.

^{4/} Section 605.0407(1), Florida Statutes.

^{5/} Section 608.422(2), Florida Statutes.

^{6/} Section 608.402(19), Florida Statutes.

^{7/} Section 608,402(22), Florida Statutes.

^{8/} Section 608.402(20), Florida Statutes.

9/ Section 608.4235, Florida Statutes.

10/ Section 605.0102(39), Florida Statutes.

11/ Section 605.0102(41), Florida Statutes.

12/ Compare Sections 605.0102(8) and 605.0102(59), Florida Statutes in the New Act with Section 608.402(3), Florida Statutes in the Repealed Act.

13/ Sections 605.04074 and 605.0301, Florida Statutes.

14/ See *infra* note 16 at 399 and 409.

15/ See, e.g., *infra* note 16 at 361 and 398;
Darren Heitner, Florida's New Limited Liability Company Act (August 26, 2014), <http://heitnerlegal.com/2014/08/26/floridas-new-limited-liability-company-act/>;
Steven D. Lear, Revised Florida LLC Act Takes Effect January 1, 2014 for Newly-Formed LLCs (January 22, 2014), <http://www.newmiamiblog.com/2014/01/22/revised-florida-llc-act-takes-effect-january-1-2014-for-newly-formed-llcs/> and other blog posts referenced in it; Micah G. Fogarty and Mitchell I. Horowitz, Florida Revised Limited Liability Company Act: Management (August 22, 2013), http://www.martindale.com/business-law/article_Fowler-White-Boggs-PA_1936004.htm .

16/ Stuart R. Cohn & Stuart D. Ames, Florida Business Laws Annotated 2014-2015 (© 2014 Thomson Reuters).

17/ *Id.* at 361-362.

18/ *Id.* at 398.

19/ Section 605.0105(1)(a) and (3)(p), Florida Statutes.

20/ Section 605.0105(3), Florida Statutes.

21/ The White Paper comments as to Section 605.0105, Florida Statutes in the New Act state, “The operating agreement is pivotal to a [FL LLC] because all of the provisions of [the New Act] are default provisions which can be overridden or trumped by the agreement of the members in their operating agreement, except for the non-waivable provisions identified in Section 605.0105(3).” See *supra* note 16 at 375.

22/ Section 608.422(2), Florida Statutes in the Repealed Act provided for managing members’ vote “in proportion to the then-current percentage or other interest of members in the profits of the [FL LLC] owned by all of the . . . *elected managing members* . . . [and] [e]xcept as otherwise provided in [the Repealed Act], the decision of a majority-in-interest of the . . . *elected managing members* shall be controlling [*emphasis supplied*]” (see *supra* text accompanying note 5) but Section 608.4231(6), Florida Statutes in the Repealed Act provided for managing members’ decisions to “be made by majority vote of the . . . managing members if at a meeting, or by unanimous written consent,” in each case unless otherwise provided in the articles of organization or the operating agreement of the FL LLC. Section 608.422(4), Florida Statutes in the Repealed Act provided the procedure for designation, appointment, election, removal or replacement of managers of a FL LLC unless otherwise provided in the articles of organization or operating agreement of the FL LLC but the Repealed Act did not provide this procedure with respect to managing members.

Contrast New York Limited Liability Company Law (“NYLLCL”) Section 401 in the New York Code, <http://codes.lp.findlaw.com/nycode/LLC/4/401>, which provides, “Unless the articles of organization [not the operating agreement] provides for management of the limited liability company [formed in New York] by a manager or managers or a class or classes of managers, management of the limited liability company shall be vested in its members who shall manage the limited liability company in accordance with [NYLLCL], subject to any provisions in the

articles of organization or the operating agreement and [NYLLCL S]ection 418 [about classes and voting of members] granting or withholding the management powers or responsibilities of one or more members or classes of members” and “(i) any such member exercising such management powers or responsibilities shall be *deemed to be a manager* for purposes of applying the provisions of [NYLLCL], unless the context otherwise requires, and (ii) any such member shall *have and be subject to all of the duties and liabilities of a manager* provided in [NYLLCL] [*emphasis supplied*].”

23/ The White Paper comments as to Section 605.0302, Florida Statutes in the New Act state, “This provision creates an important safeguard for [FL LLCs] that want to limit the apparent authority of one or more members, managers or other persons or one or more persons holding specified positions.” See *supra* note 16 at 393. Section 608.407(6), Florida Statutes in the Repealed Act and Section 605.0201(3)(d), Florida Statutes in the New Act permit but do not require the articles of organization of a FL LLC to describe limitations upon the authority of a person identified in the articles of organization as a manager or managing member.

24/ Although the phrase “of a member or manager of the [FL LLC]” follows this quoted provision of Section 605.04071, Florida Statutes in the New Act, as it followed the corresponding provision of Section 608.4236, Florida Statutes in the Repealed Act, Florida business entity attorneys generally understand it to authorize delegation by members of a FL LLC to, among others, agents, boards of managers, managing members or directors, officers and assistant officers, and employees of the FL LLC itself: The White Paper comments as to Section 605.04071, Florida Statutes in the New Act state, “This Section is carried over from [the Repealed Act] and provides members and managers with the right to delegate their rights and powers to manage the [FL LLC], including the right to delegate to agents, boards of managers, *managing members* or directors, officers and assistant officers, and employees [*emphasis supplied*].” See *supra* note 16 at 399.

25/ See *supra* note 16 at 263-264, 265-266, 269-270, 283, 285-291, 298, and 301-302. Before October 1, 1999, Section 608.407(1)(g)2, Florida Statutes required the articles of organization of a FL LLC to include, “If the management of [the FL LLC was] reserved to the members, a statement to that effect and the names and addresses of the *managing members* [*emphasis supplied*].” Effective on January 1, 2006, Section 608.407(6), Florida Statutes permitted but did not require the articles of organization of a FL LLC to “identify one or more persons authorized to serve as a manager or *managing member* [*emphasis supplied*].” See *supra* note 16 at 269-270.

26/ See *supra* note 16 at 399.

27/ See 42 U.S.C. Section 1437z-7; ALA Code Section 40-14B-1; CAL. BPC. Code Section 11240; CAL. HSC. Code Section 1779.4; CAL. UIC. Code Sections 2107, 2110.3, 2110.5 and 2110.7; CAL. EDC. Code Section 35277; MONT Code Ann Sections 61-4-101 and 16-4-401; N.Y. PVH. Law Section 16; Three Minnows, LLC v. Cream, LLC, 832 N.W. 2d 385, 2013 Iowa App. LEXIS 395 (Iowa Ct. App. 2013).

28/ See Sections 605.0105(3)(p), 605.0106 and 605.0107(2), Florida Statutes in the New Act.

29/ See *supra* note 15.

30/ See *supra* note 16 at 402.