BRING TO MEETING

REAL PROPERTY, PROBATE & TRUST LAW SECTION
www.rpptl.org

Executive Council Meeting

AGENDA

The Breakers Resort
One South County Road
Palm Beach, FL 33480
Phone: (561) 655-6611

Saturday, August 6, 2011
10:00 a.m.

BRING TO THE MEETING

Real Property, Probate and Trust Law Section
Executive Council Meeting
The Breakers – Palm Beach, FL

AGENDA

I. **Presiding** — *George J. Meyer, Chair*

II. **Attendance** — *Michael J. Gelfand, Secretary*

III. **Minutes of Previous Meeting** — *Michael J. Gelfand, Secretary*
Motion to Approve the 5/28/2011 Executive Council Meeting Minutes **pp. 14-56**

IV. **Chair's Report** — *George J. Meyer*
2011 – 2012 RPPTL Executive Council Schedule **pp. 57**

V. **Chair-Elect's Report** — *Wm. Fletcher Belcher*
2012 – 2013 RPPTL Executive Council Schedule **pp. 58**

VI. **Liaison with Board of Governors Report** — *Clay A. Schnitker*

VII. **Treasurer's Report** — *Andrew A. O'Malley*
2011-12 Monthly Report Summary **pp. 59-79**

VIII. **At Large Members Report** — *Debra L. Boje, Director*

IX. Real Property Division — *Margaret A. Rolando , Real Property Division Director*

Action Items:

1. Condominium and Planned Development Committee – *Steven H. Mezer, Chair*

Support legislative positions:

A. To amend Section 718.707, F.S., to extend the applicability of the Distressed Condominium Relief Act beyond its original sunset of July 1, 2012 until July 1, 2017. **pp 80-85**

B. To create Section 718.406, F.S., to provide guidance and regulation with respect to the creation of a condominium within a condominium unit. The proposal addresses the relationship between the primary condominium and the secondary condominium units. **pp 86-97**

C. To clarify that certain operational provisions of Chapter 718, F.S., do not apply to nonresidential condominium associations; to define "nonresidential condominiums;" to clarify that the Division's arbitration program only pertains to residential condominiums. **pp 98-125**

D. To create Section 718.407, F.S., to define a hotel condominium and to provide that the

offering of hotel condominium units for sale is not subject to part V of Chapter 718, F.S. **pp 126-133**

2. Construction Law Committee – *Arnold D. Tritt, Chair*

Support a legislative position to address inconsistencies between different provisions that purport to define the statute of limitations for actions on a statutory payment bond; and would remove language added in the 2010 session through S.B. 1196 that may inadvertently create ambiguity as to the expiration date of a notice of commencement. **pp 134-151**

3. Landlord and Tenant Committee – *Neil Shoter, Chair*

Support a legislative position to delete the requirement that the landlord's blanket notice under Section 713.10, Florida Statutes include the specific language contained in the various leases prohibiting construction liens against the landlord's property for work performed by a tenant. **pp 152-155**

4. Mortgage and Other Encumbrances Committee – *Salome Zikakis, Chair*

Support a legislative position to amend 701.04(1), F.S., to require mortgagees to provide subsequent owners of property with payoff information as to mortgages encumbering the property. **pp 156-161**

5. Real Property Problem Study Committee – *S. Katherine Frazier, Chair*

Support a legislative position proposed by the Tax Law Section with seeks to clarify Section 213.758 "Transfer of tax liabilities" in order to streamline the transfers of businesses, stocks of goods, and certain real estate transactions. **pp 162-179**

Information Items:

1. Condominium and Planned Development Committee – *Steven H. Mezer, Chair*

On June 30, 2011, the Federal Housing Administration (FHA) released a consolidated and updated Condominium Project Approval and Processing Guide designed to provide FHA's baseline condominium project approval and processing requirements. The contents of the Guide are applicable for all condominium project approvals where a single unit will be insured under Section 203(b) of the National Housing Act. The Guide is available on the HUD website at http://www.hud.gov/offices/adm/hudclips/letters/mortgagee/files/11-22mlguide.pdf

2. Real Property Problem Study Committee – *S. Katherine Frazier, Chair*

In the first quarter of 2011 Fannie Mae alerted its servicers that Fannie Mae will retroactively charge mortgage servicers for failing to process severely aged loans. This follows its Announcement SVC-2010-12 dated August 31, 2010 on Foreclosure Time Frames and Compensatory Fees for Breach of Servicing Obligations. In the August 31, 2010 announcement, Fannie Mae stated that it:

- updated the allowable foreclosure time frames for four states, including Florida;
- is monitoring all delinquent loans in Fannie Mae's portfolio or MBS pools, and will begin notifying servicers of delays in processing delinquent loans;
- may begin conducting reviews of servicer loan files, processes, or procedures;
- requires accurate and timely reporting on the delinquency status of mortgage loans; and,
- will exercise its remedy to assess compensatory fees as deemed necessary.

The Announcement SVC-2010-12 on Foreclosure Time Frames appears on Fannie Mae's website at https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2010/svc1012.pdf

3. Real Estate Entities and Land Trusts – *Wilhelmina F. Kightlinger, Chair*

The LLC Drafting Task Force of the Business Law Section is close to completing its rewrite of the Florida LLC Act, and the Task Force is soliciting the RPPTL Section's participation and input. This bill will be introduced in the 2012 legislative session, and the Business Law Section's lobbyist will be in charge of shepherding it through the process. A copy of the latest draft of the LLC Act is attached with the caveat that it is a **NON-FINAL, WORKING DRAFT**. If any of our Executive Council members have any issues with the draft legislation, they should send those concerns promptly to Burt Bruton, brutonb@gtlaw.com or Lauren Detzel, ldetzel@deanmead.com or you can voice them directly to the Task Force which is led by Louis Conti, louis.conti@hklaw.com **pp180-352**

X. Probate and Trust Law Division – *Michael A. Dribin, Probate and Trust Law Division Director*

Action Items

1. Guardianship and Advance Directives – *Sean W. Kelley, Chair*

Support a legislative position creating F.S. §765.2021, terminating the right of a divorced spouse to exercise the authority granted in a healthcare surrogate granted by the former spouse, unless the document provides otherwise and creating F.S. §765.3031, terminating the right of a divorced spouse to exercise the authority granted in a living will, unless the document provides otherwise. **pp 353-357**

2. IRA, Insurance & Employee Benefits – *Linda Griffin and Howard Payne, Co-Chairs*

Support a legislative position creating F.S. §732.702, to provide for the termination of rights of a former spouse as the primary beneficiary of assets of the deceased former spouse, including: insurance policies, annuities, employee benefit plans, individual retirement accounts, pay-on-death accounts and transfer-on-death accounts and providing certain exceptions to the application. **This proposed legislation was previously approved by the Executive Council. The only portions under consideration are changes as a result of input from the insurance industry and stylistic changes, all of which have been approved by the IRA, Insurance & Employee Benefits Committee. pp 358-378**

3. Principal and Income -- *Edward F. Koren, Chair*

Support legislative positions making changes to Chapter 738 (Principal and Income) as follows: 738.101 Short title; 738.102 Definitions; 738.103 Fiduciary duties; general principles; 738.104 Trustee's power to adjust; 738.1041 Total return unitrust; 738.105 Judicial control of discretionary powers; 738.201 Determination and distribution of net income; 738.202 Distribution to residuary and remainder beneficiaries; 738.301 When right to income begins and ends; 738.302 Apportionment of receipts and disbursements when decedent dies or income interest begins. **pp 379-446**

4. Probate Law and Procedure – *Tae Kelley Bronner, Chair*

A. Support legislative position seeking to amend F.S. §732.401 to clarify when a Guardian of the Property or Attorney in Fact must file a petition for authority to make the new homestead election under Section F.S. §732.401 on behalf of the surviving spouse and, once the petition is filed, how long the time period to make the election is tolled. **pp 447-452**

B. Support legislative position to amend F.S. §731.201(33), the definition of protected homestead, to clarify that the defined term of protected homestead (for the purposes of the code) does not include property held by the decedent in a joint tenancy with rights of survivorship (tenancy by entireties property is already excluded). **pp 453-460**

C. Support legislative position to create F.S. §732.1081, seeking to prohibit any parent from inheriting as an intestate heir of his or her deceased child (minor or adult) or from serving as personal representative if the parent has engaged in conduct that resulted in termination of their parental rights. **pp 461-466**

D. Support legislative position to create F.S. §732.5011, seeking to require the identification of the attorney who prepares a will and providing that the absence of the identification does not affect the validity of the will. **pp 467-471**

Information Item

1. Overview of New RJA Rule 2.425 and SC08-2443, reflecting June 30, 2011 approval by Florida Supreme Court of changes supported by Section to Florida Probate Rules and July 7 approval by Florida Supreme Court of rule change to address content of caveat. (Probate Law and Procedure Committee).**pp 472-473**

2. Caveat rule (Florida Probate Rule 5.260) and brief Supreme Court adopting it at the request of the Section **pp 474-477**

XI. General Standing Committee Items – *Wm. Fletcher Belcher, Chair-Elect*

Action Item

Legislation Committee – *Barry F. Spivey, Chair*

Approve proposed Agreement for legislative consulting services for 2011-2013 with Peter M. Dunbar (Pennington, Moore, Wilkinson, Bell & Dunbar, P.A.. **pp 478-486**

Information Items

1. New General Standing Committees

Alternative Dispute Resolution (ADR)

Florida Electronic Filing & Service (From Probate & Trust Law Division)

Homestead Issues Study

Membership and Diversity (Consolidation of Membership Diversity, Membership Services, and Mentoring Committees)

2. Legislation Committee – *Barry F. Spivey, Chair*

A. 2011 Probate and Trust Law Legislation

POA (Ch. 2011-210) (Section Initiative)
http://laws.flrules.org/files/Ch_2011-210.pdf

Olmstead & LLCs (Ch. 2011-77) (Section Initiative)
http://laws.flrules.org/files/Ch_2011-077.pdf

Fiduciary Atty-Client Privilege, Notice of Administration, Notice of Trust, Intestate Share of Surviving Spouse, Reformation/Modification of Wills, Challenging Revocations of Wills/Trusts for Undue Influence, Taxation of Fees and Costs in Trust Proceedings (Ch. 2011-183) (Section Initiative)
http://laws.flrules.org/files/Ch_2011-183.pdf

Inherited IRAs (Ch. 2011-84) (Section Initiative)
http://laws.flrules.org/files/Ch_2011-084.pdf

Fla. Estate Tax Returns – (Ch. 2011-86)
http://laws.flrules.org/files/Ch_2011-086.pdf

Management of Institutional Funds by Charities
http://laws.flrules.org/files/Ch_2011-170.pdf

Guardianship – Public Records Exemption
http://laws.flrules.org/files/Ch_2011-204.pdf

B. 2011 Real Property Law Legislation

Adverse Possession
http://laws.flrules.org/files/Ch_2011-107.pdf

Affordable Housing
http://laws.flrules.org/files/Ch_2011-015.pdf

Building Construction and Inspection
http://laws.flrules.org/files/Ch_2011-222.pdf

Citizens Insurance – Repeal of Structural Soundness Evaluation Grant Program
http://laws.flrules.org/files/Ch_2011-012.pdf

Construction Liens (Section Initiative)
http://laws.flrules.org/files/Ch_2011-212.pdf

Condominiums and Community Associations (Section Initiative)
http://laws.flrules.org/files/Ch_2011-196.pdf

Growth Management
http://laws.flrules.org/files/Ch_2011-014.pdf

http://laws.flrules.org/files/Ch_2011-139.pdf

Judgment Interest
http://laws.flrules.org/files/Ch_2011-169.pdf

Mobile Homes Tenancies
http://laws.flrules.org/files/Ch_2011-105.pdf

Negligence
http://laws.flrules.org/files/Ch_2011-215.pdf

Open House Parties
http://laws.flrules.org/files/Ch_2011-161.pdf

Propane Tank Setbacks
http://laws.flrules.org/files/Ch_2011-106.pdf

Property and Casualty Insurance
http://laws.flrules.org/files/Ch_2011-039.pdf

Property Rights
http://laws.flrules.org/files/Ch_2011-191.pdf

Property Tax Exemption for Veterans
http://laws.flrules.org/files/Ch_2011-093.pdf

Recording of Real Property Documents (Section Initiative)
http://laws.flrules.org/files/Ch_2011-173.pdf
Service of Process in Gated Communities
http://laws.flrules.org/files/Ch_2011-159.pdf

Tax Deeds
http://laws.flrules.org/files/Ch_2011-151.pdf

Title Insurer Insolvency
http://laws.flrules.org/files/Ch_2011-226.pdf

Vacation Rentals
http://laws.flrules.org/files/Ch_2011-119.pdf

Value Adjustment Board Appeals
http://laws.flrules.org/files/Ch_2011-181.pdf

Water Management
http://laws.flrules.org/files/Ch_2011-165.pdf

XII. General Standing Committee Reports – *Wm. Fletcher Belcher, Chair-Elect*

1. **ActionLine** – J. Richard Caskey, Chair; Scott P. Pence, Vice Chair (Real Property); Shari Ben Moussa, Vice Chair (Probate & Trust)

2. **Alternative Dispute Resolution (ADR)** – Deborah Bovarnick Mastin and David R.

Carlisle, Co-Chairs

3. **Amicus Coordination** – Robert W. Goldman, John W. Little, III, Kenneth B. Bell and Judge Gerald B. Cope, Jr., Co-Chairs

4. **Budget** – Andrew O'Malley, Chair; Pamela O. Price and Daniel L. DeCubellis, Co-Vice Chairs

5. **CLE Seminar Coordination** – Deborah P. Goodall, Chair; Sancha B. Whynot, Laura Sundberg and Sylvia B. Rojas, Co-Vice Chairs

   2012- 2013 CLE Schedule **pp 487**

6. **Convention Coordination (2012)** – S. Katherine Frazier and Phillip A. Baumann, Co-Chairs

7. **Florida Bar Journal** – Kristen M. Lynch, Co-Chair (Probate & Trust); William P. Sklar, Co-Chair (Real Property)

8. **Florida Electronic Filing & Service** – Patricia P. Jones, Rohan Kelley and Laird A. Lile, Co-Chairs

9. **Homestead Issues Study** – Shane Kelley, Co-Chair (Probate & Trust); Wilhelmina F. Kightlinger, Co-Chair (Real Property); Deborah Boyd, Vice Chair

10. **Legislation** – Barry F. Spivey, Chair; Robert S. Freedman, Vice Chair (Real Property); William T. Hennessey, III, Vice Chair (Probate & Trust); Susan K. Spurgeon and Michael A. Bedke, Legislative Reporters

11. **Legislative Update (2011)** – Robert S. Swaine, Chair; Stuart H. Altman, Charles I. Nash, R. James Robbins, and Sharaine Sibblies, Co-Vice Chairs

12. **Liaison with:**

    A. **American Bar Association (ABA)** – Edward F. Koren and Julius J. Zschau
    B. **Board of Legal Specialization and Education (BLSE)** – Michael C. Sasso, W. Theodore Conner, David M. Silberstein and Deborah L. Russell
    C. **Clerks of Circuit Court** – Laird A. Lile
    D. **FLEA / FLSSI** – David C. Brennan, John Arthur Jones and Roland Chip Waller
    E. **Florida Bankers Association** – Stewart Andrew Marshall, III, and Mark T. Middlebrook
    F. **Judiciary** – Judge Jack St. Arnold, Judge Melvin B. Grossman, Judge Hugh D. Hayes, Judge Claudia Rickert Isom, Judge Maria M. Korvick, Judge Lauren Laughlin, Judge Celeste H. Muir, Judge Robert Pleus, Judge Lawrence Allen Schwartz, Judge Richard Suarez, Judge Morris Silberman, Judge Patricia V. Thomas and Judge Walter L. Schafer, Jr.
    G. **Law Schools** – Frederick R. Dudley and Stacy O. Kalmanson
    H. **Out of State Members** – Michael P. Stafford, John E. Fitzgerald, Jr., and Gerard J. Flood
    I. **TFB Board of Governors** – Clay A. Schnitker
    J. **TFB Business Law Section** – Marsha G. Rydberg
    K. **TFB CLE Committee** – Deborah P. Goodall
    L. **TFB Council of Sections** – George J. Meyer and Wm. Fletcher Belcher

13. **Long-Range Planning** – Wm. Fletcher Belcher, Chair

14. **Meetings Planning** – John B. Neukamm, Chair

15. **Member Communications and Information Technology** – Nicole C. Kibert, Chair; S. Dresden Brunner and William Parady, Co-Vice Chairs

16. **Membership and Diversity** – Michael A. Bedke and Lynwood T. Arnold, Jr., Co-Chairs; Marsha G. Madorsky, Vice Chair (Fellowship); Phillip A. Baumann, Vice Chair (Member Services); Tasha K. Pepper-Dickinson, Vice Chair (Diversity); and Guy S. Emerich, Vice Chair (Mentoring)

17. **Model and Uniform Acts** – Bruce M. Stone and S. Katherine Frazier, Co-Chairs

18. **Pro Bono** – Gwynne A. Young and Adele I. Stone, Co-Chairs; Tasha K. Pepper-Dickinson, Vice Chair

19. **Professionalism and Ethics** – Lee A. Weintraub, Chair; Paul E. Roman, Vice Chair (Probate & Trust) and Lawrence J. Miller, Vice Chair (Real Property)

20. **Sponsor Coordination** – Kristen M. Lynch, Chair; Wilhelmina Kightlinger, Jon Scuderi, J. Michael Swaine, Adele I. Stone, Marilyn M. Polson, and W. Cary Wright, Co-Vice Chairs

21. **Strategic Planning** – Wm. Fletcher Belcher, Chair

XIII. Probate and Trust Law Division Committee Reports – *Michael A. Dribin - Director*

1. **Ad Hoc Study Committee on Creditors' Rights to Non-Exempt, Non-Probate Assets** – Angela M. Adams, Chair

2. **Ad Hoc Committee on Jurisdiction and Service of Process** – Barry F. Spivey, Chair; Sean W. Kelley, Vice Chair

3. **Ad Hoc Study Committee on Estate Planning Conflict of Interest** - William T. Hennessey III, Chair

4. **Asset Preservation** – Brian C. Sparks, Chair; Marsha G. Madorsky, Vice-Chair

5. **Attorney/Trust Officer Liaison Conference** – Robin J. King, Chair; Jack A. Falk, Jr., Vice Chair; Mary Biggs Knauer, Corporate Fiduciary Chair

5. **Estate and Trust Tax Planning** – Elaine M. Bucher, Chair; Harris L. Bonnette, Jr., and David Akins, Co-Vice Chairs

7. **Florida Electronic Court Filing** – Rohan Kelley, Chair; Laird A. Lile, Vice Chair

8. **Guardianship and Advance Directives** – Sean W. Kelley, Chair; Seth A. Marmor and Tattiana Brenes-Stahl, Co-Vice Chairs

9. **IRA, Insurance and Employee Benefits** – Linda Suzzanne Griffin and L. Howard Payne, Co-Chairs; Anne Buzby-Walt, Vice Chair

10. **Liaisons with Elder Law Section** – Charles F. Robinson and Marjorie Wolasky

11. **Liaisons with Tax Section** – Lauren Y. Detzel, William R. Lane, Jr., David Pratt, Brian C. Sparks and Donald R. Tescher

12. **Power of Attorney** – Tami F. Conetta, Chair; William R. Lane, Jr., Vice Chair

13. **Principal and Income** – Edward F. Koren, Chair

14. **Probate and Trust Litigation** – Thomas M. Karr, Chair; Jon Scuderi and J. Richard Caskey, Co-Vice Chairs

15. **Probate Law and Procedure** – Tae Kelley Bronner, Chair; S. Dresden Brunner, Jeffrey S. Goethe and John C. Moran, Co-Vice Chairs

16. **Trust Law** – Shane Kelley, Chair; Angela M. Adams, Laura P. Stephenson and Jerry B. Wells, Co-Vice Chairs

17. **Wills, Trusts and Estates Certification Review Course** – Deborah L. Russell, Chair; Richard R. Gans, Vice Chair

XIV. Real Property Division Committee Reports - *Margaret A. Rolando, Director*

1. **Condominium and Planned Development** – Steven H. Mezer, Chair; Jane Cornett and Nicole Kibert, Co-Vice-Chairs

2. **Construction Law** – Arnold D. Tritt, Chair; Hardy Roberts and Lisa Colon Heron, Co Vice-Chairs

3. **Construction Law Certification Review Course** – Kim Ashby, Chair; Bruce Alexander and Melinda Gentile, Co Vice-Chairs

4. **Construction Law Institute** – Wm. Cary Wright, Chair; Michelle Reddin and Reese Henderson, Co-Vice Chairs

5. **Governmental Regulation** –Anne Pollack, Chair; Arlene Udick and Frank L. Hearne, Co-Vice Chairs

6. **Landlord and Tenant** – Neil Shoter, Chair; Scott Frank and Lloyd Granet, Co-Vice Chairs

7. **Legal Opinions** – David R. Brittain, Chair; Roger A. Larson and Kip Thorton, Co-Vice Chairs

8. **Liaisons with FLTA** – Norwood Gay and Alan McCall, Co-Chairs; Barry Scholnik, John S. Elzeer, Joe Reinhardt, James C. Russick and Alan Fields, Co-Vice Chairs

9. **Mortgages and Other Encumbrances** – Salome Zikakis, Chair; Robert Swaine and Robert Stern, Co-Vice Chairs

10. **Property & Liability Insurance/Suretyship** – Wm. Cary Wright and Andrea Northrop, Co-Chairs

11. **Real Estate Certification Review Course** – Ted Conner, Chair; Jennifer Tobin and Raul Ballaga, Co-Vice Chairs

12. **Real Estate Entities and Land Trusts** – Wilhelmina Kightlinger, Chair; Burt Bruton and Dan DeCubellis, Co-Vice Chairs

13. **Real Property Forms** – Homer Duval, III, Chair; Jeffrey T. Sauer and Arthur J. Menor, Co-Vice Chairs

14. **Real Property Litigation** – Mark A. Brown, Chair; Susan Spurgeon and Martin Awerbach, Co-Vice Chairs

15. **Real Property Problems Study** – S. Katherine Frazier, Chair; Patricia J. Hancock and Alan Fields, Co-Vice Chairs

16. **Residential Real Estate and Industry Liaison** – Frederick Jones, Chair; William J. Haley and Denise Hutson, Co-Vice Chairs

17. **Title Insurance and Title Insurance Liaison** – Kristopher Fernandez, Chair; Homer Duvall and Raul Ballaga, Co-Vice Chairs

18. **Title Issues and Standards** – Patricia P. Jones, Chair; Robert M. Graham, Karla Gray, Jeanne Mott (also archivist) and Christopher W. Smart, Co-Vice Chairs

XV. Adjourn

The Florida Bar
Real Property, Probate & Trust Law Section

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Real Property, Probate & Trust Law Section

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Northern Trust, N.A.
Trust Law Committee

Business Valuation Analysts
Probate and Trust Litigation

Minutes, Real Property, Probate and Trust Law Section
Executive Council Meeting

May 28, 2011

The Eden Roc Hotel – Miami Beach

References in these minutes to specified pages of "agenda materials" are to the agenda of the May 28, 2011, meeting of the Executive Council posted at the RPPTL website

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AGENDA

I. **Call to Order** - Brian J. Felcoski, Chair

Brian called the meeting to order at 10:00 a.m. and welcomed everyone to his final meeting as Chair.

II. **Attendance** - Debra L. Boje, Secretary

The attendance roster was circulated to be initialed by Council members in attendance at the meeting. Attendance is shown cumulatively on circulated attendance rosters. Debbie reminded the Council members that it is the responsibility of each member to record his or her own attendance on the roster and to promptly bring any corrections to the attention of the Secretary. The cumulative attendance roster for the 2010-2011 Bar year is attached to these Minutes as **Exhibit A**.

III. **Minutes of Previous Meeting** - Debra L. Boje, Secretary

The Minutes of the Executive Council Meeting held in Santa Barbara, California on February 26, 2011, included at pages 10-24 of the agenda materials approved unanimously.

IV. **Chair's Report** - Brian J. Felcoski, Chair

1. Brian invited Laird Lile to the podium to recognize Gwynne Young's recent victory as President Elect of the Florida Bar. The Council gave Gwynne a standing ovation. Gwynne thanked the Council for its friendship and support.
2. Brian thanked the 2011 Convention Committee, Katherine Frazier, John Scuderi, Mike Dribin and Carlos Batlle for all of its hard work in organizing the Convention and presenting a wonderful seminar.
3. Brian reviewed the day's activities.
4. Brian welcomed the law students in attendance and asked them to please stand to be recognized.

5. Brian thanked the sponsors for their continued support and sponsorship of the activities associated with the Executive Council.
6. Brian thanked the Florida Bar Foundation, US Trust, and Stewart Title for their co-sponsorship of the Executive Council luncheon.
7. Tim Bachmeyer, Director of Development, from the Florida Bar Foundation was present and invited to the podium. Tim thanked the Council for its continued support. He advised that the Foundation is experiencing a financially tough time due to the decline in revenue from interest from IOTA program. He encouraged Council members to contribute to the Foundation.
8. Brian presented Bob Swaine, who was unable to attend the awards ceremony on Saturday night, with the Section's Real Property Division Rising Star Award. Brian announced the names the other awards recipients from last night:

   Annual Service Award: Kristen Lynch
   Robert C. Scott Memorial Award: Pete Dunbar and Martha Edenfield
   William S. Belcher Lifetime Professionalism Award: Barry Spivey
   Rising Star Award: Probate Division Bill Hennessey

9. Brian advised the Council that he had received a thank you letter from Mayanne Downs, the outgoing Present of the Florida Bar, for the Sections support in her response to the Court Reform Legislation. Brian read the letter to the Council. A copy of the letter is attached as **Exhibit B**.
10. Brian thanked everyone for allowing him to serve as Chair of the Council. On behalf of the Council, John Neukamm, thanked Brian and presented him with the ceremonial Bloody Mary and officially welcomed him to the "back row".

V. **Chair-Elect's Report** – George J. Meyer, Chair-Elect

1. George reviewed the schedule of Executive Council meetings for 2011-2012, appearing on page 25 of the agenda materials. He informed everyone that the Saturday night event at the Breaker's meeting was a must attend. George warned that the room block for the upcoming out of state meeting in Prague was eighty percent sold out, so those wanting to attend should not wait to make their reservations.

VI. **Liaison with Board of Governors Report** - Daniel L. DeCubellis

George Meyer advised that Dan was unable to attend today's meeting. He referred the Council to the summary of the Board of Governors meeting of the March 25, 2011, in Orlando appearing on pages 26-28 of the agenda materials.

Laird Lile announced that Council members Adele Stone and Sandra Diamond attended their inaugural meeting as new members of the Board of Governors on Friday in Key West.

Gwynne Young announced that Laird was appointed as Vice President of the Legislative Committee.

VII. **Treasurer's Report** – Michael A. Dribin, Treasurer

Mike presented the treasurer's report appearing on pages 28-48 of the agenda materials.

VIII. **Circuit Representative's Report** - Andrew O'Malley, Director

Drew advised that the last meeting of the circuit representatives was held on Friday. Drew thanked everyone for voting on the new At Large Members structure. Drew advised that as of July 1st, Debra Boje, would be taking over chair of the ALMS and that her Deputy Directors will be Jon Scuderi and Arlene Udick. Drew advised that over the past two days of meetings members of the ALMS had attending the various committee meetings to let committees know they were available to assist them.

1. First Circuit – W. Christopher Hart; Colleen Coffield Sachs
2. Second Circuit – J. Breck Brannen; Sarah S. Butters; John T. Lajoie
3. Third Circuit – John J. Kendron; Guy W. Norris; Michael S. Smith; Clay Alan Schnitker
4. Fourth Circuit – Roger W. Cruce; Brenda Ezell
5. Fifth Circuit – Del G. Potter; Arlene C. Udick
6. Sixth Circuit – Robert N. Altman; Gary L. Davis; Joseph W. Fleece, III; George W. Lange, Jr.; Sherri M. Stinson; Kenneth E. Thornton; Hugh C. Umstead; Richard Williams, Jr.
7. Seventh Circuit – Sean W. Kelley; Michael A. Pyle; Richard W. Taylor; Jerry B. Wells
8. Eighth Circuit – Richard M. White Jr., Jeffrey Dollinger
9. Ninth Circuit – David J. Akins; Amber J. Johnson; Stacy A. Prince; Joel H. Sharp Jr.; Charles D. Wilder; G. Charles Wohlust
10. Tenth Circuit – Sandra Graham Sheets; Robert S. Swaine; Craig A. Mundy
11. Eleventh Circuit – Carlos A. Batlle; Raul Ballaga; Aniella Gonzalez; Thomas M. Karr; Patrick J. Lannon; Marsha G. Madorsky; William T. Muir; Hung Nguyen; Adrienne Frischberg Promoff; Eric Virgil
12. Twelfth Circuit – Kimberly A. Bald; Michael L. Foreman; P. Allen Schofield

13. Thirteenth Circuit – Lynwood F. Arnold, Jr.; Michael A. Bedke; Thomas N. Henderson; Wilhelmina F. Kightlinger; Christian F. O'Ryan; William R. Platt; R. James Robbins; Stephen H. Reynolds; Susan K. Spurgeon
14. Fourteenth Circuit – Brian Leebrick
15. Fifteenth Circuit – Elaine M. Bucher; Glen M. Mednick; Robert M. Schwartz
16. Sixteenth Circuit – Julie A. Garber
17. Seventeenth Circuit –Robert B. Judd; Shane Kelley; Alexandra V. Rieman
18. Eighteenth Circuit – Jerry W. Allender; Steven C. Allender; Stephen P. Heuston
19. Nineteenth Circuit – Jane L. Cornett
20. Twentieth Circuit – Sam W. Boone; John T. Cardillo; Michael T. Hayes; Alan S. Kotler; Jon Scuderi; D. Keith Wickenden

IX. Probate and Trust Law Division – *Wm. Fletcher Belcher, Probate and Trust Law Division*

Information Item

1. Fletch referred the Council to Ethics Opinion 10-3 (final) issued by the Professional Ethics Committee of the Florida Bar regarding the lawyer's ethical duty of confidentiality owed to a deceased client found at pages 49-53 of the agenda materials.

   The Opinion advises as to the ethical obligations of an attorney when a personal representative, beneficiaries, or heirs-at-law of a decedent, or their attorney, request confidential information.

Action Item

1. **Guardianship & Advance Directives Committee** – *Sean W. Kelley and Alexandra V. Rieman, Co-Chairs*

   On behalf of the committee, Seth Marmor, presented proposed legislation supporting amending s. 744.301, F.S., to provide that the "parents," rather than the "mother and father," are the natural guardians of their minor child, and change existing references to "custody" to "parental responsibility." The statutory wording, a White Paper, and Legislative Request appears at pages 53-57 of the agenda materials. The Committee's motion to approve the proposed legislation was approved unanimously. The Committee's motions to find such action to be within the purview of the Section and to authorize the expenditure of Section funds in support of that position were also unanimously approved.

X. **Real Property Division** — *Margaret A. Rolando , Real Property Division Director*

Action Items

1. **Title Issues and Standards Committee** – *Patricia P. Hendricks Jones, Chair*

Pat reported, on behalf of the Committee, on the proposed revisions to the standards in Chapter 20, Marital Property and Chapter 21, Description, of the Uniform Title Standards, appearing at pages 58-80 of the agenda materials. Pat reviewed modifications to Chapter 20 that were made since the agenda materials. The final proposed revisions to Chapter 20 are attached as **Exhibit C**.

The Committee's motion to approve the changes to the title standards in Chapter 20, as modified, and Chapter 21, were unanimously approved

2. **Condominium and Planned Development Committee** – *Robert S. Freedman and Steven Mezer, Co-Chairs*

On behalf of the Committee, Rob presented proposed legislation to amend Section 718.403 to allow condominium associations with a vote of the association members to extend the 7 year statutory deadline for adding phases to a condominium. The extension cannot be more than 10 years from the date of recording the declaration of condominium (meaning that the maximum extension period would be 3 years), and the vote for extension cannot occur until the last 3 years of the original 7 year period. The statutory wording, a White Paper, and Legislative Request appears at pages 81-87 of the agenda materials. The Committee's motion to approve the proposed legislation was unanimously approved. The Committee's motion to find such action to be within the purview of the Section and to authorize the expenditure of Section funds in support of that position also were unanimously approved.

Information Items

1. Peggy advised the Council that the Executive Committee approved Brian Felcoski sending a letter to the Federal Housing Finance Agency (FHFA) commenting on its proposed rules on Private Transfer Fee Covenants. Peggy reminded the Counsel that last fall, the Section sent its comments on and objections to proposed guidelines issued by the FHFA regarding restricting the purchase of mortgages loans secured by residential property subject to private transfer fees covenants. Although the proposed rules represent a substantial improvement over the FHFA's prior efforts, certain ambiguous definitions create issues. The Real Property P Committee prepared the letter included

at page 88-92 of the agenda material on behalf of the Section regarding its concerns. The Condominium and Planned Development Committee reviewed the letter as well.

2. Peggy advised that the Real Property and Liability Insurance Committee is expanding the scope of its responsibilities to include suretyship.

3. Peggy announced that an informal meeting was held on Thursday with Representatives Kathleen Passidomo and George Moriatis to open a dialogue on foreclosure reform.

XI. General Standing Committee — *George J. Meyer, Director and Chair-Elect*

1. George advised again about the letter Mayanne Downs wrote that was read by Brian.

2. George announced that a new Alternative Dispute Resolution committee has been formed that will be chaired by Deborah Mastin.

3. Bylaws Committee – *Wm. Fletcher Belcher, Chair*

On behalf of the Bylaws Committee, Fletch, advised that the Board of Governors approved the proposed Bylaws previously approved by the RPPTL Executive Council as reflected on pages 93-110 of the agenda matters with the changes reflected on the attached **Exhibit D**. Fletch then moved for the approval and adoption of the various edits made by the Board of Governors to the Section's revised Bylaws. The Committee's motion to approve the revised Bylaws was unanimously approved.

XII. General Standing Committee Reports – *George J. Meyer, Director and Chair-Elect*

1. **Actionline** – J. Richard Caskey, Chair; Scott P. Pence and Rose M. LaFemina, Co-Vice Chairs

   Scott reported that the Committee was working on the next issue of Actionline and is looking for articles and pictures.

2. **Amicus Coordination** – Robert W. Goldman, John W. Little, III and Kenneth B. Bell Co-Chairs

   John reported that there has been about a half a dozen requests for amicus briefs. None of which procedurally meet the requirements for Section involvement. The Cc[illegible]g to prepare guidelines.

3. **Budget** – Michael A. Dribin, Chair; Pamela O. Price, Vice Chair

4. **Bylaws** – W. Fletcher Belcher, Chair

John Neukamm thanked Fletcher for all of his hard work in preparing the revised the Bylaws.

George Meyer announced that the Bylaws committee was being dissolved.

5. **CLE Seminar Coordination** – Deborah P. Goodall, Chair; Sancha B. Whynot, Laura Sundberg and Sylvia B. Rojas, Co-Vice Chairs

Debbie reviewed the remaining 2010 – 2011 CLE Schedule appearing at page **121** of the agenda materials. Debbie advised that the committee was working on the new programs for next year. The committee expected that new Power of Attorney legislation would be a big project. Debbie reported that, on behalf of the committee, she attended the Florida Bar meeting in June. Debbie announced that the Florida Bar has launched a new website and is working to make it more useable.

6. **2011 Convention Coordinator** – S. Katherine Frazier and Jon Scuderi, Co Chairs Michael A. Dribin, Vice Chair.

George Meyer thanked the committee for its hard work.

7. **Fellowship** – Michael A. Bedke, Chair; Tae Kelley Bronner and Phillip Baumann, Co-Vice Chairs

Michael advised that the Fellowship, Member Services, Diversity and Mentoring Committees had combined. Michael provided the joint report of the committees. He asked the 3 fellows present to stand and be recognized. Chip Waller was given the opportunity to match the fellows with their names. Chip successfully completed the challenge. Guy, on behalf of the combined committees, added that the purpose of combining the committees was to create synergy.

8. **Florida Bar Journal** – Kristen M. Lynch, Chair Probate Division; William P. Sklar, Chair Real Property Division

Kristen reported that the committee is always looking for articles, particularly Real Property articles.

9. **Legislative Review** – Michael J. Gelfand, Chair; Alan B. Fields and Barry F. Spivey, Co-Vice Chairs.

Michael reported that Barry Spivey would be taking over as the Chair next year. Michael thanked his committee vice chairs. He reminded Council members of the importance of becoming part of the PAC.

Pete Dunbar reviewed the legislative efforts over the past year. It was a very tough year. The Bar's efforts were heroic in dealing with Judicial reform. As President of the Bar, Mayanne Downs, did a wonderful job in balancing all of the issues and problems she encountered.

10. **Legislative Update 2011** – Robert S. Swaine, Chair; Stuart H. Altman, Charles I. Nash, and R. James Robbins, Co-Vice Chairs

11. **Liaison Committees:**

A. **ABA:** Edward F. Koren; Julius J. Zschau

Ed reported that the largest ever CLE was just completed. He expects changes to the IRS code in the upcoming year to be forth coming.

B. **BLSE:** Michael C. Sasso, W. Theodore Conner, David M. Silberstein, Anne Buzby–Walt.

Laird Lile reported on behalf of David. Laird advised that the Board was looking at the challenges to peer review confidentiality. The Board has determined that because certification is optional, the peer review comments can remain confidential. Those attorneys recently receiving Board certification are now posted on the website. The BLSE conference is coming up.

C. **Business Law Section:** Marsha G. Rydberg

D. **BOG:** Daniel L. DeCubellis

E. **CLE Committee:** Deborah P. Goodall

F. **Clerks of the Circuit Court:** Laird A. Lile

Laird reported that at the Breaker's meeting a behind the scenes tour of the Clerk's Office would be provide.

G. **Council of Sections:** Brian J. Felcoski and George J. Meyer

H. **FLEA / FLSSI:** David C. Brennan; John Arthur Jones; Roland Chip Waller

I. **Florida Bankers:** Stewart Andrew Marshall, III; Mark T. Middlebrook

J. **Judiciary:** Judge Jack St. Arnold, Judge Gerald B. Cope, Jr., Judge George W. Greer; Judge Melvin B. Grossman; Judge Hugh D. Hayes; Judge Claudia Rickert Isom, Judge Maria M. Korvick; Judge Beth Krier, Judge Lauren Laughlin; Judge Celeste H. Muir;

Judge Robert Pleus; Judge Richard Suarez; Judge Morris Silberman; Judge Patricia V. Thomas; Judge Walter L. Schafer, Jr.

K. **Law Schools:** Frederick R. Dudley, Stacy O. Kalmanson, and Professor James J.Brown

Stacy thanked the council for the hospitality it has shown to the law students. She asked for volunteers to speak at the various law schools.

L. **Out of State:** Michael P. Stafford; John E. Fitzgerald, Jr., Gerard J. Flood

12. **Long Range Planning Committee** – George J. Meyer, Chair

13. **Member Communications and Information Technology** – Alfred A. Colby, Chair; S. Dresden Brunner and Nicole C. Kibert, Co – Vice Chair

Nicole reminded committee chairs that they needed to submit their committee agendas and projects.

14. **Membership Services** – Phillip A. Baumann, Chair; Mary E. Karr, Vice Chair

15. **Membership Diversity Committee** – Lynwood T. Arnold, Jr., and Fabienne E. Fahnestock, Co-Chairs; Karen Gabbadon, Vice-Chair

16. **Mentoring** – Guy S. Emerich, Chair; Jerry E. Aron and Keith S. Kromash, Co-Vice Chairs

17. **Meeting Planning Committee** – John Nuekamm, Chair

John reported that the committee has almost completed the meeting sites for Fletcher's year. It is beginning work on Peggy's year and will be staring Mike's year soon.

18. **Model and Uniform Acts** – Bruce M. Stone and S. Katherine Frazier, Co-Chairs

19. **Professionalism & Ethics** – Lee A. Weintraub, Chair; Paul E. Roman and Lawrence J. Miler, Co-Vice Chairs.

Lee announced that the committee has prepared short skits that address various ethical issues. Lee invited Larry Miller to come forward to begin the presentation.

20. **Pro Bono** – Gwynne A. Young and Adele I. Stone, Co Chair; Tasha K. Pepper-Dickinson, Vice Chair

Tasha reported on the status of the committee's Wills on Wheels pilot program.

21. **Sponsor Coordinators** – Kristen M. Lynch, Chair; Wilhelmina Kightlinger, Jon Scuderi, J. Michael Swaine, Adele I. Stone, Marilyn M. Polsen, Co-Vice Chairs

Kristin thanked everyone for their efforts and interaction with the sponsors. She advised that a new category of sponsorship "Friends of the Section" has been created. The committee is also looking into adding a summary of sponsor services to the website.

22. **Strategic Planning** – George J. Meyer, Chair

George advise that the reappointment letters will be sent out next week.

XIII. Probate and Trust Law Division Committee Reports - *Wm. Fletcher Belcher - Director*

1. **Ad Hoc Committee on Creditors' Rights to Non-Exempt, Non-Probate Assets** – Angela M. Adams, Chair

2. **Ad Hoc Committee on Jurisdiction and Service of Process** – Barry F. Spivey, Chair; Sean W. Kelley, Vice Chair

3. **Ad Hoc Study Committee on Estate Planning Attorney Conflict of Interest** - William T. Hennessey III, Chair

4. **Asset Preservation** – Jerome L. Wolf and Brian C. Sparks, Co-Chairs

5. **Attorney/Trust Officer Liaison Conference** – Robin J. King, Chair; Jack A. Falk, Jr., Vice Chair; Mark T. Middlebrook, Corporate Fiduciary Chair

6. **Estate and Trust Tax Planning** – Richard R. Gans, Chair; Harris L. Bonnette, Jr., and Elaine M. Bucher, Co-Vice Chairs

7. **Florida Electronic Court Filing** – Rohan Kelley, Chair; Laird A. Lile, Vice Chair

8. **Guardianship and Advance Directives** – Sean W. Kelley and Alexandra V. Rieman, Co-Chairs; Seth A. Marmor and Sherri M. Stinson, Co-Vice Chairs

9. **IRA, Insurance and Employee Benefits** – Linda Suzzanne Griffin and L. Howard Payne, Co-Chairs; Rex E. Moule, Jr., Vice Chair

10. **Liaisons with Elder Law Section** – Charles F. Robinson and Marjorie Wolasky

11. **Liaisons with Tax Section** – Lauren Y. Detzel, William R. Lane, Jr., David Pratt; Brian C. Sparks and Donald R. Tescher

12. **Power of Attorney** – Tami F. Conetta, Chair; David R. Carlisle, Vice Chair

13. **Principal and Income** – Edward F. Koren, Chair

14. **Probate and Trust Litigation** – William T. Hennessey, III, Chair; Thomas M. Karr and Jon Scuderi, Co-Vice Chairs

15. **Probate Law and Procedure** – Tae Kelley Bronner, Chair; S. Dresden Brunner, Anne Buzby-Walt and Jeffrey S. Goethe, Co-Vice Chairs

16. **Trust Law** – Shane Kelley, Chair; Angela M. Adams, John C. Moran and Laura P. Stephenson, Co-Vice Chairs

17. **Wills, Trusts and Estates Certification Review Course** – Anne Buzby-Walt, Chair; Deborah L. Russell, Vice Chair

XIV. Real Property Division Committee Reports

1. **Condominium and Planned Development** – Robert S. Freedman, Co-Chair; Steven Mezer, Co-Chair; Jane Cornett, Vice-Chair

2. **Construction Law** – Brian Wolf, Chair; Hardy Roberts and Arnold Tritt, Co Vice-Chairs

3. **Construction Law Institute** – Wm. Cary Wright, Chair; Michelle Reddin and Reese Henderson, Co-Vice Chairs

4. **Construction Law Certification Review Course** – Kim Ashby, Chair; Bruce Alexander and Melinda Gentile, Co Vice-Chair

5. **Governmental Regulation of Real Estate** – Eleanor Taft, Chair; Nicole Kibert, Kristen Brundage and Frank L. Hearne, Co Vice-Chairs

6. **Residential Real Estate Committee and Industry Liaison** – Frederick Jones, Chair; William J. Haley, Vice Chair

7. **Land Trusts** – S. Katherine Frazier, Chair; Wilhelmena Kightlinger, Vice Chair

8. **Landlord and Tenant** – Neil Shoter, Chair; Scott Frank, Vice Chair

9. **Legal Opinions** – David R. Brittain and Roger A. Larson, Co Chairs; Burt Bruton, Vice Chair

10. **Liaisons with FLTA** – Norwood Gay and Alan McCall Co-Chairs; Barry Scholnik, John S. Elzeer, Joe Reinhardt, James C. Russick, Lee Huzagh, Co-Vice Chairs

11. **Mortgages and Other Encumbrances** – Salome Zikakis, Chair; Robert Stern, Co-Vice Chair

12. **Real Estate Certification Review Course** – Ted Conner, Chair; Guy W. Norris and Raul Ballaga, Co-Vice Chairs

13. **Real Property Forms** – Homer Duval, III, Chair; Jeffrey T. Sauer and Arthur Menor, Vice Chairs

14. **Real Property Insurance** – Jay D. Mussman, Chair; Andrea Northrop and Wm. Cary Wright, Co-Vice Chairs

15. **Real Property Litigation** – Mark A. Brown, Chair; Eugene E. Shuey and Martin Awerbach, Co-Vice Chairs

16. **Real Property Problems Study** – Wayne Sobien, Chair; Jeanne Murphy and Pat J. Hancock, Co-Vice Chair.

17. **Title Insurance & Title Insurance Liaison** – Melissa Murphy, Chair; Homer Duvall and Kristopher Fernandez, Co-Vice Chairs.

18. **Title Issues and Standards** – Patricia Jones, Chair; Robert Graham, Karla Gray and Christopher Smart, Co-Vice Chairs

XV. Adjourn -- There being no further business to come before the Executive Council, the meeting was adjourned at approximately 12:00 p.m.

Respectfully submitted,

Debra L. Boje, Secretary

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ATTENDANCE ROSTER

REAL PROPERTY PROBATE & TRUST LAW SECTION
EXECUTIVE COUNCIL MEETINGS
2010 – 2011

Executive Committee	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Felcoski, Brian J,, Chair	X	X	X	X	X
Meyer, George J., Chair-Elect	X	X	X	X	X
Belcher, Wm. Fletcher, Probate & Trust Law Div. Director	X	X	X		X
Rolando, Margaret A., Real Property Law Div. Director	X	X	X	X	X
Boje, Debra L., Secretary	X	X	X		X
Dribin, Michael A., Treasurer	X	X			X
Gelfand, Michael J., Legislation Chair	X	X	X	X	X
Goodall, Deborah, Seminar Coordinator	X	X	X		X
O'Malley, Andrew M., Director of Circuit Representatives	X	X	X	X	X
Neukamm, John B., Immediate Past Chair	X	X	X		X
Schwartz, Lawrence Allen, Section Judicial Liaison					

Executive Council Members	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Adams, Angela M.	X	X	X		X
Adcock, Jr., Louie N., **Past Chair**					
Akins, David James	X	X	X		
Alexander, Bruce					
Allender, Jerry W.	X				
Allender, Steven C.	X				
Altman, Robert N.	X		X	X	X

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EXHIBIT

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Executive Council Members	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Altman, Stuart H.	X	X	X	X	X
Arnold, Jr. , Lynwood F.	X	X			
Aron, Jerry E., **Past Chair**	X	X	X		
Ashby, Kimberly		X			X
Atkins, April					
Awerbach, Martin	X	X	X	X	
Bald, Kimberly	X	X	X		X
Ballaga, Raul P.	X	X		X	X
Banister, John R.	X	X		X	X
Batlle, Carlos Alberto	X	X	X	X	X
Baumann, Phillip A.	X	X	X		
Beales III, Walter Randolph, **Past Chair**	X				
Bedke, Michael	X	X	X		X
Bell, Honorable Kenneth					
Bonnette, Jr., Harris L.	X	X	X		
Boone, Jr., Sam Wood	X	X			X
Brannen, J. Brecken					
Brennan, David Clark, **Past Chair**	X	X			
Brittain, David Ross	X	X	X		X
Bronner, Tae Kelley	X	X	X		X
Brown, J.J.					
Brown, Mark A.	X	X	X	X	
Brundage, Kristen Blaine Parker					
Brunner, S. Dresden	X	X			X
Bruton, Jr., Burt	X	X	X		X
Bucher, Elaine M.	X	X	X		X
Butters, Sarah		X	X		
Buzby, Anne K.		X	X		X
Cardillo, John T.		X			X

Executive Council Members	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Carlisle, David Russell	X	X	X	X	X
Caskey, J. Richard	X	X			
Christiansen, Pat, **Past Chair**	X	X	X		
Colby, Alfred		X			
Conetta, Tami Foley	X	X	X	X	X
Conner, William Theodore		X	X		X
Cope, Honorable Gerald B., Jr.	X				X
Cornett, Jane L.		X			X
Cruce, Roger W.	X		X		
Davis, Gary	X				
DeCubellis, Dan L.	X	X	X		
Detzel, Lauren Y.	X	X	X		X
Diamond, Sandra F., **Past Chair**	X	X	X		X
Dickinson, Tasha	X	X	X		X
Dollinger, Jeffrey		X	X		
Dudley, Frederick Raymond	X	X	X		X
Duvall III, Homer		X	X	X	X
Elzeer, John S.	X	X	X		
Emerich, Guy Storms	X	X			X
Ezell, Brenda B.	X	X	X		X
Falk, Jack A.	X	X	X		X
Fahnestock, Fabienne E.	X				X
Fernandez, Kristopher	X	X	X		X
Fields, Alan Beaumont	X	X	X		X
Fitzgerald, Jr., John Edward	X		X		X
Fleece III, Joseph W.	X	X	X	X	
Flood, Gerard J.	X	X	X	X	
Foreman, Michael Loren	X	X			X
Frazier, Susan Katherine	X	X	X		X
Freedman, Robert Scott	X	X	X		X

Executive Council Members	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Gabbadon, Karen					
Gans, Richard Roy	X	X			
Garber, Julie Ann					X
Gay III, Robert Norwood	X				X
Gentile, Melinda					
Goethe, Jeffrey	X	X	X		X
Goldman, Robert W., **Past Chair**	X		X		
Gonzalez, Aniella	X	X			X
Graham, Robert Manuel	X	X	X		
Gray, Karla S.	X				
Greer, Honorable George W.					
Griffin, Linda S.	X	X	X		X
Grimsley, John Gall, **Past Chair**					
Grossman, Honorable Melvin B.	X	X			X
Guttmann III, Louis B., **Past Chair**		X			
Haley, William James					X
Hancock, Patricia J.	X	X			X
Hart, W. Christopher	X	X	X		X
Hayes, Honorable Hugh D.	X		X		X
Hayes, M. Travis	X	X	X		X
Hearn, Steven Lee, **Past Chair**		X			X
Hearne, Frank L.	X	X	X		X
Henderson, Reese		X	X		
Henderson, Thomas	X	X	X		X
Hennessey III, William Thomas	X	X		X	X
Heuston, Stephen Paul	X	X	X		X
Huszagh, Victor Lee					
Isom, Honorable Claudia Rickert					
Isphording, Roger O., **Past Chair**	X	X	X		X

Executive Council Members	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Johnson, Amber Jade F.	X	X	X		X
Jones, Frederick Wayne	X	X	X		X
Jones, John Arthur, **Past Chair**		X	X		
Jones, Patricia P. Hendricks	X	X	X		X
Judd, Robert Brian	X	X			
Kalmanson, Stacy O.	X	X	X		X
Karr, Mary		X			
Karr, Thomas M.		X			X
Kayser, Joan Bradbury, **Past Chair**		X			X
Kelley, Rohan, **Past Chair**	X	X		X	X
Kelley, Sean	X	X	X	X	X
Kelley, Shane	X	X	X	X	X
Kendon, John		X	X		
Kibert, Nicole C.	X	X	X		X
Kightlinger, Wilhelmina F.	X	X	X		
King, Robin	X	X	X		X
Kinsolving, Ruth Barnes, **Past Chair**			X	X	
Koren, Edward F., **Past Chair**			X		X
Korvick, Honorable Maria Marinello	X	X		X	X
Kotler, A. Stephen	X	X	X		X
Krier, Honorable Beth					
Kromash, Keith Stuart	X	X	X		X
LaFemina, Rose	X		X	X	X
Lajoie, John Thomas					
Lane, William	X	X	X	X	X
Lange, Jr., George W.	X	X	X		X
Lannon, Patrick	X	X	X		X
Larson, Roger Allen	X	X		X	
Laughlin, Honorable Lauren					
Leebrick, Brian	X	X			X

Executive Council Members	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Lile, Laird, **Past Chair**		X	X		X
Little III, John Wesley	X		X		X
Lynch, Kristen M.	X	X	X		X
Madorsky, Marsha G.	X	X	X		
Marger, Bruce, **Past Chair**	X				X
Marmor, Seth		X			X
Marshall III, Stewart Andrew		X	X		X
McCall, Alan K.	X	X	X	X	
Mednick, Glenn M.	X		X		X
Menor, Arthur James	X	X	X		X
Mezer, Steven H.	X	X	X		X
Middlebrook, Mark Thomas	X	X	X		X
Miller, Lawrence Jay		X	X		X
Moran, John	X	X	X		X
Moule, Rex E.	X		X		
Muir, Honorable Celeste	X	X	X	X	X
Muir, William T.	X		X	X	
Mundy, Craig A.	X				
Murphy, Melissa, **Past Chair**	X	X	X		X
Murphy, Jeanne			X		X
Mussman, Jay D.	X	X	X		X
Nash, Charles Ian	X	X	X		X
Nguyen, Hung V.		X		X	X
Norris, Guy W.	X	X	X		
Northrop, Andrea	X				
Norris, John E., **Past Chair**		X			
O'Ryan, Christian Felix	X	X			X
Payne, L. Howard		X	X	X	
Pence, Scott	X				X
Platt, William R.	X		X		X

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Executive Council Members	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Pleus, Jr., Honorable Robert James					
Polson, Marilyn Mewha	X	X	X		X
Potter, Del G.					
Pratt, David		X	X		X
Promoff, Adrienne F.	X				X
Price, Pamela O.	X	X	X		X
Prince-Troutman, Stacy A.	X	X			
Pyle, Michael A.	X	X	X		X
Reddin, Michelle A.		X			
Reinhardt, Joe					
Reynolds, Stephen			X		X
Rieman, Alexandra V.	X	X	X		X
Robbins, James, Jr.	X	X	X		
Roberts, Hardy		X	X	X	X
Robinson, Charles F.	X	X	X		X
Rojas, Silvia B.	X	X	X		X
Roman, Paul	X	X		X	X
Roscow IV, John Frederick	X				
Russell, Deborah L.	X	X	X		
Russick, James C.	X	X	X	X	X
Rydberg, Marsha G.	X	X	X		
Sachs, Colleen Coffield	X	X			X
Sasso, Michael Cornelius		X			
Sauer, Jeffrey Thomas	X	X			X
Schaefer, Jr. , Honorable Walter L.					
Schnitker, Clay	X				
Schofield, Percy Allen	X	X	X		
Scholnik, Barry	X				X
Schwartz, Robert M.		X	X		X
Scuderi, Jon	X	X	X		X

Executive Council Members	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Sheets, Sandra Graham	X	X			
Shoter, Neil	X	X	X		X
Shuey, Eugene Earl	X	X	X		
Silberman, Honorable Morris					
Silberstein, David Mark	X	X	X		
Sklar, William Paul	X				
Smart, Christopher	X				X
Smith, G. Thomas, **Past Chair**	X	X	X	X	X
Smith, Michael S.		X			
Smith, Wilson, **Past Chair**					X
Sobien, Wayne	X	X	X	X	X
Sparks, Brian Curtis	X	X	X		
Spivey, Barry F.	X	X	X	X	X
Spurgeon, Susan K.	X		X		X
St. Arnold, Honorable Jack					
Stafford, Michael P.	X	X	X	X	X
Stephenson, Laura P.	X	X	X		
Stern, Robert Gary	X	X	X		X
Stinson, Sherri M.	X				
Stone, Adele Ilene	X	X	X	X	X
Stone, Bruce M., **Past Chair**		X		X	X
Suarez, Honorable Richard					
Sundberg, Laura K.	X	X	X	X	
Swaine, Jack Michael, **Past Chair**	X			X	
Swaine, Robert S.	X				X
Taft, Eleanor W.		X	X		X
Taylor, Richard W.	X	X			X
Tescher, Donald Robert		X	X		X
Thomas, Honorable Patricia Vitter	X		X		
Thornton, Kenneth E.	X	X	X		X

Executive Council Members	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Tritt, Arnold	X	X	X		X
Udick, Arlene	X	X	X		X
Umsted, Hugh Charles	X		X		
Virgil, Eric	X		X	X	
Waller, Roland D., **Past Chair**	X	X	X		X
Weintraub, Lee A.	X	X	X		X
Wells, Jerry	X	X	X		X
White, Jr.; Richard M.	X	X	X		X
Whynot, Sancha Brennan	X	X	X		
Wickenden, D. Keith	X			X	
Wilder, Charles D.	X	X	X		X
Williams, Jr., Richard	X	X			X
Williamson, Julie Ann Stulce, **Past Chair**	X				X
Wohlust, G. Charles	X	X	X	X	
Wolasky, Marjorie Ellen	X	X	X		
Wolf, Brian	X				
Wolf, Jerome Lee	X				X
Wright, Wm. Cary	X	X	X	X	X
Young, Gwynne Alice	X	X	X		X
Zikakis, Salome	X	X	X	X	X
Zschau, Julius Jay, **Past Chair**		X	X		
			X		
Legislative Consultants					
Adams, Gene	X	X	X		X
Aubuchon, Joshua D.	X	X	X		
Dunbar, Peter M.	X	X		X	X
Edenfield, Martha		X	X	X	X

Executive Committee	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Guests and Fellows					
Andrew, Mike				X	
Armstrong, David G.	X				
Boyd, Deborah	X		X		
Brenes-Stahl, Tattiana		X			X
Bush, Ben	X	X	X		
Byrnes, Gentry		X			
Callahan, Chad	X				
Cole, Stacey		X			
Evans, Kara					X
Fagan, Gail				X	
Fallon, Cynthia	X				
Frank, Scott					X
George, Joseph P.	X				
Godelia, Vinette			X		X
Hailey, Phyllis	X				
Hale, Russ	X	X	X		
Hamrick, Alex		X			X
Kypreos, Theo	X	X	X		X
Lucchi, Elisa	X	X	X	X	X
McElroy, Robert Lee, III					X
Marx, James	X				
Mirpuri, Shelley			X		
Nice, Marina				X	
Pasem, Narvin	X	X	X		X
Sibblies, Sharaine			X		
Stone, Andrea		X			
Stuart, Pam	X	X			
Thurlow, Thomas, III	X				

Executive Committee	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Guests and Fellows (Continued)					
Topor, Thomas K.	X				
Wintter, Christopher			X		
Wozniak, Carrie Ann					X

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THE FLORIDA BAR
Office of the President
Mayanne Downs

King, Blackwell, Downs & Zehnder, P.A.
25 East Pine Street
Orlando, FL 32801
Phone: (407) 422-2472
Fax: (407) 648-0161
mdowns@kbdzlaw.com

May 18, 2011

Brian J. Felcoski, Esquire
Goldman, Felcoski & Stone, P.A.
95 Merrick Way, Suite 440
Coral Gables, FL 33134-5310

Re: Court Reform Legislation

Dear Brian:

Thank you so very much for your letter of May 5, 2011, expressing your appreciation and support for all the issues we addressed during the 2011 legislative session. It was indeed my honor and pleasure to serve as president during this difficult time and I am so very grateful that the final results of this session were markedly better than we anticipated.

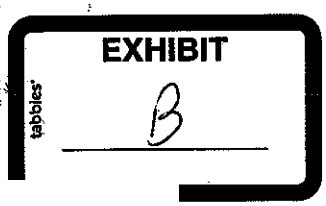
Brian, your support, and the support of the RPPTL section, particularly that of Laird Lile and Pete Dunbar, meant a great deal to me during the session, and I will forever be grateful to you and the leadership of your section for that support. As you know, we came under significant criticism as a result of our decision to approach the legislative issues with care and nuance, and your support helped weather that difficult storm.

Thank you again and I hope you will convey this information to your executive counsel and leadership. With kindest regards, I am

Very truly yours,

Mayanne Downs

MD/jr
cc: John F. Harkness, Jr., Esq.
Laird A. Lile, Esq.
Peter M. Dunbar, Esq.
Scott G. Hawkins, Esq.
Stephen W. Metz, Esq.



CHAPTER 20

MARITAL PROPERTY

STANDARD 20.1

RECITAL OF UNMARRIED STATUS

STANDARD: THE RECITAL IN AN INSTRUMENT OF RECORD THAT A PERSON IS UNMARRIED MAY BE RELIED UPON IN THE ABSENCE OF ANY EVIDENCE IN THE CHAIN OF TITLE OR OTHER KNOWN FACTS INDICATING THAT THE PERSON WAS MARRIED.

Problem 1: John Doe~~, and the sole owner of Blackacre,~~ conveyed ~~it~~Blackacre by a deed that recited that he ~~was describing himself as~~ a single man. Nothing of record indicates that Doe was married prior to the recording of the deed. Is an examiner justified in relying on the recital of marital status?

Answer: Yes.

Problem 2: John Doe, the sole owner of Blackacre, conveyed it, describing himself as a single man. Several years previously, John Doe and Mary Doe, his wife, had joined in a mortgage of Blackacre. Nothing of record shows the termination of the marital status. Is an examiner justified in assuming that the grantee takes free of any possible homestead rights?

Answer: No. An examiner should require satisfactory record evidence of elimination of any possible homestead rights.

Authorities & References: FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE §3.57 (CLE 6th ed. 2010); FUND TN 20.02.03, 20.02.05.

Comment: Although the recital of marital status may be binding as to the grantor or mortgagor, it does not eliminate the rights of one who is not a party. However, the improbability of outstanding interests that are not indicated by the chain of title justifies reliance. Any contrary facts coming to the examiner's attention, although not in the chain of title, cannot be ignored.

A recital that a person is unmarried may include a reference to the person being single, a widow or widower. However, a designation as widow or widower of a particular spouse does not necessarily indicate current marital status. See FUND TN 20.02.03.

PROPOSED BYLAWS OF THE REAL PROPERTY, PROBATE AND TRUST LAW SECTION OF THE FLORIDA BAR

April 2011

Base Document: Proposed Bylaws approved by RPPTL Executive Council on 8-7-10 (including Members-At-Large to At-Large-Members amendment approved on 11-6-10)

Redline: Changes anticipated to be required by Board of Governors

Article I
NAME AND PURPOSES

Section 1. Name. The name of this organization is "The Real Property, Probate and Trust Law Section of The Florida Bar" ("section").

Section 2. Purposes. The purposes of the section are:

(a) To provide an organization within The Florida Bar open to persons having an interest in real property (including construction), probate, trust, or related fields of law, that furthers the knowledge and practices of members in those areas;

(b) To inculcate in its members the principles of duty and service to the public; and

(c) To serve the public and its members by improving the administration of justice and advancing jurisprudence in the fields of real property (including construction), probate, trust, and related fields of law, through all appropriate means, including the development and implementation of legislative, administrative, and judicial positions; continuing legal education programs; standards for ethical and competent practice by lawyers; and professional relationships between real property (including construction), probate, and trust lawyers, and other lawyer and nonlawyer groups.

Article II
SECTION MEMBERSHIP

Section 1. Membership Types. The membership of the section shall be the active members ("active section member"), affiliate members ("affiliate section member"), and honorary members ("honorary section member") hereafter described:

(a) Active section members. Any member of The Florida Bar in good standing may become an active section member by applying for such membership and paying the section's annual dues. Any person who is an active section member who ceases to be a member of The Florida Bar in good standing also ceases to be a member of the section. Reinstatement as a member of The Florida Bar in good standing shall automatically reinstate the person as an active section member, provided that the member is current in the payment of section dues.

(b) Affiliate section members. The Executive Council of the section ("executive council") may, in its discretion (after review and approval of the applicant's qualifications for membership), enroll as an affiliate section member, any person who has shown the dual capacity of interest in and contribution to the section's activities and who is either a law student enrolled in an accredited Florida law school, a graduate of any law school, or a legal assistant, as defined below. Affiliate section members shall pay the annual dues prescribed by the executive council and shall have all the privileges of active section members, except that they may not vote or hold any office or position in the section. The number of affiliate section members shall not exceed 1/3 of the number of active section members.

For purposes of this Article, a legal assistant is a person who assists a member of The Florida Bar in the delivery of legal services in the area of real property (including construction), probate, trust, and related fields of law, and who has satisfied the following minimum requirements:

1. Successful completion of the certified legal assistant (CLA) examination of the National Association of Legal Assistants, Inc.;

2. Graduation from an ABA-approved program of study for legal assistants or graduation from any accredited law school;

3. Graduation from a course of study for legal assistants which is institutionally accredited, but not ABA-approved, and which requires not less than the equivalent of 60 semester hours of classroom study;

4. Graduation from a course of study for legal assistants, other than those set forth in 2 and 3, above, plus not less than 6 months of in-house training as a legal assistant;

5. A bachelor degree in any field, plus not less than 1year of in-house training as a legal assistant; or

6. Five years of in-house training as a legal assistant.

(c) Honorary section members. Any person whom the executive council shall find to have made outstanding contributions in the fields of real property (including construction), probate, trust, or related fields of law, may be made an honorary section member by the executive council. An honorary section member shall have no vote at section meetings, shall not be entitled to hold any office or position in the section, and shall not be required to pay dues.

~~(d) All members of the section shall be required to observe the standards of professionalism and ethical conduct expected of members of The Florida Bar, and legal assistants who are affiliate section members shall also be required to observe and adhere to the Code of Ethics and Professional Responsibility established by the National Association of Legal Assistants, Inc. The executive council, by 2/3 vote of the members present at a meeting, may terminate section membership for misconduct involving moral turpitude or the failure to observe the standards of conduct established by these bylaws. Any proposed termination of section membership by the executive council shall be an agenda item at an in-state meeting, and the affected member shall be given reasonable notice of the basis for the proposed termination and an opportunity to be heard at that meeting.~~
[MOVED TO NEW SECTION 4.]

Section 2. Membership Year. The membership year of the section runs concurrently with the membership year of The Florida Bar.

Section 3. Dues. The executive council shall establish the amount of annual section dues ~~payable from time to time by the members of the section. The dues so~~

~~established will be effective when approved~~ for each type of section membership, subject to approval by the Board of Governors of The Florida Bar ("board of governors"). Annual section dues shall be payable in advance of each year of section membership. There will be no proration of annual section dues ~~except for first-year members of The Florida Bar. After becoming a section member, dues are payable in advance of each membership year, provided, however, each person who is admitted to The Florida Bar shall be extended an invitation to become a member of the section, and upon acceptance, such member shall be entitled to a waiver of the dues for the first year of membership in the section, according to the following formula:~~

~~(a) If a person is admitted to membership in The Florida Bar after June 30, but prior to December 31, of any calendar year, then that member will not be required to pay section dues until the June 30th following such member's admission to The Florida Bar.~~

~~(b) If a person is admitted to membership in The Florida Bar after January 1, but prior to June 30, of any calendar year, that member will not be required to pay section dues until June 30 of the calendar year next succeeding the calendar year of the member's admission to The Florida Bar (e.g. if admitted to The Florida Bar on March 1, no section dues will be payable until the fiscal year beginning July 1.)~~

~~The Florida Bar shall bill section dues simultaneously with the billing(s) for regular dues of The Florida Bar. Any member of the section whose section dues are not paid by the date that The Florida Bar dues become delinquent thereupon ceases to be a member of the section.~~

(a) The Florida Bar shall bill active members of the section for annual section dues simultaneously with billing for regular membership dues of The Florida Bar. Members of The Florida Bar who become active section members shall not be required to pay annual section dues for the first fiscal year following their admission to The Florida Bar.

(b) Annual section dues for affiliate members of the section shall initially accompany applications for affiliate section membership and shall thereafter be paid by the date the membership dues for The Florida Bar become due.

(c) Any member of the section whose annual section dues are not paid by the date Florida Bar membership dues become delinquent ceases to be a member of the section.

~~(d)~~Section 4. Membership Standards. All members of the section shall be required to observe the standards of professionalism and ethical conduct expected of members of The Florida Bar, and legal assistants who are affiliate section members shall also be required to observe and adhere to the Code of Ethics and Professional Responsibility established by the National Association of Legal Assistants, Inc. The executive council, by 2/3 vote of the members present at a meeting, may terminate section membership for misconduct involving moral turpitude or the failure to observe the standards of conduct established by these bylaws. Any proposed termination of section membership by the executive council shall be an agenda item at an in-state meeting, and the affected member shall be given reasonable notice of the basis for the proposed termination and an opportunity to be heard at that meeting.
[THIS SECTION 4 WAS MOVED FROM FORMER SECTION 1(d) WITHOUT CHANGE, EXCEPT FOR ADDITION OF HEADING.]

Article III
ORGANIZATION

The section is divided into 2 divisions, "the real property law division" and "the probate and trust law division." The section and its real property law division shall be served by committees and section liaisons that operate under the supervision of the real property law division director. The section and its probate and trust law division shall be served by committees and section liaisons that operate under the supervision of the probate and trust law division director. The section shall also be served by general standing committees and section liaisons that operate under the supervision of the chair-elect.

Article IV
OFFICERS, ELECTED POSITIONS, AND EXECUTIVE COMMITTEE

Section 1. Officers. The officers of the section are the section chair, the chair-elect, the secretary, the treasurer, the real property law division director, the probate and trust law division director, the immediate past section chair, and the at-large-members director ("section officers"). The section officers, the

representatives for out-of-state members of the section, and the at-large-members, shall be selected in the manner set forth in this Article IV.

Section 2. Qualifications. No person may serve as a section officer or in a position as representative for out-of-state members or at-large-members unless they are an active section member, and the loss of that status shall cause the office or position to be vacant. If status as an active section member ceases because of a loss of status as a member of The Florida Bar in good standing that is solely attributable to a delinquency in:

(i) the payment of membership fees or dues; or

(ii) completing continuing legal education requirements,

reinstatement as a member of The Florida Bar in good standing and as an active section member shall automatically reinstate the member to the vacant office or position if it has not been filled.

Section 3. Executive Committee. The section officers, together with the chairs of the section CLE seminar coordination committee and legislation committee, shall serve as the executive committee of the section ("executive committee"), which shall be the planning agency for the executive council. The executive committee shall also have the full power and authority to exercise the function of the executive council when and to the extent authorized by the executive council with respect to a specific matter, and on any other matter which the executive committee reasonably determines requires action between meetings of the executive council. All action taken by the executive committee on behalf of the executive council shall be reported to the executive council at its next meeting. The executive committee shall not take any action that conflicts with the policies and expressed wishes of the executive council. The executive committee shall also:

(i) make recommendations for consideration by the chair-elect in appointing chairs and vice chairs of section committees and section liaisons;

(ii) make recommendations for consideration by the section's long-range planning committee ("long-range planning committee") in submitting nominees for at-large-members; and

(iii) perform such other duties as may be directed by the executive council or prescribed in these bylaws.

Section 4. Nominating Procedure.

(a) The long-range planning committee, which shall consist of all past section chairs who are members of the executive council and be chaired by the chair-elect, shall submit nominees to the section for election to the offices of chair-elect, secretary, real property law division director, probate and trust law division director, treasurer, at-large-members director, and ~~to~~ the positions of representatives for out-of-state members and at-large-members. If the office of chair-elect becomes vacant during the year, the nominations submitted by the long-range planning committee for the following year shall include a nominee for the office of section chair. The long-range planning committee shall notify the members of the section of the names of the nominees no later than 60 days prior to the section's annual meeting ("election meeting"). In submitting nominations for at-large-members ~~and~~, the long-range planning committee shall consider recommendations from the at-large-members director and the executive committee.

(b) No nominations for any elected office or position other than those made by the long-range planning committee will be permitted, except that nominations may be made by a written nominating petition signed by 25 or more active section members and submitted to the section chair not less than 30 days prior to the election meeting. If more than one person is nominated for any elected office or position, the section chair, assisted by such special committees as the section chair may appoint, will announce the procedures to be followed for that election.

(c) Each nominee will be permitted to prepare a statement of no more than 500 words, containing such information about the nominee as the nominee may choose, to be reproduced and distributed by the section to its members, either as an article in the section's publication, Action Line, or separately. Any such statement shall also be distributed at the election meeting.

Section 5. Election and Term of Offices and Positions.

(a) The section officers, the representatives for out-of-state members, and the at-large-members, shall be elected by majority vote of the active section members in physical attendance at the election meeting, which shall be held prior

to July 1 of each year. Voting by proxy shall not be permitted. At the election meeting ~~(i)~~ the section chair, chair-elect, and secretary shall determine the number of active section members in physical attendance and entitled to vote; ~~(ii)~~ and voting will be by written, secret ballot prepared in advance;, ~~(iii) i~~If no nominee receives a majority vote for an office or position, additional balloting will take place between the 2 nominees receiving the greatest number of votes until the required majority is obtained;, ~~and (iv) the r~~Results of the election will be immediately announced by the section chair.

(b) The nominees so elected shall serve for a period of 1 year, beginning on July 1. The chair-elect shall automatically become section chair upon expiration of the term as chair-elect or upon the death, resignation, or removal of the section chair.

Section 6. Duties of Officers.

(a) Section Chair. The section chair shall be the chief executive officer and principal representative of the section, and shall preside at all meetings of the section, the executive council, and the executive committee. The section chair shall also be responsible for reports to The Florida Bar or the board of governors and for performing such other duties as may be prescribed in these bylaws or which customarily pertain to the office of section chair. The section chair is an ex-officio member of all section committees.

(b) Chair-elect. The chair-elect shall be responsible for: (i) ~~for~~ the general standing committees and any projects assigned to them, including the preparation and submission of any required reports; (ii) ~~for~~ such duties as the section chair, the executive council, or the executive committee may designate; and (iii) ~~for~~ performing such other duties as may be prescribed in these bylaws or customarily pertain to the office of chair-elect. In addition, in the case of the temporary disability or absence of the section chair, the chair-elect shall serve as acting section chair, but only for the duration of the section chair's disability or absence. Any issue concerning the disability or absence of the section chair shall be determined by the executive committee, subject to review by the executive council.

(c) Secretary. The secretary shall make and record: (i) minutes of meetings of the executive council (including record of attendance); (ii) significant actions taken by the executive committee, including all actions which exercise any

function of the executive council; and (iii) the election results at the election meeting, and shall file all of those records with the permanent records of the section at The Florida Bar headquarters in Tallahassee. The secretary shall also report and keep a record of all policies adopted by the section as a separate record.

(d) Division Directors. The real property law division director and the probate and trust law division director shall be responsible for the section committees within their respective divisions, and for the projects assigned to them, including the preparation and submission of reports of such section committees as may be required.

(e) Treasurer. The treasurer and the appropriate staff of The Florida Bar shall make certain that the financial affairs of the section are administered in a manner authorized by the section's budget and in accordance with the standing policies of the board of governors. The treasurer shall monitor and review for correctness all accounts, reports and other documents pertaining to section funds, revenues and expenditures that are furnished by the staff of The Florida Bar. No reimbursement may be made to any member of the section without approval of the treasurer, and any reimbursement to the treasurer must be approved by the section chair or chair-elect. The treasurer shall: (i) work with the chair-elect to prepare and submit a projected budget to the executive council; (ii) report from time to time on the section's present and projected financial condition, advising the executive committee and the executive council as to the financial impact of any proposed action that might have a significant impact on the financial condition of the section; and (iii) prepare such other recommendations and special reports of financial affairs of the section as may be requested by the section chair.

(f) At-Large-Members Director. The at-large-members director shall:

(i) in consultation with the executive committee, define any responsibilities of the at-large-members;

(ii) be responsible to the section for the at-large-members;

(iii) evaluate the performance of the at-large-members on an annual basis; and

(iv) provide recommendations for consideration by the long-range

planning committee in submitting nominees for at-large-members.

(g) Immediate Past Section Chair. The immediate past section chair shall provide counsel, guidance and advice to the executive committee.

Section 7. Vacancies.

(a) If the office of section chair becomes vacant, the chair-elect shall immediately assume the office of section chair, and shall serve as section chair for the remainder of the unexpired term, as well as for the following term for which the chair-elect was elected to serve as section chair.

(b) If the office of chair-elect becomes vacant, the section chair shall assume the duties of the office of chair-elect for the remainder of the unexpired term. In that event, at the next election meeting, a section chair shall be nominated and elected in the manner provided in these bylaws.

(c) If the offices of section chair and chair-elect both become vacant, the long-range planning committee shall convene an emergency meeting and select a qualified person to serve as section chair for the remainder of the unexpired term. In that event, the person selected as section chair shall also assume the duties of the office of chair-elect for the remainder of the unexpired term and, at the next election meeting, a section chair shall be nominated and elected in the manner provided in these bylaws.

(d) If any office other than section chair or chair-elect becomes vacant within 6 weeks of the next scheduled in-state meeting of the executive council, the vacancy shall be filled for the remainder of the unexpired term by the executive council at that meeting. If no in-state meeting is scheduled within 6 weeks following the creation of such a vacancy, it shall be filled for the remainder of the unexpired term by the executive committee.

(e) Vacancies in the positions of representative for out-of-state members and at-large-members shall be filled by the section chair.

Article V
EXECUTIVE COUNCIL

Section 1. Powers and Duties. The executive council is the governing body of the section and shall have the power and duty to fully administer these bylaws, including the power to exercise all authority expressed or implied in these bylaws and to employ necessary personnel on behalf of the section.

Section 2. Membership. The executive council shall consist of the section chair, the chair-elect, the real property law division director, the probate and trust law division director, the treasurer, the secretary, the at-large-members director, the chairs and vice chairs of section committees, the section liaisons, the member of the board of governors appointed as its liaison representative to the section, the at-large-members, the past section chairs, and the representatives for out-of-state members of the section.

Section 3. At-large-Members and Regional Representation. The existence of the at-large-members category is intended to help the section achieve the goal of maintaining active, productive members on the executive council, while preserving regional representation. To be considered for such a position, a prospective at-large-member must demonstrate the willingness and ability, through previous committee leadership or otherwise, to assist the section with its needs. To the extent that the section officers, chairs and vice chairs of section committees, section liaisons, and representatives for out-of-state members of the section serving on the executive council do not include geographical representation from each judicial circuit and outside of Florida, the at-large-members should include such representation when reasonably practicable.

Section 4. Attendance. Regular attendance by executive council members at executive council meetings is requisite to the proper performance of their duties and responsibilities. Accordingly, if any past section chair is absent from 10 consecutive in-state executive council meetings, or if any other member of the executive council is absent from 3 consecutive in-state executive council meetings in any membership year, such member shall be deemed to have resigned from the executive council, and any section office or position held by that person shall be deemed vacant. In such event, the resigned member shall not be eligible for election to or membership on the executive council for the next succeeding membership year unless: (i) the executive committee, upon a showing of good cause for the absences, waives the attendance requirement for the membership year involved; and (ii) the waiver is announced at a formal meeting of the executive council and duly recorded in the minutes of the meeting. Any vacancy created by

the absence of a member as herein provided shall be filled as provided in these bylaws.

Article VI
SECTION COMMITTEES AND LIAISONS

Section 1. Committees. The section chair shall have the authority to establish and dissolve such ~~section~~ committees and liaison positions as the section chair deems necessary or advisable, except that the section chair may not dissolve the section legislation committee or the CLE seminar coordination committee. The section chair shall promptly report such changes to the executive council, and they shall be effective until and unless disapproved by the executive council.

Section 2. Section Committee Chairs and Liaisons. Prior to July 1 of each year, after considering the recommendations of the executive committee, the chair-elect shall make the following appointments for the coming year: (i) chairs of the section's real property law division committees, and such vice chairs of those committees as the chair-elect deems necessary; (ii) chairs of the section's probate and trust law division committees, and such vice chairs of those committees as the chair-elect deems necessary; (iii) chairs of the section's general standing committees, and such vice chairs of those committees and as the chair-elect deems necessary; and (iv) ~~and~~ section liaisons to other sections and groups. The section chair shall have the power to remove chairs and vice chairs of section committees and section liaisons if the section chair believes that it is in the best interest of the section to do so, and to fill vacancies in those positions (including vacancies resulting from the section chair's creation of new section committees or liaison positions).

Section 3. Committee Members. The chair of each section committee may appoint and remove members to and from that committee, except that a committee chair may not remove a vice chair of the committee.

Section 4. Section Membership Requirement. No person may serve as a member of any section committee unless they are a member of the section. No person may serve as a (i) chair, vice chair, or voting member of any section committee; or (ii) section liaison, unless they are an active section member, and the loss of that status shall cause the position to be vacant. If status as an active section member ceases because of a loss of status as a member of The Florida Bar

in good standing that is solely attributable to a delinquency in (i) the payment of membership fees or dues; or (ii) completing continuing legal education requirements, reinstatement as a member of The Florida Bar in good standing and as an active section member shall automatically reinstate the member to the vacant position if it has not been filled.

Section 5. Committee Reports. The chair of each section committee shall submit a written annual report of the committee's activities during the year to the executive committee by the date requested by the section chair. All recommendations contained in such reports are confidential and shall not be disclosed outside the executive committee without approval of the section chair.

Article VII
MEETINGS

Section 1. Annual/Election Meeting of the Section. The section chair shall designate the annual meeting of the section each year, which shall be the election meeting and be held prior to July 1. The executive council may call special meetings of the section provided at least 30 days notice thereof shall be given. The active section members in physical attendance at any meeting of the section shall constitute a quorum for the transaction of business, and a majority vote of those in physical attendance will be binding. Voting by proxy shall not be permitted.

Section 2. Executive Council Meetings. There shall be no fewer than 3 in-state meetings of the executive council each year. The executive council may act or transact business herein authorized, without meeting, by written or electronic approval of the majority of its members. The section chair may call meetings of the executive council by giving no less than 15 days notice to its members. Those present at a meeting of the executive council duly called will constitute a quorum, and a majority vote of those present will be binding, unless a greater majority is required by these bylaws for a particular matter. Voting by proxy shall not be permitted.

Section 3. Executive Committee Meetings. The executive committee shall meet as directed by the section chair, and shall hold an organizational meeting prior to each membership year at a time, date, and place selected by the section chair. The section chair shall fix the date and location of each meeting and shall give written, electronic, or oral notice of such date and location to each executive

committee member at least 7 days prior to the meeting. A majority of the executive committee may exercise its powers unless a greater majority is required by these bylaws for a particular matter, and it is not necessary that a formal meeting be held for action, action by mail, e-mail, or telephone being sufficient. Voting by proxy shall not be permitted.

Section ~~6~~4. Conduct of Meetings. The current edition of Robert's Rules of Order shall govern the conduct of all meetings of the section and its subdivisions, except that provisions contained in these bylaws shall prevail over any conflicting provision in those Rules. The section chair may appoint a parliamentarian to advise and assist the section chair or any other person presiding over a meeting of the section or any of its subdivisions in connection with any procedural issues that may arise. Non-members of the executive council may address the executive council with the permission of the section chair or upon 2/3 vote of the members of the executive council present (without debate).
[THIS SECTION 4 WAS MOVED FROM FORMER SECTION 6, ARTICLE IX, WITHOUT CHANGE]

Article VIII
LEGISLATIVE, ADMINISTRATIVE, AND JUDICIAL POSITIONS

Section 1. Authority. The section may be involved in legislative, administrative, and judicial (including amicus curiae and court rule) activities that are within the purview of the section. Activities are within the purview of the section if they are significant to the judiciary, the administration of justice, the fundamental legal rights of the public, or the interests of the section, provided they are consistent with the purposes of the section and the policies promulgated by the board of governors, including the requirements that:

(a) the issue involved is within the substantive areas of real property (including construction), probate, trust, or related fields of law;

(b) the issue is beyond the scope of permissible legislative activity of The Florida Bar, or is within the permissible scope of legislative activity of The Florida Bar, but the proposed section position is not inconsistent with an official position of The Florida Bar on that issue; and

(c) the issue is not one that carries the potential of deep philosophical or

emotional division among a substantial segment of the membership of The Florida Bar.

Section 2. Section Positions. A "section position" is a legislative, administrative, or judicial (including amicus curiae and court rule) position that complies with Section 1 of this Article and has been adopted by the section in accordance with this Article. A section position, which may be expressed as a concept, may either support or oppose a matter. Any advocacy by the section shall be based upon a section position and comply with the requirements of this Article.

Section 3. Legislation Committee. The section legislation committee shall consist of a chair, a vice chair for real property, a vice chair for probate and trust, the section chair, the chair-elect, the director of the real property law division, the director of the probate and trust law division, and such other members of the executive council as are appointed by the chair of the section legislation committee with the approval of the section chair. The section legislation committee shall coordinate the legislative activities of the section and act as a liaison between (i) the executive council (or its executive committee); and (ii) the section lobbyist and legislative and administrative bodies.

Section 4. Procedures for Adopting and Reporting Section Positions.

(a) A proposed section position shall be an agenda item and supporting documentation shall be distributed to the executive council at least one week prior to the executive council meeting unless those requirements are waived by 2/3 of the members of the executive council present at that meeting.

(b) A section position may be proposed by a section committee.

(c) To adopt a section position, the executive council must, by a 2/3 vote of the members present: (i) find that the proposal is within the purview of the section, as defined in Section 1 of this Article; and (ii) approve the proposal. Voting by proxy shall not be permitted. Whenever, because of time constraints, the executive council cannot meet to adopt a section position prior to the time when legislative, administrative, or judicial action is required, the executive committee may, by a 2/3 vote of its members, adopt a section position. Any section position adopted by the executive committee must be reported to the executive council at its next meeting.

(d) Written notice of the adoption of a section position shall be promptly given to The Florida Bar, and it shall be circulated for comment to all divisions, sections, and committees of The Florida Bar that are believed to be interested in the matter.

(e) A section position may not be advanced ~~by the section~~ unless it has been submitted to, and not disapproved by, the board of governors. A section position shall remain in force for the current biennial legislative session unless rescinded by the board of governors.

(f) In even-numbered years, the section legislation committee shall recommend those section positions to be renewed at the executive council meeting held in conjunction with the election meeting of the section.

(g) The section shall not participate as an amicus curiae without the consent of the board of governors.

(h) Section positions shall be clearly identified as positions of the section, and not those of The Florida Bar.

Section 5. Expenses Incurred in Advancing Section Positions. If the section lobbyist or section chair requests the appearance of a section member to advance a section position, the member's reasonable expenses shall be paid by the section in accordance with its budgetary policies.

Section 6. Section Lobbyist. Subject to the approval of the board of governors, the section may retain a lobbyist to assist the section in its legislative activities or matters.

Article IX
MISCELLANEOUS

Section 1. Integrity of Section Proceedings - Disclosure of Conflict and Recusal. A member of the executive council or any section committee shall not participate in a section matter if circumstances exist that may reasonably be expected to cause that participation to undermine confidence in the integrity of the section, executive council, or section committee. Where any fact or circumstance exists that may reasonably bring into question an accusation of bias, prejudice, or

conflict of interest on the part of a member while participating in a section matter, it is the duty and responsibility of any member having knowledge of such fact or circumstance to make full disclosure of such fact or circumstance to the executive council or section committee. A bias, prejudice, or conflict of interest may arise from a member's personal interests, employment, or client relationships. When such an issue arises, the chair or other person presiding over the proceeding may request the member to voluntarily refrain from participation and voting with respect to the matter. In addition, recusal may be ordered by 2/3 of the members present of the executive council or section committee. Upon recusal, the member may not vote or otherwise participate in proceedings concerning the matter. If recusal should have occurred but did not, the integrity of section proceedings and the validity of its actions shall not be adversely affected.

Section 2. Action of The Florida Bar. No action of the section shall be represented or construed as the action of The Florida Bar until it has been approved by The Florida Bar.

Section 3. Compensation and Expenses. No salary or other compensation may be paid to any member of the section for performance of services to the section, but members of the section may be reimbursed for such reasonable and necessary telephone expenses, reproduction expenses and other similar out-of-pocket expenses that such member incurs in the performance of services for the section.

Section 4. Policies of the Section. Policies adopted by the executive council, including section policies, shall be maintained in a separate journal at The Florida Bar Headquarters in Tallahassee, Florida together with the other official records of the section.

Section 5. Amendments. These bylaws may be amended only with the consent of the board of governors upon recommendation made by the executive council.

~~Section 6. Conduct of Meetings. The current edition of Robert's Rules of Order shall govern the conduct of all meetings of the section and its subdivisions, except that provisions contained in these bylaws shall prevail over any conflicting provision in those Rules. The section chair may appoint a parliamentarian to advise and assist the section chair or any other person presiding over a meeting of~~

~~the section or any of its subdivisions in connection with any procedural issues that may arise. Non-members of the executive council may address the executive council with the permission of the section chair or upon 2/3 vote of the members of the executive council present (without debate).~~
[MOVED TO ARTICLE VII, NEW SECTION 4, WITHOUT CHANGE.]

Section ~~7~~6. Notice. Any requirement in these bylaws that notice (whether written or otherwise), information, or materials be furnished may be satisfied by: (i) any method of delivery specified in the requirement; (ii) transmitting the notice, information or materials by e-mail to any e-mail address provided by the recipient to The Florida Bar; or (iii) posting the notice, information, or materials to the section's website and notifying the member of the posting by e-mail to any e-mail address provided by the recipient to The Florida Bar.

Section ~~8~~7. Effective Date. These bylaws shall be effective as of July 1, 2010, or upon their adoption by the executive council, or upon their approval by the board of governors, whichever occurs later. Upon the effective date of these bylaws and for the remainder of the term for which they were elected, each existing circuit representative shall automatically become an at-large-member, and the existing circuit representatives director shall automatically become the at-large-members director.

RPPTL 2011 - 2012
Executive Council Meeting Schedule
George Meyer's YEAR

Date	Location
August 4 – August 7, 2011	**Executive Council Meeting & Legislative Update** The Breakers Palm Beach, Florida Reservation Phone # 561-655-6611 www.thebreakers.com Room Rate: $190.00 Cut-off Date: July 3, 2011
September 21 – September 25, 2011	**Executive Council Meeting / Out-of-State Meeting** Four Seasons – Prague Prague, Czech Republic Reservation Phone # 420-221-427-000 http://www.fourseasons.com/prague/ Room Rate: $362.00 Cut-off Date: August 31, 2011
December 1 – December 4, 2011	**Executive Council Meeting** Marco Island Marriott Marco Island, Florida Reservation Phone #1-800-438-4373 http://www.marcoislandmarriott.com/ Room Rate: $189.00 Cut-off Date: November 9, 2011
March 1 – March 4, 2012	**Executive Council Meeting** Sawgrass Marriott Ponte Vedra Ponte Vedra, Florida Reservation Phone #1-800-457-4653 http://www.sawgrassmarriott.com/ Room Rate: $149.00 Cut-off Date: February 8, 2012
May 31 – June 3, 2012	**Executive Council Meeting / RPPTL Convention** Don CeSar Beach Resort St. Petersburg, Florida Reservation Phone # 1-800-282-1116 http://www.loewshotels.com/en/Hotels/St-Pete-Beach-Resort/Overview.aspx Room Rate $160.00 Cut-off Date: May 9, 2012

RPPTL 2012 - 2013
Executive Council Meeting Schedule
W. Fletcher Belcher's YEAR

Date	Location
July 25 – July 28, 2012	**Executive Council Meeting & Legislative Update** The Breakers Palm Beach, Florida Reservation Phone # 561-655-6611 www.thebreakers.com Room Rate: $199.00 Cut-off Date: June 25, 2012
September 13 – September 15, 2012	**Executive Council Meeting** Ritz Carlton Key Biscayne Key Biscayne, Florida Reservation Phone # 1-800-241-3333 http://www.ritzcarlton.com/keybiscayne Room Rate: $169.00 Cut-off Date: August 22, 2012
November 15 – November 18, 2012	**Executive Council Meeting/Out of State** The Inn on Biltmore Estates Ashville, North Carolina Reservation Phone #1-866-779-6277 www.biltmore.com/stay/rates Room Rate: $219.00 Cut-off Date: October 15, 2012
January 31 – February 3, 2013	**Executive Council Meeting** Hotel Duvall *(Pending)* Tallahassee, Florida Reservation Phone #1-866-957-4001 http://www.hotelduvall.comn Room Rate: $149.00 Cut-off Date: January 11, 2013
May 23 – May 26, 2013	**Executive Council Meeting / RPPTL Convention** The Vinoy St. Petersburg, Florida http://www.marriott.com/hotels/travel/tpasr-renaissance-vinoy-resort-and-golf-club Reservation Phone # 1-888-303-4430 Room Rate $149.00 Cut-off Date: May 5, 2013

RPPTL FINANCIAL SUMMARY

2010 – 2011 [***July 1, 2010 – May 31, 2011***[1]]

Revenue:	**$1,050,134*
Expenses:	*$847,684*
Net:	*$202,450*

**$208,349 of this figure represents revenue from sponsors and exhibitors*

Beginning Fund Balance (7-1-10)	***RPPTL CLE***
$ 1,024,000	*RPPTL YTD Actual CLE Revenue* ***$178,553***
YTD Fund Balance (5-31-11) **$1,226,450**	*RPPTL Budgeted CLE Revenue* ***$198,100***

[1] **This report is based on the tentative unaudited detail statement of operations dated 5/31/2011.**

RPPTL Financial Summary from Separate Budgets

2010 – 2011 [July 1, 2010 – May 31, 2011[1]]
YEAR TO DATE REPORT

General Budget

Revenue:	**$ 994,592**
Expenses:	**$ 745,661**
Net:	**$ 248,931**

Legislative Update

Revenue:	**$ 50,062**
Expenses:	**$ 82,413**
Net:	**($32,351)**

Convention

Revenue:	**$ 327**
Expenses:	**$4,970**
Net:	**($4,643)**

Attorney Trust Officer Conference

Revenue:	**$ 0**
Expenses:	**$ 11,046**
Net:	**($ 11,046)**

Miscellaneous Section Service Courses

Revenue:	**$ 5,153**
Expenses:	**$ 3,594**
Net:	**$ 1,559**

Roll-up Summary (Total)

Revenue:	**$**	**1,050,134**
Expenses:	**$**	**847,684**
Net Operations:	**$**	**202,450**

Reserve (Fund Balance):	**$**	**1,024,000**
GRAND TOTAL	**$**	**1,226,450**

[1] **This report is based on the tentative unaudited detail statement of operations dated 5/31/2011.**

		May 2011 Actuals	YTD 10-11 Actuals	Budget	Percent Budget
Total Real Prop Probate &					
31431	Section Dues	150	460,000	465,000	98.92
31432	Affiliate Dues	0	1,900	1,750	108.57
31433	Admin Fee to TFB	-210	-160,315	-163,450	98.08
Total	Dues Income-Net	-60	301,585	303,300	99.43
32001	Registrations	234	4,122	157,250	2.62
32006	Live Web Cast	0	11,500	8,750	131.43
32010	Legal Span On-line	0	2,775	750	370.00
32191	CLE Courses	48,769	178,553	198,100	90.13
32205	Compact Disc	330	16,270	28,800	56.49
32207	DVD	235	5,875	10,000	58.75
32293	Section Differential	3,525	28,465	35,000	81.33
32301	Course Materials	100	2,500	3,500	71.43
34704	Actionline Advertise	6,850	21,550	15,000	143.67
35003	Ticket Events	0	72,914	0	*
35101	Exhibit Fees	0	12,500	37,600	33.24
35201	Sponsorships	31,708	195,849	277,750	70.51
35603	Bd/Council Mtg Regis	200	59,907	120,000	49.92
38499	Investment Allocatio	-8,246	135,769	44,785	303.16
Other	Income	83,705	748,549	937,285	79.86
Total	Revenues	83,645	1,050,134	1,240,585	84.65
36998	Credit Card Fees	1,350	6,655	5,924	112.34
51101	Employee Travel	0	5,508	10,241	53.78
61201	Equipment Rental	0	9,325	20,000	46.63
71001	Telephone/Direct	0	700	1,200	58.33
71005	Internet Charges	0	483	1,100	43.91
75102	1st Class & Misc Mai	0	37	300	12.33
75401	Express Mail	14	763	1,500	50.87
81411	Promotional Printing	0	1	2,000	0.05
81412	Promotional Mailing	0	620	14,000	4.43
84001	Postage	17	2,091	5,700	36.68
84002	Printing	70	447	3,950	11.32
84006	Newsletter	0	32,314	40,000	80.79
84009	Supplies	0	54	500	10.80
84010	Photocopying	23	266	500	53.20
84012	Registration Support	0	5,079	3,000	169.30
84015	Officers Conference	0	460	1,200	38.33
84016	Scrivener	0	0	5,000	0.00
84051	Officers Travel Expe	0	2,362	3,000	78.73
84054	CLE Speaker Expense	0	2,216	4,500	49.24
84061	Reception	0	494	67,500	0.73
84062	Luncheons	0	[illegible]	60,000	38.89
84064	Golf Tourn Expenses	0		11,000	0.00
84101	Committee Expenses	129	61,903	65,000	95.24

	May 2011 Actuals	YTD 10-11 Actuals	Budget	Percent Budget
Total Real Prop Probate &				
84106 Realtor Relations	0	3,150	5,000	63.00
84107 Diversity Initiative	0	2,234	15,000	14.89
84110 Exhibitor Fees	0	0	250	0.00
84115 Entertainment	1,590	1,590	20,000	7.95
84201 Board Or Council Mee	968	410,776	400,000	102.69
84216 Strategic Planning M	0	5,320	10,000	53.20
84238 Council Mtg Recreati	0	49,384	35,000	141.10
84239 Hospitality Suite	0	14,967	15,000	99.78
84253 Sleeping Rooms	0	0	2,500	0.00
84254 Speaker Gifts	0	1,591	2,000	79.55
84258 Web Services	0	5,025	6,000	83.75
84279 Council Members Hand	0	2,055	3,500	58.71
84310 Law School Liaison	0	138	7,500	1.84
84322 Fellowships-Exc Cou	0	6,362	10,000	63.62
84422 Website	250	39,610	75,000	52.81
84501 Legislative Consulta	0	75,000	100,000	75.00
84503 Legislative Travel	0	10,133	20,000	50.67
84524 Memorial Tributes	0	0	500	0.00
84701 Council Of Sections	300	300	300	100.00
84998 Operating Reserve	0	0	85,092	0.00
84999 Miscellaneous	0	0	500	0.00
85064 Service Recognition	0	1,594	5,000	31.88
86432 Time Taping Editing	0	5,995	4,500	133.22
88211 Steering Committee	0	0	1,500	0.00
88230 Speakers Expense	0	1,319	7,000	18.84
88233 Speakers Hotel	0	4,062	3,700	109.78
88239 Speakers Other Exp	0	24	0	*
88241 Outline Prt-Inhouse	5,605	5,697	7,000	81.39
88242 Outline Prt-Contract	0	11,403	13,000	87.72
88252 Course Credit Fee	0	350	150	233.33
88260 Meeting Parking	0	716	0	*
88262 Meeting Meals	5,260	1,952	84,000	2.32
88265 Refreshment Breaks	0	4,309	13,000	33.15
88269 Breakfast	0	7,328	38,000	19.28
88281 A/V Ctr Dup/Prod	0	0	1,600	0.00
Total Operating Expenses	15,576	827,495	1,318,707	62.75
86431 Meetings Administrat	660	6,270	4,500	139.33
86532 Advertising News	1,614	3,228	2,958	109.13
86543 Graphics & Art	949	9,393	12,698	73.97
86623 Registrars	242	1,298	2,500	51.92
Total TFB Support Services	3,465	20,189	22,656	89.11
Total Expenses	19,041	847,684	1,341,363	63.20

Total Real Prop Probate &	May 2011 Actuals	YTD 10-11 Actuals	Budget	Percent Budget
Net Operations	64,604	202,450	-100,778	-200.89
21001 Fund Balance	0	1,024,000	895,690	114.33
Total Current Fund Balance	64,604	1,226,450	794,912	154.29

	May 2011 Actuals	YTD 10-11 Actuals	Budget	Percent Budget
Real Prop Probate & Trust				
31431 Section Dues	150	460,000	465,000	98.92
31432 Affiliate Dues	0	1,900	1,750	108.57
31433 Admin Fee to TFB	-210	-160,315	-163,450	98.08
Total Dues Income-Net	-60	301,585	303,300	99.43
32191 CLE Courses	48,769	178,553	198,100	90.13
32293 Section Differential	3,525	28,465	35,000	81.33
34704 Actionline Advertise	6,850	21,550	15,000	143.67
35003 Ticket Events	0	72,914	0	*
35201 Sponsorships	31,708	195,849	187,000	104.73
35603 Bd/Council Mtg Regis	200	59,907	120,000	49.92
38499 Investment Allocatio	-8,246	135,769	44,785	303.16
Other Income	82,806	693,007	599,885	115.52
Total Revenues	82,746	994,592	903,185	110.12
36998 Credit Card Fees	70	3,392	3,700	91.68
51101 Employee Travel	0	4,047	4,724	85.67
71001 Telephone/Direct	0	700	1,200	58.33
71005 Internet Charges	0	483	1,100	43.91
81411 Promotional Printing	0	1	0	*
84001 Postage	17	2,042	3,000	68.07
84002 Printing	0	377	1,500	25.13
84006 Newsletter	0	32,314	40,000	80.79
84009 Supplies	0	54	300	18.00
84010 Photocopying	23	266	500	53.20
84015 Officers Conference	0	460	1,200	38.33
84016 Scrivener	0	0	5,000	0.00
84051 Officers Travel Expe	0	2,362	3,000	78.73
84054 CLE Speaker Expense	0	2,216	4,500	49.24
84101 Committee Expenses	129	61,903	65,000	95.24
84106 Realtor Relations	0	3,150	5,000	63.00
84107 Diversity Initiative	0	2,234	15,000	14.89
84201 Board Or Council Mee	968	410,776	400,000	102.69
84216 Strategic Planning M	0	5,320	10,000	53.20
84238 Council Mtg Recreati	0	49,384	35,000	141.10
84239 Hospitality Suite	0	14,967	15,000	99.78
84279 Council Members Hand	0	2,055	3,500	58.71
84310 Law School Liaison	0	138	7,500	1.84
84322 Fellowships-Exc Cou	0	6,362	10,000	63.62
84422 Website	250	39,610	75,000	52.81
84501 Legislative Consulta	0	75,000	100,000	75.00
84503 Legislative Travel	0	10,133	20,000	50.67
84524 Memorial Tributes	0	0	500	0.00
84701 Council Of Sections	300		300	100.00
84998 Operating Reserve	0	0	85,092	0.00

Preliminary Unaudited Stmt of Operations

	May 2011 Actuals	YTD 10-11 Actuals	Budget	Percent Budget
Real Prop Probate & Trust				
84999 Miscellaneous	0	0	500	0.00
85064 Service Recognition	0	1,594	5,000	31.88
Total Operating Expenses	1,757	731,640	922,116	79.34
86431 Meetings Administrat	660	6,270	4,500	139.33
86543 Graphics & Art	633	7,751	9,400	82.46
Total TFB Support Services	1,293	14,021	13,900	100.87
Total Expenses	3,050	745,661	936,016	79.66
Net Operations	79,696	248,931	-32,831	-758.22
21001 Fund Balance	0	1,024,000	895,690	114.33
Total Current Fund Balance	79,696	1,272,931	862,859	147.52

Preliminary Unaudited Stmt of Operations

	May 2011 Actuals	YTD 10-11 Actuals	Budget	Percent Budget
Total RP Miscellaneous Cou				
Total Dues Income-Net	0	0	0	*
32001 Registrations	0	3,795	0	*
32010 Legal Span On-line	0	598	0	*
32205 Compact Disc	95	760	0	*
Other Income	95	5,153	0	*
Total Revenues	95	5,153	0	*
36998 Credit Card Fees	6	13	0	*
75102 1st Class & Misc Mai	0	3	0	*
75401 Express Mail	5	41	0	*
86432 Time Taping Editing	0	1,765	0	*
Total Operating Expenses	11	1,822	0	*
86543 Graphics & Art	24	474	0	*
86623 Registrars	242	1,298	0	*
Total TFB Support Services	266	1,772	0	*
Total Expenses	277	3,594	0	*
Net Operations	-182	1,559	0	*
Total Current Fund Balance	-182	1,559	0	*

Preliminary Unaudited Stmt of Operations

C1205 Sun Sea and CLE

	May 2011 Actuals	YTD 10-11 Actuals	Budget	Percent Budget
Total Dues Income-Net	0	0	0	*
Other Income	0	0	0	*
Total Revenues	0	0	0	*
36998 Credit Card Fees	3	3	0	*
Total Operating Expenses	3	3	0	*
86543 Graphics & Art	24	389	0	*
86623 Registrars	242	1,287	0	*
Total TFB Support Services	266	1,676	0	*
Total Expenses	269	1,679	0	*
Net Operations	-269	-1,679	0	*
Total Current Fund Balance	-269	-1,679	0	*

C1226 Fire on the Coast

	May 2011 Actuals	YTD 10-11 Actuals	Budget	Percent Budget
Total Dues Income-Net	0	0	0	*
32001 Registrations	0	3,795	0	*
32010 Legal Span On-line	0	53	0	*
32205 Compact Disc	95	760	0	*
Other Income	95	4,608	0	*
Total Revenues	95	4,608	0	*
36998 Credit Card Fees	3	10	0	*
75102 1st Class & Misc Mai	0	3	0	*
75401 Express Mail	5	32	0	*
86432 Time Taping Editing	0	175	0	*
Total Operating Expenses	8	220	0	*
86623 Registrars	0	11	0	*
Total TFB Support Services	0	11	0	*
Total Expenses	8	231	0	*
Net Operations	87	4,377	0	*
Total Current Fund Balance	87	4,377	0	*

C1240 Time Out/Tampa A/V

	May 2011 Actuals	YTD 10-11 Actuals	Budget	Percent Budget
Total Dues Income-Net	0	0	0	*
32010 Legal Span On-line	0	545	0	*
Other Income	0	545	0	*
Total Revenues	0	545	0	*
75401 Express Mail	0	9	0	*
86432 Time Taping Editing	0	1,590	0	*
Total Operating Expenses	0	1,599	0	*
86543 Graphics & Art	0	85	0	*
Total TFB Support Services	0	85	0	*
Total Expenses	0	1,684	0	*
Net Operations	0	-1,139	0	*
Total Current Fund Balance	0	-1,139	0	*

	May 2011 Actuals	YTD 10-11 Actuals	Budget	Percent Budget
Total Trust Officer Liaiso				
Total Dues Income-Net	0	0	0	*
32001 Registrations	0	0	107,250	0.00
32301 Course Materials	0	0	500	0.00
35101 Exhibit Fees	0	0	9,600	0.00
35201 Sponsorships	0	0	65,750	0.00
Other Income	0	0	183,100	0.00
Total Revenues	0	0	183,100	0.00
36998 Credit Card Fees	892	1,895	1,020	185.78
51101 Employee Travel	0	0	2,698	0.00
61201 Equipment Rental	0	0	10,000	0.00
81411 Promotional Printing	0	0	500	0.00
81412 Promotional Mailing	0	0	5,500	0.00
84001 Postage	0	0	200	0.00
84002 Printing	2	2	1,500	0.13
84009 Supplies	0	0	200	0.00
84061 Reception	0	0	65,000	0.00
84062 Luncheons	0	0	30,000	0.00
84064 Golf Tourn Expenses	0	0	11,000	0.00
88211 Steering Committee	0	0	1,500	0.00
88230 Speakers Expense	0	0	3,000	0.00
88241 Outline Prt-Inhouse	5,605	5,605	4,000	140.13
88252 Course Credit Fee	0	350	150	233.33
88260 Meeting Parking	0	716	0	*
88265 Refreshment Breaks	0	0	7,500	0.00
88269 Breakfast	0	0	28,000	0.00
Total Operating Expenses	6,499	8,568	171,768	4.99
86532 Advertising News	1,614	1,614	2,158	74.79
86543 Graphics & Art	219	864	1,115	77.49
Total TFB Support Services	1,833	2,478	3,273	75.71
Total Expenses	8,332	11,046	175,041	6.31
Net Operations	-8,332	-11,046	8,059	-137.06
Total Current Fund Balance	-8,332	-11,046	8,059	-137.06

Trust Officer Liaison Conf

	May 2011 Actuals	YTD 10-11 Actuals	Budget	Percent Budget
Total Dues Income-Net	0	0	0	*
32001 Registrations	0	0	107,250	0.00
32301 Course Materials	0	0	500	0.00
35101 Exhibit Fees	0	0	9,600	0.00
35201 Sponsorships	0	0	65,750	0.00
Other Income	0	0	183,100	0.00
Total Revenues	0	0	183,100	0.00
36998 Credit Card Fees	0	0	1,020	0.00
51101 Employee Travel	0	0	2,698	0.00
61201 Equipment Rental	0	0	10,000	0.00
81411 Promotional Printing	0	0	500	0.00
81412 Promotional Mailing	0	0	5,500	0.00
84001 Postage	0	0	200	0.00
84002 Printing	2	2	1,500	0.13
84009 Supplies	0	0	200	0.00
84061 Reception	0	0	65,000	0.00
84062 Luncheons	0	0	30,000	0.00
84064 Golf Tourn Expenses	0	0	11,000	0.00
88211 Steering Committee	0	0	1,500	0.00
88230 Speakers Expense	0	0	3,000	0.00
88241 Outline Prt-Inhouse	3,075	3,075	4,000	76.88
88252 Course Credit Fee	0	200	150	133.33
88265 Refreshment Breaks	0	0	7,500	0.00
88269 Breakfast	0	0	28,000	0.00
Total Operating Expenses	3,077	3,277	171,768	1.91
86532 Advertising News	0	0	2,158	0.00
86543 Graphics & Art	0	0	1,115	0.00
Total TFB Support Services	0	0	3,273	0.00
Total Expenses	3,077	3,277	175,041	1.87
Net Operations	-3,077	-3,277	8,059	-40.66
Total Current Fund Balance	-3,077	-3,277	8,059	-40.66

C1210 2011 RPTOLC

	May 2011 Actuals	YTD 10-11 Actuals	Budget	Percent Budget
Total Dues Income-Net	0	0	0	*
Other Income	0	0	0	*
Total Revenues	0	0	0	*
36998 Credit Card Fees	892	1,895	0	*
88241 Outline Prt-Inhouse	2,530	2,530	0	*
88252 Course Credit Fee	0	150	0	*
88260 Meeting Parking	0	716	0	*
Total Operating Expenses	3,422	5,291	0	*
86532 Advertising News	1,614	1,614	0	*
86543 Graphics & Art	219	864	0	*
Total TFB Support Services	1,833	2,478	0	*
Total Expenses	5,255	7,769	0	*
Net Operations	-5,255	-7,769	0	*
Total Current Fund Balance	-5,255	-7,769	0	*

Preliminary Unaudited Stmt of Operations

	May 2011 Actuals	YTD 10-11 Actuals	Budget	Percent Budget
Total Legislative Update				
Total Dues Income-Net	0	0	0	*
32006 Live Web Cast	0	11,500	8,750	131.43
32010 Legal Span On-line	0	2,177	750	290.27
32205 Compact Disc	235	15,510	28,800	53.85
32207 DVD	235	5,875	10,000	58.75
32301 Course Materials	100	2,500	3,000	83.33
35101 Exhibit Fees	0	12,500	15,000	83.33
Other Income	570	50,062	66,300	75.51
Total Revenues	570	50,062	66,300	75.51
36998 Credit Card Fees	65	661	184	359.24
51101 Employee Travel	0	993	1,467	67.69
61201 Equipment Rental	0	9,200	10,000	92.00
75102 1st Class & Misc Mai	0	34	300	11.33
75401 Express Mail	9	722	1,500	48.13
81411 Promotional Printing	0	0	1,000	0.00
81412 Promotional Mailing	0	620	3,500	17.71
84001 Postage	0	49	1,500	3.27
84002 Printing	0	0	700	0.00
84012 Registration Support	0	5,079	3,000	169.30
84061 Reception	0	494	2,500	19.76
84062 Luncheons	0	23,333	30,000	77.78
84254 Speaker Gifts	0	1,591	2,000	79.55
84258 Web Services	0	5,025	6,000	83.75
86432 Time Taping Editing	0	4,230	4,500	94.00
88230 Speakers Expense	0	1,319	4,000	32.98
88233 Speakers Hotel	0	4,062	3,700	109.78
88239 Speakers Other Exp	0	24	0	*
88241 Outline Prt-Inhouse	0	92	3,000	3.07
88242 Outline Prt-Contract	0	11,403	13,000	87.72
88265 Refreshment Breaks	0	4,309	5,500	78.35
88269 Breakfast	0	7,328	10,000	73.28
88281 A/V Ctr Dup/Prod	0	0	1,600	0.00
Total Operating Expenses	74	80,568	108,951	73.95
86532 Advertising News	0	1,614	800	201.75
86543 Graphics & Art	0	231	1,285	17.98
86623 Registrars	0	0	2,500	0.00
Total TFB Support Services	0	1,845	4,585	40.24

	May 2011 Actuals	YTD 10-11 Actuals	Budget	Percent Budget
Total Legislative Update				
Total Expenses	74	82,413	113,536	72.59
Net Operations	496	-32,351	-47,236	68.49
Total Current Fund Balance	496	-32,351	-47,236	68.49

	May 2011 Actuals	YTD 10-11 Actuals	Budget	Percent Budget
Legislative Update				
Total Dues Income-Net	0	0	0	*
32006 Live Web Cast	0	0	8,750	0.00
32010 Legal Span On-line	0	0	750	0.00
32205 Compact Disc	0	0	28,800	0.00
32207 DVD	0	0	10,000	0.00
32301 Course Materials	0	0	3,000	0.00
35101 Exhibit Fees	0	12,500	15,000	83.33
Other Income	0	12,500	66,300	18.85
Total Revenues	0	12,500	66,300	18.85
36998 Credit Card Fees	59	191	184	103.80
51101 Employee Travel	0	255	1,467	17.38
61201 Equipment Rental	0	9,200	10,000	92.00
75102 1st Class & Misc Mai	0	0	300	0.00
75401 Express Mail	0	0	1,500	0.00
81411 Promotional Printing	0	0	1,000	0.00
81412 Promotional Mailing	0	620	3,500	17.71
84001 Postage	0	49	1,500	3.27
84002 Printing	0	0	700	0.00
84012 Registration Support	0	5,079	3,000	169.30
84061 Reception	0	494	2,500	19.76
84062 Luncheons	0	23,333	30,000	77.78
84254 Speaker Gifts	0	1,591	2,000	79.55
84258 Web Services	0	0	6,000	0.00
86432 Time Taping Editing	0	0	4,500	0.00
88230 Speakers Expense	0	326	4,000	8.15
88233 Speakers Hotel	0	0	3,700	0.00
88241 Outline Prt-Inhouse	0	0	3,000	0.00
88242 Outline Prt-Contract	0	11,403	13,000	87.72
88265 Refreshment Breaks	0	4,309	5,500	78.35
88269 Breakfast	0	7,328	10,000	73.28
88281 A/V Ctr Dup/Prod	0	0	1,600	0.00
Total Operating Expenses	59	64,178	108,951	58.91
86532 Advertising News	0	0	800	0.00
86543 Graphics & Art	0	61	1,285	4.75
86623 Registrars	0	0	2,500	0.00
Total TFB Support Services	0	61	4,585	1.33
Total Expenses	59		113,536	56.58

Legislative Update

	May 2011 Actuals	YTD 10-11 Actuals	Budget	Percent Budget
Net Operations	-59	-51,739	-47,236	109.53
Total Current Fund Balance	-59	-51,739	-47,236	109.53

Preliminary Unaudited Stmt of Operations

	May 2011 Actuals	YTD 10-11 Actuals	Budget	Percent Budget
C1037 2009 Legislative Upd				
Total Dues Income-Net	0	0	0	*
32010 Legal Span On-line	0	1,336	0	*
32205 Compact Disc	0	2,115	0	*
32207 DVD	0	705	0	*
Other Income	0	4,156	0	*
Total Revenues	0	4,156	0	*
36998 Credit Card Fees	0	43	0	*
75102 1st Class & Misc Mai	0	5	0	*
75401 Express Mail	0	43	0	*
Total Operating Expenses	0	91	0	*
Total TFB Support Services	0	0	0	*
Total Expenses	0	91	0	*
Net Operations	0	4,065	0	*
Total Current Fund Balance	0	4,065	0	*

Preliminary Unaudited Stmt of Operations

	May 2011 Actuals	YTD 10-11 Actuals	Budget	Percent Budget
C1216 2010 Legislative Upd				
Total Dues Income-Net	0	0	0	*
32006 Live Web Cast	0	11,500	0	*
32010 Legal Span On-line	0	841	0	*
32205 Compact Disc	235	13,395	0	*
32207 DVD	235	5,170	0	*
32301 Course Materials	100	2,500	0	*
Other Income	570	33,406	0	*
Total Revenues	570	33,406	0	*
36998 Credit Card Fees	6	427	0	*
51101 Employee Travel	0	738	0	*
75102 1st Class & Misc Mai	0	29	0	*
75401 Express Mail	9	679	0	*
84258 Web Services	0	5,025	0	*
86432 Time Taping Editing	0	4,230	0	*
88230 Speakers Expense	0	993	0	*
88233 Speakers Hotel	0	4,062	0	*
88239 Speakers Other Exp	0	24	0	*
88241 Outline Prt-Inhouse	0	92	0	*
Total Operating Expenses	15	16,299	0	*
86532 Advertising News	0	1,614	0	*
86543 Graphics & Art	0	170	0	*
Total TFB Support Services	0	1,784	0	*
Total Expenses	15	18,083	0	*
Net Operations	555	15,323	0	*
Total Current Fund Balance	555	15,323	0	*

RPPTL Convention

	May 2011 Actuals	YTD 10-11 Actuals	Budget	Percent Budget
Total Dues Income-Net	0	0	0	*
32001 Registrations	234	327	50,000	0.65
35101 Exhibit Fees	0	0	13,000	0.00
35201 Sponsorships	0	0	25,000	0.00
Other Income	234	327	88,000	0.37
Total Revenues	234	327	88,000	0.37
36998 Credit Card Fees	317	694	1,020	68.04
51101 Employee Travel	0	468	1,352	34.62
61201 Equipment Rental	0	125	0	*
81411 Promotional Printing	0	0	500	0.00
81412 Promotional Mailing	0	0	5,000	0.00
84001 Postage	0	0	1,000	0.00
84002 Printing	68	68	250	27.20
84110 Exhibitor Fees	0	0	250	0.00
84115 Entertainment	1,590	1,590	20,000	7.95
84253 Sleeping Rooms	0	0	2,500	0.00
88262 Meeting Meals	5,260	1,952	84,000	2.32
Total Operating Expenses	7,235	4,897	115,872	4.23
86543 Graphics & Art	73	73	898	8.13
Total TFB Support Services	73	73	898	8.13
Total Expenses	7,308	4,970	116,770	4.26
Net Operations	-7,074	-4,643	-28,770	16.14
Total Current Fund Balance	-7,074	-4,643	-28,770	16.14

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE
Date Form Received _____

GENERAL INFORMATION

Submitted By (List name of the section, division, committee, bar group or individual)

Steven H. Mezer, Chair, Condominium and Planned Development Committee of the Real Property Probate & Trust Law Section

Address (List street address and phone number)

c/o Bush Ross, P.A., 1801 North Highland Avenue, Tampa, Florida 33602-2656, Telephone (813) 204-6492

Position Level Florida Bar or Section / Division / Committee – or both, if requested)

Condominium and Planned Development Committee, RPPTL Section, The Florida Bar

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. Every request should be accompanied by a copy of any existing or proposed legislation, or a detailed presentation of the matter at issue. Contact the Governmental Affairs office with questions.

If Applicable, List The Following:

(Bill or PCB #) (Sponsor)

_____ _____

_____ _____

Indicate Position: ☑ Support ☐ Oppose ☐ Technical or Other Non-Partisan Assistance

Proposed Wording of Position for Official Publication:

To extend the sunset of the Distressed Condominium Relief Act until July 1, 2017, through amendment to Section 718.707, F.S.; to provide an effective date.

Reasons For Proposed Advocacy:

The Distressed Condominium Relief Act was passed in 2010 to encourage absorption of the large inventory of unsold condominiu ng from the collapse of the real estate market. With the Florida real estate nuing to languish and recovery several years away, there is a need to extend the applicability of the Distressed Condominium Relief

Act beyond its original sunset of July 1, 2012. Extension of the sunset until July 1, 2017 will enable the conveyance of condominium units to third party purchasers and provide economic stability and future growth to the condominium market.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section/division/committee positions on this issue, to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position

(Bar / Section / Division / Committee)	(Support or Oppose)	(Date)
_____	_____	_____

Others (Attach list if more than one)

(Bar / Section / Division / Committee)	(Support or Oppose)	(Date)
_____	_____	_____

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

A request for action on a legislative position must be circulated to all divisions, sections and committees that might be interested in the issue. The Legislation Committee and Board of Governors may delay final action on a request in the absence of any responses from such groups. Please include all responses with this form.

Referrals

1.
(Name of Group or Organization) (Support, Oppose or No Position)

NONE

2.
(Name of Group or Organization) (Support, Oppose or No Position)

NONE

3.
(Name of Group or Organization) (Support, Oppose or No Position)

NONE

CONTACTS

Board & Legislation Committee Appearance
(List name, address and phone number)

Margaret A. Rolando, Shutts & Bowen, P.A., 201 S. Biscayne Blvd., 1500 Miami Center, Miami, FL 33131, (305) 358-6300

Barry F. Spivey, Spivey & Fallon, P.A., 1515 Ringling Blvd., Suite 885, Sarasota, FL 34236, (941) 840-1991

Robert S. Freedman, Carlton Fields, P.A., 4221 W. Boy Scout Blvd., Suite 1000, Tampa, FL 33607, (813) 223-7000

Steven H. Mezer, Bush Ross, P.A., 1801 North Highland Avenue, Tampa, Florida 33602-2656, Telephone (813) 204-6492

Peter Dunbar, Pennington, Moore, et al., P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533

Martha J. Edenfield, Pennington, Moore, et al., P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533

Appearances Before Legislators
(List name and phone number of those appearing before House/Senate Committees)

SAME

Meetings With Legislators/Staff
(List name and phone number of those having direct contact with legislators)

SAME

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request – which may involve a separate appearance before the Legislation Committee unless otherwise advised.

For information or assistance, please contact the Governmental Affairs Office of The Florida Bar at 800-342-8060, extension 5662.

Revised 080915

An act relating to condominiums; amending s. 718.707, F.S.; providing for the exension of the sunset date of the Distressed Condominium Relief Act; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 718.707, Florida Statutes, is amended to read:

A person acquiring condominium parcels may not be classified as a bulk assignee or bulk buyer unless the condominium parcels were acquired before July 1, 2017~~2012~~. The date of such acquisition shall be determined by the date of recording of a deed or other instrument of conveyance for such parcels in the public records of the county in which the condominium is located, or by the date of issuance of a certificate of title in a foreclosure proceeding with respect to such condominium parcels.

Section 2. This act shall take effect upon becoming a law.

WHITE PAPER

PROPOSED AMENDMENT TO SECTION 718.707, FLORIDA STATUTES, EXTENDING THE SUNSET OF THE DISTRESSED CONDOMINIUM RELIEF ACT

I. SUMMARY

In 2010, the Florida Legislature passed the Distressed Condominium Relief Act, Section 718.701 *et. seq.*, Florida Statutes ("Relief Act"). The express purpose of the Relief Act was to encourage absorption of the large inventory of unsold condominium units resulting from the collapse of the real estate market. The Relief Act contained a sunset clause of July 1, 2012. Given the continued stagnant economic circumstances in the Florida real estate market and the limited amount of time that the Relief Act has been available for use with distressed condominiums, an extension of the sunset until July 1, 2017 is desired.

II. CURRENT SITUATION

The Florida real estate market continues to languish and it will be several years until recovery is firmly underway. In the interim, there are a plethora of distressed condominium projects that require new investment and leadership to be repositioned to benefit existing owners. Developers are reluctant to invest in distressed condominium projects without adequate protection from unknown liabilities. Accordingly, the extension of the timeframe for the Relief Act will extend the impetus for investment in distressed condominium projects.

III. EFFECT OF PROPOSED CHANGE

The proposed amendment to Section 718.707, F.S., would extend the sunset of the Relief Act from July 1, 2012, until July 1, 2017.

IV. ANALYSIS

The extension of the sunset of the Relief Act until July 1, 2017, will provide lenders, bulk purchasers, unit owners and associations with much needed additional time to resolve issues involving distressed condominiums, thereby enabling the conveyance of condominium units to third party purchasers and providing economic stability and future growth to the condominium market.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal does not have any fiscal impact upon state or local governments.

VI. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The extension of the sunset will provide the private sector with an impetus for investment in distressed condominium projects providing additional security for existing condominium property owners in distressed condominium projects.

VII. CONSTITUTIONAL ISSUES

There are no constitutional issues raised by this proposal.

VIII. OTHER INTERESTED PARTIES

None are known at this time.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE
Date Form Received _____

GENERAL INFORMATION

Submitted By (List name of the section, division, committee, bar group or individual)

Steven H. Mezer, Chair, Condominium and Planned Development Committee of the Real Property Probate & Trust Law Section

Address (List street address and phone number)

c/o Bush Ross, P.A., 1801 North Highland Avenue, Tampa, Florida 33602-2656, Telephone (813) 204-6492

Position Level Florida Bar or Section / Division / Committee – or both, if requested)

Condominium and Planned Development Committee, RPPTL Section, The Florida Bar

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. Every request should be accompanied by a copy of any existing or proposed legislation, or a detailed presentation of the matter at issue. Contact the Governmental Affairs office with questions.

If Applicable, List The Following:

(Bill or PCB #) (Sponsor)

_____ _____

_____ _____

Indicate Position: ☑ Support ☐ Oppose ☐ Technical or Other Non-Partisan Assistance

Proposed Wording of Position for Official Publication:

To provide guidance and regulation respecting the creation of a condominium within a condominium unit, through creation of Section 718.406, F.S.; to provide an effective date.

Reasons For Proposed Advocacy:

In 2007, amendments to the Florida Condominium Act created the ability for a condominium to be created within a condominium u[illegible]mendments did not provide clarity in the relationship between the primary a[illegible] condominium regimes. Section 718.406, F.S. is proposed to address the relationship between the different regimes and

various other provisions of the Florida Condominium Act.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section/division/committee positions on this issue, to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position

(Bar / Section / Division / Committee)	(Support or Oppose)	(Date)
_____	_____	_____

Others (Attach list if more than one)

(Bar / Section / Division / Committee)	(Support or Oppose)	(Date)
_____	_____	_____

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

A request for action on a legislative position must be circulated to all divisions, sections and committees that might be interested in the issue. The Legislation Committee and Board of Governors may delay final action on a request in the absence of any responses from such groups. Please include all responses with this form.

Referrals

1.
(Name of Group or Organization) (Support, Oppose or No Position)

Division of Florida Condominiums, Timeshares and Mobile Homes, Department of Business and Professional Regulation

2.
(Name of Group or Organization) (Support, Oppose or No Position)

NONE

3.
(Name of Group or Organization) (Support, Oppose or No Position)

NONE

Board & Legislation Committee Appearance

(List name, address and phone number)

Margaret A. Rolando, Shutts & Bowen, P.A., 201 S. Biscayne Blvd., 1500 Miami Center, Miami, FL 33131, (305) 358-6300

Barry F. Spivey, Spivey & Fallon, P.A., 1515 Ringling Blvd., Suite 885, Sarasota, FL 34236, (941) 840-1991

Robert S. Freedman, Carlton Fields, P.A., 4221 W. Boy Scout Blvd., Suite 1000, Tampa, FL 33607, (813) 223-7000

Steven H. Mezer, Bush Ross, P.A., 1801 North Highland Avenue, Tampa, Florida 33602-2656, Telephone (813) 204-6492

Peter Dunbar, Pennington, Moore, et al., P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533

Martha J. Edenfield, Pennington, Moore, et al., P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533

Appearances Before Legislators
(List name and phone number of those appearing before House/Senate Committees)

SAME

Meetings With Legislators/Staff
(List name and phone number of those having direct contact with legislators)

SAME

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For information or assistance, please contact the Governmental Affairs Office of The Florida Bar at 800-342-8060, extension 5662.

Revised 080915

An act relating to condominiums; creating s. 718.406, F.S.; creating requirements pertaining to condominiums created within condominium units; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 718.406, Florida Statutes, is created to read:

Condominiums created in condominium units -

(1) When a condominium is created in a condominium parcel, the following definitions shall apply:

(a) “Primary condominium” means a condominium that is not a secondary condominium but contains one or more subdivided units.

(b) “Primary condominium association” means the association responsible for the operation of a primary condominium.

(c) “Primary condominium declaration” means the declaration of condominium of a primary condominium.

(d) “Secondary condominium” means one or more condominium parcels which have been submitted to condominium ownership pursuant to a secondary condominium declaration.

(e) “Secondary condominium association” means the association responsible for the operation of a secondary condominium.

(f) “Secondary condominium declaration” means the declaration of condominium of a secondary condominium.

(g) “Subdivided unit” means a condominium parcel in a primary condominium submitted to condominium ownership pursuant to a secondary condominium declaration.

(2) Unless otherwise provided in the primary condominium declaration, if a condominium parcel is a subdivided unit, the secondary condominium association governing the secondary condominium containing the subdivided unit shall act on behalf of the unit owners of units in the subdivided unit and shall exercise all rights of the unit owners of units in the subdivided unit in the primary condominium association other than the right of possession of such unit. The designated representative of the secondary condominium association shall cast the vote of the subdivided unit in the primary condominium association, and if no person is designated by the secondary condominium association to cast such vote, the vote shall be cast by the president of the secondary condominium association or the designee of the president.

(3) Unless otherwise provided in the primary condominium declaration, if a condominium parcel in the primary condominium is being submitted to condominium ownership, then the consent of the primary condominium association responsible for the operation of the condominium containing such condominium parcel shall not be required to create the secondary condominium on such condominium parcel.

(4) If the primary condominium declaration requires the consent of the primary condominium association to create a secondary condominium in a condominium parcel within the primary condominium, then, unless otherwise provided in the primary condominium declaration, only the approval of a majority of the board of administration of the primary condominium association shall be required for such consent. Unless

otherwise provided in the primary condominium declaration, neither consent of the unit owners of, nor the lienholders on, any condominium parcels in the primary condominium that are not subdivided units shall be required to approve the secondary condominium declaration. Approval is required for the execution of a secondary condominium declaration by the owner of the subdivided unit and any lienholder on the subdivided unit.

(5) An owner of a condominium parcel in a subdivided unit shall be subject to the provisions of both the primary condominium declaration and the secondary condominium declaration.

(6) The primary condominium association may provide insurance required by s. 718.111(11) for common elements and other improvements within the secondary condominium if the primary condominium declaration permits the primary condominium association to provide such insurance for the benefit of the condominium property included in the subdivided unit, in lieu of such insurance being provided by the secondary condominium association.

(7) Unless otherwise provided in the primary condominium declaration, the board of administration of the primary condominium association may adopt hurricane shutter or hurricane protection specifications for each building within which subdivided units are located and governing any subdivided units in the primary condominium.

(8) Any unit owner of, or holder of a first mortgage on, a unit in a secondary condominium may register such unit owner's or mortgagee's interest in the secondary condominium with the primary condominium association by written notice to the primary condominium association. Once registered, the primary condominium association must

provide written notice to such unit owner and his or her mortgagee at least 30 days in advance of instituting any foreclosure action against the subdivided unit in which the unit owner or his and her mortgagee holds an interest for failure to pay any assessments or other amounts due to the primary condominium association. A foreclosure action against a subdivided unit is not effective without an affidavit indicating that written notice of such foreclosure was timely sent to the names and addresses of unit owners and first mortgagees registered with the primary condominium association pursuant to this subsection. The registered unit owner or mortgagee has a right to pay the proportionate amount of the delinquent assessment attributable to the unit in which the registered unit owner or mortgagee holds an interest. Upon such payment, the primary condominium association shall release the lien of the primary condominium association of record against such unit. Alternatively, such registered unit owner or mortgagee may pay the amount of all delinquent assessments attributed to the subdivided unit and seek reimbursement for all such amounts paid and all costs incurred from the secondary condominium association including, without limitation, the costs of collection other than the share allocable to the unit on behalf of which such payment was made.

(9) In the event of a conflict between the primary condominium declaration and the secondary condominium declaration, the primary condominium declaration shall control.

(10) All common expenses due to the primary condominium association with respect to a subdivided unit shall be a common expense of the secondary condominium

association and collected by the secondary condominium association from its members and paid to the primary condominium association.

Section 2. This act shall take effect upon becoming a law.

WHITE PAPER

PROPOSED CREATION OF SECTION 718.406, FLORIDA STATUTES, DEFINING CONDOMINIUMS CREATED WITHIN CONDOMINIUM UNITS

I. SUMMARY

In 2007, Section 718.103(18) of the Florida Condominium Act, Chapter 718, Florida Statutes ("Act") was amended to expand the definition of "land" to clarify that a condominium could be created within a condominium unit. A single structure could, therefore, consist of a master or "primary" condominium and one or more sub-condominiums or "secondary" condominiums. While the change to the definition of land to add a condominium unit was generally welcomed by condominium attorneys, the shorthand manner of effecting this change resulted in uncertainty in its impact on other provisions of the Act.

II. CURRENT SITUATION

There is a need for statutory guidance and regulation respecting the creation of a condominium within a condominium unit (defined in the proposed legislation as the creation of a "secondary condominium" within a "primary condominium"). At present, developers may create a condominium within a condominium unit, as specifically authorized by Section 718.103(18) of the Act, but various other legal and operational aspects of those newly-created sub-condominium(s) were never addressed by the 2007 modification to Section 718.103(18) of the Act. As such, numerous unanswered issues exist in the interface between the primary condominium and the secondary condominium. The proposed legislation seeks to address these issues.

III. EFFECT OF PROPOSED CHANGE

The proposed new Section 718.406 of the Act would provide guidance to developers and their counsel where there is an intent to create one or more "secondary condominiums" out of a "primary condominium." The proposal addresses the relationship between the primary condominium and the secondary condominium units. Many operating aspects of a "secondary condominium" are currently open to interpretation and the proposed legislation will resolve those matters.

The proposed legislation would provide important guidance and be beneficial for condominium unit purchasers and the business interests of developers creating a condominium within a condor ; follows:

(a) Establishing authority for owners of a “primary condominium” and the units therein to act as designated representatives for and on behalf of owners of such subdivided units in the exercise of all rights of the owners of subdivided units (except for the right of possession), unless otherwise provided in the primary condominium’s declaration of condominium.

(b) Providing for the relationship between the board of directors and/or the owners of the primary condominium, as compared to those same parties of the secondary condominium, and affirming certain beneficial and consentual rights of the affected mortgagees;

(c) Providing a mechanism by which assessments are both levied and collected by the primary condominium association and the secondary condominium association and as between the owners of secondary condominium units and their related primary unit;

(d) Providing that an owner of a subdivided unit shall be subject to the provisions of both the primary and secondary condominium declarations;

(e) Clarifying when “consents” may be needed (from owners and mortgagees) regarding the creation of a secondary condominium;

(f) Addressing the control of a primary condominium association to dictate specifications for all hurricane shutters or other protection of the building(s), unless otherwise set forth in the primary condominium declaration; and

(g) Establishing the insurance requirements and obligations of condominium associations managing and operating both primary condominiums and secondary condominiums, consistent with Section 718.111(11) of the Act.

IV. **ANALYSIS**

Specific section-by-section analysis:

(a) Section 718.406(1) provides new definitions for the "primary condominium" and "secondary condominium" and their respective declarations of condominium and condominium associations.

(b) Section 718.406(2) provides that the secondary association shall be treated as the "owner" and/or designated representative of the subdivided unit with respect to the primary condominium and the primary condominium association.

(c) Section 718.406(3) provides that, unless the declaration of condominium of the primary condominium provides otherwise, the consent of the

primary condominium unit owners to the creation of the secondary condominium is not required.

(d) Section 718.406(4) provides that where the consent of the primary condominium association is required to create a secondary condominium, unless the primary condominium declaration provides otherwise, only the approval of a majority of the board of directors of the primary condominium association shall be required.

(e) Section 718.406(5) provides that a unit owner in a secondary condominium is governed by both the declaration of condominium for the primary condominium and the secondary condominium.

(f) Section 718.406(6) provides that the primary condominium may furnish insurance for both the primary and secondary condominium.

(g) Section 718.406(7) permits the board of directors of the primary condominium association to adopt hurricane shutter specifications for both the primary and secondary condominium.

(h) Section 718.406(8) provides that an owner or mortgagee of a unit in a secondary condominium must register with the primary condominium to receive notices of delinquencies of or foreclosure against the secondary condominium and release of the unit in the secondary condominium from any such delinquency or foreclosed by payment of the unit's proportional share of the common elements in the secondary condominium.

(i) Section 718.406(9) provides that with respect to any conflict between the primary and secondary condominium declarations, the primary condominium declaration controls.

(j) Section 718.406(10) provides that common expenses due to the primary condominium from the secondary condominium are a common expense of the secondary condominium

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal does not have any fiscal impact upon state or local governments.

VI. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The clarity established by this new legislation will enable consumers to understand more clearly the nature of their investment and intended expectation of the type of unit that they are acquiring within a particular real estate project.

VII. CONSTITUTIONAL ISSUES

There are no constitutional issues raised by this proposal.

VIII. **OTHER INTERESTED PARTIES**

Division of Florida Condominiums, Timeshares, and Mobile Homes, Department of Business and Professional Regulation.

WHITE PAPER

PROPOSED REVISIONS TO CHAPTER 718, FLORIDA STATUTES REGARDING NONRESIDENTIAL CONDOMINIUMS

I. SUMMARY

Chapter 718, Florida Statutes (the “Act”) serves three primary functions – providing the means for creating a condominium regime, detailing the procedures for the operation of the condominium property and condominium association, and protecting the right of purchasers of condominium units. Certain parts of the Act are clearly limited to residential condominiums - Part V dealing with developer disclosure in the sale of residential condominium units and Part VI dealing with conversions of residential rental projects to condominium ownership – but various provisions do not specify applicability only to residential condominiums, even though application in a nonresidential context does not make sense. The proposed legislation would clarify that various operative provisions of the Act do not apply to nonresidential condominiums.

II. CURRENT SITUATION

Part I of the Act establishes, for both residential and nonresidential condominiums, the manner of creation and operation of a condominium regime. In almost all cases, Part I does not distinguish between residential and nonresidential condominiums but its consumer protection aspects do not fit well with the operation of nonresidential condominiums. Rather, these consumer aspects serve merely as an unwarranted straightjacket impeding the operation of a commercial venture. In addition, certain provisions involving the Division of Florida Condominiums, Timeshares and Mobile Homes ("Division") are inconsistent with the Division's jurisdiction limited to residential condominiums.

III. EFFECT OF PROPOSED CHANGE

The proposed legislation would eliminate inconsistencies involved in the interpretation of the Division’s jurisdiction over nonresidential condominiums and certain consumer-oriented operational requirements that adversely affect the operation of nonresidential condominiums. These changes are similar in many instances to the existing exclusions for timeshare regimes.

IV. SECTION BY SECTION ANALYSIS

1. Section 718.103(21) provides a new definition of a “nonresidential condominium.” This definition is based on the types of condominiums excluded from the definition of residential condominiums, and is therefore consistent in capturing all condominiums that are not included in those defined as "residential condominiums."

2. Section 718.112(2)(a)2. provides that the board of directors of the condominium association can only obtain advice from the Division if the condominium is a residential condominium.

3. Section 718.112(2)(b)2. provides that general proxies cannot be used for voting in a nonresidential condominium.

4. Section 718.112(2)(d)1. eliminates restrictions on directors of the association in a nonresidential condominium as to term limits and the ability of co-owners to serve on the board.

5. Section 718.112(2)(d)3. provides that the requirements for written ballots or voting machines for voting do not apply to nonresidential condominiums.

6. Section 718.112(2)(d)3.b. eliminates the requirement for association directors to submit a certification of knowledge of the governing documents and condominium law in nonresidential condominiums.

7. Section 718.112(2)(d)4. is amended to correct a typographical error.

8. Section 718.112(2)(d)9. provides that general proxies may used for association meetings in a nonresidential condominium, and also provides more extensive use of limited proxies in association meetings in a nonresidential condominium.

9. The last paragraph of Section 718.112(2)(d) provides that the declaration of condominium in a nonresidential condominium may contain alternative forms of voting and election procedures, in order to provide flexibility in structuring nonresidential condominium projects with a mix of different commercial uses.

10. Section 718.112(2)(k) provides that the mandatory nonbinding arbitration provided by the Division pertains only to residential condominiums.

11. Section 718.112(2)(l) provides that fire sprinkler requirements apply only to residential condominiums. Nonresidential condominiums would still be subject to sprinkler requirements of local governments. The filing with the Division for association votes for any opt-out from retrofitting has been clarified to limit filings to residential condominiums.

12. Section 718.113(5) provides that the association process of adopting hurricane shutter requirements applies only to residential condominiums.

13. Section 718.1255(6) provides that the dispute resolution procedure operated by the Division does not apply to nonresidential condominiums.

14. Section 718.1256 has been clarified so that only residential condominiums are classified as residential property for the purpose of property and casualty insurance risk classification. As presently existing, this section could be interpreted to require classification of residential property for nonresidential condominiums.

15. Section 718.403 provides that its phasing requirements, in most instances, only apply to nonresidential condominiums.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal does not have a fiscal impact on state or local governments.

VI. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The passage of these proposals will improve operation of nonresidential condominium associations, thereby facilitating the expansion of use of nonresidential condominiums for development of commercial properties.

VII. CONSTITUTIONAL ISSUES

There are no known constitutional issues resulting from this proposal.

VIII. OTHER INTERESTED PARTIES

Division of Florida Condominiums, Timeshares, and Mobile Homes, Department of Business and Professional Regulation.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE
Date Form Received _____

GENERAL INFORMATION

Submitted By (List name of the section, division, committee, bar group or individual)

Steven H. Mezer, Chair, Condominium and Planned Development Committee of the Real Property Probate & Trust Law Section

Address (List street address and phone number)

c/o Bush Ross, P.A., 1801 North Highland Avenue, Tampa, Florida 33602-2656, Telephone (813) 204-6492

Position Level Florida Bar or Section / Division / Committee – or both, if requested)

Condominium and Planned Development Committee, RPPTL Section, The Florida Bar

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. Every request should be accompanied by a copy of any existing or proposed legislation, or a detailed presentation of the matter at issue. Contact the Governmental Affairs office with questions.

If Applicable, List The Following:

(Bill or PCB #)	(Sponsor)
_____	_____
_____	_____

Indicate Position: ☑ Support ☐ Oppose ☐ Technical or Other Non-Partisan Assistance

Proposed Wording of Position for Official Publication:

To clarify that certain operational provisions of Chapter 718, F.S., do not apply to nonresidential condominium associations; to define "nonresidential condominiums;" to clarify that the Division's arbitration program only pertains to residential condominiums; to provide an effective date.

Reasons For Proposed Advocacy:

Chapter 718, F.S., serves two pri s - creating a form of condominium ownership and protecting purchasers of residential condominium units. Certain parts of the

Act are clearly limited to residential condominiums, but various provisions do not specify applicability only to residential condominiums, even though application in a nonresidential context does not make sense. The proposed legislation would eliminate (a) inconsistencies involved in the interpretation of Division jurisdiction over nonresidential condominiums and (b) certain consumer-oriented operational requirements that adversely affect the operation of nonresidential condominiums. These changes are similar in many instances to the existing exclusions for timeshare regimes.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section/division/committee positions on this issue, to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position

(Bar / Section / Division / Committee)	(Support or Oppose)	(Date)
_____	_____	_____

Others (Attach list if more than one)

(Bar / Section / Division / Committee)	(Support or Oppose)	(Date)
_____	_____	_____

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

A request for action on a legislative position must be circulated to all divisions, sections and committees that might be interested in the issue. The Legislation Committee and Board of Governors may delay final action on a request in the absence of any responses from such groups. Please include all responses with this form.

Referrals

1.
(Name of Group or Organization) (Support, Oppose or No Position)

Division of Florida Condominiums, Timeshares and Mobile Homes, Department of Business and Professional Regulation

2.
(Name of Group or Organization) (Support, Oppose or No Position)

NONE

3.
(Name of Group or Organization) (Sup[illegible] or No Position)

NONE

CONTACTS

Board & Legislation Committee Appearance
(List name, address and phone number)

Margaret A. Rolando, Shutts & Bowen, P.A., 201 S. Biscayne Blvd., 1500 Miami Center, Miami, FL 33131, (305) 358-6300

Barry F. Spivey, Spivey & Fallon, P.A., 1515 Ringling Blvd., Suite 885, Sarasota, FL 34236, (941) 840-1991

Robert S. Freedman, Carlton Fields, P.A., 4221 W. Boy Scout Blvd., Suite 1000, Tampa, FL 33607, (813) 223-7000

Steven H. Mezer, Bush Ross, P.A., 1801 North Highland Avenue, Tampa, Florida 33602-2656, Telephone (813) 204-6492

Peter Dunbar, Pennington, Moore, et al., P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533

Martha J. Edenfield, Pennington, Moore, et al., P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533

Appearances Before Legislators
(List name and phone number of those appearing before House/Senate Committees)

SAME

Meetings With Legislators/Staff
(List name and phone number of those having direct contact with legislators)

SAME

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request – which may involve a separate appearance before the Legislation Committee unless otherwise advised.

For information or assistance, please contact the Governmental Affairs Office of The Florida Bar at 800-342-8060, extension 5662.

Revised 080915

An act relating to condominiums: amending ss. 718.103, 718.112, 718.113, 718.1255, 718.1256, 718.403; creating definition of "nonresidential condominium;" clarifying notice and governance provisions only applicable to residential condominiums; clarifying election and voting methods that a nonresidential condominium association or a timeshare condominium association may employ; clarifying that term limits for directors under the chapter do not apply to nonresidential condominiums; clarifying director certification requirements to apply only to nonresidential condominiums; clarifying that fire sprinkler certificate of compliance requirements only pertain to residential condominiums; clarifying that hurricane shutter specification requirements only pertain to residential condominiums; clarifying that arbitration under s. 718.1255 only pertains to residential condominiums unless otherwise specifically provided in the governing documents; clarifying that property and casualty insurance risk classification as residential property only pertains to residential condominiums; clarifies that s. 718.403 phasing requirements do not apply to nonresidential condominiums; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 718.103, Florida Statutes, is amended to read:

As used in this chapter, the term:

(1) "Assessment" means a share of the funds which are required for the payment of common expenses, which from time to time is assessed against the unit owner.

(2) "Association" means, in addition to any entity responsible for the operation of common elements owned in undivided shares by unit owners, any entity which operates or maintains other real property in which unit owners have use rights, where membership in the entity is composed exclusively of unit owners or their elected or appointed representatives and is a required condition of unit ownership.

(3) "Association property" means that property, real and personal, which is owned or leased by, or is dedicated by a recorded plat to, the association for the use and benefit of its members.

(4) "Board of administration" or "board" means the board of directors or other representative body which is responsible for administration of the association.

(5) "Buyer" means a person who purchases a condominium unit. The term "purchaser" may be used interchangeably with the term "buyer."

(6) "Bylaws" means the bylaws of the association as they are amended from time to time.

(7) "Committee" means a group of board members, unit owners, or board members and unit owners appointed by the board or a member of the board to make recommendations to the board regarding the proposed annual budget or to take action on behalf of the board.

(8) "Common elements" means the portions of the condominium property not included in the units.

(9) "Common expenses" means all expenses properly incurred by the association in the performance of its duties, including expenses specified in s. 718.115.

(10) "Common surplus" means the amount of all receipts or revenues, including assessments, rents, or profits, collected by a condominium association which exceeds common expenses.

(11) "Condominium" means that form of ownership of real property created pursuant to this chapter, which is comprised entirely of units that may be owned by one or more persons, and in which there is, appurtenant to each unit, an undivided share in common elements.

(12) "Condominium parcel" means a unit, together with the undivided share in the common elements appurtenant to the unit.

(13) "Condominium property" means the lands, leaseholds, and personal property that are subjected to condominium ownership, whether or not contiguous, and all improvements thereon and all easements and rights appurtenant thereto intended for use in connection with the condominium.

(14) "Conspicuous type" means bold type in capital letters no smaller than the largest type, exclusive of headings, on the page on which it appears and, in all cases, at least 10-point type. Where conspicuous type is required, it must be separated on all sides from other type and print. Conspicuous type may be used in a contract for purchase and sale of a unit, a lease of a unit for more than 5 years, or a prospectus or offering circular only where required by law.

(15) "Declaration" or "declaration of condominium" means the instrument or instruments by which a condominium is created, as they are from time to time amended.

(16) "Developer" means a person who creates a condominium or offers condominium parcels for sale or lease in the ordinary course of business, but does not include:

(a) An owner or lessee of a condominium or cooperative unit who has acquired the unit for his or her own occupancy;

(b) A cooperative association that creates a condominium by conversion of an existing residential cooperative after control of the association has been transferred to the unit owners if, following the conversion, the unit owners are the same persons who were unit owners of the cooperative and no units are offered for sale or lease to the public as part of the plan of conversion;

(c) A bulk assignee or bulk buyer as defined in s. 718.703; or

(d) A state, county, or municipal entity acting as a lessor and not otherwise named as a developer in the declaration of condominium.

(17) "Division" means the Division of Florida Condominiums, Timeshares, and Mobile Homes of the Department of Business and Professional Regulation.

(18) "Land" means the surface of a legally described parcel of real property and includes, unless otherwise specified in the declaration and whether separate from or including such surface, airspace lying above and subterranean space lying below such surface. However, if so defined in the declaration, the term "land" may mean all or any portion of the airspace or subterranean space between two legally identifiable elevations and may exclude the surface of a parcel of real property and may mean any combination of the foregoing, whether or not contiguous, or may mean a condominium unit.

(19) "Limited common elements" means those common elements which are reserved for the use of a certain unit or units to the exclusion of all other units, as specified in the declaration.

(20) "Multicondominium" means a real estate development containing two or more condominiums, all of which are operated by the same association.

(21) "Nonresidential condominium" means any condominium, other than a residential condominium, composed of commercial, industrial or other uses.

(~~21~~22) "Operation" or "operation of the condominium" includes the administration and management of the condominium property.

(~~22~~23) "Rental agreement" means any written agreement, or oral agreement if for less duration than 1 year, providing for use and occupancy of premises.

(~~23~~24) "Residential condominium" means a condominium consisting of two or more units, any of which are intended for use as a private temporary or permanent residence, except that a condominium is not a residential condominium if the use for which the units are intended is primarily commercial or industrial and not more than three units are intended to be used for private residence, and are intended to be used as housing for maintenance, managerial, janitorial, or other operational staff of the condominium. With respect to a condominium that is not a timeshare condominium, a residential unit includes a unit intended as a private temporary or permanent residence as well as a unit not intended for commercial or industrial use. With respect to a timeshare condominium, the timeshare instrument as defined in s. 721.05(35) shall govern the intended use of each unit in the condominium. If a condominium is a residential condominium but contains units intended to be used for commercial or

industrial purposes, then, with respect to those units which are not intended for or used as private residences, the condominium is not a residential condominium. A condominium which contains both commercial and residential units is a mixed-use condominium and is subject to the requirements of s. 718.404.

(~~24~~25) "Special assessment" means any assessment levied against a unit owner other than the assessment required by a budget adopted annually.

(~~25~~26) "Timeshare estate" means any interest in a unit under which the exclusive right of use, possession, or occupancy of the unit circulates among the various purchasers of a timeshare plan pursuant to chapter 721 on a recurring basis for a period of time.

(~~26~~27) "Timeshare unit" means a unit in which timeshare estates have been created.

(~~27~~28) "Unit" means a part of the condominium property which is subject to exclusive ownership. A unit may be in improvements, land, or land and improvements together, as specified in the declaration.

(~~28~~29) "Unit owner" or "owner of a unit" means a record owner of legal title to a condominium parcel.

(~~29~~30) "Voting certificate" means a document which designates one of the record title owners, or the corporate, partnership, or entity representative, who is authorized to vote on behalf of a condominium unit that is owned by more than one owner or by any entity.

(~~30~~31) "Voting interests" means the voting rights distributed to the association members pursuant to s. 718.104(4)(j). In a multicondominium association, the voting

interests of the association are the voting rights distributed to the unit owners in all condominiums operated by the association. On matters related to a specific condominium in a multicondominium association, the voting interests of the condominium are the voting rights distributed to the unit owners in that condominium.

Section 2**.** Paragraphs (a), (b), (d), (k) and (l) of subsection (2) of Section 718.112, Florida Statutes, are amended to read:

(2) REQUIRED PROVISIONS.--The bylaws shall provide for the following and, if they do not do so, shall be deemed to include the following:

(a) Administration.—

1. The form of administration of the association shall be described indicating the title of the officers and board of administration and specifying the powers, duties, manner of selection and removal, and compensation, if any, of officers and boards. In the absence of such a provision, the board of administration shall be composed of five members, except in the case of a condominium which has five or fewer units, in which case in a not-for-profit corporation the board shall consist of not fewer than three members. In the absence of provisions to the contrary in the bylaws, the board of administration shall have a president, a secretary, and a treasurer, who shall perform the duties of such officers customarily performed by officers of corporations. Unless prohibited in the bylaws, the board of administration may appoint other officers and grant them the duties it deems appropriate. Unless otherwise provided in the bylaws, the officers shall serve without compensation and at the pleasure of the board of administration. Unless otherwise provided in the bylaws, the members of the board shall serve without compensation.

2. When a unit owner files a written inquiry by certified mail with the board of administration, the board shall respond in writing to the unit owner within 30 days of receipt of the inquiry. The board's response shall either give a substantive response to the inquirer, notify the inquirer that a legal opinion has been requested, or notify the inquirer that advice has been requested from the division if the condominium is a residential condominium. If the board in a residential condominium requests advice from the division, the board shall, within 10 days of its receipt of the advice, provide in writing a substantive response to the inquirer. If a legal opinion is requested, the board shall, within 60 days after the receipt of the inquiry, provide in writing a substantive response to the inquiry. The failure to provide a substantive response to the inquiry as provided herein precludes the board from recovering attorney's fees and costs in any subsequent litigation, administrative proceeding, or arbitration arising out of the inquiry. The association may through its board of administration adopt reasonable rules and regulations regarding the frequency and manner of responding to unit owner inquiries, one of which may be that the association is only obligated to respond to one written inquiry per unit in any given 30-day period. In such a case, any additional inquiry or inquiries must be responded to in the subsequent 30-day period, or periods, as applicable.

(b) Quorum; voting requirements; proxies.—

1. Unless a lower number is provided in the bylaws, the percentage of voting interests required to constitute a quorum at a meeting of the members is a majority of the voting interests. Unless otherwise provided in this chapter or in the declaration, articles of incorporation, or bylaws, and except as provided in subparagraph (d)4,

decisions shall be made by a majority of the voting interests represented at a meeting at which a quorum is present.

2. Except as specifically otherwise provided herein, unit owners in a residential condominium may not vote by general proxy, but may vote by limited proxies substantially conforming to a limited proxy form adopted by the division. A voting interest or consent right allocated to a unit owned by the association may not be exercised or considered for any purpose, whether for a quorum, an election, or otherwise. Limited proxies and general proxies may be used to establish a quorum. Limited proxies shall be used for votes taken to waive or reduce reserves in accordance with subparagraph (f)2.; for votes taken to waive the financial reporting requirements of s. 718.111(13); for votes taken to amend the declaration pursuant to s. 718.110; for votes taken to amend the articles of incorporation or bylaws pursuant to this section; and for any other matter for which this chapter requires or permits a vote of the unit owners. Except as provided in paragraph (d), a proxy, limited or general, may not be used in the election of board members in a residential condominium. General proxies may be used for other matters for which limited proxies are not required, and may be used in voting for nonsubstantive changes to items for which a limited proxy is required and given. Notwithstanding this subparagraph, unit owners may vote in person at unit owner meetings. This subparagraph does not limit the use of general proxies or require the use of limited proxies for any agenda item or election at any meeting of a timeshare condominium association or a nonresidential condominium association.

3. Any proxy given is effective only for the specific meeting for which originally given and any lawfully adjourned meetings thereof. A proxy is not valid longer

than 90 days after the date of the first meeting for which it was given. Every proxy is revocable at any time at the pleasure of the unit owner executing it.

4. A member of the board of administration or a committee may submit in writing his or her agreement or disagreement with any action taken at a meeting that the member did not attend. This agreement or disagreement may not be used as a vote for or against the action taken or to create a quorum.

5. If any of the board or committee members meet by telephone conference, those board or committee members may be counted toward obtaining a quorum and may vote by telephone. A telephone speaker must be used so that the conversation of those members may be heard by the board or committee members attending in person as well as by any unit owners present at a meeting.

(d) Unit owner meetings.—

1. An annual meeting of the unit owners shall be held at the location provided in the association bylaws and, if the bylaws are silent as to the location, the meeting shall be held within 45 miles of the condominium property. However, such distance requirement does not apply to an association governing a timeshare condominium. Unless the bylaws provide otherwise, a vacancy on the board caused by the expiration of a director's term shall be filled by electing a new board member, and the election must be by secret ballot. An election is not required if the number of vacancies equals or exceeds the number of candidates. For purposes of this paragraph, the term "candidate" means an eligible person who has timely submitted the written notice, as described in sub-subparagraph 4.a., of his or her intention to become a candidate. Except in a timeshare <u>or nonresidential</u> condominium, or if the staggered

term of a board member does not expire until a later annual meeting, or if all members terms would otherwise expire but there are no candidates, the terms of all board members expire at the annual meeting and such members may stand for reelection unless prohibited by the bylaws. If the bylaws permit staggered terms of no more than 2 years and upon approval of a majority of the total voting interests, the association board members may serve 2-year staggered terms. If the number of board members whose terms expire at the annual meeting exceeds the number of candidates, the candidates become members of the board effective upon the adjournment of the annual meeting. Unless the bylaws provide otherwise, any remaining vacancies shall be filled by the affirmative vote of the majority of the directors making up the newly constituted board even if the directors constitute less than a quorum or there is only one director. In a residential condominium association of more than 10 units or in a residential condominium association that does not include timeshare units or timeshare interests, coowners of a unit may not serve as members of the board of directors at the same time unless they own more than one unit or unless there are not enough eligible candidates to fill the vacancies on the board at the time of the vacancy. Any unit owner in a residential condominium desiring to be a candidate for board membership must comply with sub-subparagraph 3.a. A person who has been suspended or removed by the division under this chapter, or who is delinquent in the payment of any fee, fine, or special or regular assessment as provided in paragraph (n), is not eligible for board membership. A person who has been convicted of any felony in this state or in a United States District or Territorial Court, or who has been convicted of any offense in another jurisdiction which would be considered a felony if committed in this state, is not eligible

for board membership unless such felon's civil rights have been restored for at least 5 years as of the date such person seeks election to the board. The validity of an action by the board is not affected if it is later determined that a board member is ineligible for board membership due to having been convicted of a felony. The provision of this subparagraph shall not limit the term of the members of the board in a nonresidential condominium.

2. The bylaws must provide the method of calling meetings of unit owners, including annual meetings. Written notice, which must include an agenda, shall be mailed, hand delivered, or electronically transmitted to each unit owner at least 14 days before the annual meeting and must be posted in a conspicuous place on the condominium property at least 14 continuous days preceding the annual meeting. Upon notice to the unit owners, the board shall, by duly adopted rule, designate a specific location on the condominium property or association property upon which all notices of unit owner meetings shall be posted. However, if there is no condominium property or association property upon which notices can be posted, this requirement does not apply. In lieu of or in addition to the physical posting of meeting notices, the association may, by reasonable rule, adopt a procedure for conspicuously posting and repeatedly broadcasting the notice and the agenda on a closed-circuit cable television system serving the condominium association. However, if broadcast notice is used in lieu of a notice posted physically on the condominium property, the notice and agenda must be broadcast at least four times every broadcast hour of each day that a posted notice is otherwise required under this section. If broadcast notice is provided, the notice and agenda must be broadcast in a manner and for a sufficient continuous length of time so

as to allow an average reader to observe the notice and read and comprehend the entire content of the notice and the agenda. Unless a unit owner waives in writing the right to receive notice of the annual meeting, such notice must be hand delivered, mailed, or electronically transmitted to each unit owner. Notice for meetings and notice for all other purposes must be mailed to each unit owner at the address last furnished to the association by the unit owner, or hand delivered to each unit owner. However, if a unit is owned by more than one person, the association shall provide notice, for meetings and all other purposes, to that one address which the developer initially identifies for that purpose and thereafter as one or more of the owners of the unit shall advise the association in writing, or if no address is given or the owners of the unit do not agree, to the address provided on the deed of record. An officer of the association, or the manager or other person providing notice of the association meeting, shall provide an affidavit or United States Postal Service certificate of mailing, to be included in the official records of the association affirming that the notice was mailed or hand delivered, in accordance with this provision.

3. The members of the board <u>in a residential condominium</u> shall be elected by written ballot or voting machine. Proxies may not be used in electing the board in general elections or elections to fill vacancies caused by recall, resignation, or otherwise, unless otherwise provided in this chapter.

a. At least 60 days before a scheduled election, the association shall mail, deliver, or electronically transmit, by separate association mailing or included in another association mailing, delivery, or transmission, including regularly published newsletters, to each unit owner entitled to a vote, a first notice of the date of the election. Any unit

owner or other eligible person desiring to be a candidate for the board must give written notice of his or her intent to be a candidate to the association at least 40 days before a scheduled election. Together with the written notice and agenda as set forth in subparagraph 3, the association shall mail, deliver, or electronically transmit a second notice of the election to all unit owners entitled to vote, together with a ballot that lists all candidates. Upon request of a candidate, an information sheet, no larger than 81/2 inches by 11 inches, which must be furnished by the candidate at least 35 days before the election, must be included with the mailing, delivery, or transmission of the ballot, with the costs of mailing, delivery, or electronic transmission and copying to be borne by the association. The association is not liable for the contents of the information sheets prepared by the candidates. In order to reduce costs, the association may print or duplicate the information sheets on both sides of the paper. The division shall by rule establish voting procedures consistent with this sub-subparagraph, including rules establishing procedures for giving notice by electronic transmission and rules providing for the secrecy of ballots. Elections shall be decided by a plurality of ballots cast. There is no quorum requirement; however, at least 20 percent of the eligible voters must cast a ballot in order to have a valid election. A unit owner may not permit any other person to vote his or her ballot, and any ballots improperly cast are invalid. A unit owner who violates this provision may be fined by the association in accordance with s. 718.303. A unit owner who needs assistance in casting the ballot for the reasons stated in s. 101.051 may obtain such assistance. The regular election must occur on the date of the annual meeting. Notwithstanding this sub-subparagraph, an election is not required unless more candidates file notices of intent to run or are nominated than board

vacancies exist. This sub-subparagraph does not apply to associations for nonresidential condominiums.

b. Within 90 days after being elected or appointed to the board of an association for a residential condominium, each newly elected or appointed director shall certify in writing to the secretary of the association that he or she has read the association's declaration of condominium, articles of incorporation, bylaws, and current written policies; that he or she will work to uphold such documents and policies to the best of his or her ability; and that he or she will faithfully discharge his or her fiduciary responsibility to the association's members. In lieu of this written certification, within 90 days after being elected or appointed to the board, the newly elected or appointed director may submit a certificate of having satisfactorily completed the educational curriculum administered by a division-approved condominium education provider within 1 year before or 90 days after the date of election or appointment. The written certification or educational certificate is valid and does not have to be resubmitted as long as the director serves on the board without interruption. A director of an association for a residential condominium who fails to timely file the written certification or educational certificate is suspended from service on the board until he or she complies with this sub-subparagraph. The board may temporarily fill the vacancy during the period of suspension. The secretary shall cause the association to retain a director's written certification or educational certificate for inspection by the members for 5 years after a director's election. Failure to have such written certification or educational certificate on file does not affect the validity of any board action.

4. Any approval by unit owners called for by this chapter or the applicable declaration or bylaws, including, but not limited to, the approval requirement in s. 718.111(8), must be made at a duly noticed meeting of unit owners and is subject to all requirements of this chapter or the applicable condominium documents relating to unit owner ~~decisionmaking~~ decision making except that unit owners may take action by written agreement, without meetings, on matters for which action by written agreement without meetings is expressly allowed by the applicable bylaws or declaration or any statute that provides for such action.

5. Unit owners may waive notice of specific meetings if allowed by the applicable bylaws or declaration or any law. If authorized by the bylaws, notice of meetings of the board of administration, unit owner meetings, except unit owner meetings called to recall board members under paragraph (j), and committee meetings may be given by electronic transmission to unit owners who consent to receive notice by electronic transmission.

6. Unit owners have the right to participate in meetings of unit owners with reference to all designated agenda items. However, the association may adopt reasonable rules governing the frequency, duration, and manner of unit owner participation.

7. A unit owner may tape record or videotape a meeting of the unit owners subject to reasonable rules adopted by the division.

8. Unless otherwise provided in the bylaws, any vacancy occurring on the board before the expiration of a term may be filled by the affirmative vote of the majority of the remaining directors, even if the remaining directors constitute less than a quorum,

or by the sole remaining director. In the alternative, a board may hold an election to fill the vacancy, in which case the election procedures must conform to sub-subparagraph 3.a. unless the association governs 10 units or fewer and has opted out of the statutory election process, in which case the bylaws of the association control. Unless otherwise provided in the bylaws, a board member appointed or elected under this section shall fill the vacancy for the unexpired term of the seat being filled. Filling vacancies created by recall is governed by paragraph (j) and rules adopted by the division.

9. This chapter may not limit the use of general or limited proxies, require the use of general or limited proxies, or require the use of a written ballot or voting machine for any agenda item or election at any meeting of an association for any timeshare or nonresidential condominium or any primary condominium governed by s. 718.406.

Notwithstanding subparagraph (b)2. and sub-subparagraph (d)3.a., an association responsible for the operation of a residential condominium containing ~~of~~ 10 or fewer units may, by affirmative vote of a majority of the total voting interests, provide for different voting and election procedures in its bylaws, which vote may be by a proxy specifically delineating the different voting and election procedures. The different voting and election procedures may provide for elections to be conducted by limited or general proxy. The declaration of a nonresidential condominium or any condominium governed by s. 718.406 or the bylaws of the association responsible for the operation of any condominium thereunder may contain different voting and election procedures.

(k) Arbitration.—There shall be a provision for mandatory nonbinding arbitration as provided for in s. 718.1255 for any residential condominium.

(l) Certificate of compliance.-- A provision that a certificate of compliance from a licensed electrical contractor or electrician may be accepted by the association's board as evidence of compliance of the condominium units with the applicable fire and life safety code must be included. Notwithstanding chapter 633 or of any other code, statute, ordinance, administrative rule, or regulation, or any interpretation of the foregoing, an association, condominium, or unit owner is not obligated to retrofit the common elements, association property, or units of a residential condominium with a fire sprinkler system in a building that has been certified for occupancy by the applicable governmental entity if the unit owners have voted to forego such retrofitting by the affirmative vote of a majority of all voting interests in the affected condominium. The local authority having jurisdiction may not require completion of retrofitting with a fire sprinkler system before the end of 2019. By December 31, 2016, ~~an~~ any residential condominium association that is not in compliance with the requirements for a fire sprinkler system and has not voted to forego retrofitting of such a system must initiate an application for a building permit for the required installation with the local government having jurisdiction demonstrating that the association will become compliant by December 31, 2019.

1. A vote to forego retrofitting in a residential condominium may be obtained by limited proxy or by a ballot personally cast at a duly called membership meeting, or by execution of a written consent by the member, and is effective upon recording a certificate attesting to such vote in the public records of the county where the condominium is located. The association shall mail or hand deliver to each unit owner written notice at least 14 days before the membership meeting in which the vote to

forego retrofitting of the required fire sprinkler system is to take place. Within 30 days after the association's opt-out vote, notice of the results of the opt-out vote must be mailed or hand delivered to all unit owners. Evidence of compliance with this notice requirement must be made by affidavit executed by the person providing the notice and filed among the official records of the association. After notice is provided to each owner, a copy must be provided by the current owner to a new owner before closing and by a unit owner to a renter before signing a lease.

2. If there has been a previous vote to forego retrofitting, a vote to require retrofitting may be obtained at a special meeting of the unit owners called by a petition of at least 10 percent of the voting interests. Such a vote may only be called once every 3 years. Notice shall be provided as required for any regularly called meeting of the unit owners, and must state the purpose of the meeting. Electronic transmission may not be used to provide notice of a meeting called in whole or in part for this purpose.

3. As part of the information collected annually from condominiums, the division shall require residential condominium associations to report the membership vote and recording of a certificate under this subsection and, if retrofitting has been undertaken, the per-unit cost of such work. The division shall annually report to the Division of State Fire Marshal of the Department of Financial Services the number of residential condominiums that have elected to forego retrofitting.

4. Notwithstanding s. 553.509, an association may not be obligated to, and may forego the retrofitting of, any improvements required by s. 553.509(2) upon an affirmative vote of a majority of the voting interests in the affected condominium.

Section 3. Subsection (5) of Section 718.113, Florida Statutes, is amended to read:

(5) Each board of administration of a residential condominium shall adopt hurricane shutter specifications for each building within each condominium operated by the association which shall include color, style, and other factors deemed relevant by the board. All specifications adopted by the board must comply with the applicable building code.

(a) The board may, subject to the provisions of s. 718.3026, and the approval of a majority of voting interests of the residential condominium, install hurricane shutters, impact glass or other code-compliant windows, or hurricane protection that complies with or exceeds the applicable building code. However, a vote of the owners is not required if the maintenance, repair, and replacement of hurricane shutters, impact glass or other code compliant windows are the responsibility of the association pursuant to the declaration of condominium. If hurricane protection or laminated glass or window film architecturally designed to function as hurricane protection which complies with or exceeds the current applicable building code has been previously installed, the board may not install hurricane shutters, hurricane protection impact glass or other code-compliant windows except upon approval by a majority vote of the voting interests.

(b) The association is responsible for the maintenance, repair, and replacement of the hurricane shutters or other hurricane protection authorized by this subsection if such hurricane shutters or other hurricane protection is the responsibility of the association pursuant to the declaration of condominium. If the hurricane shutters or other hurricane protection authorized by this subsection are the responsibility of the unit

owners pursuant to the declaration of condominium, the maintenance, repair, and replacement of such items are the responsibility of the unit owner.

(c) The board may operate shutters installed pursuant to this subsection without permission of the unit owners only if such operation is necessary to preserve and protect the condominium property and association property. The installation, replacement, operation, repair, and maintenance of such shutters in accordance with the procedures set forth in this paragraph are not a material alteration to the common elements or association property within the meaning of this section.

(d) Notwithstanding any other provision in the residential condominium documents, if approval is required by the documents, a board may not refuse to approve the installation or replacement of hurricane shutters by a unit owner conforming to the specifications adopted by the board.

Section 4. Subsection (6) of Section 718.1255, Florida Statutes, is created to read:

(6) APPLICABILITY.--This section does not apply to any nonresidential condominium unless otherwise specifically provided for in the declaration of a nonresidential condominium.

Section 5. Section 718.1256, Florida Statutes is amended to read: Condominiums as residential property.—

For the purpose of property and casualty insurance risk classification, residential condominiums shall be classed as residential property.

Section 6. Paragraph (a) of subsection (2) of Section 718.403, Florida Statutes, is amended to read and subsection (9) is created to read:

(2) The original declaration of condominium, or an amendment to the declaration, which amendment has been approved by all unit owners and unit mortgagees and the developer, shall describe:

(a) The land which may become part of the condominium and the land on which each phase is to be built. The descriptions shall include metes and bounds or other legal descriptions of the land for each phase, plot plans, and surveys. Plot plans, attached as an exhibit, must show the approximate location of all existing and proposed buildings and improvements that may ultimately be contained within the condominium. The plot plan may be modified by the developer as to unit or building types ~~to the extent that~~but, in a residential condominium, such changes ~~are~~must be described in the declaration. If provided in the declaration, the developer may make nonmaterial changes in the legal description of a phase.

(9) The provisions of subsections (2)(b)-(f) and (8) of this section shall not apply to nonresidential condominiums.

Section 7. This act shall take effect upon becoming a law.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE
Date Form Received _____

GENERAL INFORMATION

Submitted By (List name of the section, division, committee, bar group or individual)

Steven H. Mezer, Chair, Condominium and Planned Development Committee of the Real Property Probate & Trust Law Section

Address (List street address and phone number)

c/o Bush Ross, P.A., 1801 North Highland Avenue, Tampa, Florida 33602-2656, Telephone (813) 204-6492

Position Level Florida Bar or Section / Division / Committee – or both, if requested)

Condominium and Planned Development Committee, RPPTL Section, The Florida Bar

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. Every request should be accompanied by a copy of any existing or proposed legislation, or a detailed presentation of the matter at issue. Contact the Governmental Affairs office with questions.

If Applicable, List The Following:

(Bill or PCB #)	(Sponsor)
_____	_____
_____	_____

Indicate Position: ☑ Support ☐ Oppose ☐ Technical or Other Non-Partisan Assistance

Proposed Wording of Position for Official Publication:

To define a hotel condominium to provide that the offering of hotel condominium units for sale is not subject to part V of Chapter 718, F.S., through creation of Section 718.407, F.S.; to provide an effective date.

Reasons For Proposed Advocacy:

The applicability of purchaser disclosu s to a hotel condominium project is not clear under present statute, as a hotel is a commercial venture in nature and disclosure requirements are designed for the protection of residential purchasers. By

specifically creating required parameters for a project to be classified as a hotel condominium, a distinguishing line is drawn between a residential project and a hotel condominium project, thereby enabling hotel condominiums to be exempt from otherwise-applicable disclosure requirements. The legislation is intended to clarify existing law and be applicable to existing purchase and sale contracts involving hotel condominium units.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section/division/committee positions on this issue, to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position

(Bar / Section / Division / Committee)	(Support or Oppose)	(Date)
_____	_____	_____

Others (Attach list if more than one)

(Bar / Section / Division / Committee)	(Support or Oppose)	(Date)
_____	_____	_____

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

A request for action on a legislative position must be circulated to all divisions, sections and committees that might be interested in the issue. The Legislation Committee and Board of Governors may delay final action on a request in the absence of any responses from such groups. Please include all responses with this form.

Referrals

1.
(Name of Group or Organization) (Support, Oppose or No Position)

Division of Florida Condominiums, Timeshares and Mobile Homes, Department of Business and Professional Regulation

2.
(Name of Group or Organization) (Support, Oppose or No Position)

NONE

3.
(Name of Group or Organization) (Sup or No Position)

NONE

CONTACTS

Board & Legislation Committee Appearance
(List name, address and phone number)

Margaret A. Rolando, Shutts & Bowen, P.A., 201 S. Biscayne Blvd., 1500 Miami Center, Miami, FL 33131, (305) 358-6300

Barry F. Spivey, Spivey & Fallon, P.A., 1515 Ringling Blvd., Suite 885, Sarasota, FL 34236, (941) 840-1991

Robert S. Freedman, Carlton Fields, P.A., 4221 W. Boy Scout Blvd., Suite 1000, Tampa, FL 33607, (813) 223-7000

Steven H. Mezer, Bush Ross, P.A., 1801 North Highland Avenue, Tampa, Florida 33602-2656, Telephone (813) 204-6492

Peter Dunbar, Pennington, Moore, et al., P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533

Martha J. Edenfield, Pennington, Moore, et al., P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533

Appearances Before Legislators
(List name and phone number of those appearing before House/Senate Committees)

SAME

Meetings With Legislators/Staff
(List name and phone number of those having direct contact with legislators)

SAME

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request – which may involve a separate appearance before the Legislation Committee unless otherwise advised.

For information or assistance, please contact the Governmental Affairs Office of The Florida Bar at 800-342-8060, extension 5662.

Revised 080915

An act relating to condominiums; creating s. 718.407, F.S.; creating the definition of a “hotel condominium;” enabling a hotel condominium to be exempt from certain disclosure requirements; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 718.407, Florida Statutes, is created to read:

(1) “Hotel condominium” means a condominium which: (a) is located within an area whose zoning permits use of the property as a hotel or is located within a zoning district for transient or other non-residential use that permits use of the property as a hotel or allows transient occupancy; (b) contains or has access to a registration area, such as a front desk, for occupants, guests and unit owners to check-in prior to being permitted occupancy of a unit; (c) contains units to be occupied by guests which are regulated and subject to jurisdiction of the Division of Hotels and Restaurants of the Department of Business and Professional Regulation as a “public lodging establishment,” pursuant to Chapter 509, F.S.; and (d) does not contain more than five percent of its units that may be occupied by the owners thereof for more than 180 days in any calendar year.

(2) Unless otherwise provided in the declaration of condominium as originally recorded, a hotel condominium is not subject to part V of this chapter. This section is intended to clarify existing law and applies to hotel condominiums existing on the effective date of this act, as well as to contracts to purchase hotel condominium units existing on the effective date of this act.

Section 2. This act shall take effect upon becoming a law.

WHITE PAPER

PROPOSED CREATION OF SECTION 718.407, FLORIDA STATUTES, PERTAINING TO HOTEL CONDOMINIUMS

I. SUMMARY

A “hotel condominium” or “condominium hotel” – a condominium regime in which the units occupied by third parties consist of hotel rooms, there are units used for retail or commercial purposes, and there are minimal common elements - has no clear place under Chapter 718, Florida Statutes (the “Act”). It is essentially a commercial operation, yet the inclusion of the phrase "temporary residence" in the definition of "residential condominium" under Section 718.103(23), F.S., has created confusion as to the classification of this type of condominium. The purpose of the proposed legislation is to create, for the first time under Florida law, a definition for a hotel condominium so that its status under the Act will be clear.

II. CURRENT SITUATION

At present, it is unclear whether the developer and/or offeror of condominium hotel units is developing a “residential condominium” and thus is obligated to file a prospectus with the Division of Florida Condominiums, Timeshares and Mobile Homes ("Division") and obtain Division approval before the commencement of closings on the sale of individual hotel condominium units, pursuant to Sections 718.503 and 718.504, F.S. Moreover, it is unclear whether or not the creation of such condominium hotel fits within the defined “residential condominium” regime, as provided for in Section 718.103(23), F.S.

III. EFFECT OF PROPOSED CHANGE

The proposed legislation would eliminate the vagueness attendant to the concept of a hotel condominium, thereby resulting in a clear determination of the Division’s jurisdiction (or lack thereof) when such projects are created in the future. It would provide that the offeror of a hotel condominium shall not be required to file a prospectus or otherwise comply with disclosure obligations of a “residential condominium,” as mandated by Part V of the Act.

The proposed creation of Section 718.407, F.S., will provide clarity and remove any ambiguity as to whether a condominium hotel project fits within the existing

statutory scheme. A hotel condominium would be exempt from the registration and disclosure requirements contained in Part V of the Act.

IV. ANALYSIS

Specific section-by-section analysis:

(a) Section 718.407(1) defines a "hotel condominium" as one which (a) is located within a specific and permissible zoning category which “permits use of the property as a hotel or allows transient occupancy;” (b) contains or has access to a registration area or front desk; (c) is regulated as a “public lodging establishment” pursuant to Chapter 509, Florida Statutes; and (d) has at least 95% of its units being occupied by owners and/or guests on a transient basis, meaning occupancy of no more than 180 days in any calendar year. The proposed legislation includes continuing protections afforded to consumers based on compliance with the Division of Hotels and Restaurants of the Department of Business and Professional Regulation, as a condition of qualifying as a hotel condominium.

(b) Section 718.407(2) provides that a hotel condominium is exempt from the disclosure requirements contained in Part V of the Act, unless otherwise provided in the declaration of condominium as originally recorded. This section is stated as intending to clarify existing law and applies to hotel condominiums existing on the effective date of the legislation, as well as to contracts to purchase hotel condominium units existing on the effective date of the legislation.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal does not have any fiscal impact upon state or local governments.

VI. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The clarity brought forth by the legislation will enable consumers to understand more clearly the nature of their investment and the intended governance of the hotel condominium as same relate to one or more hotel condominium units within a particular real estate project.

VII. **CONSTITUTIONAL ISSUES**

There are no constitutional issues raised by this proposal.

VIII. **OTHER INTERESTED PARTIES**

Division of Florida Condominiums, Timeshares, and Mobile Homes, Department of Business and Professional Regulation.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE
Date Form Received _____

GENERAL INFORMATION

Submitted By (List name of the section, division, committee, bar group or individual)

Arnold Tritt, Chair, and Reese Henderson, Legislative Chair, Construction Law Committee of the Real Property Probate & Trust Law Section.

Address (List street address and phone number)

707 Peninsular Place, Jacksonville, Florida 32204, (904) 354-5200

Position Level Florida Bar or Section / Division / Committee – or both, if requested)

Construction Law Committee, RPPTL Section.

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. Every request should be accompanied by a copy of any existing or proposed legislation, or a detailed presentation of the matter at issue. Contact the Governmental Affairs office with questions.

If Applicable, List The Following:

(Bill or PCB #) (Sponsor)

_____ _____

_____ _____

Indicate Position: ☑ Support ☐ Oppose ☐ Technical or Other Non-Partisan Assistance

Proposed Wording of Position for Official Publication:

A bill related to construction liens: amending chs. 85, 95 and 713, F.S.; to amend s. 85.021 F.S., to clarify the scope of the remedies available to enforce construction liens; to amend s. 95.11(2) and (5), F.S., as to the statute of limitations for actions on payment bonds; to amend s. 713.08(3) (the statutory form for a claim of lien) to include the separate statement required by F.S. 713.08(1)(c); to amend s. s. 713.13, F.S. to delete the requirement that the notice of commencement be verified and to clarify the timing of the expiration date of the notice of commencement; to amend s. 713.18, F.S. as to electronic confirmation of delivery through the U ice; to provide an effective date.

Reasons For Proposed Advocacy:

The construction lien law in its present form is the result of enactments over a period of more than forty years. Amendments to the lien law are frequent and, as with any statute amended on multiple occasions, inconsistencies have accumulated. The proposal would, among other things, address existing inconsistencies between different provisions that purport to define the statute of limitations for actions on a statutory payment bond; and would remove language added in the 2010 session through S.B. 1196 that may inadvertently create ambiguity as to the expiration date of a notice of commencement, which could cause unintended title problems on countless residential and commercial properties.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section/division/committee positions on this issue, to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position

(Bar / Section / Division / Committee)	(Support or Oppose)	(Date)
N/A		

Others (Attach list if more than one)

(Bar / Section / Division / Committee)	(Support or Oppose)	(Date)
N/A		

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(Name of Group or Organization) (Support, Oppose or No Position)

2.
(Name of Group or Organization) (Support, Oppose or No Position)

3.
(Name of Group or Organization) (Support, Oppose or No Position)

CONTACTS

Board & Legislation Committee Appearance
(List name, address and phone number)

Margaret A. Rolando, Shutts & Bowen, P.A., 201 S. Biscayne Blvd., 1500 Miami Center, Miami, FL 33131, (305) 358-6300

Barry F. Spivey, Spivey & Fallon, P.A., 1515 Ringling Blvd., Suite 885, Sarasota, FL 34236, (941) 840-1991

Arnold D. Tritt, Jr., Tritt|Henderson, 707 Peninsular Place, Jacksonville, FL 32204, (904) 354-5200

Reese J. Henderson, Jr., Tritt|Henderson, 707 Peninsular Place, Jacksonville, FL 32204, (904) 354-5200

Peter Dunbar, Pennington, Moore, et al., P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533

Martha J. Edenfield, Pennington, Moore, et al., P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533

Appearances Before Legislators
(List name and phone number of those appearing before House/Senate Committees)

Same

Meetings With Legislators/Staff
(List name and phone number of those having direct contact with legislators)

Same

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request – which may involve a separate appearance before the Legislation Committee unless otherwise advised.

For information or assistance, please contact the Governmental Affairs Office of

The Florida Bar at 800-342-8060, extension 5662.

Revised 080915

A bill related to construction liens: amending chs. 85, 95 and 713, F.S.; to amend s. 85.021 F.S., to clarify the scope of the remedies available to enforce construction liens; to amend s. 95.11(2) and (5), F.S., as to the statute of limitations for actions on payment bonds; to amend s. 713.08(3) containing the statutory form for a claim of lien to include the separate statement required by F.S. 713.08(1)(c); to amend s. s. 713.13, F.S. to delete the requirement that the notice of commencement be verified and to clarify the timing of the expiration date of the notice of commencement; to amend s. 713.18, F.S. as to electronic confirmation of delivery through the U.S. Postal Service; to provide an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 85.021, Florida Statutes, is amended to read:

Enforcement by persons not in privity with the owner.—A person not in privity with the owner may resort to any of the remedies prescribed by s. 85.011. The judgment may enforce the lien against the property of the owner. The judgment may also, or alternatively, provide for the recovery from the lienor's customer and from the owner ~~contractor or other person for whom the labor or material was furnished.~~, ~~if the contractor or other person is joined in the action,~~ of the amount ~~due~~ owed to the lienor under the claim of lien plus interest, costs, and fees pursuant to F.S. 713.29. ~~by him or her~~, ~~and from the owner of the amount due owed by the owner~~ ~~to~~ ~~contractor or other~~

~~person as aforesaid~~ ~~at the time of the service of the notice provided for by s.~~ 713.75 ~~of part II of chapter 713,~~ ~~as well as enforce the lien against the property of such owner for such amount, but~~ ~~only one satisfaction of the judgment shall be had.~~ ~~Although no lien is found to exist and no judgment rendered against the owner, judgment may be rendered against the contractor or other person for whom the labor or materials were furnished for the amount due owed by him or her.~~ The lienor may only recover once, which recovery shall satisfy all judgments obtained hereunder.

Section 2. Sections (2) and (5) of Section 95.11, Florida Statutes, are amended to read:

(2) WITHIN FIVE YEARS.—

(a) An action on a judgment or decree of any court, not of record, of this state or any court of the United States, any other state or territory in the United States, or a foreign country.

(b) A legal or equitable action on a contract, obligation, or liability founded on a written instrument, except for an action to enforce a claim against a payment bond~~,~~ ~~which shall be~~ governed by the applicable provisions of ss. 255.05(10), 337.18(1)d) or ~~and~~ 713.23(1)(e).

(5) WITHIN ONE YEAR.—

(a) An action for specific performance of a contract.

(b) An action to enforce an equitable lien arising from the furnishing of labor, services, or material for the improvement of real property.

(c) An action to enforce rights under the Uniform Commercial Code—Letters of Credit, chapter 675.

(d) An action against any guaranty association and its insured, with the period running from the date of the deadline for filing claims in the order of liquidation.

~~(e) An action to enforce any claim against a payment bond on which the principal is a contractor, subcontractor, or sub-subcontractor as defined in s. 713.01, for private work as well as public work, from the last furnishing of labor, services, or materials or from the last furnishing of labor, services, or materials by the contractor if the contractor is the principal on a bond on the same construction project, whichever is later.~~

(~~f~~e) Except for actions described in subsection (8), a petition for extraordinary writ, other than a petition challenging a criminal conviction, filed by or on behalf of a prisoner as defined in s. 57.085.

(~~g~~f) Except for actions described in subsection (8), an action brought by or on behalf of a prisoner, as defined in s. 57.085, relating to the conditions of the prisoner's confinement.

Section 3. Subsection (3) of Section 713.08, Florida Statutes, is amended to read:

(3) The claim of lien shall be sufficient if it is in substantially the following form, and includes the following warning:

WARNING!

THIS LEGAL DOCUMENT REFLECTS THAT A CONSTRUCTION LIEN HAS BEEN PLACED ON THE REAL PROPERTY LISTED HEREIN. UNLESS THE OWNER OF SUCH PROPERTY TAKES ACTION TO SHORTEN THE TIME PERIOD, THIS LIEN

MAY REMAIN VALID FOR ONE YEAR FROM THE DATE OF RECORDING, AND SHALL EXPIRE AND BECOME NULL AND VOID THEREAFTER UNLESS LEGAL PROCEEDINGS HAVE BEEN COMMENCED TO FORECLOSE OR TO DISCHARGE THIS LIEN.

CLAIM OF LIEN

State of ____

County of ____

Before me, the undersigned notary public, personally appeared ____, who was duly sworn and says that she or he is (the lienor herein) (the agent of the lienor herein ____), whose address is ____; and that in accordance with a contract with ____, lienor furnished labor, services, or materials consisting of ____ on the following described real property in ____ County, Florida:

(Legal description of real property)

owned by ____ of a total value of $_____ (which amount includes $_____ for materials specially fabricated off-site for incorporation in the improvement but not yet incorporated), of which there remains unpaid $____, and furnished the first of the items on ____, (year) , and the last of the items on ____, (year) ; and (if the lien is claimed by one not in privity with the owner) that the lienor served her or his notice to owner on ____, (year) , by ____; and (if required) that the lienor served copies of the notice on

the contractor on ____, (year) , by ____ and on the subcontractor, ____, on ____, (year) , by ____.

(Signature)

Sworn to (or affirmed) and subscribed before me this ____ day of ____, (year) , by (name of person making statement) .

(Signature of Notary Public - State of Florida)

(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known ____ OR Produced Identification ____

Type of Identification Produced_____

However, the negligent inclusion or omission of any information in the claim of lien which has not prejudiced the owner does not constitute a default that operates to defeat an otherwise valid lien.

Section 4. Sub-subsection (d) of subsection (1) of Section 713.13, Florida Statutes, is amended to read:

(d) A notice of commencement must be in substantially the following form:

Permit No.____ Tax Folio No.____

NOTICE OF COMMENCEMENT

State of____

County of____

The undersigned hereby gives notice that improvement will be made to certain real property, and in accordance with Chapter 713, Florida Statutes, the following information is provided in this Notice of Commencement.

1. Description of property: (legal description of the property, and street address if available) .

2. General description of improvement:____.

3. Owner information or Lessee Information if Lessee Contracted for the Improvement:____.

a. Name and address:____.

b. Interest in property:____.

c. Name and address of fee simple titleholder (if different from Owner listed above):____.

4. a. Contractor: (name and address) .

b. Contractor's phone number:____.

5. Surety (if applicable, a copy of the payment bond is attached):

a. Name and address:____.

b. Phone number:____.

c. Amount of bond: $____.

6. a. Lender: (name and address) .

b. Lender's phone number:____.

7. a. Persons within the State of Florida designated by Owner upon whom notices or other documents may be served as provided by Section 713.13(1)(a)7., Florida Statutes:

a. Name and address:____.

b. Phone numbers of designated persons:____.

8. a. In addition to himself or herself, Owner designates _____ of _____ to receive a copy of the Lienor's Notice as provided in Section 713.13(1)(b), Florida Statutes.

b. Phone number of person or entity designated by owner:____.

9. Expiration date of notice of commencement (the expiration date ~~may not be before completion of construction and final payment to the contractor, but~~ will be 1 year from the date of recording unless a different date is specified)____.

WARNING TO OWNER: ANY PAYMENTS MADE BY THE OWNER AFTER THE EXPIRATION OF THE NOTICE OF COMMENCEMENT ARE CONSIDERED IMPROPER PAYMENTS UNDER CHAPTER 713, PART I, SECTION 713.13, FLORIDA STATUTES, AND CAN RESULT IN YOUR PAYING TWICE FOR IMPROVEMENTS TO YOUR PROPERTY. A NOTICE OF COMMENCEMENT MUST BE RECORDED AND

POSTED ON THE JOB SITE BEFORE THE FIRST INSPECTION. IF YOU INTEND TO OBTAIN FINANCING, CONSULT WITH YOUR LENDER OR AN ATTORNEY BEFORE COMMENCING WORK OR RECORDING YOUR NOTICE OF COMMENCEMENT.

~~Under penalty of perjury, I declare that I have read the foregoing notice of commencement and that the facts stated therein are true to the best of my knowledge and belief.~~

(Signature of Owner or Lessee or Owner's or Lessee's Authorized Officer/Director/Partner/Manager)

(Signatory's Title/Office)

The foregoing instrument was acknowledged before me this ____ day of ____, (year) , by (name of person) as (type of authority, . . . e.g. officer, trustee, attorney in fact) for (name of party on behalf of whom instrument was executed) .

(Signature of Notary Public - State of Florida)

(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known ____ OR Produced Identification ____

Type of Identification Produced_____

Section 5. Subsection (2) of Section 713.18, Florida Statutes, is amended to read:

(2) Notwithstanding subsection (1), if a notice to owner, a notice to contractor under s. 713.23, or a preliminary notice under s. 255.05 is mailed by registered or certified mail with postage prepaid to the person to be served at any of the addresses set forth in subsection (3) within 40 days after the date the lienor first furnishes labor, services, or materials, service of that notice is effective as of the date of mailing if the person who served the notice:

(a) maintains a registered or certified mail log that shows the registered or certified mail number issued by the United States Postal Service, the name and address of the person served, and the date stamp of the United States Postal Service confirming the date of mailing; or

(b) ~~if the person who served the notice~~ maintains electronic tracking records generated ~~through the use of~~ by the United States Postal Service ~~Confirm service or a similar service~~ containing the postal tracking number, the name and address of the person served, and verification of the date of receipt by the United States Postal Service.

Section 6. This act shall take effect on October 1, 2012.

WHITE PAPER

AMENDMENT OF CHAPTERS 85, 95 AND 713, FLORIDA STATUTES REGARDING CONSTRUCTION LIENS AND ACTIONS ON PAYMENT BONDS

I. SUMMARY

Florida courts are presented with language in the construction lien law, Chapters 85, 95 and 713, Florida Statutes, which is confusing and appears almost designed to lead to inconsistent results. The proposal streamlines and clarifies the remedies available to non-privity lienors; resolves conflicts among several sections governing the statutes of limitations on actions on payment bonds; adds to the statutory form for a claim of lien to implement previous statutory changes not reflected on the form currently; removes unnecessary and confusing language from the statutory form for notices of commencement; and clarifies procedures for obtaining electronic proof of delivery of notices. The proposal does not have a fiscal impact on state or local government funds.

II. CURRENT SITUATION

The lien law currently has a number of inconsistencies. Section 85.021, Florida Statutes, governs enforcement of liens by persons not in privity with the owner. As currently written, the statute is virtually unreadable and confusing. Although § 85.021 has been construed by the Florida Supreme Court as providing for personal money judgments against the owner as well as against the lienor's customer, *see Logan Constr. Co. v. Warren Bros. Constr. Co.*, 268 So.2d 369, 371 (Fla. 1972), as currently worded, the statute confusingly refers to obtaining judgment against "the contractor or other person for whom the labor or material was furnished." The amendment seeks to clarify the intent to avoid inconsistent results.

Section 95.11, Florida Statutes, contains two separate provisions governing actions on payment bonds – subsections (2)(b) and (5)(e). Subsection (2)(b) provides for a five year statute of limitations except as to statutory payment bonds – as to which it cross-references the provisions for public project payment bonds (in Chapter 255, F.S.) and private project payment bonds (in Chapter 713, F.S.). Subsection (5)(e), conversely, purports to provide a one-year statute of limitations for <u>all</u> actions on payment bonds – public or private – including, apparently, statutory as well as non-statutory bonds. This conflict is explained further below.

Sections 713.08 and 713.13, Florida Statutes, provide the statutory forms for claims of lien and notices of non-payment, respectively. The proposal seeks to add language missing from the statutory claim of lien form, but required by the substantive provisions of § 713.08. It also seeks to remove confusing and unnecessary language from the notice of commencement form. Finally, the proposal seeks to clarify the provisions of Section 713.18, Florida Statutes, relating to electronic proof of delivery of notices.

III. SECTION-BY-SECTION ANALYSIS

The proposed changes are broken down for discussion purposes below by subsection:

A. Section 85.021.

Current situation: As currently worded, § 85.021 is awkwardly worded, unnecessarily refers to whether a party is joined in an action (which would be required by due process in any event), and contains a reference to §713.75, which relates to personal property liens, not construction liens. The latter reference would not be relevant in 99% of lien cases.

Effect of Proposed Changes: The section is re-worded to delete the unnecessary references including the reference to § 713.75 and to simplify and clarify the wording.

For clarity, the net result is as follows:

"85.021 Enforcement by persons not in privity with the owner.—A person not in privity with the owner may resort to any of the remedies prescribed by s. 85.011. The judgment may enforce the lien against the property of the owner. The judgment may also, or alternatively, provide for the recovery from the lienor's customer and from the owner of the amount owed to the lienor under the claim of lien plus interest, costs, and fees pursuant to F.S. 713.29. The lienor may only recover once, which recovery shall satisfy all judgments obtained hereunder."

B. Section 95.11

Current situation: Section 95.11 contains two confusing, and contradictory, statements regarding the statute of limitations governing actions against payment bonds. Section 95.11(2)(b) provides that such actions "shall be governed by the applicable provisions of ss. 255.05(10) and 713.23(1)(e)." Section 95.11(5)(e), on the other hand, provides that an action against a payment bond must be commenced within one year "from the last furnishing of labor, services, or materials or from the last furnishing of labor, services, or materials by the contractor if the contractor is the principal on a bond on the same construction project, whichever is later", which is a different period than stated in either §255.05(10) or §713.23(1)(e). Section 95.11(5)(e) also purports to apply to all actions against payment bonds – contractor bonds, subcontractor bonds and sub-subcontractor bonds, on both public and private projects – even though only general contractor bonds are required to be recorded and are the only kind of bonds deemed to be "statutory" bonds. Finally,

§95.11 does not reference or reconcile with F.S. §337.18(1)(d), which provides a statute of limitations for actions on payment bonds furnished by contractors in connection with state transportation projects.

Effect of Proposed Changes: Section 95.11(5)(e) would be deleted, with subsequent sub-subsections re-designated accordingly, as it adds nothing but confusion and is unnecessary. Section 95.11(2)(b) would be re-worded to cross-reference §337.18(1)(d) and to make it clear the exception to the five-year statute of limitations only applies to payment bond actions governed by either §255.05(10), §713.23(1)(e) or §337.18(1)(d). Actions under subcontractor bonds, sub-subcontractor bonds and any other payment bonds not furnished by a general contractor pursuant to one of the above statutes would be governed by the general five-year statute of limitations for actions founded upon a written instrument.

C. Section 713.08(3)

Current situation: Section 713.08(1)(c) provides that "materials specially fabricated at a place other than the site of the improvement for incorporation in the improvement but not so incorporated and the contract price or value thereof shall be separately stated in the claim of lien." However, the statutory form for a claim of lien contained in § 713.08(3) contains no provision for a separate statement of the contract price or value of specially fabricated materials included in the lien amount.

Effect of Proposed Changes: The statutory form is amended to provide for the separate statement of the contract price or value of specially fabricated materials in accordance with § 713.08(1)(c).

D. Section 713.13(1)(d)

Current situation: As currently worded, the statutory form for a notice of commencement contains language that requires the signatory to verify under penalty of perjury (see F.S. § 92.525) that the information provided in the notice of commencement is true "to the best of my knowledge and belief." This requirement is contained nowhere else in § 713.13 and there is no discernible purpose for this requirement. Lienors are entitled under §713.18(3) to rely upon the information contained in the notice of commencement for the purpose of serving any required notices on the owner. Therefore, the consequence of any errors in that information would fall on the owner who negligently prepared the notice. Moreover, the enforceability of a verifying signature made in a representative capacity, as the section as currently worded requires, is subject to question. Rather than attempt to fix this apparent problem by requiring a second signature in an individual capacity, the requirement simply should be deleted.

Additionally, language was added to the statutory form in the 2011 legislative session which could cause confusion and inconsistent court interpretations as to when a notice of commencement expires, which could result in unintended title problems. To avoid confusion and potential litigation, this language should be deleted to restore the clarity of the language regarding the effective date of the notice of commencement for the benefit of bona fide purchasers, lenders, title companies and others who rely upon this information in making business decisions.

Effect of Proposed Changes: The language requiring the signing person to verify the information under penalty of perjury is stricken. The language providing that the expiration date of a notice of commencement may not be before completion of construction and final payment to the contractor is also stricken. As revised, a notice of commencement following the statutory form will expire one year from the date of recording unless a different date is specified.

E. Section 713.18(2)

Current situation: Subsection (2) is a run-on sentence approximately 177 words long which refers to a non-existent electronic verification of delivery service by the U.S. Postal Service. The delivery confirmation service currently provided by the U.S. Postal Service does not provide verification of the name and address of the person served as required by this subsection (and which is likely required in order to comport with the requirements of due process).

Effect of Proposed Changes: The reference to the non-existent "United States Postal Service Confirm service" is deleted, but the section is re-structured to make it more readable and the language providing for electronic confirmation of delivery is left intact with the same requirements (again, to satisfy due process concerns) with the expectation this service may become available from the U.S. Postal Service at some point in the future.

F. Effective Date

The legislation would take effect October 1, 2012.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal does not have a fiscal impact on state and local governments.

V. DIRECT ECONOMIC IMPACT ON THE PRIVATE SECTOR

The proposal clarifies existing statutes and creates no new obligations. Hence, there is no direct economic impact on the private sector, except potential litigation costs saved by the clarifications.

VI. CONSTITUTIONAL ISSUES

The proposal presents no constitutional issues.

VII. OTHER INTERESTED PARTIES

Construction trades groups such as the Associated General Contractors of Florida, Associated Builders and Contractors and the like typically take an interest in any changes to the construction lien law. It is unknown whether these groups will support or oppose the requested changes.

A bill to be entitled

An act relating to construction liens; amending s. 713.10, F.S.; deleting the requirement that a notice for a parcel of property must set forth the specific language contained in the various leases prohibiting the lessor's liability for liens for improvements made by the lessee.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subparagraph 2 of paragraph b of subsection 2 of Section 713.10, Florida Statutes, is amended to read:

2. The terms of the lease expressly prohibit such liability and a notice advising that leases for the rental of premises on a parcel of land prohibit such liability has been recorded in the official records of the county in which the parcel of land is located before the recording of a notice of commencement for improvements to the premises and the notice includes the following:

a. The name of the lessor.

b. The legal description of the parcel of land to which the notice applies.

c. ~~The specific language contained in the various leases prohibiting such liability. d.~~ A statement that all or a majority of the leases entered into for the premises on the parcel of land expressly prohibit such liability.

Section 2. This act shall take effect upon becoming law.

REAL PROPERTY, PROBATE & TRUST LAW SECTION
WHITE PAPER

CONSTRUCTION LIENS FOR LEASED PROPERTY

I. SUMMARY

This legislation is intended to address a possible problem with the interpretation of **CS for CS for SB 1196** amending Section 713.10, Florida Statutes to create greater certainty in extending the protection intended by Section 713.10 of the Florida Construction Lien Law to landlords[1] of property on which tenants make improvements by addressing the holding in *Everglades Electric Supply, Inc. v. Paraiso Granite, LLC*, 28 So.3d 235 (Fla. 4th DCA 2010) that a landlord's blanket notice recorded under Section 713.10, Florida Statutes that all leases contained language prohibiting construction liens against the landlord's property was defective because the language in the notice was not identical in every lease. The bill does not have a fiscal impact on state funds.

II. CURRENT SITUATION

Section 713.10 of the Construction Lien Law is entitled "Extent of Liens" and provides that a lien "shall extend to, and only to, the right, title, and interest of the person who contracts for the improvements as such right, title, and interest exists at the commencement of the improvement..." If, however, "an improvement is made by a lessee in accordance with an agreement between such lessee and her or his lessor, the lien shall extend also to the interest of such lessor."

Prior to 1985, Section 713.10 provided that a landlord's interest would not be subject to liens for improvements on its property "when the lease is recorded in the clerk's office and the terms of the lease expressly prohibit such liability." *See* §713. 10, Fla. Stat. (1983). In 1985, the statute was amended to provide alternatives to recording the entire lease. Specifically, the landlord could record either the lease or a short form of the lease or, if all of the leases entered into by the landlord prohibited such liability, the landlord could record a blanket notice setting forth the specific language contained in the various leases prohibiting such liability together with a statement that all of the leases contain such language. *See* §713.10(2), Fla. Stat. (1985).

"In amending this statute, the Legislature obviously sought to provide a simplified and less costly manner in which lessors may provide notice to prospective contractors of their disclaimer of liability for improvements made by a lessee." *14th & Heinberg, L.L.C. v. Henricksen & Co., Inc.*, 877 So.2d 34, 38 (Fla. 1st DCA 2004).

[1] The statute uses the terms "lessor" and "lessee". Most practitioners use the terms "landlord" and "tenant" since they are less likely to be mistakenly used for the wrong party. The proposed statutory amendments continue to use the terms lessor and lessee but in this paper the terms landlord and tenant are used for greater clarity.

Unfortunately, there are some practical problems for landlords in using the two alternatives provided by the 1985 amendments. These problems were highlighted in the case of *Everglades Electric Supply, Inc. v. Paraiso Granite, LLC*, 28 So.3d 235 (Fla. 4th DCA, 2010) which was decided on March 3, 2010.

The first alternative – recording the lease or a short form of it -- poses title problems for landlords. The lease or short form[2] remains of record forever unless terminated while leases expire or are terminated with regularity and the termination is generally not a matter of record. The title search obtained in connection with a sale or mortgage by a landlord will reflect all recorded leases or memoranda of leases even as to leases that have expired or have been terminated. The buyer or mortgagee is then on notice of any interest in the property claimed by the tenant which would include not only the tenant's leasehold interest but also other possible rights such as to lease additional space or to purchase the property. In order to pass clear title, the landlord will need to eliminate of record all recorded leases or memoranda of them which are no longer in effect. This process can be time consuming and expensive. For this reason, it is not common, except in the case of major leases, for leases or notices of them to be recorded in Florida.

The second alternative – recording a blanket notice setting forth the specific language contained in the various leases prohibiting such liability together with a statement that all of the leases contain such language – poses a different practical problem for landlords. Often when a landlord purchases a property he inherits leases that do not contain lien prohibition language which, under the holding in the *Everglades Electric* case, would mean the landlord could not record an effective blanket notice. Additionally, the lien prohibition language contained in the leases may vary or be changed in some of the leases. Under the holding in the *Everglades Electric* case, even where the landlord has substantially complied with the statute, a small, technical variation in the language of a single lease can lead to the blanket notice being found ineffective thus defeating the lien prohibition effect generally intended by the statute even where lienors were not prejudiced by the technical non-compliance.

In the 2011 legislative session CS for CS for SB 1196 was enacted in an effort to address the *Everglades Electric* holding and provide greater utility to the use of blanket notices of lien prohibition by landlords. However, this bill left in the requirement in Section 713.10 (2)(b)(2)(c) that the blanket notice include: "the specific language contained in the various leases prohibiting such liability." It is possible that with this language still in the statute a court faced with the same fact pattern as that in *Everglades Electric* – a lease for a property that contains lien prohibition language that is different than the lien prohibition language in the blanket notice -- could reach the same result as the *Everglades Electric* court and find the blanket notice ineffective to protect the landlord from liens arising from work performed by tenants.

Therefore, the proposed bill will delete the requirement in Section 713.10 (2)(b)(2)(c) that the blanket notice include: "the specific language contained in the various leases prohibiting

[2] The term "short form of lease" is not commonly used as the name of the document that is recorded in lieu of recording the entire lease. The term "memorandum of lease" is more prevalent.

such liability."

III. EFFECT OF PROPOSED CHANGES

The requirement in Section 713.10 (2)(b)(2)(c) that the blanket notice include: "the specific language contained in the various leases prohibiting such liability" will be deleted. Therefore, a blanket notice recorded by a landlord under Section 713.10 (2)(b)(2) will still be valid and the landlord's interest in premises will not be liable for liens arising from work performed by a tenant even if the leases for the overall property have different versions of the lien prohibition language or no lien prohibition language at all, so long as a majority of the leases contain lien prohibition language.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal does not have a fiscal impact on state or local governments.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The passage of this proposal should economically benefit property owners, allowing them to protect against construction liens resulting from construction projects undertaken by a tenant.

VI. CONSTITUTIONAL ISSUES

This proposal should not raise any constitutional issues.

V. OTHER INTERESTED PARTIES

Associated General Contractors
Florida Home Builders Association
Florida Apartment Association
Florida Association of Realtors
International Council of Shopping Centers
National Association of Industrial and Office Properties
National Assn of Credit Mgt-Improved Construction Practices Committee

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE
Date Form Received_____

GENERAL INFORMATION

Submitted By (List name of the section, division, committee, bar group or individual)

Salome J. Zikakis, Chair, Mortgages and Other Encumbrances Committee of the Real Property Probate & Trust Law

Address (List street address and phone number)

Parady & Zikakis, P.A., Ft. Lauderdale, FL 33316-1929
(954) 728-9799

Position Level (Florida Bar, section, division, committee or both)

Mortgages and Other Encumbrances Committee, RPPTL Section, The Florida Bar

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following:

(Bill or PCB #) (Sponsor)

_____

_____

Indicate Position: Support / Oppose / Technical or Other Non-Partisan Assistance

Proposed Wording of Position for Official Publication:

To require mortgagees to provide subsequent owners of property with payoff information as to mortgages encumbering the property, through changes to Section 701.04(1), F.S.; to provide an effective date.

Reasons For Proposed Advocacy:

Although Section 701.04(1), F.S. currently requires a mortgagee to provide payoff information to the mortgagor, it does not require a mortgagee to provide payoff information to a subsequent owner of the property. Mortgagees are refusing to provide this information unless ordered by the courts or required by statute. The proposed amendment to the section would require a mortgagee to provide this limited information to a subsequent owner.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position

(Bar / Section / Division / Committee)	(Support or Oppose)	(Date)
_____	_____	

Others (Attach list if more than one)

(Bar / Section / Division / Committee)	(Support or Oppose)	(Date)
_____	_____	

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

A request for action on a legislative position must be circulated to all divisions, sections and committees that might be interested in the issue. The Legislation Committee and Board of Governors may delay final action on a request in the absence of any responses from such groups. Please include all responses with this request form.

Referrals

1.
(Name of Group or Organization) (Support, Oppose or No Position)

_____

2.
(Name of Group or Organization) (Support, Oppose or No Position)

_____

3.
(Name of Group or Organization) (Support, Oppose or No Position)

_____

CONTACTS

Board & Legislation Committee Appearance
(List name, address and phone number)

Margaret A. Rolando, Shutts & Bowen, P.A., 201 S. Biscayne Blvd., 1500 Miami Center, Miami, FL 33131, (305) 358-6300

Barry F. Spivey, Spivey & Fallon, P.A., 1515 Ringling Blvd., Suite 885, Sarasota, FL 34236, (941) 840-1991

Jeffrey T. Sauer, Smith, Sauer & DeMaria, 510 East Zaragoza Street, Pensacola, FL 32502, (850) 434-2761

Peter Dunbar, Pennington, Moore, et al., P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533

Martha J. Edenfield, Pennington, Moore, et al., P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533

Appearances Before Legislators
(List name, address and phone number)

SAME

Meetings With Legislators/Staff
(List name, address and phone number)

SAME

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request - which may involve a separate appearance before the Legislation Committee unless otherwise advised.

For information or assistance, please contact the Governmental Affairs Office of The Florida Bar at 800-342-8060, extension 5662.

An act relating to satisfactions of mortgages, liens, and judgments: amending s. 701.04(1); providing for an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (1) of Section 701.04, Florida Statutes, is hereby amended to read as follows:

(1) Within 14 days after receipt of the written request of a mortgagor or an owner of an interest in property encumbered by a mortgage, the holder of a mortgage shall deliver, or cause to be delivered through the servicer of the mortgage, to the ~~mortgagor~~ person making the request at a place designated in the written request an estoppel letter setting forth the unpaid balance of the loan secured by the mortgage, including principal, interest, and any other charges properly due under or secured by the mortgage and interest on a per-day basis for the unpaid balance; provided that if the request is not from the mortgagor, then the unpaid balance of the loan secured by the mortgage need not be itemized, but shall include a per-day amount for the unpaid balance. If the request is not from the mortgagor, the owner shall include with the request a copy of the instrument(s) showing an ownership interest in the owner. Whenever the amount of money due on any mortgage, lien, or judgment shall be fully paid to the person or party entitled to the payment thereof, the mortgagee, creditor, or assignee, or the attorney of record in the case of a judgment, to whom such payment shall have been made, shall execute in writing an instrument acknowledging satisfaction of said mortgage, lien, or judgment and have the same acknowledged, or proven, and duly entered of record in the book provided by law for such purposes in the proper county. Within 60 days of the date of receipt of the full payment of the mortgage, lien, or judgment, the person required to acknowledge satisfaction of the mortgage, lien, or judgment shall send or cause to be sent the recorded satisfaction to the person who has

made the full payment. In the case of a civil action arising out of the provisions of this section, the prevailing party shall be entitled to attorney's fees and costs.

Section 2. This act shall take effect upon becoming a law.

RPPTL SECTION WHITE PAPER
PROPOSED AMENDMENT TO §701.04(1), F.S.

I. SUMMARY

The purpose of the proposed amendment would require mortgagees to provide subsequent owners of property with payoff information as to mortgages encumbering the property.

II. CURRENT SITUATION

Currently, Section 701.04(1) requires a holder of a mortgage to provide the unpaid balance of the loan secured by the mortgage to the mortgagor within 14 days of a written request. The statute does not require the mortgagee to give that information to any other owner of the encumbered property. A person could become an owner of an interest in the property by any number of ways, including but not limited to, an heir or devisee through probate, homestead laws, a surviving spouse that was not on the note, or a junior lienholder that has foreclosed on the property against the mortgagor. Mortgagees are refusing to furnish the information citing the privacy requirements of the federal Gramm-Leach-Bliley Act, 15 USC, Subchapter I, Section 6801-6809. However, an exception to the prohibition of disclosure restrictions is contained in Section 6802(e)(8). That section exempts from the prohibition of disclosure of nonpublic personal information to comply with state laws.

III. EFFECT OF PROPOSED CHANGES

The proposed bill would amend Section 701.04(1) to require a mortgagee, or the servicer of the mortgage, to release limited payoff information as to the encumbered property so that an owner can obtain the information necessary to pay the mortgagee or servicer the unpaid balance and obtain a satisfaction of the mortgage.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The bill does not have a fiscal impact on state and local governments.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The impact on the private sector would include the same cost to the mortgagee for providing this information as if the mortgagor had requested it. The economic benefits would inure to the owners of the property by allowing those persons to pay off mortgages and clear title to the property and would inure to the mortgagees who would be receiving payment.

VI. CONSTITUTIONAL ISSUES

There are no constitutional issues that may arise as a result of the bill.

VII. OTHER INTERESTED PARTIES

Potential interested parties outside of those represented in the RPPTL section include bankers and the title insurance industry.

A bill to be entitled

An act relating to the transfer of tax liability; amending s. 213.758, F.S.; providing definitions; revising provisions relating to tax liability when a person transfers or quits a business; providing that the transfer of the assets of a business or stock of goods of a business under certain circumstances is considered a transfer of the business; requiring the Department of Revenue to provide certain notification to a business before a circuit court shall temporarily enjoin business activity by that business; providing that transferees of the business are liable for certain taxes unless specified conditions are met; requiring the department to conduct certain audits relating to the tax liability of transferors and transferees of a business within a specified time period; requiring certain notification by the Department of Revenue to a transferee before a circuit court shall enjoin business activity in an action brought by the Department of Legal Affairs seeking an injunction; specifying a transferor and transferee of the assets of a business are jointly and severally liable for certain tax payments up to a specified maximum amount; specifying the maximum liability of a transferee; providing methods for calculating the fair market value or total purchase price of specified business transfers to determine maximum tax liability of transferees; excluding certain transferees from tax liability when the transfer consists only of specified assets; amending s. 213.053, F.S.; authorizing

the Department of Revenue to provide certain tax information to a transferee against whom tax liability is being asserted pursuant to s. 213.758, F.S.; repealing s. 202.31, F.S., relating to the tax liability and criminal liability of dealers of communications services who make certain transfers related to a communications services business; repealing s. 212.10, F.S., relating to a dealer's tax liability and criminal liability for sales tax when certain transfers of a business occur; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 213.758, Florida Statutes, is amended to read:

213.758 Transfer of tax liabilities.—

(1) As used in this section, the term:

(a) "Business" means any activity regularly engaged in by any person, or caused to be engaged in by any person, for the purpose of private or public gain, benefit, or advantage. The term does not include occasional or isolated sales or transactions involving property or services by a person who does not hold himself or herself out as engaged in business. A discrete division or portion of a business is not a separate business and must be aggregated with all other divisions or portions that constitute a business if the division or portion is not a separate legal entity.

(b) "Financial institution" means a financial institution

as defined in s. 655.005 and any person who controls, is controlled by, or is under common control with a financial institution as defined in s. 655.005.

(c) "Insider" means:

1. Any person included within the meaning of insider as used in s. 726.102(7); or

2. A manager of, a managing member of, or a person who controls a transferor that is a limited liability company, or a relative as defined in s. 726.102(11) of any such persons.

(d) ~~(a)~~ "Involuntary transfer" means a transfer of a business, assets of a business, or stock of goods of a business made without the consent of the transferor, including, but not limited to, a transfer:

1. That occurs due to the foreclosure of a security interest issued to a person who is not an insider ~~as defined in s. 726.102~~;

2. That results from an eminent domain or condemnation action;

3. Pursuant to chapter 61, chapter 702, or the United States Bankruptcy Code;

4. To a financial institution~~, as defined in s. 655.005,~~ if the transfer is made to satisfy the transferor's debt to the financial institution; or

5. To a third party to the extent that the proceeds are used to satisfy the transferor's indebtedness to a financial institution ~~as defined in s. 655.005~~. If the third party receives assets worth more than the indebtedness, the transfer of the excess may not be deemed an involuntary transfer.

(e) "Stock of goods" means the inventory of a business held for sale to customers in the ordinary course of business.

(f) "Tax" means any tax, interest, penalty, surcharge, or fee administered by the department pursuant to chapter 443 or any of the chapters specified in s. 213.05, excluding chapter 220, the corporate income tax code.

(g) ~~(b)~~ "Transfer" means every mode, direct or indirect, with or without consideration, of disposing of or parting with a business, assets of the business, or stock of goods of the business, and includes, but is not limited to, assigning, conveying, demising, gifting, granting, or selling, other than to customers in the ordinary course of business, to a transferee or to a group of transferees who are acting in concert. A business is considered transferred when there is a transfer of more than 50 percent of:

1. The business;

2. The assets of the business; or

3. The stock of goods of the business.

(2) A taxpayer engaged in a business who is liable for any tax arising from the operation of that business~~, interest, penalty, surcharge, or fee administered by the department pursuant to chapter 443 or described in s. 72.011(1), excluding corporate income tax,~~ and who quits the ~~a~~ business without the benefit of a purchaser, successor, or assignee, or without transferring the business, assets of the business, or stock of goods of a business to a transferee, must file a final return for the business and make full payment of all taxes arising from the operation of that business within 15 days after quitting the

business. ~~A taxpayer who fails to file a final return and make payment may not engage in any business in this state until the final return has been filed and all taxes, interest, or penalties due have been paid.~~ The Department of Legal Affairs may seek an injunction at the request of the department to prevent further business activity of a taxpayer who fails to file a final return and make payment of the taxes associated with the operation of the business until such taxes ~~tax, interest, or penalties~~ are paid. A temporary injunction enjoining further business activity shall ~~may~~ be granted by a circuit court if the department has provided at least 20 days' prior written notice to the taxpayer ~~without notice~~.

(3) A taxpayer who is liable for taxes with respect to a business~~, interest, or penalties levied under chapter 443 or any of the chapters specified in s. 213.05, excluding corporate income tax,~~ who transfers the taxpayer's business, assets of the business, or stock of goods of the business~~,~~ must file a final return and make full payment within 15 days after the date of transfer.

(4)(a) A transferee, or a group of transferees acting in concert, of more than 50 percent of a business, assets of a business, or stock of goods of a business is liable for any unpaid tax~~, interest, or penalties~~ owed by the transferor arising from the operation of that business unless:

1.a. The transferor provides a receipt or certificate of compliance from the department to the transferee showing that the transferor has not received a notice of audit and the transferor has filed all required tax returns and has paid all

tax arising ~~is not liable for taxes, interest, or penalties~~ from the operation of the business identified on the returns filed; and

b. There were no insiders in common between the transferor and the transferee at the time of the transfer; or

2. The department finds that the transferor is not liable for taxes, interest, or penalties after an audit of the transferor's books and records. The audit may be requested by the transferee or the transferor and, if not done pursuant to the certified audit program under s. 213.285, must be completed by the department within 90 days after the records are made available to the department. The department may charge a fee for the cost of the audit if it has not issued a notice of intent to audit by the time the request for the audit is received.

(b) A transferee may withhold a portion of the consideration for a business, assets of the business, or stock of goods of the business to pay the tax ~~taxes, interest, or penalties~~ owed to the state by the transferor taxpayer arising from the operation of the business. The transferee shall pay the withheld consideration to the state within 30 days after the date of the transfer. If the consideration withheld is less than the transferor's liability, the transferor remains liable for the deficiency.

(c) ~~A transferee who acquires the business or stock of goods and fails to pay the taxes, interest, or penalties due may not engage in any business in the state until the taxes, interest, or penalties are paid.~~ The Department of Legal Affairs may seek an injunction at the request of the department to

prevent further business activity of a transferee who is liable for unpaid tax of a transferor and who fails to pay or cause to be paid the transferee's maximum liability for such tax due until such maximum liability for the tax is~~, interest, or penalties are~~ paid. A temporary injunction enjoining further business activity shall ~~may~~ be granted by a circuit court if: ~~without notice.~~

1. The assessment against the transferee is final and either:

a. The time for filing a contest under s. 72.011 has expired; or

b. Any contest filed pursuant to s. 72.011 resulted in a final and nonappealable judgment sustaining any part of the assessment; and

2. The department has provided at least 20 days' prior written notice to the transferee of its intention to seek an injunction.

(5) The transferee, or transferees acting in concert, of more than 50 percent of a business, assets of the business, or stock of goods of a business who are liable for any tax pursuant to this section shall be ~~are~~ jointly and severally liable with the transferor for the payment of the tax ~~taxes, interest, or penalties~~ owed to the state from the operation of the business by the transferor up to the transferee's or transferees' maximum liability for such tax due.

(6) The maximum liability of a transferee pursuant to this section is equal to the fair market value of the business, assets of the business, or stock of goods of the business

~~property~~ transferred to the transferee or the total purchase price paid by the transferee for the business, assets of the business, or stock of goods of the business, whichever is greater.

(a) The fair market value must be determined net of any liens or liabilities, with the exception of liens or liabilities owed to insiders.

(b) The total purchase price must be determined net of liens and liabilities against the assets, with the exception of:

1. Liens or liabilities owed to insiders.

2. Liens or liabilities assumed by the transferee that are not liens or liabilities owed to insiders.

(7) After notice by the department of transferee liability under this section, the transferee has 60 days within which to file an action as provided in chapter 72.

(8) This section does not impose liability on a transferee of a business, assets of a business, or stock of goods of a business when:

(a) The transfer is pursuant to an involuntary transfer; or

(b) The transferee is not an insider, and the asset transferred consists solely of a one- to four-family residential real property and furnishings and fixtures therein; real property that has not been improved with any building; or owner-occupied commercial real property; and, in each case, is not accompanied by a transfer of other assets of the business.

(9) The department may adopt rules necessary to administer and enforce this section.

Section 2. Subsection (17) of section 213.053, Florida Statutes, as amended by chapter 2010-280, Laws of Florida, is amended to read:

213.053 Confidentiality and information sharing.—

(17) The department may provide to the person against whom transferee liability is being asserted pursuant to s. 213.758 ~~s. 212.10(1)~~ information relating to the basis of the claim.

Section 3. Section 202.31, Florida Statutes, is repealed.

Section 4. Section 212.10, Florida Statutes, is repealed.

Section 5. This act shall take effect July 1, 2011.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE
Date Form Received _____

GENERAL INFORMATION

Submitted By (List name of the section, division, committee, bar group or individual)

Real Property, Probate and Trust Law Section, Real Property Problem Studies Committee

Address (List street address and phone number)

Katherine Frazier, Hill, Ward & Henderson, 101 East Kennedy Blvd. Suite 3700, Tampa, FL 33602-5195 Phone: (813) 221-3900 skfrazier@hwhlaw.com

Position Level Florida Bar or Section / Division / Committee – or both, if requested)

RPPTL Section and Committee

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. Every request should be accompanied by a copy of any existing or proposed legislation, or a detailed presentation of the matter at issue. Contact the Governmental Affairs office with questions.

If Applicable, List The Following:

(Bill or PCB #)	(Sponsor)
HB 907 (2011)	Rep. John Wood
_____	

Indicate Position: ☑ Support ☐ Oppose ☐ Technical or Other Non-Partisan Assistance

Proposed Wording of Position for Official Publication:

Supports clarification of Florida Statutes, Section 213.758 "Transfer of tax liabilities" in order to streamline the transfers of businesses, stocks of goods, and certain real estate transactions.

Reasons For Proposed Advocacy:

F.S. 213.758 passed in 2010 created transferee liability for the purchaser of businesses and certain assets. The Business Law Section and Ta ought to clarify the standards for triggering transferee liability and create a series of safe harbors. RPPTL seeks to support the Business Law

Section and Tax Law Section's position and to include safe harbor language for certain stand-alone real estate transactions.

HB 907 passed the House during the 2011 session and has been refilled for 2012.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section/division/committee positions on this issue, to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position

(Bar / Section / Division / Committee)	(Support or Oppose)	(Date)
Business Law Section	Support	1/28/2011
Tax Law Section	Support	10/11/2010

Others (Attach list if more than one)

(Bar / Section / Division / Committee)	(Support or Oppose)	(Date)
_____	_____	_____

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

A request for action on a legislative position must be circulated to all divisions, sections and committees that might be interested in the issue. The Legislation Committee and Board of Governors may delay final action on a request in the absence of any responses from such groups. Please include all responses with this form.

Referrals

1. (Name of Group or Organization) (Support, Oppose or No Position)

Business Law Section — Support – see above

2. (Name of Group or Organization) (Support, Oppose or No Position)

Tax Law Section — Support – see above

3. (Name of Group or Organization) (Support, Oppose or No Position)

Board & Legislation Committee Appearance
(List name, address and phone number)

If required:
Barry Spivey, Adams & Reese, LLP, P.O. Box 49017, Sarasota, FL 34230 941-316-7600 barry.spivey@arlaw.com
Rob Freedman, Carlton Fields, P.A , PO Box 3239, Tampa, Florida 33601-3239, 813-229-4149, rfreedman@carltonfields.com

Appearances Before Legislators
(List name and phone number of those appearing before House/Senate Committees)
Katherine Frazier, Hill, Ward & Henderson, 101 East Kennedy Blvd. Suite 3700, Tampa, FL 33602-5195 Phone: (813) 221-3900 skfrazier@hwhlaw.com
Alan Fields, 1129 Venetian Harbor Drive, NE, St. Petersburg, FL 33702. 727-773-6664 abfields@mindspring.com
Barry Spivey, Adams & Reese, LLP, P.O. Box 49017, Sarasota, FL 34230 941-316-7600 barry.spivey@arlaw.com
Rob Freedman, Carlton Fields, P.A , PO Box 3239, Tampa, Florida 33601-3239, 813-229-4149, rfreedman@carltonfields.com
Peter Dunbar, Pennington, Moore, et al, P.O. Box 10095, Tallahassee, Florida, 32302-2095 (850) 222-3533

Martha J. Edenfield, Pennington, Moore, et al, P.O. Box 10095, Tallahassee, Florida, 32302-2095 (850) 222-3533

Meetings With Legislators/Staff
(List name and phone number of those having direct contact with legislators)

Same

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request – which may involve a separate appearance before the Legislation Committee unless otherwise advised.

For information or assistance, please contact the Governmental Affairs Office of The Florida Bar at 800-342-8060, extension 5662.

Revised 080915

TO: Real Property Problem Studies Committee

FROM: Alan B. Fields

DATE: June 29, 2011

RE: Transferee Tax Liability under F.S. §213.758

In 2010, the legislature adopted F.S. §213.758, which made the acquirer of a business or business assets liable for the unpaid state taxes (other than corporate income taxes) of the seller. The Business Law Section and the Tax Law Section were both opposing this bill, agreement was reached to pull the bill for further study, but the operative language somehow was inserted into another bill which passed.

Since the initial passage, §213.758 has been interpreted by the DoR as being triggered by the sale of certain assets of a business. During the 2011 Legislative Session, the Business Law Section and the Tax Law Section worked with the Department of Revenue to clarify the law and create various safe harbors, including the ability to obtain a certificate of compliance which would exempt the purchaser from transferee liability. This cure did not particularly affect RPPTL interests, so we did not take a formal position.

During the negotiation process, the clarifying bill (HB 907) added language providing that the transfer of more than 50% of the assets of a business would trigger transferee liability. This clarification of the statute is consistent with the DoR interpretation of the currently ambiguous statutory language. That amendment highlighted that the transfer of real estate alone was potentially a triggering event for this liability and the FLTA and Realtors expressed their concerns.

Language was negotiated creating a carve-out for most stand-alone real estate transfers, as follows:

> "(8) This section does not impose liability on a transferee of a business, assets of a business, or stock of goods of a business when:
>
> (a) The transfer is pursuant to an involuntary transfer;
>
> or
>
> (b) The transferee is not an insider, and the asset transferred consists solely of a one- to four-family residential real property and furnishings and fixtures therein; real property that has not been improved with any building; or owner-occupied commercial real property; and, in each case, is not accompanied by a transfer of other assets of the business."

The real estate carve out leaves the transferee tax issue in play for affiliated party transfers, for situations where the property is the business (such as a rental strip center, or hotel); or where other assets of the business are being acquired with the real property.

So it is not a total solution to the real property issue, but given that the underlying law had already been passed and interpreted as applying to a sale of 50% of the assets, this language was felt to be the best we could realistically do.

HB 907, including the real estate carve-out, passed the full House, but died on the last day on the Senate floor. It is being re-filed.

The Business Law Section and Tax Law Section have been taking point on this issue, and we expect they will continue to take point. Given that this now clearly affects real property interests, I have suggested to Katherine Frazier that the Problem Studies Committee should take a position in support of the version of HB 907 which passed the House, and submit it as an action item to the full Executive Council as a proposed Legislative Position, with recommendations that it also be found within the purview of the Section and to spend money.

A copy of the enrolled bill, the Business/Tax Law Section white paper and a draft Real Estate Supplement to the White Paper are attached.

Transfer of Tax Liabilities
WHITE PAPER

AMENDMENTS TO FLORIDA STATUTES, SEC. 213.758

Tax Law Section
The Florida Bar

February 1, 2011

I. SUMMARY

The purpose of the proposed amendments to s. 213.758 F.S. is to make desirable clarifications to s. 213.758 F.S. and create a viable procedure for purchasers of Florida businesses to comply with that section.

II. CURRENT SITUATION

The 2009 Florida legislature enacted s. 213.758 F.S., which provides generally that when 50% or more of a business or stock of goods is transferred, the purchaser becomes responsible for all taxes of the seller that are administered by the Department of Revenue, except corporate income taxes. A procedure is set forth for requesting a clearance certificate from the Department, which after an audit, relieves the purchaser from liability. The statute contains exemptions for involuntary transfers such as transfers in bankruptcy or foreclosures. The statute was passed without input by business interests and as drafted, has a chilling effect on the transfer of business assets.

III. DETAIL OF PROPOSED CHANGES

1. The provision applies to a transfer of 50% or more of a business or stock of goods. Neither "business" nor "stock of goods" is defined. Borrowing from sales tax administrative rules, the proposal would define "business" as any activity regularly engaged in by any person with the object of public or private gain. The definition would exclude occasional or isolated sales by a person who does not hold himself out as in that particular business. "Stock of goods" would be defined to be synonymous with inventory.

2. Transfers to a financial institution in lieu of foreclosure, or transfers to a third party to the extent that debt owed to a financial institution is paid with the proceeds, are both treated as involuntary transfers under the statute and do not trigger transferee liability for the lender.

Many financial institutions conduct foreclosures, short sales and other collection activities through affiliate al institution who are not technically

considered to be a "financial institution." The proposal treats the affiliates of the financial institution the same as the financial institution itself.

3. The proposal would allow a purchaser to request and obtain a clearance certificate and avoid transferee liability where the seller is not under audit, has filed all required returns and has paid all taxes shown as payable thereon. This would allow the purchaser to avoid liability without undergoing a timely and expensive audit.

Where a clearance certificate cannot be obtained under the above procedure, a purchaser could still request the audit and obtain a clearance certificate under the traditional route. The proposal would require the audit to be completed within ninety days of the request, in recognition that ordinary business transactions should not be put on hold for a lengthy audit process.

4. The statute limits the liability of the purchaser to the value of the assets purchased, or the amount paid, whichever is more. The proposal would clarify that in both cases, these amounts are determined net of liabilities to persons other than insiders that are secured by the assets purchased, or that are assumed by the purchaser.

5. Requires notice to the taxpayer before an injunction can be issued barring the taxpayer to engage in further business.

6. The proposal would repeal transferee liability provisions in the Communications Service Tax chapter and in the Sales Tax chapter that are inconsistent with and duplicative of the new statute.

IV. ANALYSIS

The proposed will make desirable clarifications to s. 213.758 F.S. and create a viable procedure for business purchasers to comply with that section. A significant amount of time and energy is spent in the due diligence process in order for purchasers to obtain comfort that they will not inherit large undiscovered tax liabilities of the seller. The changes will speed up the closing of business transactions.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS--None

VI. DIRECT IMPACT ON PRIVATE SECTOR--None

VII. CONSTITUTIONAL ISSUES—None apparent

VIII. OTHER INTERESTED PARTIES—Business Law Section of The Florida Bar and Real Property, Probate and Trust Law Section of the Florida Bar

Supplement to Business Law Section White Paper
As to Real Estate Issues
June 29, 2011

Under current §213.758, the purchaser of 50% of a business or stock of goods of that business becomes liable for certain unpaid tax liabilities. The term "business" is not specifically defined, so would be interpreted as the common definition of the term – one thinks of a hardware store, a computer services business and the like, but not the building which might house those businesses, nor other real property which might be owned by the same taxpayer entity.

The Business Law Section amendment defines "business" for purposes of this section in terms of any activity regularly engaged in for private or public gain, benefit, or advantage. This greatly expands the scope of transactions subject to transferee liability. Another new provision expressly states that the sale of more than 50% of the "assets of the business" will trigger transferee liability.

These two provisions, considered together, potentially greatly expand the scope of transferee liability under §213.758, in a fashion in which the sale of real property alone, without the transfer of what anyone would commonly consider the "business" or "business assets," can carry with it liability for unpaid taxes.

Examples of real estate sales potentially triggering tax liability include:

1. The sale of a vacation condominium unit, where the seller had a series of short-term rentals and not paid taxes. Here the only asset of this particular economic activity (defined in the bill as a "business") is the leasing of the unit, so this sale meets both parts of the test.

2. The purchase of a building occupied by a taxpayer, in which taxpayer is moving their ongoing business to a new location. If the value of the building was more than 50% of the total assets, the purchaser would be liable for unpaid taxes, notwithstanding that the taxpayer continues as a viable entity.

3. Purchase of a strip mall occupied in part by the seller's own business (perhaps under a d/b/a). While it might be appropriate to impose liability for taxes related to the business of renting these units, it does not seem appropriate to impose transferee liability for taxes related to the occupant owner's retail business (the unpaid taxes of the hardware store).

4. And potentially, the sale of a personal residence by a sole proprietor taxpayer (regardless of whether the "business" is conducted at home) if, as is so often the case, the value of the home is more than 50% of the taxpayer's total worth.

Absent exclusions for real estate transactions, it is all but impossible to discern which transactions might carry with them transferee tax liability. The expected advice is for

purchasers to avail themselves of one of the safe harbor provisions made available under the bill. Unfortunately, having the purchaser apply to the Department of Revenue for a "certificate of compliance" or a full audit of the seller's business in so many cases will quickly overwhelm the available resources of the department, resulting in significantly delayed closings, the loss of financing locks and failed transactions.

In order to avoid this result, language was added to clarify that the purchaser of certain types of real property (when not accompanied by the transfer of other assets of the business and not involving an "insider") does not assume the unpaid tax liability of the seller, where those assets consist solely of:

- a one- to four-family residential real property and furnishings and fixtures therein
- real property that has not been improved with any building; or
- owner-occupied commercial real property

Chapter 608 Drafting Committee Working Draft Dated June 20, 2011 [1]

(Table of Contents at end)

FLORIDA REVISED UNIFORM LIMITED LIABILITY COMPANY ACT

[ARTICLE 1
GENERAL PROVISIONS][2]

SECTION 101.[3] SHORT TITLE. This act may be cited as the Florida Revised Uniform Limited Liability Company Act.

SECTION 102. DEFINITIONS. In this act:

(1) "Act" means the Florida Revised Limited Liability Company Act of 20[12], as amended.]

(2) "Authorized representative" means one or more persons authorized by a member of a limited liability company to form a limited liability company by executing and filing its certificate of organization. In the case of an existing limited liability company, the term "authorized representative" means a manager in the case of a manager-managed limited liability company, or a member, in the case of a member-managed limited liability company, who has the authority to file with the Department of State the instrument required by the applicable provisions of this act, or another agent of the limited liability company who has been granted the authority to file the instrument by the managers, in the case of a manager-managed limited liability company, or the members, in the case of a member-managed limited liability company.

(3) "Certificate of organization" means the certificate required by Section 201. The term includes the certificate as amended or restated.

(4) "Contribution" means any benefit provided by a person to a limited liability company:

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[1] Contains changes through Committee meeting on April 29, 2011 (as part of Florida Bar Tax Section meetings in Bonita Springs).

[2] Article and Caption references to be left in draft to assist in navigation. To consider whether captions should be used (as in Chap. 607). (STYLE SUBCOMMITTEE)

[3] These Section and subsection references will be changed to "Florida" statute" style in a final draft. Note that some subsection references in this draft are in Florida style already because they consist of provisions taken from existing Florida statutes. This was done to save effort when converting the entire draft to Florida style at a later time.(STYLE SUBCOMMITTEE)

(A) in order to become a member upon formation of the limited liability company and in accordance with an agreement between or among the persons that have agreed to become the initial members of the limited liability company;

(B) in order to become a member after formation of the company and in accordance with an agreement between the person and the limited liability company; or

(C) in the person's capacity as a member and in accordance with the operating agreement or an agreement between the member and the limited liability company.

(5) "Debtor in bankruptcy" means a person that is the subject of:

(A) an order for relief under Title 11 of the United States Code or a successor statute of general application; or

(B) a comparable order under federal, state, or foreign law governing insolvency.

(6) "Designated office" means:

(A) the office that a limited liability company is required to designate and maintain under Section 113; or

(B) the principal office of a foreign limited liability company.

(7) "Distribution", except as otherwise provided in Section 405(f), means a transfer of money or other property from a limited liability company to another person on account of a transferable interest in accordance with the operating agreement or otherwise.

(8) "Effective", with respect to a record required or permitted to be delivered to the Department of State for filing under this act, means effective under Section 205(c).

(9) "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 limited liability company.

(10) "Limited liability company" [or "company"][4], except in the phrase "foreign limited liability company", means an entity formed under this act. [or which has entity attributes substantially similar to a limited liability company][5]

(11) "Manager" means a person that under the operating agreement of a manager-managed limited liability company is responsible, alone or in concert with others, for performing the management functions stated in Section 407(c).

[4] Suggested but not acted upon.
[5] Suggested by Stu Ames but not acted upon yet

(12) "Manager-managed limited liability company" means a limited liability company that qualifies under Section 407(a).

(13) "Member" means a person that has become a member of a limited liability company under Section 401 and has not dissociated under Section 602.

(14) "Member-managed limited liability company" means a limited liability company that is not a manager-managed limited liability company.

(15) "Operating agreement" means the agreement, whether or not referred to as an operating agreement and [whether oral, in a record, implied, or in any combination thereof,][6] of all the members of a limited liability company, including a sole member, concerning the matters described in Section 110(a). The term includes the agreement as amended or restated. [7]

(16) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(17) "Principal office" means the principal executive office of a limited liability company or foreign limited liability company, whether or not the office is located in this state.

(18) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(19) "Sign" means, with the present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

(20) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(21) "Transfer" includes an assignment, conveyance, deed, bill of sale, lease, mortgage, security interest, encumbrance, gift, and transfer by operation of law.

(22) "Transferable interest" means the right, as originally associated with a person's capacity as a member, to receive distributions from a limited liability company in accordance

[6] Consider Statute of Frauds issue, ordering rule (written versus oral provisions), enforceability, amendment requirements (see 608.423 of existing law). These should be addressed elsewhere if not here. Also consider whether all "waivable" provisions under Section 110 may be modified by an oral agreement.

[7] Compare Delaware definition of LLC Agreement; should we address enforceability, signing requirements, etc.? If so, these would probably be better addressed as provisions in Section 110.

with the operating agreement, whether or not the person remains a member or continues to own any part of the right.

(23) "Transferee" means a person to which all or part of a transferable interest has been transferred, whether or not the transferor is a member.

Uniform Comment[8]

This Section contains definitions for terms used throughout the act, while Section 1001 contains definitions specific to Article 10's provisions on mergers, conversions [and domestications.][9] Section 405(g) contains an exception to the definition of "distribution," which is specific to Section 405.

Paragraph (1) [Certificate of organization] – The original ULLCA and most other LLC statutes use "articles of organization" rather than "certificate of organization." This act purposely uses the latter term to signal that: (i) the certificate merely reflects the existence of an LLC (rather than being the locus for important governance rules); and (ii) this document is significantly different from articles of *incorporation*, which have a substantially greater power to affect *inter se* rules for the corporate entity and its owners. For the relationship between the certificate of organization and the operating agreement, see Section 112(d).

Paragraph (2) [Contribution] – This definition serves to distinguish capital contributions from other circumstances under which a member or would-be member might provide benefits to a limited liability company (e.g., providing services to the LLC as an employee or independent contractor, leasing property to the LLC). The definition contemplates three typical situations in which contributions are made, and for each situation establishes two "markers" to identify capital contributions – the purpose for which the contributor makes the contribution and the agreement that contemplates the contribution:

circumstance	**purpose/cause of providing benefits**	**the relevant agreement**
pre-formation deal among would-be initial members [Paragraph 2(A)]	in order to become initial member(s)	agreement among would-be initial members
deal between an existing LLC and would-be member [Paragraph 2(B)]	in order to become a member	agreement between the LLC and the would-be member

[8] Change paragraph references to match definitions in later draft. (COMMENT SUBCOMMITTEE)

[9] Any references in comments to domestications need to be deleted (assuming Committee determines to delete this transaction from uniform act). Note that the issue of domestication is to be reconsidered (see Reporter's Note immediately preceding Section 1001. (COMMI TTEE)

member contribution [Paragraph 2(C)]	in member's capacity as a member	operating agreement or an agreement between the member and the LLC

This definition does not encompass capital raised from transferees, which is sometimes provided for in operating agreements. In such circumstances, the default rules for liquidating distributions should be altered accordingly. *See* Section 714(b)(1) ("referring to contributions made by a member and not previously returned").

Paragraph (7) [Foreign limited liability company] – Some statutes have elaborate definitions addressing the question of whether a non-U.S. entity is a "foreign limited liability company." The NY statute, for example, defines a "foreign limited liability company" as:

an unincorporated organization formed under the laws of any jurisdiction, including any foreign country, other than the laws of this state (i) that is not authorized to do business in this state under any other law of this state and (ii) of which some or all of the persons who are entitled (A) to receive a distribution of the assets thereof upon the dissolution of the organization or otherwise or (B) to exercise voting rights with respect to an interest in the organization have, or are entitled or authorized to have, under the laws of such other jurisdiction, limited liability for the contractual obligations or other liabilities of the organization.

N.Y. LIMIT LIAB CO. LAW § 102(k) (McKinney 2006). ULLCA § 101(8) takes a similar but less complex approach ("an unincorporated entity organized under laws other than the laws of this State which afford limited liability to its owners comparable to the liability under Section 303 and is not required to obtain a certificate of authority to transact business under any law of this State other than this act"). This act follows Delaware's still simpler approach. DEL. CODE ANN. tit. 6, § 18-101(4) (2006) ("denominated as such").

Paragraph (8) [Limited liability company] – This definition makes no reference to a limited liability company having members upon formation, but Section 201 does. [For a detailed discussion of the "shelf LLC" issue, see the Comment to Section 201.][10]

Paragraph (9) [Manager] – The act uses the word "manager" as a term of art, whose applicability is confined to manager-managed LLCs. The phrase "manager-managed" is itself a term of art, referring only to an LLC whose operating agreement refers to the LLC as such. Paragraph 10 (defining "manager-managed limited liability company"). Thus, for purposes of this act, if the members of a *member*-managed LLC delegate plenipotentiary management authority to one person (whether or not a member), this act's references to "manager" do not apply to that person.

This approach does have the potential for confusion, but confusion around the term "manager" is common to almost all LLC statutes. The confusion stems from the choice to define "manager" as a term of art in a way that can be at odds with other, common usages of the word.

[10] Since shelf filings will not be permitted, references thereto need to be deleted or changed throughout comments. (COMMENT SUBCOMMITTEE)

For example, a member-managed LLC might well have an "office manager" or a "property manager." Moreover, in a manager-managed LLC, the "property manager" is not likely to be a manager as the term is used in many LLC statutes. *See, e.g., Brown v. MR Group, LLC*, 278 Wis.2d 760, 768-9, 693 N.W.2d 138, 143 (Wis.App. 2005) (rejecting a party's urging to use the dictionary definition of "manager" in determining coverage of a policy applicable to a limited liability company and its "managers" and relying instead on the meaning of the term under the Wisconsin LLC act).

Under this act, the category of "person" is not limited to individuals. Therefore, a "manager" need not be a natural person. After a person ceases to be a manager, the term "manager" continues to apply to the person's conduct while a manager. *See* Section 407(c)(7).

Paragraph (10) [Manager-managed] – This act departs from most LLC statutes (including the original ULLCA) by authorizing a private agreement (the operating agreement) rather than a public document (certificate or articles of organization) to establish an LLC's status as a manager-managed limited liability company. Using the operating agreement makes sense, because under this act managerial structure creates no statutory power to bind the entity. *See* Section 301 (eliminating statutory apparent authority). The only direct consequences of manager-managed status are *inter se* – principally the triggering of a set of rules concerning management structure, fiduciary duty, and information rights. Sections 407 – 410. The management structure rules are entirely default provisions – subject to change in whole or in part by the operating agreement. The operating agreement can also significantly affect the duty and rights provisions. Section 110.

For pre-existing limited liability companies that eventually become subject to this act, Section 1104(c) provides that "language in the limited liability company's articles of organization designating the company's management structure will operate as if that language were in the operating agreement." For limited liability companies formed under this act, the typical method to select manager-managed status will be an explicit provision of the operating agreement. However, a reference in the certificate of organization to manager-management might be evidence of the contents of the operating agreement. *See* Comment to Section 112(b).

An LLC that is "manager-managed" under this definition does not cease to be so simply because the members fail to designate anyone to act as a manager. In that situation, absent additional facts, the LLC is manager-managed and the manager position is vacant. Non-manager members who exercise managerial functions during the vacancy (or at any other time) will have duties as determined by other law, most particularly the law of agency.

Paragraph 10(A) and (B) – In these paragraphs, the phrases "manager-managed" and "managed by managers" are "magic words" – i.e., for either subparagraph to apply, the operating agreement must include precisely the required language. However, the word "expressly" does not mean "in writing" or "in a record." This act permits operating agreements to be oral (in whole or in part), and an oral provision of an operating agreement could contain the magic words. This act also recognizes that provisions of an operating agreement may be reflected in patterns of conduct.

Oral and implied agreements invite memory problems and "swearing matches." Section 110(a)(4) empowers the operating agreement to determine "the means and conditions for the amending the operating agreement."

Paragraph 10(C) – In contrast to Paragraphs 10(A) and (B), this provision does not contain "magic words" and considers instead all terms of the operating agreement that expressly refer to management by managers.

Paragraph 11 [Member] – After a person has been dissociated as a member, Section 602, the term "member" continues to apply to the person's conduct while a member. *See* Section 603(b).

Paragraph 12 [Member-managed limited liability company] – A limited liability company that does not effectively designate itself a manager-member limited liability company will operate, subject to any contrary provisions in the operating agreement, under statutory rules providing for management by the members. Section 407(a). For a discussion of potential confusion relating to the term "manager", see the Comment to Paragraph 9 (Manager).

Paragraph (13) [Operating Agreement] – This definition must be read in conjunction with Sections 110 through 112, which further describe the operating agreement. An operating agreement is a contract, and therefore all statutory language pertaining to the operating agreement must be understood in the context of the law of contracts.

The definition in Paragraph 13 is very broad and recognizes a wide scope of authority for the operating agreement: "the matters described in Section 110(a)." Those matters include not only all relations *inter se* the members and the limited liability company but also all "activities of the company and the conduct of those activities." Section 110(a)(3). Moreover, the definition puts no limits on the form of the operating agreement. To the contrary, the definition contains the phrase "whether oral, in a record, implied, or in any combination thereof".

This act states no rule as to whether the statute of frauds applies to an oral operating agreement. Case law suggests that an oral agreement to form a partnership or joint venture with a term exceeding one year is within the statute. *E.g. Abbott v. Hurst*, 643 So.2d 589, 592 (Ala. 1994) ("Partnership agreements, like other contracts, are subject to the Statute of Frauds. A contract of partnership for a term exceeding one year is within the Statute of Frauds and is void unless it is in writing; however, a contract establishing a partnership terminable at the will of any partner is generally held to be capable of performance by its terms within one year of its making and, therefore, to be outside the Statute of Frauds.") (citations omitted); Pemberton *v. Ladue Realty & Const. Co.*, 362 Mo. 768, 770-71, 244 S.W.2d 62, 64 (Mo. 1951) (rejecting plaintiff's contention that mere part performance sufficed to take the oral agreement outside the statute and holding that partnership was therefore at will); *Ebker v. Tan Jay Int'l, Ltd.*, 739 F.2d 812, 827-28 (2d Cir.1984) (same analysis with regard to a joint venture). However, it is not possible to form an LLC without someone signing and delivering to the filing officer a certificate of organization in record form, Section 201(a), and the act itself then establishes the LLC's duration. Subject to the operating agreement, that duration is perpetual. Section 104(c). An oral provision of an operating agreement calling for performance that extends beyond a year might be within the one-

year provision – e.g., an oral agreement that a particular member will serve (and be permitted to serve) as manager for three years.

An oral provision of an operating agreement which involves the transfer of land, whether by or to the LLC, might come within the land provision of the statute of frauds. *Froiseth v. Nowlin*, 156 Wash. 314, 316, 287 P. 55. 56 (Wash. 1930) ("[The land provision] applies to an oral contract to transfer or convey partnership real property, and the interest of the other partners therein, to one partner as an individual, as well as to a parol contract by one of the parties to convey certain land owned by him individually to the partnership, or to another partner, or to put it into the partnership stock.") (quoting 27 CORPUS JURIS 220).").

In contrast, the fact that a limited liability company owns or deals in real property does not bring within the land provision agreements pertaining to the LLC's membership interests. Interests in a limited liability company are personal property and reflect no direct interest in the entity's assets. Re-ULLCA §§ 501 & 102(21). Thus, the real property issues pertaining to the LLC's ownership of land do not "flow through" to the members and membership interests. See, e.g., *Wooten v. Marshall*, 153 F. Supp. 759, 763-764 (S.D. N.Y. 1957) (involving an "oral agreement for a joint venture concerning the purchase, exploitation and eventual disposition of this 160 acre tract" and stating "[t]he real property acquired and dealt with by the venturers takes on the character of personal property as between the partners in the enterprise, and hence is not covered by [the Statute of Frauds]."

The operating agreement may comprise a number of separate documents (or records), however denominated, unless the operating agreement itself provides otherwise. Section 110(a)(4). Absent a contrary provision in the operating agreement, a threshold qualification for status as part of the "operating agreement" is the assent of all the persons then members. An agreement among less than all of the members might well be enforceable among those members as parties, but would not be part of the operating agreement.

An agreement to form an LLC is not itself an operating agreement. The term "operating agreement" presupposes the existence of members, and a person cannot have "member" status until the LLC exists. However, the act's very broad definition of "operating agreement" means that, as soon as a limited liability company has any members, the limited liability company has an operating agreement. For example, suppose: (i) two persons orally and informally agree to join their activities in some way through the mechanism of an LLC, (ii) they form the LLC or cause it to be formed, and (iii) without further ado or agreement, they become the LLC's initial members. The LLC has an operating agreement. "[A]ll the members" have agreed on who the members are, and that agreement – no matter how informal or rudimentary – is an agreement "concerning the matters described in Section 110(a)." (To the extent the agreement does not provide the *inter se* "rules of the game," this act "fills in the gaps." Section 110(b).)

The same result follows when a person becomes the sole initial member of an LLC. It is not plausible that the person would lack any understanding or intention with regard to the LLC. That understanding or intention constitutes an "agreement of all the members of the limited liability company, including a sole member."

It may seem oxymoronic to refer an "agreement of . . . a sole member," but this approach is common in LLC statutes. *See, e.g.*, ARIZ. REV. STAT. ANN. § 29-601 (14)(b) (2006) (defining operating agreement to mean "in the case of a limited liability company that has a single member, any written or oral statement of the member made in good faith"); COLO. REV. STAT. ANN. § 7-80-102 (11)(b)(I) (West 2006) (defining operating agreement to include, in the case of a single member LLC "[a]ny writing, without regard to whether such writing otherwise constitutes an agreement … signed by the sole member"; N.H. REV. STAT. ANN. § 304-c:1 (VI) (2006) (defining limited liability company agreement to include "a document adopted by the sole member"); OR. REV. STAT. ANN. § 63.431(2) (2005) (vesting the "power to adopt, alter, amend or repeal an operating agreement of … a single member limited liability company, in the sole member of the limited liability company"); R.I. GEN. LAWS § 7-16-2 (19) (2005) (stating that the term operating agreement "includes a document adopted by the sole member of a limited liability company that has only one member"); and WASH. REV. CODE ANN. § 25.15.005 (5) (West 2006): (defining limited liability company agreement to include "any written statement of the sole member").

This re-definition of "agreement" is a function of "path dependence." By the time single-member LLCs became widely accepted, almost all LLC statutes were premised on the LLC's key organic document being the operating agreement. Because a key function of the operating agreement is to override statutory default rules, it was necessary to make clear that a sole member could make an operating agreement. Such an agreement may also be of interest to third parties, because the operating agreement binds the LLC. Section 111(a).

In light of Paragraph 13's broad definition, it is possible to argue that any activity involving unanimous consent of the members becomes part of the operating agreement. For example, if pursuant to an operating agreement all the members consent to the redemption of one-half of the managing-member's transferable interest, does that action constitute an addition to the agreement?

Typically, such questions will turn on the practical issue of whether the unanimous consent pertained solely to a single event (now past) or also to future circumstances (now in controversy) rather than on the semantic question of whether the operating agreement has been amended. Occasionally, however, the amendment *vel non* question could have practical import. For example, if the operating agreement entitles a non-member to approve (or veto) amendments, see Section 112(a), the members and the non-member might see the matter quite differently.

Careful drafting of veto provisions can help avoid controversy – e.g., by defining with specificity the type of decisions subject to the veto. On the question of how far a written (or "in a record") operating agreement can go to prevent oral or implied-in-fact terms, see Section 110(a)(4).

If it is necessary for a court to decide whether the contents of a matter approved by unanimous consent have become part of the operating agreement, the court should rely on principles of contract interpretation and look:

- first, at the manifestations of the members, including:
  - the manifestations made to give the unanimous consent; and
  - any terms of the operating agreement (e.g., terms specifying how matters become part of the operating agreement); and
- second, at whether, viewed from the perspective of a reasonable person in the position of the members giving consent, the consent was intended to incorporate the matter into the ongoing "rules of the game" or merely take some particular action as already permitted by those rules.

Of course, if all the members have the same understanding, the reasonableness *vel non* of that understanding is irrelevant and the shared meaning governs. *See* RESTATEMENT (SECOND) OF CONTRACTS, § 201(1) (1981).

Paragraph (14) [Organizer][11] – If an LLC is to have one or more members when the filing officer files the certificate of organization, the organizer: (i) acts on behalf of the person or persons who will become the LLC's initial members, Section 401(a) and (b); and (ii) has no function other than to compose, sign, and deliver to the filing officer for filing the certificate of organization. Section 201(a). If an LLC is to have its first member sometime *after* the filing officer files the certificate of organization, the organizer has the power to admit the initial member or members, Section 401(c), and to sign and deliver for filing the notice of initial membership described in Section 201(e)(1). Whether in this latter category of circumstances the organizer acts on behalf of the initial member or members is determined under ordinary principles of agency law and depends on the facts of each situation.

Paragraph (20) [Transfer] –The reference to "transfer by operation of law" is significant in connection with Section 502 (Transfer of Transferable Interest). That section severely restricts a transferee's rights (absent the consent of the members), and this definition makes those restrictions applicable, for example, to transfers ordered by a family court as part of a divorce proceeding and transfers resulting from the death of a member. The restrictions also apply to transfers in the context of a member's bankruptcy, except to the extent that bankruptcy law supersedes this act.

Paragraph (21) [Transferee] – "Transferee" has displaced "assignee" as the Conference's term of art.

SECTION 103. KNOWLEDGE; NOTICE.

(a) A person knows a fact when the person:

(1) has actual knowledge of it; or

(2) is deemed to know it under subsection (d)(1) [or (d)(2)] or law other than this act.

[11] Note that this term was deleted. Change other paragraph references accordingly.(COMMENT SUBCOMMITTEE)

(b) A person has notice of a fact when the person:

(1) has reason to know the fact from all of the facts known to the person at the time in question; or

(2) is deemed to have notice of the fact under subsection [(d)(3);]

(c) A person notifies another of a fact by taking steps reasonably required to inform the other person in ordinary course, whether or not the other person knows the fact.

(d) A person that is not a member is deemed:

(1) to know of a limitation on authority to transfer real property as provided in Section 302(g); [12]and

[(2) to know of a limitation with respect to the authority of a person holding a company position as provided in Section 302(a)(2), or the authority, or limitations on the authority, of a specific person as provided in Section 302(a)(3).][13]

(3) to have notice of a limited liability company's:

[(A) declaration in its certificate of organization that it is "manager-managed" in accordance with Section 201(c); provided that if such a declaration has been added or changed by an amendment or restatement of the certificate of organization, notice of the addition or change shall not become effective until 90 days after the effective date of such amendment or restatement.][14]

(B) dissolution, 90 days after a certificate of dissolution filed under Section 706 becomes effective;

(C) termination, 90 days after a statement of termination Section 708 becomes effective; and

(D) merger, conversion,[or domestication,][15] 90 days after articles of merger, conversion, [or domestication] under ss. 1001 through _____ become effective.

DOS SUGGESTION: Issue: should the LLC Act contain a default "Notice" provision

[12] Need to further consider and discuss constructive notice provisions of existing Florida law regarding changes or addition to statement of agency and effect of filings with county real estate records clerk (See 608.407(5) and (6)).
[13] This is consistent with existing law (608.407(6)). To be discussed further, including whether a 90-day "burn-in" period should apply to change or addition (as under existing law (608.407(5) and proposed Section 103(d)(3)(A).
[14] This is consistent with existing law (608.407(ה״
[15] To delete?

governing

[***Reporter's Note: this was discussed briefly at the 4/29/11 meeting with Brenda Tadlock. It is apparent that Section 103 would be the wrong place for this kind of provision. It is modeled after 607.0141. One major concern is whether this degree of formality has a place in an LLC statute. The other concern is that it would represent a significant departure from the existing law and be unique when compared with other states.***]

[SECTION _____. [NOTIFICATIONS]

(1) Notice under this act must be in writing, unless oral notice is expressly authorized by the certificate of organization or the operating agreement, and is reasonable under the circumstances. Notice by electronic transmission is written notice.

(2) Notice may be communicated in person, by telephone, voice mail (where oral notice is permitted), other electronic means, or by mail or other method of delivery.

(3) (a)Written notice by a domestic or foreign limited liability company authorized to transact business in this state to its member, if in a comprehensible form, is effective:

1. upon deposit into the United States mail, if mailed postpaid and correctly addressed to the member's address shown in the limited liability company's current record of members; or

2. when electronically transmitted to the member in a manner authorized by the member.

(b) Unless otherwise provided in the certificate of organization or operating agreement, and without limiting the manner by which notice otherwise may be given effectively to members, any notice to members given by the limited liability company under any provision of this chapter, the certificate of organization, or the operating agreement shall be effective if given by a single written notice to members who share an address if consented to by the members at that address to whom such notice is given. Any such consent shall be revocable by a member by written notice to the limited liability company.

(c) Any member who fails to object in writing to the limited liability company, within 60 days after having been given notice by the limited liability company of its intention to send the single notice permitted under paragraph (h), shall be deemed to have consented to receiving such single written notice.

(4) Written notice to a domestic or foreign limited liability company authorized to transact business in this state may be addressed:

(a) To its registered agent at its registered office; or

(b) To the limited liability company or its manager or managing member at its designated or principal office address or electronic mail address as authorized and shown in its most recent annual report or, in the case of a limited liability company that has not yet delivered an annual report, in a domestic limited liability company's certificate of organization or in a foreign limited liability company's application for certificate of authority.

(5) Except as provided in this section or elsewhere in this act, written notice, if in a comprehensible form, is effective at the earliest date of the following:

(a) When received;

(b) Five days after its deposit in the United States mail, if mailed postpaid and correctly addressed; or

(c) On the date shown on the return receipt, if sent by registered or certified mail, return receipt requested, and the receipt is signed by or on behalf of the addressee.

(6) Oral notice is effective when communicated if communicated directly to the person to be notified in a comprehensible manner.

(7) If this act prescribes notice requirements for particular circumstances, those requirements govern. If a certificate of organization or operating agreement prescribes notice requirements not less stringent than the requirements of this section or other provisions of this act, those requirements govern.]

Uniform Comment

This section is substantially slimmer than the corresponding provisions of previous uniform acts pertaining to business organizations (RUPA, ULLCA, and ULPA (2001)). Each of those acts borrowed heavily from the comparable UCC provisions. For the most part, this act relies instead on generally applicable principles of agency law, and therefore this section is mostly confined to rules specifically tailored to this act.

Several facets of this section warrant particular note. First, and most fundamentally, because this act does not provide for "statutory apparent authority," see Section 301, this section contains no special rules for attributing to an LLC information possessed, communicated to, or communicated by a member or manager.

Second, the section contains no generally applicable provisions determining when an organization is charged with knowledge or notice, because those imputation rules: (i) comprise core topics within the law of agency; (ii) are very complicated; (iii) should not have any different content under this act than in other circumstances; and (iv) are the subject of considerable attention in the new Restatement (Third) of Agency.

Third, this act does not define "notice" to include "knowledge." Although conceptualizing the latter as giving the former makes logical sense and has a long pedigree, that conceptualization is counter-intuitive for the non-*aficionado*. In ordinary usage, notice has a meaning separate from knowledge. This act follows ordinary usage and therefore contains some references to "knowledge or notice."

Subsection (a)(2) – In this context, the most important source of "law other than this act" is the common law of agency.

Subsection (b)(1) – The "facts known to the person at the time in question" include facts the person is deemed to know under subsection (a)(2).

[**Subsection (d)(3)]** – Under this act, the power to bind a limited liability company to a third party is primarily a matter of agency law. Section 301, Comment. The constructive notice provided under this paragraph will be relevant if a third party makes a claim under agency law that someone who purported to act on behalf of a limited liability company had the apparent authority to do so.

SECTION 104. NATURE, PURPOSE, AND DURATION OF LIMITED LIABILITY COMPANY.

(a) A limited liability company is an entity distinct from its members.

(b) A limited liability company may have any lawful purpose, [regardless of whether for profit.] [16]

(c) A limited liability company has perpetual duration.

Uniform Comment

Subsection (a) – The "separate entity" characteristic is fundamental to a limited liability company and is inextricably connected to both the liability shield, Section 304, and the charging order provision, Section 503.

Subsection (b) – The phrase "any lawful purpose, regardless of whether for profit" means that: (i) a limited liability company need not have any business purpose; and (ii) the issue of profit *vel non* is irrelevant to the question of whether a limited liability company has been validly formed. Although some LLC statutes continue to require a business purpose, this act follows the current trend and takes a more expansive approach.

The expansive approach comports both with the original ULLCA and with ULPA (2001). *See* ULLCA §§ 112(a) (captioned with reference to "Nature of Business" and permitting "any

[16] DOS proposes deleting this clause. Stu Ames has suggested this may imply not for profit LLC not permitted (clarify DOS' intention here).

lawful purpose, subject to any law of this State governing or regulating business") and 101(3) (defining "Business" as including "every trade, occupation, profession, and other lawful purpose, whether or not carried on for profit"); ULPA (2001) § 104(b) (permitting a limited partnership to be organized for any "lawful" purpose). *Compare* UPA § 6 (defining a general partnership as organized for profit), RUPA § 101(6) (same), and RULPA (1976/85) § 106 (delineating the "Nature of [a limited partnership's] Business" by linking back to "any business that a partnership without limited partners may carry on").

The subsection does not bar a limited liability company from being organized to carry on charitable activities, and this act does not include any protective provisions pertaining to charitable purposes. Those protections must be (and typically are) found in other law, although sometimes that "other law" appears within a state's non-profit corporation statute. *See, e.g.,* MINN. STAT. § 317A.811 (2006) (providing restrictions on charitable organizations that seek to "dissolve, merge, or consolidate, or to transfer all or substantially all of their assets" but imposing those restrictions only on "corporations," which are elsewhere defined as corporations incorporated under the non-profit corporation act).

Subsection (c) – In this context, the word "perpetual" is a misnomer, albeit one commonplace in LLC statutes. Like all current LLC statutes, this act provides several consent-based avenues to override perpetuity: a term specified in the operating agreement; an event specified in the operating agreement; member consent. Section 701 (events causing dissolution). In this context, "perpetuity" actually means that the act does not require a definite term and creates no nexus between the dissociation of a member and the dissolution of the entity. (The dissociation of an LLC's last remaining member does threaten dissolution. Section 701(a)(3) (stating, as a default rule, that a limited liability company dissolves "upon . . . the passage of 90 consecutive days during which the limited liability company has no members").

An operating agreement is not a publicly-filed document, which means that the public record pertaining to a limited liability company will not necessarily reveal whether a limited liability company actually has a perpetual duration. *Accord* ULPA (2001) § 104, comment to subsection (c) ("The partnership agreement has the power to vary this subsection [which provides for perpetual duration], either by stating a definite term or by specifying an event or events which cause dissolution. . . . . [The limited partnership act] also recognizes several other occurrences that cause dissolution. Thus, the public record pertaining to a limited partnership will not necessarily reveal whether the limited partnership actually has a perpetual duration.")

SECTION 105. POWERS. A limited liability company has the powers [rights,][17] and privileges granted by this act, any other law or by its operating agreement to do all things necessary or convenient to carry on its [business,][18] affairs or activities, and the capacity to sue and be sued in its own name.

[17] Stu Ames has pointed out that this is not used in any other Florida statute.

[18] There was a comment that using "business" in this context may imply that a LLC could not be used for non-business applications. Note that we use the term .

Florida Comment

The prior corresponding law contained specific illustrations of powers possessed by a limited liability company. That the act does not do so should not imply that a limited liability company does not have any of those powers which were set forth in the prior law.

Uniform Comment

Following ULPA (2001), § 105, this act omits as unnecessary any detailed list of specific powers. *Compare* ULLCA § 112 (containing a detailed list).

The capacity to sue and be sued is mentioned specifically so that Section 110(c)(1) can prohibit the operating agreement from varying that capacity. An LLC's standing to enforce the operating agreement is a separate matter, which is covered by Section 111(a) (stating, as a default rule, that the limited liability company "may enforce the operating agreement").

SECTION 106. GOVERNING LAW. The law of this state governs:

(1) the internal affairs of a limited liability company; and

(2) the liability of a member as member and a manager as manager for the debts, obligations, or other liabilities of a limited liability company.

Uniform Comment

[**Paragraph (1)** – Like any other legal concept, "internal affairs" may be indeterminate at its edges. However, the concept certainly includes interpretation and enforcement of the operating agreement, relations among the members as members; relations between the limited liability company and a member as a member, relations between a manager-managed limited liability company and a manager, and relations between a manager of a manager-managed limited liability company and the members as members. *Compare* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302, cmt. a (defining "internal affairs" with reference to a corporation as "the relations inter se of the corporation, its shareholders, directors, officers or agents").

The operating agreement cannot alter this provision. Section 110(c)(2). However, an operating agreement may lawfully incorporate by reference the provisions of another state's LLC statute. If done correctly, this incorporation makes the foreign statutory language part of the operating agreement, and the incorporated terms (together with the rest of the operating agreement) then govern the members (and those claiming through the members) to the extent not prohibited by this act. *See* Section 110. This approach does not switch the limited liability company's governing law to that of another state, but instead takes the provisions of another state's law and incorporates them by reference into the contract among the members.][19]

[19] We concluded all or part of this comment should be included in the new law. This brings to mind the broader question of whether we should include all of the NCCUSL comments, as opposed to using a "pick and choose" approach. It appears we included all of the uniform comments in the case of RUPA. Obviously, we would delete those uniform comments that apply to sections we do not use or change significantly (and would need to make clear in an introductory "Florida Comment" that we edited the official version of the NCCUSL comments. (COMMENT SUBCOMMITTEE)

Paragraph (2) – This paragraph certainly encompasses Section 304 (the liability shield) but does not necessarily encompass a claim that a member or manager is liable to a third party for (i) having purported to bind a limited liability company to the third party; or (ii) having committed a tort against the third party while acting on the limited liability company's behalf or in the course of the company's business. That liability is not by status (i.e., not "as member . . . [or] as manager") but rather results from function or conduct. Contrast Section 301(b) (stating that, although this act does not make a member as member the agent of a limited liability company, other law may make an LLC liable for the conduct of a member).

This paragraph is stated separately from Paragraph (1), because it can be argued that the liability of members and managers to third parties is not an internal affair. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 307 (treating shareholders' liability separately from the internal affairs doctrine). A few cases subsume owner/manager liability into internal affairs, but many do not. *See, e.g.*, *Kalb, Voorhis & Co. v. American Fin. Corp.*, 8 F.3d 130, 132 (2nd Cir. 1993). In any event, the rule stated in this paragraph is correct. All sensible authorities agree that, except in extraordinary circumstances, "shield-related" issues should be determined according to the law of the state of organization.

SECTION 107. RULES OF CONSTRUCTION AND SUPPLEMENTAL PRINCIPLES OF LAW.

(a) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this chapter.

(b) It is the policy of this act to give the maximum effect to the principle of freedom of contract and to the enforceability of operating agreements.

(c) Unless displaced by particular provisions of this act, the principles of law and equity supplement this act.

(d) [Determine whether rules of construction regarding gender, titles and captions, etc. should be added][20]

SECTION 108. NAME.

(a) The name of a limited liability company:

(1) Must contain the words "limited liability company" or the abbreviation "L.L.C." or "LLC".

(2) Must be distinguishable in the records of the Department of State from the names of all other

[20] One comment was that clause like Del. Code 18-1101(f) might be helpful. Note this is not the approach in case of other business entity statutes.

entities [and filings?][21], except fictitious name registrations pursuant to s. 865.09, organized, registered or reserved under the laws of this state, the names of which are on file with the Department of State.

(3) May not contain language stating or implying that the limited liability company is organized for a purpose other than that permitted in this act and its certificate of organization.

(4) May not contain language stating or implying that the limited liability company is connected with a state or federal government agency or a corporation or other entity chartered under the laws of the United States.

(b) Subject to Section 805, this section applies to a foreign limited liability company transacting business in this state which has a certificate of authority to transact business in this state or which has applied for a certificate of authority.

(c) In the case of any limited liability company in existence prior to July 1, 2007, and registered with the Department of State, the requirement in this section that the name of a limited liability company be distinguishable from the names of other entities [and filings][22] shall not apply except when the limited liability company files documents on or after July 1, 2007, that would otherwise have affected its name.

(d) Any limited liability company in existence prior to the effective date of this act, which was registered with the Department of State and is using an abbreviation or designation in it name permitted under prior law, shall be permitted to continue using such an abbreviation or designation in its name until it dissolves or amends its name on the records of the Department of State.

(e) The name of the limited liability company shall be filed with the Department of State for public notice only and shall not alone create any presumption of ownership beyond that which is created under the common law.

Uniform Comment

Subsection (a) is taken verbatim from ULLCA § 105(a). Except for subsection (b)(2), the rest of the section is taken from ULPA (2001) § 108.

Subsection (b)(2) – This language is necessary to protect a name contained in a filed

[21] This was used in LP act. Consider whether we should clarify what is meant by "filings."
[22] Conform when address footnote to 108(a)(1).

certificate of organization that has not become effective because there are no members. If a statement of membership is not thereafter timely filed, "the certificate lapses and is void," thereby freeing the name. Section 201(e)(1).

[**SECTION 109. INTENTIONALLY OMITTED**][23]

[***Reporter's Note:*** ***to determine whether the following section of existing law or parts thereof should be added here or elsewhere***:

608.425 Limited liability company property.

(1)All property originally contributed to the limited liability company or subsequently acquired by a limited liability company by purchase or otherwise is limited liability company property.

(2)Unless otherwise provided in the articles of organization or the operating agreement, property acquired with limited liability company funds is limited liability company property.

(3)Instruments and documents providing for the acquisition, mortgage, or disposition of property of the limited liability company shall be valid and binding upon the limited liability company, if they are executed in accordance with this chapter.][24]

SECTION 110. OPERATING AGREEMENT; SCOPE, FUNCTION, AND LIMITATIONS.

(a) Except as otherwise provided in subsections (b) and (c), the operating agreement governs:

(1) relations among the members as members and between the members and the limited liability company;

(2) the rights and duties under this act of a person in the capacity of manager;

(3) the [business,][25] affairs or activities of the company and the conduct of its [business,] affairs or activities; and

[(4) the means and conditions for amending the operating agreement.][26]

(b) To the extent the operating agreement does not otherwise provide for a matter

[23] NCCUSL version provided for Reservation of Name here. When deleted in later drafts will need to change cross-references.
[24] It was decided REPTL should provide guidance on whether these or similar provisions still desirable. Burt Bruton advised Reporter it should be included in new law.
[25] See footnotes to Sections 104 and 105 as well. Should we clarify that non-profit activities are permissible? The term "business" in existing law specifically defined to include not for profit activities.
[26] To be discussed

described in subsection (a), this act governs the matter.

(c) An operating agreement may not:

(1) vary a limited liability company's capacity under Section 105 to sue and be sued in its own name;

(2) [vary the law applicable under Section 106;][27]

(3) vary the power of the court under Section 204;

(4) [subject to subsections (d) through (g), eliminate the duty of loyalty, the duty of care, or any other fiduciary duty;][28]

(5) [subject to subsections (d) through (g), eliminate the contractual obligation of good faith and fair dealing under Section 409(d);][29]

(6) unreasonably restrict the duties and rights stated in Section 410;

(7) vary the power of a court to decree dissolution in the circumstances specified in Sections 702(b)(1) through (4);[30]

(8) vary the requirement to wind up a limited liability company's business as specified in Section 708(a) and (b)(1);

(9) unreasonably restrict the right of a member to maintain an action under ss. 901 through 906 [Article 9][31];

(10) [restrict the right to approve a merger, conversion, or domestication under Section 1014 to a member that will have personal liability with respect to a surviving, converted, or domesticated organization; or][32]

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[27] Should an operating agreement be permitted to incorporate laws of other jurisdictions for certain purposes (e.g., standards of performance for officers and managers, matters not directly related to relationship of members to one another or of the members to the LLC {unrelated to internal affairs}), and what about the situation where the operating agreement is implied from other contracts subject to laws of another state? BUT ISN'T THIS ALREADY HANDLED IN THE COMMENT TO 106 (and so maybe better approach is to cross-reference that section in comment to this section - COMMENTS SUBCOMMITTEE)? Also, consider prevalent practice of having jurisdiction and venue stipulated in another state. This would include issue whether another state's series LLC liability law should be respected in Florida (BUT CONSIDER WHETHER SEPARATE RULE WOULD APPLY WITH RESPECT TO THIRD PARTIES DEALING WITH THE LLC -- consider general principle that operating agreement cannot modify the rights of third parties --- only the rights and duties of the members inter se).

[28] Depends on how we address fiduciary duty issues in subsequent sections.

[29] To be discussed

[30] The comments should probably mention that Sections 702(b)(5) and (6) were expressly excluded from mention in this section to make it clear that judicial dissolution may be waived for circumstances related to deadlock and oppression claims.

[31] To be discussed (whether members may waive derivative action remedy)

[32] To consider re-wording (note under Sec. 1014 the exception to the default consent right when operating agreement doesn't require unanimous membe transaction (this in effect allows the operating

(11) [except as otherwise provided in Section 112(b), restrict the rights under this act of a person other than a member or manager.][33]

(d) [If not manifestly unreasonable, the operating agreement may]:[34]

(1) restrict or eliminate the duty:

(A) as required in Section 409(b)(1) and (g), to account to the limited liability company and to hold as trustee for it any property, profit, or benefit derived by the member in the conduct or winding up of the company's business, from a use by the member of the company's property, or from the appropriation of a limited liability company opportunity;

(B) as required in Section 409(b)(2) and (g), to refrain from dealing with the company in the conduct or winding up of the company's business as or on behalf of a party having an interest adverse to the company; and

(C) as required by Section 409(b)(3) and (g), to refrain from competing with the company in the conduct of the company's business before the dissolution of the company;

(2) identify specific types or categories of activities that do not violate the duty of loyalty;

(3) alter the duty of care, except to authorize intentional misconduct or knowing violation of law;

(4) alter any other fiduciary duty, including eliminating particular aspects of that duty; and

(5) prescribe the standards by which to measure the performance of the contractual obligation of good faith and fair dealing under Section 409(d).

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agreement to over-ride the default consent right). If this is an issue, note that the same approach and language is used in LP act.

[33] To be discussed further (Sec. 112(b) touches upon charging order remedy and exclusivity issue to be addressed when we discuss charging orders in particular under Sec. 503).

[34] The committee discussed the topics of fiduciary duties under Section 409 and permissible modifications under this Section 110 at length at its November 4, 2009 meeting. Many different views and proposals were presented. Straw polls were taken as to whether a consensus existed for any of the proposals but no concrete action was taken other than to bookmark this provision for further consideration during our weekend drafting session on February 26-27, 2010. Most of the committee members participating in the November 4, 2009 meeting acknowledged that further research and analysis was required, and that the final language for this section was directly dependent on the final approach to be taken under Section 409. For example, if the default standard for duty of care under Section 409 is "ordinary, etc." (versus a gross negligence standard), a greater degree of alteration of that duty under this section should be permitted. Some of the committee members believed that permissible alteration in any situation should include elimination of the default duty entirely (that is, to follow the Delaware approach of permitting of all fiduciary duties and obligations other than oblig h and fair dealing).

(e) The operating agreement may specify the method by which a specific act or transaction that would otherwise violate the duty of loyalty may be authorized or ratified by one or more disinterested and independent persons after full disclosure of all material facts.

(f) To the extent the operating agreement of a member-managed limited liability company expressly relieves a member of a responsibility that the member would otherwise have under this act and imposes the responsibility on one or more other members, the operating agreement may, to the benefit of the member that the operating agreement relieves of the responsibility, also eliminate or limit any fiduciary duty that would have pertained to the responsibility.

(g) [The operating agreement may alter or eliminate the indemnification for a member or manager provided by Section 408(a), and may eliminate or limit a member or manager's liability to the limited liability company and members for money damages, except for:][35]

(1) breach of the duty of loyalty;

(2) a financial benefit received by the member or manager to which the member or manager is not entitled;

(3) a breach of a duty under Section 406;

(4) intentional infliction of harm on the company or a member; or

(5) an intentional violation of criminal law.

[(h) The court shall decide any claim under subsection (d) that a term of an operating agreement is manifestly unreasonable. The court:

(1) shall make its determination as of the time the challenged term became part of the operating agreement and by considering only circumstances existing at that time; and

(2) may invalidate the term only if, in light of the purposes and activities of the limited liability company, it is readily apparent that:

[35] The Committee found the syntax of this provision troublesome and its relationship with language used in Section 408 worthy of clarification (STYLISTIC COMMITTEE). The Uniform Comment suggests an appropriate interpretation (that is, that the list of exceptions applies to the indemnification right and the exculpatory reference, but it would be preferable to restructure this subsection to avoid misinterpretation. It was also suggested that (1) through (5) of this subsection be moved to Section 408 and better integrated with the two existing preconditions in Section 408 for indemnification recited in Section 408(a) (that is, the existing references therein to Sections 405 and 409). Section 408 would then contain the entire default provision pertaining to a member's or manager's indemnification right, and Section 110(g) would deal solely with the permitted degree of modification of those preconditions. A clarification would also seem to be in order for the precondition relating to satisfaction of the performance standards in Section 409 since those standards are themselves subject to permitted alteration in accordance with this Section 110.

(A) the objective of the term is unreasonable; or

(B) the term is an unreasonable means to achieve the provision's objective.][36]

[(i) In addition to any right or remedy under applicable law or this act, an operating agreement may provide for specified consequences of any default under, or breach of, the operating agreement or this act, and such specified consequences may take the form of:

(1) reduction, modification or forfeiture of the person's transferable interest in the limited liability company;

(2) subordinating the defaulting person's transferable interest in the limited liability company to that of the non-defaulting person's transferable interest;

(3) a forced sale of the defaulting person's transferable interest in the limited liability company;

(4) forfeiture of the defaulting person's transferable interest in the limited liability company;

(5) the lending by a non-defaulting person of the amount necessary to satisfy the defaulting person's contribution obligation;

(6) fixing the value of the defaulting person's transferable interest by appraisal or by formula and redemption or sale of the defaulting person's transferable interest at such value; or

(7) other remedies, penalties or consequences, including specific performance.][37]

[(j) Any inconsistency between written and oral operating agreements shall be resolved in favor of the written agreement.][38]

Uniform Comment

The operating agreement is pivotal to a limited liability company, and Sections 110 through 112 are pivotal to this act. They must be read together, along with Section 102(13) (defining the operating agreement).

One of the most complex questions in the law of unincorporated business organizations is

[36] Discussed (but not at length) at November 4, 2009 meeting and further analysis to be deferred until February 2010 meeting.

[37] This is language in the ABA Prototype. It is also similar to provisions in current law (608.4211(5)). This was discussed but we need to determine whether it should be included. Query whether the reference to "transferable" interest is intended to lead to the interpretation that the defaulting member retains other membership rights, such that it would require an expulsion under 602(4). If that is the case, then we should consider clarification in 602(4) that transfer of entire transferable interest includes a forfeiture of that interest.

[38] This is language in existing 608.423(1). We need to determine whether it should be included.

the extent to which an agreement among the organization's owners can affect the law of fiduciary duty. This section gives special attention to that question and is organized as follows:

Subsection (a)	grants broad, *general* authority to the operating agreement
Subsection (b)	establishes this act as comprising the "default rules" ("gap fillers") for matters within the purview of the operating agreement but not addressed by the operating agreement
Subsection (c)	states restrictions on the power of the operating agreement, especially but not exclusively with regard to fiduciary duties and the contractual obligation of good faith
Subsection (d)	contains *specific* grants of authority for the operating agreement with regard to fiduciary duty and the contractual obligation of good faith; expressed so as to state restrictions on those specific grants – including the "if not manifestly unreasonable" standard
Subsection (e)	specifically grants the operating agreement the power to provide mechanisms for approving or ratifying conduct that would otherwise violate the duty of loyalty; expressed so as to state restrictions on those mechanism – full disclosure and disinterested and independent decision makers
Subsection (f)	specifically authorizes the operating agreement to divest a member of fiduciary duty with regard to a matter if the operating agreement is also divesting the person of responsibility for the matter (and imposing that responsibility on one or more other members)
Subsection (g)	contains *specific* grants of authority for the operating agreement with regard to indemnification and exculpatory provisions; expressed so as to state

	restrictions on those specific grants
Subsection (h)	provides rules for applying the "not manifestly unreasonable" standard established by subsection (d)

A limited liability company is as much a creature of contract as of statute, and Section 102(13) delineates a very broad scope for "operating agreement." As a result, once an LLC comes into existence and has a member, the LLC necessarily has an operating agreement. *See* Comment to Section 102(13). Accordingly, this act refers to "the operating agreement" rather than "an operating agreement."

This phrasing should not, however, be read to require a limited liability company or its members to take any formal action to adopt an operating agreement. *Compare* CAL. CORP. CODE § 17050(a) (West 2006) ("In order to form a limited liability company, one or more persons shall execute and file articles of organization with, and on a form prescribed by, the Secretary of State and, either before or after the filing of articles of organization, the members shall have entered into an operating agreement.")

The operating agreement is the exclusive consensual process for modifying this act's various default rules pertaining to relationships *inter se* the members and between the members and the limited liability company. Section 110(b). The operating agreement also has power over "the rights and duties under this act of a person in the capacity of manager," subsection (a)(2), and "the obligations of a limited liability company and its members to a person in the person's capacity as a transferee or dissociated member." Section 112(b).

Subsection (a) – This section describes the very broad scope of a limited liability company's operating agreement, which includes all matters constituting "internal affairs." Compare Section 106(1) (using the phrase "internal affairs" in stating a choice of law rule). This broad grant of authority is subject to the restrictions stated in subsection (c), including the broad restriction stated in paragraph (c)(11) (concerning the rights under this act of third parties).

Subsection (a)(1) – Under this act, a limited liability company is emphatically an entity, and the members lack the power to alter that characteristic.

Subsection (a)(2) – Under this paragraph, the operating agreement has the power to affect the rights and duties of managers (including non-member managers). Because the term "[o]perating agreement . . . . includes the agreement as amended or restated," Section 102(13), this paragraph gives the members the ongoing power to define the role of an LLC's managers. Power is not the same as right, however, and exercising the power provided by this paragraph might constitute a breach of a separate contract between the LLC and the manager. A non-member manager might also have rights under Section 112(a).

Subsection (a)(4) – If the operating agreement does not address this matter, under subsection (b) this act provides the rule. The rule appears in Section 407(b)(5) and 407(c)(4)(D)

(unanimous consent).

This act does not specially authorize the operating agreement to limit the sources in which terms of the operating agreement might be found or limit amendments to specified modes (e.g., prohibiting modifications except when consented to in writing). *Compare* UCC § 2-209(2) (authorizing such prohibitions in a "signed agreement" for the sale of goods). However, this Paragraph (a)(4) could be read to encompass such authorization. Also, under Section 107 the parol evidence rule will apply to a written operating agreement containing an appropriate merger provision.

Subsection (c) – If a person claims that a term of the operating agreement violates this subsection, as a matter of ordinary procedural law the burden is on the person making the claim.

Subsection (c)(4) – This limitation is less powerful than might first appear, because subsections (d) through (g) specifically authorize significantly alterations to fiduciary duty. The reference to "or any other fiduciary duty" is necessary because the act has "un-cabined" fiduciary duty. *See* Comment to Section 409.

Subsection (c)(9) – Arbitration and forum selection provisions are commonplace in business agreements, and this paragraph's restrictions do not reflect any special hostility to or skepticism of such provisions.

Subsection (c)(10) – Under Section 1014:

- each member is protected from being merged, converted, or domesticated "into" the status of an unshielded general partner (or comparable position) without the member having *directly* consented to either:
  - the merger, conversion, or domestication; or
  - an operating agreement provision that permits such transactions to occur with less than unanimous consent of the members; and
- merely consenting to an operating agreement provision that permits amendment of the operating agreement with less than unanimous consent of the members does not qualify as the requisite direct consent.

The sole function of subsection (c)(10) is to protect Section 1014 by denying the operating agreement the power to restrict or otherwise undercut the protections of Section 1014.

Subsection (c)(11) – This limitation pertains only to "the rights under this act of" third parties. The extent to which an operating agreement can affect other rights of third parties is a question for other law, particularly the law of contracts.

Subsection (d) – Delaware recently amended its LLC statute to permit an operating agreement to fully "eliminate" fiduciary duty within an LLC. This act rejects the ultra-contractarian notion that fiduciary duty within a business organization is merely a set of default rule and seeks instead to balance the virtues of "freedom of contract" against the dangers that inescapably exist when some have power over the interests of others. As one source has

explained:

The open-ended nature of fiduciary duty reflects the law's long-standing recognition that devious people can smell a loophole a mile away. For centuries, the law has assumed that (1) power creates opportunities for abuse and (2) the devious creativity of those in power may outstrip the prescience of those trying, through ex ante contract drafting, to constrain that combination of power and creativity.

CARTER G. BISHOP AND DANIEL S. KLEINBERGER, LIMITED LIABILITY COMPANIES: TAX AND BUSINESS LAW, ¶ 14.05[4][a][ii]

Subsection (h) contains rules for applying the "not manifestly unreasonable" standard.

Subsection (d)(1) – Subject to the "not manifestly unreasonable" standard, this paragraph empowers the operating agreement to eliminate all aspects of the duty of loyalty listed in Section 409. The contractual obligation of good faith would remain, see subsections(c)(5) and (d)(5), as would any other, uncodified aspects of the duty of loyalty. *See* Comment to Section 409 (explaining the decision to "un-cabin" fiduciary duty). *See also* subsection (d)(4) (empowering the operating agreement to "alter any other fiduciary duty, including eliminating particular aspects of that duty").

Subsection (d)(3) – The operating agreement's power to affect this act's duty of care both parallels and differs from the agreement's power to affect this act's duty of loyalty as well as any other fiduciary duties not codified in the statute. With regard to all fiduciary duties, the operating agreement is subject to the "manifestly unreasonable" standard. The differences concern: (i) the extent of the operating agreement's power to restrict the duty; and (ii) the power of the operating agreement to provide indemnity or exculpation for persons subject to the duty.

duty	**extent of operating agreement's power to restrict the duty (subject to the "manifestly unreasonable" standard) Section 110(d)(1), (3) and (4)**	**power of the operating agreement to provide indemnity or exculpation w/r/t breach of the duty Section 110(g)**
loyalty	restrict or completely eliminate	none
care	alter, but not eliminate; specifically may not authorize intentional misconduct or knowing violation of law	complete
other fiduciary duties, not codified in the	restrict or completely eliminate Section 110(4)	complete

statute		

Subsection (e) – Section 409(f) states the act's default rule for authorization or ratification – unanimous consent. This subsection specifically empowers the operating agreement to provide alternate mechanisms but, in doing so, imposes significant restrictions – namely, any alternate mechanism must involve full disclosure to, and the disinterestedness and independence of, the decision makers. These restrictions are consonant with ordinary notions of authorization and ratification.

This act provides four separate methods through which those with management power in a limited liability company can proceed with conduct that would otherwise violate the duty of loyalty:

Method	Statutory Authority
The operating agreement might eliminate the duty or otherwise permit the conduct, without need for further authorization or ratification.	Section 110(d)(1) and (2)
The conduct might be authorized or ratified by all the members after full disclosure.	Section 409(f)
The operating agreement might establish a mechanism other than the informed consent for authorizing or ratifying the conduct.	Section 110(e)
In the case of self-dealing the conduct might be successfully defended as being or having been fair to the limited liability company.	Section 409(e)

Subsection (f) – This subsection is intended to make clear that – regardless of the strictures stated elsewhere in this section – in the specified circumstances the operating agreement can entirely strip away the pertinent fiduciary duties.

Subsection (g) – This subsection specifically empowers the operating agreement to address matters of indemnification and exculpation but subjects that power to stated limitations. Those limitations are drawn from the raft of exculpatory provisions that sprung up in corporate statutes in response to *Smith v. Van Gorkum*, 488 A.2d 858 (Del. 1985). Delaware led the response with DEL. CODE ANN. tit. 8, § 102(b)(7) (2006), and a number of LLC statutes have similar provisions. *E.g.* GA. CODE ANN. § 14-11-305(4)(A) (West 2006); IDAHO CODE ANN. § 53-624(1) (2006). For an extreme example, see VA. CODE ANN. § 13.1-1025 (West 2006) (establishing limits of monetary liability as the default rule).

The restrictions stated in paragraphs (1) through (5) apply both to indemnification and exculpation. The power to "alter or eliminate the indemnification provided by Section 408(a)" includes the power to expand or reduce that indemnification.

Subsection (g)(4) – Due to this paragraph, an exculpatory provision cannot shield against a member's claim of oppression. *See* Section 701(a)(5)(B) and (b).

Subsection (h) – The "not manifestly unreasonable standard" became part of uniform business entity statutes when RUPA imported the concept from the Uniform Commercial Code.

This subsection provides rules for applying that standard, which are necessary because:

- Determining unreasonableness *inter se* owners of an organization is a different task than doing so in a commercial context, where concepts like "usages of trade" are available to inform the analysis. Each business organization must be understood in its own terms and context.
- If loosely applied, the standard would permit a court to rewrite the members' agreement, which would destroy the balance this act seeks to establish between freedom of contract and fiduciary duty.
- Case law research indicates that courts have tended to disregard the significance of the word "manifestly."
- Some decisions have considered reasonableness as of the time of the complaint, which means that a prospectively reasonable allocation of risk could be overturned because it functioned as agreed.

If a person claims that a term of the operating agreement in manifestly unreasonable under subsections (d) and (h), as a matter of ordinary procedural law the burden is on the person making the claim.

Subsection (h)(1) – The significance of the phrase "as of the time the term as challenged became part of the operating agreement" is best shown by example.

EXAMPLE: An LLC's operating agreement as initially adopted includes a provision subjecting a matter to "the manager's sole, reasonable discretion." A year later, the agreement is amended to delete the word "reasonable." Later, a member claims that, without the word "reasonable," the provision is manifestly unreasonable. The relevant time under subsection (h)(1) is when the agreement was amended, not when the agreement was initially adopted.

EXAMPLE: When a particular manager-managed LLC comes into existence, its business plan is quite unusual and its success depends on the willingness of a particular individual to serve as the LLC's sole manager. This individual has a rare combination of skills, experiences, and contacts, which are particularly appropriate for the LLC's start-up. In order to induce the individual to accept the position of sole manager, the members are willing to have the operating agreement significantly limit the manager's fiduciary duties. Several years later, when the LLC's operations have turned prosaic and the manager's talents and background are not nearly so crucial, a member challenges the fiduciary duty limitations as manifestly unreasonable. The relevant time under subsection (h)(1) is when the LLC began. Subsequent developments are not relevant, except as they might inferentially bear on the circumstances in existence at the relevant time.

SECTION 111. OPERATING AGREEMENT; EFFECT ON LIMITED LIABILITY COMPANY AND PERSONS BECOMING MEMBERS; PREFORMATION AGREEMENT.

(a) A limited liability company is bound by and may enforce the operating agreement, whether or not the company has itself m t to the operating agreement.

(b) A person that becomes a member of a limited liability company is deemed to assent to, is bound by and may enforce the operating agreement.

(c) Two or more persons intending to become the initial members of a limited liability company may make an agreement providing that upon the formation of the company the agreement will become the operating agreement. One person intending to become the initial member of a limited liability company may assent to terms providing that upon the formation of the company the terms will become the operating agreement.

Uniform Comment[39]

Subsection (a) – This subsection does not consider whether a limited liability company is an indispensable party to a suit concerning the operating agreement. That is a question of procedural law, which can determine whether federal diversity jurisdiction exists.

Subsection (b) – Given the possibility of oral and implied-in-fact components to the operating agreement, see Comment to Section 110(a)(4), a person becoming a member of an existing limited liability company should take precautions to ascertain fully the contents of the operating agreement.

Subsection (c) – The second sentence refers to "assent to terms" rather than "make an agreement" because, under venerable principles of contract law, an agreement presupposes at least two parties. This act specifically defines the operating agreement to include a sole member, Section 102(13), but a preformation arrangement is not an operating agreement. An operating agreement is among "members," and, under this act, the earliest a person can become a member is upon the formation of the limited liability company. Section 401.

SECTION 112. OPERATING AGREEMENT; EFFECT ON THIRD PARTIES AND RELATIONSHIP TO RECORDS EFFECTIVE ON BEHALF OF LIMITED LIABILITY COMPANY.

(a) An operating agreement may specify that its amendment requires the approval of a person that is not a party to the operating agreement or the satisfaction of a condition. An amendment is ineffective if its adoption does not include the required approval or satisfy the specified condition.

(b) The obligations of a limited liability company and its members to a person in the person's capacity as a transferee or dissociated member are governed by the operating agreement. [Subject only to any court order issued under Section 503(b)(2) to effectuate a

[39] To add a reference in Committee's comment that Section 401 contains general provisions relating to admission of members.

charging order, an amendment to the operating agreement made after a person becomes a transferee or dissociated member is effective with regard to any debt, obligation, or other liability of the limited liability company or its members to the person in the person's capacity as a transferee or dissociated member.][40]

(c) If a record that has been delivered to the Department of State for filing, and which has become effective under this act, contains a provision that would be ineffective under Section 110(c) if contained in the operating agreement, the provision is likewise ineffective in the record.

(d) Subject to subsection (c), if a record that has been delivered to the Department of State for filing, and which has become effective under this act, conflicts with a provision of the operating agreement:

(1) the operating agreement prevails as to members, dissociated members, transferees, and managers; and

(2) the record prevails as to other persons to the extent they reasonably rely on the record.

Uniform Comment

Subsection (a) – This subsection, derived from DEL. CODE ANN. tit. 6, § 18-302(e), permits a non-member to have veto rights over amendments to the operating agreement. Such veto rights are likely to be sought by lenders but may also be attractive to non-member managers.

EXAMPLE: A non-member manager enters into a management contract with the LLC, and that agreement provides in part that the LLC may remove the manager without cause only with the consent of members holding 2/3 of the profits interests. The operating agreement contains a parallel provision, but the non-member manager is not a party to the operating agreement. Later the LLC members amend the operating agreement to change the quantum to a simple majority and thereafter purport to remove the manager without cause. Although the LLC has undoubtedly breached its contract with the manager and subjected itself to a damage claim, the LLC has the power under Section 110(a)(2) to effect the removal – unless the operating agreement provided the non-member manager a veto right over changes in the quantum provision.

The subsection does not refer to member veto rights because, unless otherwise provided in the operating agreement, the consent of each member is necessary to effect an amendment. Section 407(b)(5) and (c)(4)(D).

Subsection (b) – The law of unincorporated business organizations is only beginning to grapple in a modern way with the tension between the rights of an organization's owners to carry

[40] This must be conformed with Sec. 503 when]

on their activities as they see fit (or have agreed) and the rights of transferees of the organization's economic interests. (Such transferees can include the heirs of business founders as well as former owners who are "locked in" as transferees of their own interests. *See* Section 603(a)(3).).

If the law categorically favors the owners, there is a serious risk of expropriation and other abuse. On the other hand, if the law grants former owners and other transferees the right to seek judicial protection, that specter can "freeze the deal" as of the moment an owner leaves the enterprise or a third party obtains an economic interest.

Bauer v. Blomfield Co./Holden Joint Venture, 849 P2d 1365 (Alaska 1993) illustrates this point nicely. The case arose after all the partners had approved a commission arrangement with a third party and the arrangement dried up all the partnership profits. When an assignee of a partnership interest objected, the court majority flatly rejected not only the claim but also the assignee's right to assert the claim. A mere assignee "was not entitled to complain about a decision made with the consent of all the partners." *Id.* at 1367. A footnote explained, "We are unwilling to hold that partners owe a duty of good faith and fair dealing to assignees of a partner's interest." *Id.* at 1367, n. 2.

The dissent, invoking the law of contracts, asserted that the majority had turned the statutory protection of the partners' management prerogatives into an instrument for abuse of assignees:

It is a well-settled principle of contract law that an assignee steps into the shoes of an assignor as to the rights assigned. Today, the court summarily dismisses this principle in a footnote and leaves the assignee barefoot….
As interpreted by the court, the [partnership] statute now allows partners to deprive an assignee of profits to which he is entitled by law for whatever outrageous motive or reason. The court's opinion essentially leaves the assignee of a partnership interest without remedy to enforce his right.

Id. at 1367-8 (Matthews, J., dissenting).

The *Bauer* majority is consistent with the limited but long-standing case law in this area (all of it pertaining to partnerships rather than LLCs). This subsection follows the *Bauer* majority and other cases by expressly subjecting transferees and dissociated members to operating agreement amendments made after the transfer or dissociation. *Compare* UPA § 32(2) (permitting an assignee to seek judicial dissolution of an at-will general partnership at any time and of a partnership for a term or undertaking if partnership continues in existence after the completion of the term or undertaking); RUPA § 801(6) (same except adding the requirement that the court determine that dissolution is equitable); ULLCA, § 801(5) (same as RUPA); ULLCA, § 801(4) (permitting a dissociated member to seek dissolution on the grounds *inter alia* of oppressive conduct). *See also* UCC §§ 9-405(a) and (b) and RESTATEMENT (SECOND) OF CONTRACTS § 338 (1981) (recognizing a duty of good faith applicable to the modification of a contract when an assignment of contract is in effect).

The issue of whether, in extreme and sufficiently harsh circumstances, transferees might be able to claim some type of duty or obligation to protect against expropriation, is a question for other law.

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Subsection (d) – A limited liability company is a creature of contract as well as a creature of statute. It will be possible, albeit improvident, for the operating agreement to be inconsistent with the certificate of organization or other public filings pertaining to the limited liability company. For those circumstances, this subsection provides rules for determining which source of information prevails.

For members, managers and transferees, the operating agreement is paramount. For third parties seeking to invoke the public record, actual knowledge of that record is necessary and notice, deemed notice, and deemed knowledge under Section 103 are irrelevant. A third party wishing to enforce the public record over the operating agreement must show reasonable reliance on the public record, and reliance presupposes knowledge.

The mere fact that a term is present in a publicly-filed record and not in the operating agreement, or *vice versa*, does not automatically establish a conflict. This subsection does not expressly cover a situation in which (i) one of the specified filed records contains information in addition to, but not inconsistent with, the operating agreement, and (ii) a person, other than a member or transferee, reasonably relies on the additional information. However, the policy reflected in this subsection seems equally applicable to that situation.

Section 110(a)(4) might also be relevant to the subject matter of this subsection. Absent a contrary provision in the operating agreement, language in an LLC's certificate of organization might be evidence of the members' agreement and might thereby constitute or at least imply a term of the operating agreement.

This subsection does not apply to records delivered to the Department of State for filing on behalf of persons other than a limited liability company.

SECTION 113. DESIGNATED OFFICE, REGISTERED OFFICE AND REGISTERED AGENT.

(a) A limited liability company shall designate and continuously maintain in this state:

(1) a designated office, which need not be a place of its activity in this state; and

(2) a registered agent for service of process upon the limited liability company and a registered office, which shall be the street address of its registered agent.

(b) A foreign limited liability company that has a certificate of authority under Section 802 shall designate and continuously maintain in this state a registered agent for service of process and a registered office, which shall be the address of its registered agent.

(c) A registered agent of a limited liability company or foreign limited liability company

must be an individual who is a resident of this state or other person with authority to transact business in this state.

(d) Each initial registered agent, and each successor registered agent that may be appointed in accordance with this act [pursuant to Section 114 *only*?], must sign and file a statement in writing with the Department of State, in such form and manner as prescribed by the Department of State, accepting the appointment as registered agent and stating that the registered agent is familiar with, and accepts, the obligations of that position.[41]

Uniform Comment

Source: ULPA (2001), § 114.

SECTION 114. CHANGE OF REGISTERED AGENT OR REGISTERED OFFICE.[42]

(a) In order to change its registered agent or registered office address, a limited liability company or a foreign limited liability company may deliver to the Department of State for filing a statement of change containing:

(1) the name of the limited liability company or foreign limited liability company;

(2) the name of its current registered agent;

(3) if the registered agent is to be changed, the name of the new registered agent;

(4) the street address of its current registered office for its registered agent; and

(5) if the street address of the registered office is to be changed, the new street address of the registered office in this state.

(b) If the registered agent is to be changed, the written acceptance of the successor registered agent described in Section 113(d) must also be included in or attached to the statement of change. [43]

(c) A statement of change is effective when filed by the Department of State.[44]

(d) The changes described in this section may also be made on the limited liability company or

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[41] This subsection was added by the Reporter to accommodate a change by the Committee to Section 203. Also, need to confirm how this applies in the case of change made by annual report.

[42] It was decided that we don't need to include a procedure for changing "designated office" in the manner provided in the uniform version. The DOS is going to advise whether the Committee's comment may describe the informal procedure used by the DOS for changing a designated office. (DOS)

[43] This subsection was added by the Reporter --- see footnote 34 above.

[44] Should there be a clarification to show that this is not subject to usual rule for prior or delayed effective date in 205(c), whether in the act itself or the Committe

foreign limited liability company's annual report filed with the Department of State.

Uniform Comment

Source – ULPA (2001) § 115, which is based on ULLCA § 109.

Subsection (a) – This subsection uses "may" rather than "shall" because other avenues exist. A limited liability company may also change the information by amending its certificate of organization, Section 202, or through its annual report. Section 209(e). A foreign limited liability company may use its annual report. Section 209(e). However, neither a limited liability company nor a foreign limited liability company may wait for the annual report if the information described in the public record becomes inaccurate. *See* Sections 207 (imposing liability for false information in record) and 116(b) (providing for substitute service).

SECTION 115. RESIGNATION OF REGISTERED AGENT.

(a) To resign as registered agent of a limited liability company or foreign limited liability company, the agent must deliver to the Department of State for filing a signed statement of resignation containing the name of the limited liability company or foreign limited liability company.

(b) After filing the statement with the Department of State, the registered agent shall mail a copy to the limited liability company's or foreign limited liability company's current mailing address.

(c) A registered agent is terminated on the earlier of (1) the 31st day after the Department of State files the statement of resignation, or (2) when a statement of change or other record for designating a new registered agent under this act has been filed by the Department of State.

Uniform Comment

Source – ULPA (2001) § 116, which is based on ULLCA §110.

SECTION 116. SERVICE OF PROCESS.[45]

[45] Existing 608.463(1) provides that service of process on an LLC is to be made in accordance with FS chapter 48 or chapter 49 "as if the limited liability company were a partnership." The Committee has received comments that this provision is problematic and that the LLC act should contain stand-alone provisions specifying how service should be made. We have discussed changing or calling for a change to those chapters as an alternative since they do not currently contain specific provisions relating to an LLC (chap 49, dealing with constructive service, does refer to other business entities, which customarily includes LLCs). This latter course of action would be consistent with approaches taken in 607 (see 607.0504). The current draft contains changes suggested by DOS so make this act's approach on service of process consistent with the LP act (620.1117). In reviewing chapter 49 and 620.1117 again, I question whether the 620.1117 approacl ere seems to be overlap and perhaps

(a) A registered agent appointed by a limited liability company or foreign limited liability company is an agent of the company for service of any process, notice, or demand required or permitted by law to be served on the company.

(b) If a limited liability company or foreign limited liability company does not appoint or maintain a registered agent in this state or the registered agent cannot with reasonable diligence be found at the address of the registered office, the Department of State shall be an agent of the company upon whom process, notice, or demand may be served.

(c) Service of any process, notice, or demand on the Department of State may be made by delivering to and leaving with the Department of State duplicate copies of the process, notice, or demand.

(d) Service is effected under subsection (c) upon the date shown as having been received by the Department of State.

(e) The Department of State shall keep a record of each process, notice, and demand served pursuant to this section and record the time of, and the action taken regarding, the service.

(f) This section does not affect the right to serve process, notice, or demand in any other manner provided by law.

Uniform Comment

Source – ULPA (2001) § 117, which is based on ULLCA §111.

[***Reporter's Note:*** *to determine whether any of the following provisions from existing law to be included (see also the footnote to Sec. 116)*:

608.463 Service of process.
(1) Process against a limited liability company may be served:
(a) In accordance with chapter 48 or chapter 49, as if the limited liability company were a partnership.
(b) Upon the registered agent at the agent's street address.
(2) Any notice to or demand on a limited liability company organized pursuant to this chapter may be made:
(a) By delivery to a manager of the limited liability company, if the management of the limited liability company is vested in one or more managers, or by delivery to a member, if the management of the limited liability company is vested in the members.
(b) By mailing a writing, which notice or demand in writing is mailed to the registered office of the limited liability company in this state or to another address in this state which is the principal office of the limited liability company.

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inconsistency) and the Committee needs to further review this issue. Is this addressed by subsection (f) of this section? (LITIGATION SUBCOMMITTEE)

(3) Nothing contained in this section shall limit or affect the right to serve, in any other manner now or hereafter permitted by law, any process, notice, or demand required or permitted by law to be served upon a limited liability company.]

[ARTICLE] 2

FORMATION; CERTIFICATE OF ORGANIZATION AND OTHER FILINGS

SECTION 201. FORMATION OF LIMITED LIABILITY COMPANY; CERTIFICATE OF ORGANIZATION.

(a) One or more persons may act as authorized representatives to form a limited liability company by signing and delivering to the Department of State for filing a certificate of organization.

(b) A certificate of organization must state:

(1) the name of the limited liability company, which must comply with Section 108; and

(2) the street and mailing addresses of the initial designated office and the name, street address in this state, and written acceptance of the initial registered agent.

(c) The certificate of organization may also declare whether the limited liability company is "manager-managed" for purposes of Section 407 and other relevant provisions of this act. [If the certificate of organization does not declare that the limited liability company is "manager-managed", then it shall be presumed that it is "member-managed" for purposes of Section 407 and other relevant provisions of this act.][46] However, a statement in a certificate of organization is not effective as a statement of agency.

(d) A limited liability company's existence begins at the date and time the Department of State has filed the certificate of organization, unless the certificate states a prior or delayed effective date pursuant to Section 205(c).

(e) If the certificate states a delayed effective date, a limited liability company is not formed if, before the certificate takes effect, a statement of cancellation is signed and delivered to the Department of State for filing and the Department of State files the certificate.

(f) Subject to any delayed effective date and except in a proceeding by this state to dissolve a limited liability company, the filing of the certificate of organization by the

[46] Needs to be coordinated with Section 407 and

Department of State is conclusive proof that the authorized representative satisfied all conditions to the formation of a limited liability company.

Uniform Comment[47]

No topic received more attention or generated more debate in the drafting process for this act than the question of the "shelf LLC" – i.e., an LLC formed without having at least one member upon formation. Reasonable minds differed (occasionally intensely) as to whether the "shelf" approach (i) is necessary to accommodate current business practices; and (ii) somehow does conceptual violence to the partnership antecedents of the limited liability company.

The 2006 Annual Meeting Draft provided for a "limited shelf" – a shelf that lacked capacity to conduct any substantive activities:

a) Except as otherwise provided in subsection (b), a limited liability company has the capacity to sue and be sued in its own name and the power to do all things necessary or convenient to carry on its activities.

(b) Until a limited liability company has or has had at least one member, the company lacks the capacity to do any act or carry on any activity except:

(1) delivering to the Department of State for filing a statement of change under Sections 114, an amendment to the certificate under Section 202, a statement of correction under Section 206, an annual report under section 209, and a statement of termination under Section 708;

(2) admitting a member under section 401; and

(3) dissolving under Section 701.

(c) A limited liability company that has or has had at least one member may ratify an act or activity that occurred when the company lacked capacity under subsection (b).

However, when the Conference considered the 2006 Annual Meeting Draft, the Drafting Committee itself proposed an amendment, and the Conference agreed. A product of intense discussion and compromise with several ABA Advisors, the amendment substituted a double filing and "embryonic certificate" approach. An authorized representative may deliver for filing a certificate of organization without the company having any members and the filing officer will file the certificate, but:

- the certificate as delivered to the filing officer must acknowledge that situation, Subsection (a)(3);

- the limited liability company is not formed until and unless the authorized representative timely delivers to the filing officer a notice that the company has at least one member, Subsection (e)(1); and

- if the authorized representative does not timely deliver the required notice, the certificate lapses and is void. *Id.*

[47] Needs to be revised to eliminate references to MMENT SUBCOMMITTEE)

The Conference recommends a 90-day "window" for filing the notice, which must state "the date on which a person or persons became the company's initial member or members." When the filing officer files that notice, the company is deemed formed as of the date stated in the notice. Subsection (e)(2).

Thus under this act, the delivery to the filing officer of a certificate of organization has different consequences, depending on whether the certificate contains the "no members" statement as provided by subsection (b)(3).

does the certificate contain the "no members" statement under subsection (b)(3)	**by delivering the certificate for filing, what is the authorized representative affirming, per Section 207(c), about members**	**effect of the filing officer filing the certificate**	**logical relationship of the filed certificate to the formation of the LLC**
no	that the LLC will have at least one member upon formation	LLC is formed, subject to any delayed effective date	necessary and sufficient
yes	that the LLC will have no members when the filing officer files the certificate	the document is part of the public record, protects the name, and starts the 90-day clock ticking	necessary but not sufficient

Subsection (b) – This act does not require the certificate of organization to designate whether the limited liability company is manager-managed or member-managed. Under this act, those characterizations pertain principally to *inter se* relations, and the act therefore looks to the operating agreement to make the characterization. *See* Sections 102(10) and (12); 407(a).

Subsection (d) – This subsection states the "pathway" through which a limited liability company is formed if the certificate of organization does not contain a statement as provided in subsection (b)(3) – i.e., if the limited liability company will have at least one member when the filing officer files the certificate.

Subsection (e) – This subsection states the "pathway" through which a limited liability company is formed if the certificate of organization contains a statement as provided in subsection (b)(3) – i.e., if the limited liability company will not have at least one member when the filing officer files the certificate.

This pathway requires a second filing in order to form the limited liability company: "a notice stating (A) that the limited liability company has at least one member; and (B) the date on which a person or persons became the company's initial member or members." Subsection (e)(1).

In this pathway, a certificate of organization may not itself state a delayed effective date, Section 205(c), because:

- the reason to state a delayed effective date in a certificate of organization is to set the date on which the limited liability company is formed, Section 205(c); and

- when a certificate contains a statement as provided in subsection (b)(3), this act mandates when (if at all) the limited liability company is deemed formed – i.e., "as of the date of initial membership stated in the notice delivered" to the filing officer as the second filing. Subsection (e)(2).

[Reporter's note: to determine whether the following provision from existing law should be included here or elsewhere:

608.4238 Unauthorized assumption of powers.
All persons purporting to act as or on behalf of a limited liability company, having actual knowledge that there was no organization of a limited liability company under this chapter, are jointly and severally liable for all liabilities created while so acting except for any liability to any person who also had actual knowledge that there was no organization of a limited liability company.]

SECTION 202. AMENDMENT OR RESTATEMENT OF CERTIFICATE OF ORGANIZATION.

(a) A certificate of organization may be amended or restated at any time.

(b) To amend its certificate of organization, a limited liability company must deliver to the Department of State for filing a document entitled Amendment to Certificate of Organization containing:

(1) the name of the company;

(2) the date of filing of its certificate of organization;

(3) the amendment to the certificate of organization; and

(4) the delayed effective date, pursuant to Section 205(c), if the amendment is not effective on the date the Department of State files the amendment.

(c) To restate its certificate of organization, a limited liability company must deliver to the Department of State for filing a restatement, which merely integrates into a single instrument all the provisions of its certificate of organization then in effect, entitled Restatement of Certificate of Organization, containing:

(1) in the heading or an introductory paragraph, the company's present name and

the date of the filing of the company's initial certificate of organization;

(2) all of the current provisions of its certificate of organization in effect;

(3) a statement that the restatement does not further amend the current provisions of the limited liability company's certificate of organization as theretofore amended or supplemented and there is no discrepancy between the current provisions and the restatement; and

(4) the delayed effective date, pursuant to Section 205(c), if the restatement is not effective on the date the Department of State files the amendment.

(d) To restate and amend the current provisions of its certificate of organization, a limited liability company must deliver to the Department of State a document entitled Amended and Restated Certificate of Organization, containing:

(1) in the heading or an introductory paragraph, the company's present name and the date of the filing of the company's initial certificate of organization;

(2) the document restates and amends one or more of the current provisions of the company's certificate of organization; and

(3) the delayed effective date, pursuant to Section 205(c), if the Amended and Restated Certificate of Organization is not effective on the date the Department of State files the document.

(e) Subject to Sections 112(c) and 205(c), a certificate of amendment, restated certificate of organization, or amended and restated certificate of organization is effective when filed by the Department of State.

(f) If a member of a member-managed limited liability company, or a manager of a manager-managed limited liability company, knows that any information in a filed certificate of organization was inaccurate when the certificate was filed or has become inaccurate owing to changed circumstances, the member or manager shall promptly:

(1) cause the certificate to be amended; or

(2) if appropriate, deliver to the Department of State for filing a statement of change under Section 114 or a statement of correction under Section 206.

Uniform Comment

Subsection (e) – This subsection is taken from ULPA (2001) § 202(c), which imposes the responsibility on general partners. The original ULLCA had no comparable provision.

This subsection imposes an obligation directly on the members and managers rather than on the limited liability company. A member or manager's failure to meet the obligation exposes the member or manager to liability to third parties under Section 207(a)(2) and might constitute a breach of the member or manager's duties under Section 409(c) and (g)(1). In addition, an aggrieved person may seek a remedy under Section 204 (Signing and Filing Pursuant to Judicial Order).

Like other provisions of the act requiring records to be delivered to the filing officer for filing, this section is not subject to change by the operating agreement. *See* Section 110(c)(11) (precluding the operating agreement from "restrict[ing] the rights under this act of a person other than a member or manager").

SECTION 203. SIGNING OF RECORDS TO BE DELIVERED FOR FILING TO DEPARTMENT OF STATE.[48]

(a) A record delivered to the Department of State for filing pursuant to this act must be signed as follows:

(1) Except as otherwise provided in paragraphs (2) through (7) of this subsection (a), the record must be signed by an authorized representative of the limited liability company or foreign limited liability company, as applicable.

(2) A limited liability company's initial certificate of organization must be signed by at least one person acting as an authorized representative. The certificate or organization must also include or have attached to it a statement signed by its initial registered agent in the form described in Section 113(d).

(3) A record filed on behalf of a dissolved limited liability company that has no members must be signed by the person winding up the company's activities under Section 708(c) or a person appointed under Section 708(d) to wind up those activities.

(4) A statement of cancellation under Section 201(e) must be signed by each authorized representative that signed the initial certificate of organization.

(5) A statement of denial by a person under Section 303 must be signed by that person.

(6) A record changing the registered agent must also include or be accompanied

[48] The Committee decided to revisit this section after the changes in this draft were made. Note that the intended revision to subsection (a)(6) of former draft was not made (instead it was deleted) because as revised it would be subsumed in the general rule contained in revised subsection (a)(1). Note that subsection (c) added by DOS was deleted because the uniform act addressed the issue in Section 207(c). Subsection (d), which was added by DOS to last draft, was added to Section 207 as new subsection (b).

by a statement signed by the successor registered agent in the form described in Section 113(d).

(7) Any other record must be signed by the person on whose behalf the record is delivered to the Department of State.

(b) A record may also be signed by a personal representative, guardian, conservator or other authorized representative of a deceased or incompetent individual, or a dissolved or terminated legal entity, or an attorney-in-fact, as applicable, if such a person has been duly appointed and is authorized to sign the record, and the record recites that such person has that authority.

Uniform Comment

Subsection (b) – This subsection does not require that the agent's authority be memorialized in a writing or other record. However, a person signing as an agent "thereby affirms under penalties of perjury that [the assertion of agent status is] . . . accurate." Section 207(c).

SECTION 204. SIGNING AND FILING PURSUANT TO JUDICIAL ORDER.

(a) If a person required by this act to sign a record or deliver a record to the Department of State for filing under this act does not do so, any other person that is aggrieved may petition the circuit court to order:

(1) the person to sign the record;

(2) the person to deliver the record to the Department of State for filing; or

(3) the Department of State to file the record unsigned.

(b) If a petitioner under subsection (a) is not the limited liability company or foreign limited liability company to which the record pertains, the petitioner shall make the company a party to the action. The petitioner may seek the remedies provided in subsection (a) in the same action in combination or in the alternative.

(c) A record filed unsigned pursuant to this section is effective without being signed.

Uniform Comment

Source – ULPA (2001) § 205, which is based on RULPA § 205, which was the source of ULLCA § 210.

Subsection (a)(3) – A record filed under this paragraph is effective without being signed.

SECTION 205. DELIVERY TO AND FILING OF RECORDS BY DEPARTMENT OF STATE; EFFECTIVE TIME AN

(a) A record authorized or required to be delivered to the Department of State for filing under this act must be captioned to describe the record's purpose, be in a medium permitted by the Department of State, and be delivered to the Department of State. Unless the Department of State determines that a record does not comply with the filing requirements of this act, and if all filing fees have been paid, the Department of State shall file the record.

(b) Upon request and payment of the applicable fee, the Department of State shall send to the requester a certified copy of the requested record.

(c) Except as otherwise provided in Sections 115 and 206 any document delivered to the Department of State for filing under this act may specify an effective time and a delayed effective date. In the case of an initial certificate of organization, a prior effective date may be specified in the certificate, provided such date is within 5 business days prior to the date of filing. Subject to Sections 115, 201(d) and 206, a record filed by the Department of State is effective:

(1) if the record does not specify an effective time and does not specify a prior to or a delayed effective date, on the date and at the time the record is filed as evidenced by the Department of State's endorsement of the date and time on the record;

(2) if the record specifies an effective time but not a prior to or delayed effective date, on the date the record is filed at the time specified in the record;

(3) if the record specifies a delayed effective date but not an effective time, at 12:01 a.m. on the earlier of:

(A) the specified date; or

(B) the 90th day after the record is filed; or

(4) if the record specifies a date prior to the effective date but no effective time, at 12:01 a.m. on the later of:

(A) the specified date; or

(B) the 5th business day before the record is filed; or

(5) if the record specifies an effective time and a delayed effective date, at the specified time on the earlier of:

(A) the specified date; or

(B) the 90th day after the record is filed.

(6) if the record specifies an effective time and a prior effective date, at the specified time on the later of:

(A) the specified date; or

(B) the 5th business day before the record is filed; or

(7) If the Department of State has prescribed a mandatory medium or form for the record being filed, the record must be in the prescribed medium or on the prescribed form.

[ALTERNATE/SUPPLEMENTAL DOS VERSION:

SECTION 205. FILING REQUIREMENTS. [49]

(1) To be filed by the Department of State, a document must satisfy the following requirements, as supplemented or modified by any other section of this chapter:

(a) This chapter must require or permit filing the document by the Department of State.

(b) The document must be executed as required by Section 203.

(c) The document must contain any information required by this chapter and may contain other information the limited liability company elects to include.

(d) The document must be typewritten or printed in ink and must be legible.

(e) The document must be in the English language. A limited liability company name need not be in English if written in English letters or Arabic or Roman numerals, and the certificate of existence required of a foreign limited liability company need not be in English if accompanied by a reasonably authenticated English translation.

(f) If the Department of State has prescribed a mandatory form for the document, the document must be in or on the prescribed form.

(g) The document must be delivered to the Department of State for filing and must be accompanied by the correct filing fee and any other tax or penalty required by this chapter or other law.

(2) The document may be accompanied by one exact or conformed copy.

(3) Any signature on any document authorized to be filed by the Department of State under any provision of this chapter may be a facsimile, a conformed signature, or an electronically transmitted signature.]

Uniform Comment

[49] Requested by DOS. Will need to be integrate of Section 205.

Source – ULPA (2001) § 206, which was based on ULLCA §206.

This act uses the concept of "filing" to refer to the official act of the Department of State, which is typically preceded by a person "delivering" some record "to the Department of State for filing."

Subsection (c)(3)(B) and 4(B) – If a person delivers to the Secretary of State for filing a record that contains an over-long delay in the effective date, the Secretary of State: (i) will not reject the record; and (ii) is neither required nor authorized to inform the person that this act will truncate the period of delay specified in the record.

SECTION 206. CORRECTING FILED RECORD.

(a) A limited liability company or foreign limited liability company may deliver to the Department of State for filing a statement of correction to correct a record previously delivered by the company to the Department of State and filed by the Department of State, if at the time of filing the record contained inaccurate information or was defectively signed.

(b) A statement of correction under subsection (a) may not state a delayed effective date and must:

(1) describe the record to be corrected, including its filing date;

(2) specify the inaccurate information and the reason it is inaccurate or the manner in which the signing was defective; and

(3) correct the defective signature or inaccurate information.

(c) When filed by the Department of State, a statement of correction is effective retroactively as of the effective date of the record the statement corrects, but the statement is effective when filed:

(1) for the purposes of Section 103(d); and

(2) as to persons that previously relied on the uncorrected record and would be adversely affected by the retroactive effect.

Uniform Comment

Source – ULPA (2001) § 207, which was based on ULLCA §207.

SECTION 207. LIABILITY FOR INACCURATE INFORMATION IN FILED

RECORD.[50]

(a) If a record delivered to the Department of State for filing under this act and filed by the Department of State contains inaccurate information, a person that suffers a loss by reliance on the information may recover damages for the loss from:

(1) a person that signed the record, or caused another to sign it on the person's behalf, and knew the information to be inaccurate at the time the record was signed; and

(2) subject to subsection (b), a member of a member-managed limited liability company or the manager of a manager-managed limited liability company, if:

(A) the record was delivered for filing on behalf of the company; and

(B) the member or manager had notice of the inaccuracy for a reasonably sufficient time before the information was relied upon so that, before the reliance, the member or manager reasonably could have:

(i) effected an amendment under Section 202;

(ii) filed a petition under Section 204; or

(iii) delivered to the Department of State for filing a statement of change under Section 114 or a statement of correction under Section 206.

(b) To the extent that the operating agreement of a member-managed limited liability company expressly relieves a member of responsibility for maintaining the accuracy of information contained in records delivered on behalf of the company to the Department of State for filing under this act and imposes that responsibility on one or more other members, the liability stated in subsection (a)(2) applies to those other members and not to the member that the operating agreement relieves of the responsibility.

(c) An individual who signs a record authorized or required to be filed under this act affirms under penalty of perjury that the information stated in the record is accurate.

(d) If a certificate of organization or any other record authorized or required to be filed under this act contains a false statement, one who suffers loss by reliance on that record may recover damages for the loss from a person who signed the record or caused another to sign it on the person's behalf and knew the statement to be false at the time the record was signed.[51]

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[50] The Committee recognized issues that involve calling an annual report a "record" under the act and wanted to flag this issue for further consideration.

[51] Language added by DOS to last draft and mo 03.

Uniform Comment

Source: ULPA (2001) § 208, which expanded on ULLCA § 209.

Section (a)(2)(B) – This subparagraph implies that doing any of the acts listed in clauses (i) through (iii) will preclude liability arising from subsequent reliance. In this connection, Clause (a)(2)(B)(ii) warrants special attention, because that act (filing a petition in court) can occur without any immediate effect on the records relevant to a limited liability company maintained by the filing officer. The other clauses refer to acts that (assuming no filing backlog) affect that public record immediately.

SECTION 208. CERTIFICATE OF STATUS OR AUTHORIZATION.

(a) The Department of State, upon request and payment of the requisite fee, shall furnish to any person a certificate of status for a limited liability company if the records filed in the Department of State show that the Department of State has accepted and filed a certificate of organization. A certificate of status must state:

(1) the company's name;

(2) that the company was duly formed under the laws of this state and the date of formation;

(3) whether all fees and penalties due to the Department of State under this act have been paid;

(4) whether the company's most recent annual report required by Section 209 has been filed by the Department of State;

(5) whether the Department of State has administratively dissolved the company or received a record notifying the Department of State that the company has been dissolved by judicial action pursuant to Section 701;

(6) whether the Department of State has filed a certificate of dissolution for the company; and

(7) whether the Department of State has accepted and filed a statement of termination.

(b) The Department of State, upon request and payment of the requisite fee, shall furnish a certificate of status for a foreign limited liability company if the records filed in the Department of State show that the Department of State has filed a certificate of authority. A certificate of status must state:

(1) the company's name alternate name adopted under Section

805(a) for use in this state;

(2) that the company is authorized to transact business in this state;

(3) whether all fees and penalties due to the Department of State under this act or other law have been paid;

(4) whether the company's most recent annual report required by Section 209 has been filed by the Department of State; and

(5) whether the Department of State has revoked the company's certificate of authority or filed a notice of cancellation.

(c) Subject to any qualification stated in the certificate, a certificate of status issued by the Department of State is conclusive evidence that the limited liability company is in existence or the foreign limited liability company is authorized to transact business in this state.

Uniform Comment

Source – ULPA (2001), § 209, which was based on ULLCA, § 208.

The information provided in a certificate of existence or authorization is, of course, current only as of the date of the certificate.

SECTION 209. ANNUAL REPORT FOR DEPARTMENT OF STATE.

(a) A limited liability company or a foreign limited liability company authorized to transact business in this state shall deliver to the Department of State for filing an annual report that states:

(1) the name of the limited liability company or, if a foreign limited liability company, the name under which the foreign limited liability company is registered to transact business in this state;

(2) the street and mailing addresses of the company, the name of its registered agent in this state, and the street address of its registered office in this state;

(3) the name and address of each of its managers, if a it is a manager-managed limited liability company, or each of its members, if it is a member-managed limited liability company;

(4) the company's Federal Employer Identification Number or, if none, whether one has been applied for; and

(5) Any additional information that is necessary or appropriate to enable the Department of State to carry out the provisions of this act.

(b) Information in an annual report must be current as of the date the report is delivered to the Department of State for filing.

(c) The first annual report under this section must be delivered to the Department of State between January 1 and May 1 of the year following the calendar year in which a limited liability company was formed or a foreign limited liability company was authorized to transact business. Subsequent annual reports must be delivered to the Department of State between January 1 and May 1 of each subsequent calendar year.

(d) If an annual report does not contain the information required in subsection (a), the Department of State shall promptly notify the reporting limited liability company or foreign limited liability company and return the report to it for correction. If the report is corrected to contain the information required in subsection (a) and delivered to the Department of State within 30 days after the effective date of the notice, it is timely delivered.

(e) If a filed annual report contains the address of a designated office, name of a registered agent, or registered office which differs from the information shown in the records of the Department of State immediately before the filing, the differing information in the annual report is considered a statement of change under Section 114.[52]

(f) Proof to the satisfaction of the Department of State that on or before May 1 such report was deposited in the United States mail in a sealed envelope, properly addressed with postage prepaid, shall be deemed timely compliance with this requirement.

(g) Each report shall be executed by an authorized representative or, if the company is under the control of a receiver or trustee, it shall be executed on behalf of the company by such receiver or trustee, and the signing thereof shall have the same legal effect as if made under oath, without the necessity of appending such oath thereto.

Uniform Comment

Source – ULPA (2001) § 210, which was based on ULLCA § 211.

A limited liability company that fails to comply with this section is subject to

[52] Note that this relates to the issue of whether the annual report will be considered a "record." Also, clarify whether Section 113(d) applies to this change.

administrative dissolution. Section 711(a)(2). A foreign limited liability company that fails to comply with this section is subject to having its certificate of authority revoked. Section 807(a)(2).

SECTION 210. FILING DUTIES OF DEPARTMENT OF STATE.[53]

(a) The Department of State files a document by stamping or otherwise endorsing the document as "filed," together with the Secretary of State's official title and the date and time of receipt. After filing a document, the Department of State shall deliver an acknowledgment or certified copy of the document to the domestic or foreign limited liability company or its representative.

(b) The Department of State shall return any document the Department refuses to file to the domestic or foreign limited liability company or its representative within 15 days after the document was received for filing, together with a brief, written explanation of the reason for refusal.

(c) If the applicant returns the document with corrections in accordance with the rules of the Department of State within 60 days after it was mailed to the applicant by the Department of State and if at the time of return the applicant so requests in writing, the filing date of the document shall be the filing date that would have been applied had the original document not been deficient, except as to persons who justifiably relied on the record before correction and were adversely affected thereby.

(d) The Department of State's duty to file documents under this section is ministerial. Filing or refusing to file a document does not:

(1) Affect the validity or invalidity of the document in whole or part;

(2) Relate to the correctness or incorrectness of information contained in the document;

(3) Create a presumption that the document is valid or invalid or that information contained in the document is correct or incorrect.

(e) If not otherwise provided by law and the provisions of this chapter, the Department of State shall determine, by rule, the appropriate format for, number of copies of, manner of execution of, method of electronic transmission of, and amount of and method of payment of fees for, any document placed under its jurisdiction.

[53] This is language from existing 608.4082. Coı

SECTION 211. FEES OF THE DEPARTMENT OF STATE.

The fees of the Department of State under this act are as follows:

(1) For furnishing a certified copy, $30.

(2) For filing original certificate of organization or a foreign limited liability company's application for a certificate of authority to transact business, $100.

(3) For filing a certificate of merger of limited liability companies or other business entities, $25 per constituent party to the merger, unless a specific fee is required for a party in other applicable law.

(4) For filing an annual report, $50, plus the annual fee imposed pursuant to s. 607.193 in the amount of $88.75.

(5) For filing an application for reinstatement after an administrative or judicial dissolution or a revocation of authority to transact business, $100.

(6) For designating a registered agent or changing a registered agent or registered office address, $25.

(7) For filing a registered agent's statement of resignation from an active limited liability company, $85.

(8) For filing a registered agent's statement of resignation from a dissolved or revoked limited liability company, $25.

(9) For filing a certificate of conversion of a limited liability company, $25.

(10) For furnishing a certificate of status, $5.

(11) For filing a restated certificate or organization, an amended and restated certificate of organization, or an amendment to a certificate of organization (or an amendment to a restated or an amended and restated certificate of organization), $25.

(12) For filing a statement of cancellation of certificate of authority, $25.

(13) [For filing a statement of dissociation, $25.][54]

(14) For filing a certificate of dissolution [or a statement or termination], $25.

(15) For filing a certificate of revocation of dissolution, $100.

[54] Depends on whether Sec. 407(g) and Sec. 604

(16) For filing a statement of agency, $25.

(17) For filing a statement of denial, $25.

(18) For filing any other domestic or foreign limited liability company document, $25.

SECTION 212. POWERS OF DEPARTMENT OF STATE.[55]

The Department of State shall have the power and authority reasonable necessary to enable it to administer this act efficiently, to perform the duties herein imposed upon it by this act, and to adopt rules pursuant to ss. 120.536(1) and 120.54 or any other applicable statute to implement the provisions of this act or to carry out its duties and functions under this act.

SECTION 213. CERTIFICATES AND CERTIFIED COPIES TO BE RECEIVED IN EVIDENCE.

All certificates issued by the Department of State in accordance with this [chapter], and all copies of records filed in the Department of State in accordance with this [chapter] when certified by the Department of State, shall be taken and received in all courts, public offices, and official bodies as prima facie evidence of the facts therein stated. A certificate under the seal of the Department of State, as to the existence or nonexistence of the facts relating to a limited liability company or foreign limited liability company, shall be taken and received in all courts, public offices, and official bodies as prima facie evidence of the existence or nonexistence of the facts therein stated.

SECTION 214. EVIDENTIARY EFFECT OF COPY OF FILED DOCUMENT.

[55] Requested by DOS.

A certificate from the Department of State delivered with a copy of a document filed by the Department of State is conclusive evidence that the original document is on file with the Department of State.

[Reporter's note: to determine whether any of the following provisions from existing law should be included:

608.409 Effect of filing and issuance of time and date endorsement on the articles of organization.

(3) The Department of State's filing of the articles of organization is conclusive proof that all conditions precedent to organization have been satisfied except in a proceeding by the state to cancel or revoke the organization or to administratively dissolve the organization.

(4) A limited liability company shall not transact business or incur indebtedness, except that which is incidental to its organization or to obtaining subscriptions for or payment of contributions, until the effective date and time of the commencement of the limited liability company's existence.]

[ARTICLE] 3

RELATIONS OF MEMBERS AND MANAGERS TO PERSONS DEALING WITH LIMITED LIABILITY COMPANY

SECTION 301. NO AGENCY POWER OF MEMBER AS MEMBER.

[Reporter's Note: The issues raised by this section were extensively discussed during our Committee's CLE session on 2/27/10. No specific proposals were made during that session, but see Reporter's Note to Section 302. A CD will be available from the Bar containing the Committee's discussions (not sure of cost, if any, to Committee members).]

(a) A member is not an agent of a limited liability company solely by reason of being a member.

(b) A person's status as a member does not prevent or restrict law other than this act from imposing liability on a limited liability company because of the person's conduct.

Uniform Comment

Subsection (a) – Most LLC statutes, including the original ULLCA, provide for what might be termed "statutory apparent aut ıbers in a member-managed limited

liability company and managers in a manager-managed limited liability company. This approach codifies the common law notion of apparent authority by position and dates back at least to the original, 1914 Uniform Partnership act. UPA, § 9 provided that "the act of every partner … for apparently carrying on in the usual way the business of the partnership … binds the partnership," and that formulation has been essentially followed by RUPA, § 301, ULLCA, § 301, ULPA (2001), § 402, and myriad state LLC statutes.

This act rejects the statutory apparent authority approach, for reasons summarized in a "Progress Report on the Revised Uniform Limited Liability Company act," published in the March 2006 issue of the newsletter of the ABA Committee on Partnerships and Unincorporated Business Organizations:

The concept [of statutory apparent authority] still makes sense both for general and limited partnerships. A third party dealing with either type of partnership can know by the formal name of the entity and by a person's status as general or limited partner whether the person has the power to bind the entity.

Most LLC statutes have attempted to use the same approach but with a fundamentally important (and problematic) distinction. An LLC's status as member-managed or manager-managed determines whether members or managers have the statutory power to bind. But an LLC's status as member- or manager-managed is not apparent from the LLC's name. A third party must check the public record, which may reveal that the LLC is manager-managed, which in turn means a member as member has no power to bind the LLC. As a result, a provision that originated in 1914 as a protection for third parties can, in the LLC context, easily function as a trap for the unwary. The problem is exacerbated by the almost infinite variety of management structures permissible in and used by LLCs.

The new act cuts through this problem by simply eliminating statutory apparent authority.

PUBOGRAM, Vol. XXIII, no. 2 at 9-10.

Codifying power to bind according to position makes sense only for organizations that have well-defined, well-known, and almost paradigmatic management structures. Because:

- flexibility of management structure is a hallmark of the limited liability company; and
- an LLC's name gives no signal as to the organization's structure,

it makes no sense to:

- require each LLC to publicly select between two statutorily preordained structures (i.e., manager-managed/member-managed); and then
- link a "statutory power to bind" to each of those two structures.

Under this act, other law – most especially the law of agency – will handle power-to-bind questions. See the Comment to subsection (b).

This subsection does not address the power to bind of a manager in a manager-managed LLC, although this act does consider a manager's management responsibilities. *See* Section 407(c) (allocating management authority, subject to the operating agreement). For a discussion of how agency law will approach the actual and apparent authority of managers, see Section 407(c), cmt.

Subsection (b) – As the "flip side" to subsection (a), this subsection expressly preserves the power of other law to hold an LLC directly or vicariously liable on account of conduct by a person who happens to be a member. For example, given the proper set of circumstances: (i) a member might have actual or apparent authority to bind an LLC to a contract; (ii) the doctrine of *respondeat superior* might make an LLC liable for the tortious conduct of a member (i.e., in some circumstances a member acts as a "servant" of the LLC); and (iii) an LLC might be liable for negligently supervising a member who is acting on behalf of the LLC. A person's status as a member does not weigh against these or any other relevant theories of law.

Moreover, subsection (a) does not prevent member status from being relevant to one or more elements of an "other law" theory. The most categorical example concerns the authority of a non-manager member of a manager-managed LLC.

EXAMPLE: A vendor knows that an LLC is manager-managed but chooses to accept the signature of a person whom the vendor knows is merely a member of the LLC. Assuring the vendor that the LLC will stand by the member's commitment, the member states, "It's such a simple matter; no one will mind." The member genuinely believes the statement, and the vendor accepts the assurance.

The person's status as a mere member will undermine a claim of apparent authority. RESTATEMENT (THIRD) OF AGENCY § 2.03, cmt. d (2006) (explaining the "reasonable belief" element of a claim of apparent authority, and role played by context, custom, and the supposed agent's position in an organization). Likewise, the member will have no actual authority. Absent additional facts, section 407(c)(1) (vesting all management authority in the managers) renders the member's belief unreasonable. RESTATEMENT (THIRD) OF AGENCY § 2.01, cmt. c (2006) (explaining the "reasonable belief" element of a claim of actual authority).

In general, a member's actual authority to act for an LLC will depend fundamentally on the operating agreement.

EXAMPLE: Rachael and Sam, who have known each other for years, decide to go into business arranging musical tours. They fill out and electronically sign a one page form available on the website of the Secretary of State and become the authorized representatives of MMT, LLC. They are the only members of the LLC, and their understanding of who will do what in managing the enterprise is based on several lengthy, late-night conversations that preceded the LLC's formation. Sam is to "get the acts," and Rachael is to manage the tour logistics. There is no written operating agreement.

In the terminology of this act, MMT, LLC is member-managed, Section 407(a), and the understanding reached in the late night conversations has become part of the LLC's operating

agreement. Section 111(c). In agency law terms, the operating agreement constitutes a manifestation by the LLC to Rachael and Sam concerning the scope of their respective authority to act on behalf of the LLC. RESTATEMENT (THIRD) OF AGENCY § 2.01, cmt. c (2006) (explaining that a person's actual authority depends first on some manifestation attributable to the principal and stating: "actual authority is a consequence of a principal's expressive conduct toward an agent, through which the principal manifests assent to be affected by the agent's action, and the agent's reasonable understanding of the principal's manifestation."

Circumstances outside the operating agreement can also be relevant to determining the scope of a member's actual authority.

EXAMPLE: Homeworks, LLC is a manager-managed LLC with three members. The LLC's written operating agreement:

- specifies in considerable detail the management responsibilities of Margaret, the LLC's manager-member, and also states that Margaret is responsible for "the day-to-day operations" of the company;
- puts Garrett, a non-manager member, in charge of the LLC's transportation department; and
- specifies no management role for Brooksley, the third member.

When the LLC's chief financial officer quits suddenly, Margaret asks Brooksley, a CPA, to "step in until we can hire a replacement."

Under the operating agreement, Margaret's request to Brooksley is within Margaret's actual authority and is a manifestation attributable to the LLC. If Brooksley manifests assent to Margaret's request, Brooksley will have the actual authority to act as the LLC's CFO.

In the unlikely event that two or more people form a member-managed LLC without any understanding of how to allocate management responsibility between or among them, agency law, operating in the context the act's "gap fillers" on management responsibility, will produce the following result:

A single member of a multi-member, member-managed LLC:

- has no actual authority to commit the LLC to any matter "outside the ordinary course of the activities of the company," section 407(b)(3); and
- has the actual authority to commit the LLC to any matter "in the ordinary course of the activities of the company," section 407(b)(2), unless the member has reason to know that other members might disagree or the member has some other reason to know that consultation with fellow members is appropriate.

For an explanation of this result, see Section 407(c), cmt., which provides a detailed agency law analysis in the context of a multi-manager, manager-managed LLC whose operating agreement is silent on the analogous question.

The common law of agency will also determine the apparent authority of a member of a member-managed LLC, and in that analysis what the particular third party knows or has reason

to know about the management structure and business practices of the particular LLC will always be relevant. RESTATEMENT (THIRD) OF AGENCY § 3.03, cmt. b (2006) ("A principal may also make a manifestation by placing an agent in a defined position in an organization …. Third parties who interact with the principal through the agent will naturally and reasonably assume that the agent has authority to do acts consistent with the agent's position … unless they have notice of facts suggesting that this may not be so.")

Under section 301(a), however, the mere fact that a person is a member of a member-managed limited liability company cannot *by itself* establish apparent authority by position. A course of dealing, however, may easily change the analysis:

EXAMPLE: David is a one of two members of DS, LLC, a member-managed LLC. David orders paper clips on behalf of the LLC, signing the purchase agreement, "David, as a member of DS, LLC." The vendor accepts the order, sends an invoice to the LLC's address, and in due course receives a check drawn on the LLC's bank account. When David next places an order with the vendor, the LLC's payment of the first order is a manifestation that the vendor may use in establishing David's apparent authority to place the second order.

SECTION 302. STATEMENT OF AGENCY.

***[Reporter's Note: The "knowledge/notice" effect of this Section was discussed during our Committee's CLE session on 2/27/10. The Committee is still struggling with the issue of whether a filing with the DOS should be conclusive evidence that an LLC is "manager-managed" for purposes of dealing with apparent authority and other agency issues. We have made provisional changes to Sec. 103(d). Another approach discussed was to amplify subsection (a)(2) of this Section to broadcast that fact. If that approach is followed, then we would have to decide to what extent this would serve as constructive knowledge of third parties. The same "burn in" time period considerations should apply (as under existing 608.407(5)) if changes are filed with the DOS.*]**

(a) A limited liability company may file a statement of agency. The statement:

(1) must include the name of the company, as identified in the records of the Department of State, and the street and mailing addresses of its designated office;

(2) with respect to any specified status or position in a company (whether as a member, transferee, manager, officer[56] or otherwise), may state the authority, or limitations on the authority, of all persons having such status or holding such position to:

(A) execute an instrument transferring real property held in the name of

[56] It has been suggested by Stu Ames that this "officers" should be enable by the statute, and that this is only reference in the act to them.

the company; or

(B) enter into other transactions on behalf of, or otherwise act for or bind, the company; and

(3) may state the authority, or limitations on the authority, of a specific person to:

(A) execute an instrument transferring real property held in the name of the company; or

(B) enter into other transactions on behalf of, or otherwise act for or bind, the company.

(b) To amend or cancel a statement of agency filed by the Department of State under Section 205(a), a limited liability company must deliver to the Department of State for filing an amendment or cancellation stating:

(1) the name of the company, as identified in the records of the Department of State;

(2) the street and mailing addresses of the limited liability company's designated office;

(3) the caption of the statement being amended or canceled and the date the statement being affected became effective; and

(4) the contents of the amendment or a declaration that the statement being affected is canceled.

(c) A statement of agency affects only the power of a person to bind a limited liability company to persons that are not members.

[(d) Subject to subsection (c) and Section 103(d) and except as otherwise provided in subsections (f), (g), and (h), a limitation on the authority of a person or a position contained in an effective statement of agency is not by itself evidence of knowledge or notice of the limitation by any person.][57]

(e) Subject to subsection (c), a grant of authority not pertaining to transfers of real property and contained in an effective statement of agency is conclusive in favor of a person that gives value in reliance on the grant, except to the extent that when the person gives value:

[57] In view of our discussions during CLE session at Committee's 2/27/10 meeting, we should readdress this subsection and provisional changes we made to Sec. 103(d). REPTL will also want to consider any provisions that give a DOS filing "knowledge" status under Sec. 103, particularly statements of agency granting authority or limiting person's or position's authority concerning transfers.

(1) the person has knowledge to the contrary;

(2) the statement has been canceled or restrictively amended under subsection (b); or

(3) a limitation on the grant is contained in another statement of agency that became effective after the statement containing the grant became effective.

(f) Subject to subsection (c), an effective statement of agency that grants authority to transfer real property held in the name of the limited liability company and that is recorded by certified copy in the office for recording transfers of the real property is conclusive in favor of a person that gives value in reliance on the grant without knowledge to the contrary, except to the extent that when the person gives value:

(1) the statement has been canceled or restrictively amended under subsection (b) and a certified copy of the cancellation or restrictive amendment has been recorded in the office for recording transfers of the real property; or

(2) a limitation on the grant is contained in another statement of agency that became effective after the statement containing the grant became effective and a certified copy of the later-effective statement is recorded in the office for recording transfers of the real property.

(g) Subject to subsection (c), if a certified copy of an effective statement containing a limitation on the authority to transfer real property held in the name of a limited liability company is recorded in the office for recording transfers of that real property, all persons are deemed to know of the limitation.[58]

(h) Subject to subsection (i), an effective certificate of dissolution or termination is a cancellation of any filed statement of agency for the purposes of subsection (f) and is a limitation on authority for the purposes of subsection (g).

(i) After a certificate of dissolution becomes effective, a limited liability company may deliver to the Department of State for filing and, if appropriate, may record a statement of agency in accordance with subsection (a) that is designated as a post-dissolution statement of agency. The statement operates as provided in subsections (f) and (g).

(j) Unless earlier canceled, an effective statement of agency is canceled by operation of

[58] See Section 608.407(6) concerning authority to make a real property transfer. We may need to include the same kind of statement here. This section states that a filing with the real estate records suffices, it should probably say that a limitation filed with the DOS is not effective unless the same limitation is filed with the county clerk. Alternatively, that point might be clarified by cc

law five years after the date on which the statement, or its most recent amendment, becomes effective. This cancellation operates without need for any recording under subsection (f) or (g).

(k) An effective statement of denial operates as a restrictive amendment under this section and may be recorded by certified copy for the purposes of subsection (f)(1).

Uniform Comment

This section is derived from and builds on RUPA, § 303, and, like that provision is conceptually divided into two realms: statements pertaining to the power to transfer interests in the LLC's real property and statements pertaining to other matters. In the latter realm, statements are filed only in the records of the Department of State, operate only to the extent the statements are actually known. Section 302(d) and (e).

As to interests in real property, in contrast, this section: (i) requires double-filing – with the Department of State and in the appropriate land records; and (ii) provides for constructive knowledge of statements limiting authority. Thus, a properly filed and recorded statement can protect the limited liability company, Section 302(g), and, in order for a statement pertaining to real property to be a sword in the hands of a third party, the statement must have been both filed and properly recorded. Section 302(f).

Subsection (a)(2) – This paragraph permits a statement to designate authority by position (or office) rather than by specific person. This type of a statement will enable LLCs to provide evidence of ongoing authority to enter into transactions without having to disclose to third parties the entirety of the operating agreement.

Here and elsewhere in the section, the phrase "real property" includes interests in real property, such as mortgages, easements, etc.

Subsection (b) – For the requirement that the original statement, like any other record, be appropriately captioned, see Section 205(a).

Subsection (c) – This subsection contains a very important limitation – i.e., that this section's rules do not operate *viz a viz* members. The text of RUPA, § 303 makes this very important point only obliquely, but the Comment to that section is unequivocal:

It should be emphasized that Section 303 concerns the authority of partners to bind the partnership to third persons. As among the partners, the authority of a partner to take any action is governed by the partnership agreement, or by the provisions of RUPA governing the relations among partners, and is not affected by the filing or recording of a statement of partnership authority.

RUPA § 303, comment 4.

However, like any other record delivered for filing on behalf of an LLC, a statement of agency might be some evidence of the contents of the operating agreement. *See* Comment to

Section 112(d).

Subsection (d) - The phrase "by itself" is important, because the existence of a limitation could be evidence if, for example, the person in question reviewed the public record at a time when the limitation was of record.

[Subsection (e)(1) – What happens if a statement of agency conflicts with the contents of an LLC's certificate of organization? The contents of the certificate are not statements of authority, Section 201(c), so the information in the certificate does not directly figure into the operation of this section. However, if the person claiming to rely on a statement of agency had read the certificate's conflicting information before giving value, that fact might be evidence that person gave value with "knowledge to the contrary" of the statement.][59]

SECTION 303. STATEMENT OF DENIAL.[60] A person named in a filed statement of agency granting that person authority may deliver to the Department of State for filing a statement of denial that:

(1) provides the name of the limited liability company, as identified in the records of the Department of State;

(2) identifies the fact being denied, which may include denial of a person's authority or status as a member; and

(3) has been signed by the person named in the filed statement of agency.

Uniform Comment

For the effect of a statement of denial, see Section 302(k).

SECTION 304. LIABILITY OF MEMBERS AND MANAGERS.

[(a) The debts, obligations, or other liabilities of a limited liability company, whether arising in contract, tort, or otherwise:

(1) are solely the debts, obligations, or other liabilities of the company;

(2) do not become the debts, obligations, or other liabilities:

(A) of any member of any limited liability company solely by reason of being a member;

(B) of a member in a member-managed limited liability company solely by reason of that person having management rights of a member of that company; or

(C) of a manager of a manager-managed limited liability company solely by reason of that

[59] This will require revision because of the changes we made to Section 103(d).
[60] DOS has made the proposed changes to this s ittee has not reviewed this section yet.

person being a manager of that company.][61]

(b) The failure of a limited liability company to observe any particular formalities relating to the exercise of its powers or management of its activities is not a ground for imposing liability on the members or managers for the debts, obligations, or other liabilities of the company.

Uniform Comment

Subsection (a)(2) – This paragraph shields members and managers only against the debts, obligations and liabilities of the limited liability company and is irrelevant to claims seeking to hold a member or manager directly liable on account of the member's or manager's own conduct.

EXAMPLE: A manager personally guarantees a debt of a limited liability company. Subsection (a)(2) is irrelevant to the manager's liability as guarantor.

EXAMPLE: A member purports to bind a limited liability company while lacking any agency law power to do so. The limited liability company is not bound, but the member is liable for having breached the "warranty of authority" (an agency law doctrine). Subsection (a)(2) does not apply. The liability is not *for* a "debt[], obligation[], [or] liabilit[y] of a limited liability company," but rather is the member's direct liability resulting because the limited liability company is *not* indebted, obligated or liable. RESTATEMENT (THIRD) OF AGENCY § 6.10 (2006).

EXAMPLE: A manager of a limited liability company defames a third party in circumstances that render the limited liability company vicariously liable under agency law. Under subsection (a)(2), the third party cannot hold the manager accountable for the *company's* liability, but that protection is immaterial. The manager is the tortfeasor and in that role is directly liable to the third party.

Subsection (a)(2) pertains only to claims by third parties and is irrelevant to claims by a limited liability company against a member or manager and *vice versa*. *See e.g.* Sections 408 (pertaining to a limited liability company's obligation to indemnify a member or manager), 409 (pertaining to management duties) and 901 (pertaining to a member's rights to bring a direct claim against a limited liability company).

Subsection (b) – This subsection pertains to the equitable doctrine of "piercing the veil" – i.e., conflating an entity and its owners to hold one liable for the obligations of the other. The doctrine of "piercing the corporate veil" is well-established, and courts regularly (and sometimes almost reflexively) apply that doctrine to limited liability companies. In the corporate realm, "disregard of corporate formalities" is a key factor in the piercing analysis. In the realm of

[61] The committee was reluctant to introduce the term "managing member" because it would require conforming changes throughout the act. This rewrite is the Reporter's attempt to have this section have the same effect as current 608.4227 without using that term. We were searching for a way to clarify that a member of a member-managed limited liability company wears two hats and that such person does not have liability when acting in a management capacity.

LLCs, that factor is inappropriate, because informality of organization and operation is both common and desired.

This subsection does not preclude consideration of another key piercing factor – disregard by an entity's owners of the entity's economic separateness from the owners.

EXAMPLE: The operating agreement of a three-member, member-managed limited liability company requires formal monthly meetings of the members. Each of the members works in the LLC's business, and they consult each other regularly. They have forgotten or ignore the requirement of monthly meetings. Under subsection (b), that fact is irrelevant to a piercing claim.

EXAMPLE: The sole owner of a limited liability company uses a car titled in the company's name for personal purposes and writes checks on the company's account to pay for personal expenses. These facts are relevant to a piercing claim; they pertain to economic separateness, not subsection (b) formalities.

This subsection has no relevance to a member's claim of oppression under Section [701(a)(5)(B)]. In some circumstances, disregard of agreed-upon formalities can be a "freeze out" mechanism. Likewise, this section has no relevance to a member's claim that the disregard of agreed-upon formalities is a breach of the operating agreement.

Provisions of regulatory law may impose liability by status on a member or manager. *See* CARTER G. BISHOP AND DANIEL S. KLEINBERGER, LIMITED LIABILITY COMPANIES: TAX AND BUSINESS LAW, ¶ 6.04(4) (Statutory Liability).

[ARTICLE] 4

RELATIONS OF MEMBERS TO EACH OTHER AND TO LIMITED LIABILITY COMPANY

SECTION 401. BECOMING MEMBER.

(a) If a limited liability company is to have only one member upon formation, the person becomes a member as agreed by that person and the authorized representative of the company. That person and the authorized representative may be, but need not be, different persons. If different, the authorized representative acts on behalf of the initial member.

(b) If a limited liability company is to have more than one member upon formation, those persons become members as agreed by the persons before the formation of the company. The authorized representative acts on behalf of the persons in forming the company and may be, but need not be, one of the persons.

(c) After formation of a limited liability company, a person becomes a member:

(1) as provided in the operating agreement;

(2) as the result of a transaction effective under [Article] 10;

(3) with the consent of all the members; or

(4) if, [within 90 consecutive days][62] after the company ceases to have any members:

(A) the last person to have been a member, or the [legal representative][63] of that person, designates a person to become a member; and

(B) the designated person consents to become a member.

(d) A person may become a member without acquiring a transferable interest and without making or being obligated to make a contribution to the limited liability company.[64]

Uniform Comment

Most LLC statutes address in separate provisions: (i) how an LLC obtains its initial member or members; and (ii) how additional persons might later become members. This act follows that approach. Subsections (a) and (b) address the most common circumstances under which a limited liability company is formed – with one or more persons becoming members upon formation. Subsection (c) addresses how persons become members after an LLC has had at least one member.

Subsection (c)(4) – The personal representative of the last member may designate her-, him-, or itself as the new member. This subsection is intended to complement Section [701(a)(3)].

Subsection (d) – To accommodate business practices and also because a limited liability company need not have a business purpose, this subsection permits so-called "non-economic

[62] The Reporter thinks the Committee should consider whether this period may be changed by operating agreement as currently allowed by 608.441(1)(d). Delaware law is the same (18-801(a)(4)). Like this draft of the LLC act, our LP act makes no reference to the ability to change this time period. Presumably this would be a default provision that could be over-ridden under Sec. 110, but this is unclear. As a matter of public policy should a LLC have the ability to have no members for more than 90 days? What if an operating agreement said that the company could be continued as long as person could be admitted into a "memberless" LLC within 2 years? Or 18 months? A company without members (and potentially managers) could be problematic for many reasons: creditor rights, third party relationships, management authority issues, tax problems, etc. Perhaps this provisions should be changed to say "within 90 days or a shorter period specified in the operating agreement." Whatever change, if any, is made here will also need to be made in Sec. 701(a)(3).

[63] In our 2/27/10 meeting we discussed whether this term should be expanded by definition to include personal representative, guardian, conservator, or administrator of natural person, and legal representative or legal representative of a person other than a natural person. See existing 608.402(26). Delaware law similar: 18-101(13). In each case the term would expand the list of persons who could continue the company upon the death, dissolution or other withdrawal of a last remaining member (that is, to avoid dissolution). No specific action taken but most seemed to agree this would be a good change.

[64] The Committee agreed that a comment should be added to Section 401 to make it clear that nothing in the definition of "Contribution" under Section 102 should be implied as a requirement that each member make a contribution to the LLC.

members." [Neither the definition of "Contribution" in Section 102 nor the {Uniform Comment} pertaining to that definition under that section should be construed as creating a condition that each member is required to make a contribution to the limited liability company in order to become a member.][65]

SECTION 402. FORM OF CONTRIBUTION. A contribution may consist of tangible or intangible property or other benefit to a limited liability company, including money, services performed, promissory notes, [credit enhancements][66] other agreements to contribute money or property, and contracts for services to be performed.

Uniform Comment

Source – ULPA (2001) § 501, which derived from ULLCA § 401.

SECTION 403. LIABILITY FOR CONTRIBUTIONS.

(a) A promise by a member to contribute to the limited liability company is not enforceable unless it is set out in a record signed by the member.[67]

(b) A person's obligation to make a contribution to a limited liability company is not excused by the person's death, disability, or other inability to perform personally. If a person does not make a required contribution, the person or the person's estate is obligated to contribute money equal to the value of the part of the contribution which has not been made, at the option of the company. [The foregoing option shall be in addition to, and not in lieu of, any other rights, including the right to specific performance, that the limited liability company may have against such member under the certificate of organization or operating agreement or applicable law.][68]

(c) A creditor of a limited liability company which extends credit or otherwise acts in reliance on an obligation described in subsection (a) may enforce the obligation.[69]

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[65] See footnote to subsection (d).

[66] Suggested by Stu Ames.

[67] This provision is based on existing Florida law (608.4211(2) and 620.1502(1)), but note that the former uses "writing" and the latter uses "record." Consider this distinction given that the latter can be electronic or other medium, with only condition being that it can be "retrieved in perceivable form." The committee needs to address the effect of Section 1102 of this act on Electronic Signatures, etc. act and how the Florida Statute of Frauds (725.01) would apply to contribution obligations.

[68] This sentence appears in both existing law (608.4211(3)) and Delaware law (18-502(a)). It has been suggested by Stu Ames that this provision and Sec. 403(d) are misplaced (should they be in Sec. 110? Probably so.) and that Committee should consider whether "reasonableness" standards should apply here and Sec. 110(i) (note that existing references like these in Chaps. 608 and LP act do not contain reasonable standards).

[69] If provisional subsection (e) used, then this su redundant.

[(d) *Florida Alternate*: The certificate of organization or operating agreement of a limited liability company may provide that the {interest} of any member who fails to make any contribution that the member is obligated to make shall be subject to specified penalties for, or specified consequences of, such failure. Such penalties or consequences may take the form of reducing the defaulting member's proportionate {membership interest} in the limited liability company, subordinating the defaulting member's interest in the limited liability company to that of the nondefaulting members, a forced sale of the defaulting member's {membership interest}, the forfeiture of the defaulting member's {membership interest}, the lending by other members of the amount necessary to meet the defaulting member's commitment, a fixing of the value of the defaulting member's {membership interest} by appraisal or by formula and redemption or sale of the defaulting member's membership interest at such value, or other penalties or consequences.][70] [(d) *Delaware Alternate*: A limited liability company agreement may provide that the interest of any member who fails to make any contribution that the member is obligated to make shall be subject to specified penalties for, or specified consequences of, such failure. Such penalty or consequence may take the form of reducing or eliminating the defaulting member's proportionate interest in a limited liability company, subordinating the member's limited liability company interest to that of nondefaulting members, a forced sale of that limited liability company interest, forfeiture of the defaulting member's limited liability company interest, the lending by other members of the amount necessary to meet the defaulting member's commitment, a fixing of the value of the defaulting member's limited liability company interest by appraisal or by formula and redemption or sale of the limited liability company interest at such value, or other penalty or consequence.][71]

[(e) *Delaware/Florida Supplemental Provisions*: Unless otherwise provided in an operating agreement, the obligation of a member to make a contribution or return money or other property paid or distributed in violation of this [act]may be compromised only by consent of all the members. {Notwithstanding the compromise, a creditor of a limited liability company who extends credit, after the entering into of a limited liability company agreement or an amendment

[70] See next footnote. Also, if this alternate is selected, we need to decide upon "interest" reference. Should it be "transferable interest"? This could be too narrow inasmuch as it may be the members' intent in many situations to dilute or cause forfeiture of the member rights associated with the transferable or economic interest.

[71] The committee decided to review both of these approaches for enabling or recognizing the validity of such provisions. Note that the Florida alternate is also [illegible]ct (620.1502(4)).

thereto which, in either case, reflects the obligation, and before the amendment thereof to reflect the compromise, may enforce the original obligation to the extent that, in extending credit, the creditor reasonably relied on the obligation of a member to make a contribution or return.} A conditional obligation of a member to make a contribution or return money or other property to a limited liability company may not be enforced unless the conditions of the obligation have been satisfied or waived as to or by such member. Conditional obligations include contributions payable upon a discretionary call of a limited liability company prior to the time the call occurs.][72]

Uniform Comment

Source: ULLCA § 402, which is taken from RULPA § 502(b), which also gave rise to ULPA (2001) § 502.

Subsection (a) – The reference to "perform personally" is not limited to individuals but rather may refer to any legal person (including an entity) that has a non-delegable duty.

SECTION 404. SHARING OF PROFITS, LOSSES AND RIGHT TO DISTRIBUTIONS BEFORE DISSOLUTION.

(a) Profits and losses of a limited liability company shall be allocated among the members in the manner provided in its operating agreement. If the operating agreement does not so provide, then profits and losses shall be allocated on the basis of the agreed value, as stated in the records of the limited liability company, of the contributions made by each member to the extent they have been received by the limited liability company and have not been returned. [73]

(b) Distributions of cash or other assets of a limited liability company shall be allocated among the members in the manner provided in its operating agreement, except to the extent necessary to comply with any transfer effective under Section 502 and any charging order in effect under

[72] The Committee wanted to consider further these supplemental provisions. The provision in braces would subsume subsection (b). The language appears in existing law of both Delaware law (18-502(b)) and Florida law (608.4211(4)), except that only Delaware contains the "conditional contribution" provisions in the last two sentences.

[73] The Committee decided on 9/30/10 to not follow the approach used in the LP act (620.1503(1)), and to use the approach under existing Section 608.4261. The Committee felt that the "silent" approach used by NCCUSL for allocating profits and losses was not a realistic

Section 503. If the operating agreement does not so provide, then, except to the extent necessary to comply with any transfer effective under Section 502 and any charging order in effect under Section 503, distributions shall be shared by the members on the basis of the agreed value, as stated in the records of the limited liability company, of the contributions made by each member to the extent they have been received by the limited liability company and have not been returned. [74]

(c) A person has a right to a distribution before the dissolution and winding up of a limited liability company only if the company decides to make an interim distribution. A person's dissociation does not entitle the person to a distribution.

(d) A person does not have a right to demand or receive a distribution from a limited liability company in any form other than money. Except as otherwise provided in Section 714(c), a limited liability company may distribute an asset in kind if each part of the asset is fungible with each other part and each person receives a percentage of the asset equal in value to the person's share of distributions.

(e) If a member or transferee becomes entitled to receive a distribution, the member or transferee has the status of, and is entitled to all remedies available to, a creditor of the limited liability company with respect to the distribution.

Uniform Comment

This act follows both the original ULLCA and ULPA (2001) in omitting any default rule for allocation of losses. The Comment to ULPA (2001), § 503 explains that omission as follows:

This act has no provision allocating profits and losses among the partners. Instead, the act directly apportions the right to receive distributions. Nearly all limited partnerships will choose to allocate profits and losses in order to comply with applicable tax, accounting and other regulatory requirements. Those requirements, rather than this act, are the proper source of guidance for that profit and loss allocation.

Subsection (b) – The second sentence of this subsection accords with Section 603(a)(3) – upon dissociation a person is treated as a mere transferee of its own transferable interest. Like most *inter se* rules in this act, this one is subject to the operating agreement. *See* Comment to

[74] The Committee decided on 9/30/10 to not follow the approach used in the LP act (620.1503(2)), and to use the approach under existing Section 608.426(1). The Committee felt that the "equal" approach used by NCCUSL for allocating distributions was not a realistic defau

Section 603(a)(3).

SECTION 405. LIMITATIONS ON DISTRIBUTION.

(a) A limited liability company may not make a distribution if after the distribution:

(1) the company would not be able to pay its debts as they become due in the ordinary course of the company's activities; or

(2) the company's total assets would be less than the sum of its total liabilities plus the amount that would be needed, if the company were to be dissolved, wound up, and terminated at the time of the distribution, to satisfy the preferential rights upon dissolution, winding up, and termination of members whose preferential rights are superior to those of persons receiving the distribution.

[(b) A limited liability company may base a determination that a distribution is not prohibited under subsection (a) on financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances or on a fair valuation or other method that is reasonable under the circumstances.][75]

(c) Except as otherwise provided in subsection (e), the effect of a distribution under subsection (a) is measured:

(1) in the case of a distribution by purchase, redemption, or other acquisition of a transferable interest in the company, the earlier of the date money or other property is transferred or the date that indebtedness is incurred by the company with respect to acquiring the transferable interest;

(2) in the case of any other distribution of indebtedness, as of the date the indebtedness is distributed; and

(3) in all other cases, as of the date:

(A) the distribution is authorized, if the payment occurs within 120 days after that date; or

(B) the payment is made, if the payment occurs more than 120 days after

[75] We discussed the relationship between this section and last sentence of Sec. 409(c). We were concerned that this subsection imposes a separate standard of care that goes beyond what is required by Sec. 409. This is unfortunately buttressed by the reference in Sec. 408(a) to the "duties stated in Sections 405 and 409." It would then be unclear to what extent it would be subject to the same contractual modification rules of the act (see Sections 110(c), (d) and (h)), would be confusing . To address this concern we amended the comment to this subsection (b) for the time being. But see footnote to that particular revised comment below. Also see the reference to Sec. 409 in Sec. 406(a) which strongly suggests that Sec. 40 ard of care that should apply.

the distribution is authorized.

(d) A limited liability company's indebtedness to a member incurred by reason of a distribution made in accordance with this section is at parity with the company's indebtedness to its general, unsecured creditors.

(e) A limited liability company's indebtedness, including indebtedness issued in connection with or as part of a distribution, is not a liability for purposes of subsection (a) if the terms of the indebtedness provide that payment of principal and interest are made only to the extent that a distribution could be made to members under this section. If the indebtedness is issued as a distribution, each payment of principal or interest on the indebtedness is treated as a distribution, the effect of which is measured on the date the payment is actually made.

(f) In subsection (a), "distribution" does not include amounts constituting reasonable compensation for present or past services or reasonable payments made in the ordinary course of business under a bona fide retirement plan or other benefits program.

Uniform Comment

Source – ULPA (2001) § 508, which was derived from ULLCA § 406, which was in turn derived from MBCA § 6.40.

[Subsection (b) – This subsection is not intended to set forth a standard of care different than the one articulated in Section 409(c). Instead, it is an example of the type of opinions, reports, statements or other information referred to in Section 409(c).][76]

Subsection (c) - This subsection, along with **subsection (e)**, sets forth measuring dates for determining whether the solvency tests in subsection (a) have been met. For example, in the case of a distribution not involving the acquisition of a transferable interest by the company, the tests are measured as of the date the distributions were authorized if the payment actually occurs within 120 days after the authorization (otherwise the date of payment becomes the measuring date for the tests). If company notes are distributed (or the company otherwise incurs a debt to make a distribution), then irrespective of the financial condition of the company the solvency financial tests must be applied on the date that the notes are distributed (or the indebtedness is incurred), *unless* the terms of the notes (or other evidence of indebtedness) require the validity of each payment of the debt obligation to be measured by the solvency tests when the payment is

[76] An alternative we discussed was to delete the specific reference in this section to being able to rely upon financial statements or valuation, and amplifying Sec. 409(c) reference to the ability to rely upon certain reports and other materials in discharging duty of care. A comment under this section could then refer to specific reliance upon financial statements or valuation being an example of the reports and other materials referred to in Sec. 409(c). However, note that existing chapters 607 and 608, as well as our LP act, have similar "reliance on statements, etc." reference in the "improper distribution" section itself. This suggests that the comment approach would be preferable to maintain some consistency.

actually made.

Subsection (d) - [To add comment clarifying that this section is not intended to change the law applicable to secured transactions under UCC Article 9, including priority rules applicable to secured creditors.][77]

Subsection (f) – This exception applies only for the purposes of this section. *See* the Comment to Section 503(b)(2). The exception is derived from existing statutory provisions. *See, e.g.*, DEL. CODE ANN., tit. 6, § 18-607(a) (2006) and VA. CODE ANN. § 13.1-1035(E) (West 2006). *See also In re Tri-River Trading, LLC*, 329 B.R. 252, 266, (8th Cir. BAP 2005), aff'd . 452 F.3d 756 (8th Cir. 2006) ("We know of no principle of law which suggests that a manager of a company is required to give up agreed upon salary to pay creditors when business turns bad.")

SECTION 406. LIABILITY FOR IMPROPER DISTRIBUTIONS.

(a) Except as otherwise provided in subsection (b), if a member of a member-managed limited liability company or manager of a manager-managed limited liability company consents to a distribution made in violation of Section 405 and in consenting to the distribution fails to comply with Section 409, the member or manager is personally liable to the company for the amount of the distribution that exceeds the amount that could have been distributed without the violation of Section 405.

(b) To the extent the operating agreement of a member-managed limited liability company expressly relieves a member of the authority and responsibility to consent to distributions and imposes that authority and responsibility on one or more other members, the liability stated in subsection (a) applies to the other members and not the member that the operating agreement relieves of authority and responsibility.

(c) A person that receives a distribution knowing that the distribution to that person was made in violation of Section 405 is personally liable to the limited liability company but only to the extent that the distribution received by the person exceeded the amount that could have been properly paid under Section 405.

(d) A person liable under subsection (a) is entitled to contribution from, and may implead in any action concerning that liability:

(1) every other person subject to liability under subsection (a); and

(2) every person who received a distribution in violation of subsection (c).

(e) An action under this section is barred if not commenced within two years after the

[77] Tom Wells said he would provide it.

distribution.

Uniform Comment

Source – Same derivation as Section 405.

Liability under this section is not affected by a person ceasing to be a member, manager or transferee after the time that the liability attaches.

Subsection (b) – The operating agreement could not accomplish the "switch" in liability provided by this subsection, because the "switch" implicates the rights of third parties under this act. Section 110(c)(11).

Subsections (c) and (d)(2) – Liability could apply to a person who receives a distribution under a charging order, but only if the person meets the knowledge requirement. That situation is very unlikely unless the person with the charging order is also a member or manager.

Subsection (d) -- [To add comment concerning joint and several liability of managers and members under this section?][78]

SECTION 407. MANAGEMENT OF LIMITED LIABILITY COMPANY.

(a) A limited liability company is a member-managed limited liability company unless the operating agreement: [or certificate of organization][79]

(1) expressly provides that:

(A) the company is or will be "manager-managed";

(B) the company is or will be "managed by managers"; or

(C) management of the company is or will be "vested in managers"; or

(2) includes words of similar import.

(b) In a member-managed limited liability company, the following rules apply:

(1) The management and conduct of the company are vested in the members.

(2) Each member has equal rights in the management and conduct of the company's activities.

(3) A difference arising among members as to a matter in the ordinary course of the activities of the company may be decided by a majority of the members.

(4) An act outside the ordinary course of the activities of the company may be

[78] We should discuss the objective of this comment. Does the committee intend to suggest a gloss on common law applicable to contribution rights of defendants who are jointly and severally liable for an obligation? If not, then perhaps the comment should be restricted to saying that other applicable law is intended to apply to enforcement of a person's contribution rights under this section.

[79] Needs to be coordinated with Section 201(c).

undertaken only with the consent of all members.

(5) The operating agreement may be amended only with the consent of all members.

(c) In a manager-managed limited liability company, the following rules apply:

(1) Except as otherwise expressly provided in this act, any matter relating to the activities of the company is decided exclusively by the managers.

(2) Each manager has equal rights in the management and conduct of the activities of the company.

(3) A difference arising among managers as to a matter in the ordinary course of the activities of the company may be decided by a majority of the managers.

(4) The consent of all members is required to:

(A) sell, lease, exchange, or otherwise dispose of all, or substantially all, of the company's property, with or without the good will, outside the ordinary course of the company's activities;

(B) undertake any other act outside the ordinary course of the company's activities; and

(C) amend the operating agreement.

(5) A manager may be chosen at any time by the consent of a majority of the members and remains a manager until a successor has been chosen, unless the manager at an earlier time resigns, is removed, or dies, or, in the case of a manager that is not an individual, terminates. A manager may be removed at any time by the consent of a majority of the members without notice or cause.

(6) A person need not be a member to be a manager, but the dissociation of a member that is also a manager removes the person as a manager. If a person that is both a manager and a member ceases to be a manager, that cessation does not by itself dissociate the person as a member.

(7) A person's ceasing to be a manager does not discharge any debt, obligation, or other liability to the limited liability company or members which the person incurred while a manager.

(d) An action requiring the consent of members under this act may be taken without a meeting, and a member may appoint a proxy or other agent to consent or otherwise act for the

member by signing an appointing record, personally or by the member's agent.

(e) The dissolution of a limited liability company does not affect the applicability of this section. However, a person that wrongfully causes dissolution of the company loses the right to participate in management as a member and a manager.

(f) This act does not entitle a member to remuneration for services performed for a member-managed limited liability company, except for reasonable compensation for services rendered in winding up the activities of the company.

[(g) A manager, if a it is a manager-managed limited liability company, or a member, if it is a member-managed limited liability company, may file a statement of dissociation with the Florida Department of State containing:

(1) The name of the limited liability company;

(2) The name and signature of the dissociating manager or member, as applicable;

(3) The date the dissociating manager or member, as applicable, withdrew or will withdraw; and

(4) A statement that the limited liability company has been notified of the dissociation in writing.][80]

Uniform Comment

Subsection (a) – This subsection follows implicitly from the definitions of "manager-managed" and "member-managed" limited liability companies, Section 102(10) and (12), but is included here for the sake of clarity. Although this act has eliminated the link between management structure and statutory apparent authority, Section 301, the act retains the manager-managed and member-managed constructs as options for members to use to structure their *inter se* relationship.

Subsection (b) – The subsection states default rules that, under Section 110, are subject to the operating agreement.

Subsection (c) – Like subsection (b), this subsection states default rules that, under Section 110, are subject to the operating agreement. For example, a limited liability company's operating agreement might state "This company is manager-managed," Section 102(10)(i), while providing that managers must submit specified ordinary matters for review by the members.

The actual authority of an LLC's manager or managers is a question of agency law and

[80] This was suggested by DOS based upon similar language in LP act. While appropriate for a partnership, probably not for a LLC. Section 604 would apply to a member in a member-managed limited liability company in any event. If we leave this in the act, words other than "dissociation" and "withdraw" should probably be used for describing the resignation of a manager.

depends fundamentally on the contents of the operating agreement and any separate management contract between the LLC and its manager or managers. These agreements are the primary source of the manifestations of the LLC (as principal) from which a manager (as agent) will form the reasonable beliefs that delimit the scope of the manager's actual authority. RESTATEMENT (THIRD) OF AGENCY § 3.01 (2006). *See also* RESTATEMENT (SECOND) OF AGENCY §§ 15, 26.

Other information may be relevant as well, such as the course of dealing within the LLC, unless the operating agreement effectively precludes consideration of that information. See Section 110(a)(4) (stating that the operating agreement governs "the means and conditions for amending the operating agreement") and the comment to that subparagraph, which states that:

[Although this] act does not specially authorize the operating agreement to limit the sources in which terms of the operating agreement might be found or limit amendments to specified modes … Paragraph (a)(4) could be read to encompass such authorization. Also, under Section 107 the parol evidence rule will apply to a written operating agreement containing an appropriate merger provision.

If the operating agreement and a management contract conflict, the reasonable manager will know that the operating agreement controls the extent of the manager's rightful authority to act for the LLC– despite any contract claims the manager might have. *See* Section 111(a)(2) (stating that the operating agreement governs "the rights and duties under this act of a person in the capacity of manager") and the comment to that paragraph, which states:

Because the term "[o]perating agreement . . . . includes the agreement as amended or restated," Section 102(13), this paragraph gives the members the ongoing power to define the role of an LLC's managers. Power is not the same as right, however, and exercising the power provided by this paragraph might constitute a breach of a separate contract between the LLC and the manager.

See also RESTATEMENT (THIRD) OF AGENCY § 8.13, cmt. b (2006) and RESTATEMENT (SECOND) OF AGENCY, § 432, cmt. b (stating that, when a principal's instructions to an agent contravene a contract between the principal and agent, the agent may have a breach of contract claim but has no right to act contrary to the principal's instructions).

If (i) an LLC's operating agreement merely states that the LLC is manager-managed and does not further specify the managerial responsibilities, and (ii) the LLC has only one manager, the actual authority analysis is simple. In that situation, this subsection:

- serves as "gap filler" to the operating agreement; and thereby
- constitutes the LLC's manifestation to the manager as to the scope of the manager's authority; and thereby
- delimits the manager's actual authority, subject to whatever subsequent manifestations the LLC may make to the manager (e.g., by a vote of the members, or an amendment of the operating agreement).

If the operating agreement states only that the LLC is manager-managed and the LLC has

more than one manager, the question of actual authority has an additional aspect. It is necessary to determine what actual authority any one manager has to act alone.

Paragraphs (c)(2), (3), and (4) combine to provide the answer. A single manager of a multi-manager LLC:

- has no actual authority to commit the LLC to any matter "outside the ordinary course of the activities of the company," paragraph (c)(4)(C), or any matter encompassed in paragraph (c)(4); and
- has the actual authority to commit the LLC to any matter "in the ordinary course of the activities of the company," paragraph (c)(3), unless the manager has reason to know that other managers might disagree or the manager has some other reason to know that consultation with fellow managers is appropriate.

The first point follows self-evidently from the language of paragraphs (c)(3) and (c)(4). In light of that language, no manager could reasonably believe to the contrary (unless the operating agreement provided otherwise).

The second point follows because:

- Subsection (c) serves as the gap-filler manifestation from the LLC to its managers, and subsection (c) does not require managers of a multi-manager LLC to act only in concert or after consultation.
- To the contrary, subject to the operating agreement:
  - paragraph (c)(2) expressly provides that "each manager has equal rights in the management and conduct of the activities of the company," and
  - paragraph (c)(3) suggests that several (as well as joint) activity is appropriate on ordinary matters, so long as the manager acting in the matter has no reason to believe that the matter will be controversial among the managers and therefore requires a decision under paragraph (c)(3).

While the individual members of a corporate board of directors lack actual authority to bind the corporation, 2 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS, § 392 (noting "the overwhelming weight of authority"), subsection (c) does not describe "board" management. Instead, subsection (c) provides management rules derived from those that govern the members of a general partnership and multiple general partners of a limited partnership. RUPA, § 401 and ULPA (2001), § 406.

The common law of agency will also determine the apparent authority of an LLC's manager or managers, and in that analysis what the particular third party knows or has reason to know about the management structure and business practices of the particular LLC will always be relevant. RESTATEMENT (THIRD) OF AGENCY § 3.03 cmt. d (2006) ("The nature of an organization's business or activity is relevant to whether a third party could reasonably believe that a [manager] is authorized to commit the organization to a particular transaction.").

As a general matter, however – i.e., as to the apparent authority of the position of LLC

manager under this act – courts may view the position as clothing its occupants with the apparent authority to take actions that reasonably appear within the ordinary course of the company's business. The actual authority analysis stated above supports that proposition; absent a reason to believe to the contrary, a third party could reasonably believe a manager to possess the authority contemplated by the gap-fillers of the statute. *But see* Section 102(9), cmt. (stating that "confusion around the term 'manager' is common to almost all LLC statutes").

Subsection (c)(5) – Under the default rule stated in this paragraph, dissolution of an entity that is a manager does not end the entity's status as manager. Contrast Section 602(4)(D) (referring to the expulsion of a member that is a partnership or limited liability company and authorizing the other members to expel, by unanimous consent, the dissolved partnership or limited liability company).

An LLC does not cease to be "manager-managed" simply because no managers are in place. In that situation, absent additional facts, the LLC is manager-managed and the manager position is vacant. Non-manager members who exercise managerial functions during the vacancy (or at any other time) will have duties as determined by other law, most particularly the law of agency.

Subsection (c)(7) – The obligation to safeguard trade secrets and other confidential or propriety information is incurred when the person is a manager, and a subsequent cessation does not entitle the person to usurp the information or use it to the prejudice of the LLC after the cessation.

Subsection (e) – Under the default rules of this act, it is not possible for a person to wrongfully cause dissolution (as distinguished from wrongfully dissociating). Compare Section 701 with Section 601(b). However, the operating agreement might contemplate wrongful dissolution, and this subsection would then apply – unless the operating provides otherwise. Under the second sentence of this subsection, a person might lose the rights to act as a manager without automatically and formally ceasing to be denominated as a manager.

Subsection (f) – This provision traces back to the 1914 Uniform Partnership act, § 18(f) and is included for fear that its absence might be misinterpreted as implying a contrary rule.

This act does not provide for remuneration to a manager of a manager-managed LLC. That issue is for the operating agreement, or a separate agreement between the LLC and the manager. A manager seeking compensation will have the burden of proving an agreement. For a case demonstrating how *not* to establish an agreement, see Jandrain v. Lovald, 351B.R. 679 (D. S.D. 2006).

SECTION 408. INDEMNIFICATION AND INSURANCE.[81]

[(a) A limited liability company shall reimburse for any payment made and indemnify for

[81] This section was discussed and analyzed during our Committee's CLE session on 2/27/10. No specific proposals were made. There is a CD containing the Comm s.

any debt, obligation, or other liability incurred by a member of a member-managed limited liability company or the manager of a manager-managed limited liability company in the course of the member's or manager's activities on behalf of the company, if, in making the payment or incurring the debt, obligation, or other liability, the member or manager complied with the duties stated in Sections 405[82] and 409.][83]

(b) A limited liability company may purchase and maintain insurance on behalf of a member or manager of the company against liability asserted against or incurred by the member or manager in that capacity or arising from that status even if, under Section 110(g), the operating agreement could not eliminate or limit the person's liability to the company for the conduct giving rise to the liability.

Uniform Comment

Subsection (a) – This subsection states a default rule, which corresponds to the default rules on management duties. In the default mode, the correspondence is appropriate, because otherwise the statutory rule on indemnification could undercut or even vitiate the statutory rules on duty. Both this subsection and the rules on duty are subject to the operating agreement.

This subsection does not expressly require a limited liability company to provide advances to cover expenses. However, in some jurisdictions the indemnity obligation might be interpreted to include an obligation to make advances.

This subsection concerns only managers of manager-managed limited liability companies and members of member-managed companies. The definite article in the phrases "the member's" [paragraph (1)] and "the member" [paragraph (2)] refers back to the original phrase "A limited liability company shall reimburse . . . and indemnify . . . a member of a member-managed company . . . ." A limited liability company's obligation, if any, to reimburse or indemnify others (including non-managing members of a manager-managed LLC and LLC employees) is a question for other law, including the law of agency.

Subsection (b) – In contrast to subsection (a), this subsection encompasses all members,

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[82] See footnotes to Section 405(b) and comments to that section regarding our discussion at 2/26/10 meeting concerning whether Sec. 405(b) should be considered separate duty of care and not subject to same contractual modification rules found in Sec. 110.

[83] This subsection was discussed at length in November 4, 2009 meeting, particularly the mandatory nature of this section. Current Florida law (608.4229) governing indemnification calls for "permissive" (or enabling) approach. The Committee decided to defer resolution on final language until finalization of Section 409 default performance standards and permitted alteration thereof under Section 110. It was generally agreed, however, that the current approach (608.4229) should be retained (as is also the use in Delaware). It was also acknowledged that this section should better dovetail with Sections 110(g) and 409 (see for example, the footnote to Section 110(g)). Another observation was that if the right to indemnity is conditional on compliance with Section 409 (whether the right is mandatory by default or required by the operating agreement) and Section 409 contains "uncabined" fiduciary duties, then the right to indemnification would b bined" or obscure.

not just members in a member-managed LLC.

This subsection's language is very broad and authorizes an LLC to purchase insurance to cover, e.g., a manager's intentional misconduct. It is unlikely that such insurance would be available. For restrictions on the power of an operating agreement to provide for indemnification, see Section 110, particularly subsection (g).

[SECTION 409. STANDARDS OF CONDUCT FOR MEMBERS AND MANAGERS.][84]

[Reporter's Note: Parts of this Section (default duties of managers and members in member-managed LLCs), Section 110 (permitted operating agreement modifications to fiduciary duties and LLC indemnity obligations) and Section 408 (indemnity rights) were discussed in depth during our Committee's CLE session on 2/27/10. No specific proposals were made during that session.]

(a) A member of a member-managed limited liability company owes to the company and, subject to Section 901(b), the other members the fiduciary duties of loyalty and care stated in subsections (b) and (c).

(b) The duty of loyalty of a member in a member-managed limited liability company includes the duties:

(1) to account to the company and to hold as trustee for it any property, profit, or benefit derived by the member:

(A) in the conduct or winding up of the company's activities;

(B) from a use by the member of the company's property; or

(C) from the appropriation of a limited liability company opportunity;

(2) to refrain from dealing with the company in the conduct or winding up of the company's activities as or on behalf of a person having an interest adverse to the company; and

(3) to refrain from competing with the company in the conduct of the company's

[84] The Committee discussed at length this provision at its November 4, 2009 meeting. It was agreed that this important section and the issues it raises deserves very serious deliberation and further analysis, and should be addressed by other Committee members not attending the November 4, 2009 meeting. It was decided that we would discuss fiduciary duties and permissible modification of the same at length during our February 26-27, 2010 session. The NCCUSL "uncabined" and ordinary negligence standard approaches were contrasted with the purely contractarian and Delaware approaches. The Ribstein article was also discussed to offer a contrasting viewpoint. There was greater consensus among Committee members regarding the duty of loyalty, and using the existing "cabin" approach under Florida law with respect to this duty. The Committee also debated the idea of using the same negligence standard applicable to directors of a Florida corporation under Chapter 607, but the majority of members participating acknowledged that the LLC act should contain its own standard of care because of the unique "duality" of the status and duties of most manag hose of a director).

activities before the dissolution of the company.

(c) Subject to the business judgment rule, the duty of care of a member of a member-managed limited liability company in the conduct and winding up of the company's activities is to act with the care that a person in a like position would reasonably exercise under similar circumstances and in a manner the member reasonably believes to be in the best interests of the company. In discharging this duty, a member may rely in good faith upon opinions, reports, statements, or other information provided by another person that the member reasonably believes is a competent and reliable source for the information.[85]

(d) A member in a member-managed limited liability company or a manager-managed limited liability company shall discharge the duties under this act or under the operating agreement and exercise any rights consistently with the contractual obligation of good faith and fair dealing.

(e) It is a defense to a claim under subsection (b)(2) and any comparable claim in equity or at common law that the transaction was fair to the limited liability company.

(f) All of the members of a member-managed limited liability company or a manager-managed limited liability company may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty.

(g) In a manager-managed limited liability company, the following rules apply:

(1) Subsections (a), (b), (c), and (e) apply to the manager or managers and not the members.

(2) The duty stated under subsection (b)(3) continues until winding up is completed.

(3) Subsection (d) applies to the members and managers.

(4) Subsection (f) applies only to the members.

(5) A member does not have any fiduciary duty to the company or to any other member solely by reason of being a member.

[(h) A member {or manager} does not violate a duty or obligation under this act or under the operating agreement merely because that person's conduct furthers that person's own

[85] Once the Committee reaches a decision on scope of duty of care we may want to add a comment under this subsection that specifically refers to Sec. 405(b) to clarify that the financial statements, valuation and or other methods that may be used to establish that LLC was solvent under that section are examples of the proper exercise of duty of care under this section and not a separate standard of care.

interest.][86]

Uniform Comment

This section follows the structure of many LLC acts, first stating the duties of members in a member-managed limited liability company and then using that statement and a "switching" mechanism, subsection (g), to allocate duties in a manager-managed limited liability company. The duties stated in this section are subject to the operating agreement, but Section 110 contains important limitations on the power of the operating agreement to affect fiduciary duties and the obligation of good faith.

This section contains several noteworthy developments in the law of unincorporated business organizations:

- fiduciary duty is "uncabined" – see the Comment to subsections (a) and (b);
- the duty of care is not set at gross negligence – see the Comment to subsection (c); and
- the statutory endorsement of self-interest is omitted – see the Comment to section (e)

The standards, duties, and obligations of this Section are subject to delineation, restriction, and, to some extent, elimination by the operating agreement. See Section 110.

Subsections (a) and (b) – Until the promulgation of RUPA, it was almost axiomatic that: (i) fiduciary duties reflect judge-made law; and (ii) statutory formulations can express some of that law but do not exhaustively codify it. The original UPA was a prime example of this approach.

In an effort to respect freedom of contract, bolster predictability, and protect partnership agreements from second-guessing, the Conference decided that RUPA should fence or "cabin in" all fiduciary duties within a statutory formulation. That decision was followed without re-consideration in ULLCA and ULPA (2001).

This act takes a different approach. After lengthy discussion in the drafting committee and on the floor of the 2006 Annual Meeting, the Conference decided that: (i) the "corral" created by RUPA does not fit in the very complex and variegated world of LLCs; and (ii) it is impracticable to cabin all LLC-related fiduciary duties within a statutory formulation.

As a result, this act: (i) eschews "only" and "limited to" – the words RUPA used in an effort to exhaustively codify fiduciary duty; (ii) codifies the core of the fiduciary duty of loyalty; but (iii) does not purport to discern every possible category of overreaching. One important consequence is to allow courts to continue to use fiduciary duty concepts to police disclosure

[86] See comment to subsection (e) to this section. The Reporter has inserted this proposed subsection (h) solely for discussion when this section is next discussed. Bob Keatinge mentioned at the 2/27/10 meeting that we should consider "reinserting" such a provision. It is like current 608.4225(1)(d), which applies to actions of managers and managing members (should probably have extended to "regular" members too). The same kind of provision is in 620.1408(5) with regard to general partner's act nt to subsection (e) to this section.

obligations in member-to-member and member-LLC transactions.

Subsection (c) – Although ULLCA, § 409(c) followed RUPA, § 404(c) and provided a gross negligence standard of care, at least a plurality of LLC statutes use an ordinary care standard. Sandra K. Miller, *The Role of the Court in Balancing Contractual Freedom With the Need For Mandatory Constraints on Opportunistic and Abusive Conduct in the LLC*, 152 U. PA. L. REV 1609, 1658 (May 2004) (containing two tables characterizing the standard of care under LLC statutes: 21 states with "good faith prudent person" language and 19 states using "gross negligence or willful misconduct" language); Elizabeth S. Miller and Thomas E. Rutledge, *The Duty of Finest Loyalty and Reasonable Decisions: The Business Judgment Rule in Unincorporated Business Organizations*, 30 DEL. J. CORP. L. 343, 366- 368 (2005) (stating that "[a]pproximately eighteen state LLC statutes parallel language formerly used in the MBCA and require managers and managing members to act in good faith and exercise the care of an ordinarily prudent person in a like position under similar circumstances"). See also William J. Callison, "*The Law Does Not Perfectly Comprehend . . . .": The Inadequacy of the Gross Negligence Duty of Care Standard in Unincorporated Business Organizations*, 94 KY. L.J. 451, 452 (2005-2006) ("examin[ing] the gross negligence standard and find[ing] it wanting, particularly as it has intruded, largely unexamined and by drafting osmosis, into subsequent uniform acts governing limited partnerships and limited liability companies").

In some circumstances, an unadorned standard of ordinary care is appropriate for those in charge of a business organization or similar, non-business enterprise. In others, the proper application of the duty of care must take into account the difficulties inherent in establishing an enterprise's most fundamental policies, supervising the enterprise's overall activities, or making complex business judgments. Corporate law subdivides circumstances somewhat according to the formal role exercised by the person whose conduct is later challenged (e.g., distinguishing the duties of directors from the duties of officers). LLC law cannot follow that approach, because a hallmark of the LLC entity is its structural flexibility.

This subsection, therefore, seeks "the best of both worlds" – stating a standard of ordinary care but subjecting that standard to the business judgment rule to the extent circumstances warrant. The content and force of the business judgment rule vary across jurisdictions, and therefore the meaning of this subsection may vary from jurisdiction to jurisdiction.

That result is intended. In any jurisdiction, the business judgment rule's application will vary depending on the nature of the challenged conduct. There is, for example, very little (if any) judgment involved when a person with managerial power acts (or fails to act) on an essentially ministerial matter. Moreover, under the law of many jurisdictions, the business judgment rule applies similarly across the range of business organizations. That is, the doctrine is sufficiently broad and conceptual so that the formality of organizational choice is less important in shaping the application of the rule than are the nature of the challenged conduct and the responsibilities and authority of the person whose conduct is being challenged.

This act seeks therefore to invoke rather than unsettle whatever may be each jurisdiction's approach to the business judgment rule.

Subsection (d) – This subsection refers to the "*contractual* obligation of good faith and fair dealing" to emphasize that the obligation is not an invitation to re-write agreements among the members. As explained in the Comment to ULPA (2001), § 305(b):

The obligation of good faith and fair dealing is not a fiduciary duty, does not command altruism or self-abnegation, and does not prevent a partner from acting in the partner's own self-interest. Courts should not use the obligation to change ex post facto the parties' or this act's allocation of risk and power. To the contrary, in light of the nature of a limited partnership, the obligation should be used only to protect agreed-upon arrangements from conduct that is manifestly beyond what a reasonable person could have contemplated when the arrangements were made…. In sum, the purpose of the obligation of good faith and fair dealing is to protect the arrangement the partners have chosen for themselves, not to restructure that arrangement under the guise of safeguarding it.

At first glance, it may seem strange to apply a contractual obligation to statutory duties and rights – i.e., duties and rights "under this act." However, for the most part those duties and rights apply to relationships *inter se* the members and the LLC and function only to the extent not displaced by the operating agreement. In the contract-based organization that is an LLC, those statutory default rules are intended to function like a contract. Therefore, applying the contractual notion of good faith makes sense.

As to whether the obligation stated in this subsection applies to transferees, see the Comment to Section 112(b).

Subsection (e) – Section 409 omits a noteworthy provision, which, beginning with RUPA, has been standard in the uniform business entity acts. RUPA, ULLCA, ULPA (2001) each placed the following language in the subsection following the formulation of the obligation of good faith:

A member … does not violate a duty or obligation under this act or under the operating agreement merely because the member's conduct furthers the member's own interest.

This language is inappropriate in the complex and variegated world of LLCs. As a proposition of contract law, the language is axiomatic and therefore unnecessary. In the context of fiduciary duty, the language is at best incomplete, at worst wrong, and in any event confusing.

This act's subsection (e) takes a very different approach, stating a well-established principle of judge-made law. Despite Section 107, the statement is not surplusage. Given this act's very detailed treatment of fiduciary duties and especially the act's very detailed treatment of the power of the operating agreement to modify fiduciary duties, the statement is important because its absence might be confusing. (An *ex post* fairness justification is not the same as an *ex ante* agreement to modify, but the topics are sufficiently close for a danger of the affirmative pregnant.)

This act also omits, as anachronistic and potentially confusing, any provision resembling

ULLCA, § 409(f) ("A member of a member-managed company may lend money to and transact other business with the company. As to each loan or transaction, the rights and obligations of the member are the same as those of a person who is not a member, subject to other applicable law.") *See also* ULPA (2001), § 112 ("A partner may lend money to and transact other business with the limited partnership and has the same rights and obligations with respect to the loan or other transaction as a person that is not a partner.")

Those provisions originated to combat the notion that debts to partners were categorically inferior to debts to non-partner creditors. That notion has never been part of LLC law, and so a modern uniform LLC act need not include language combating the notion. Moreover, to the uninitiated the language can be confusing, because the words might: (i) seem to undercut the duty of loyalty, which they do not; and (ii) deflect attention from bankruptcy law and the law of fraudulent transfer, which assuredly can look askance at transactions between an entity and an "insider."

Subsection (f) –The operating agreement can provide additional or different methods of authorization or ratification, subject to the strictures of Section 110(e). See the Comment to that subsection.

Subsection (g) – This is the "switching" mechanism, referred to in the introduction to this Comment.

Subsection (g)(2) – On the assumption that the members of a manager-managed LLC are dependent on the manager, this paragraph extends the duty longer than in a member-managed LLC.

Subsection (g)(5) – This paragraph merely negates a claim of fiduciary duty that is exclusively status-based and does not immunize misconduct.

EXAMPLE: Although a limited liability company is manager-managed, one member who is not a manager owns a controlling interest and effectively, albeit indirectly, controls the company's activities. A member owning a minority interest brings an action for dissolution under [Section 701(a)(5)(B)] (oppression by "the managers or those members in control of the company"). The court wishes to understand a claim as one alleging a breach of fiduciary duty by the controlling member. Subsection (g)(5) does not preclude that approach.

[***Reporter's Note:*** *to determine whether any of the following provisions of existing law should be added*:

608.4226 Conflicts of interest.

(1) No contract or other transaction between a limited liability company and one or more of its members, managers, or managing members or any other limited liability company, corporation, firm, association, or entity in which one or more of its members, managers, or managing members are managers, managing members, directors, or officers or are financially interested shall be either void or voidable because of such relationship or interest, because such

members, managers, or managing members are present at the meeting of the members, managers, or managing members or a committee thereof which authorizes, approves, or ratifies such contract or transaction, or because their votes are counted for such purpose, if:

(a) The fact of such relationship or interest is disclosed or known to the managers or managing members or committee which authorizes, approves, or ratifies the contract or transaction by a vote or consent sufficient for the purpose without counting the votes or consents of such interested members, managers, or managing members;

(b) The fact of such relationship or interest is disclosed or known to the members entitled to vote and they authorize, approve, or ratify such contract or transaction by vote or written consent; or

(c) The contract or transaction is fair and reasonable as to the limited liability company at the time it is authorized by the managers, managing members, a committee, or the members.

(2) For purposes of paragraph (1)(a) only, a conflict of interest transaction is authorized, approved, or ratified if it receives the affirmative vote of a majority of the managers or managing members, or of the committee, who have no relationship or interest in the transaction described in subsection (1), but a transaction may not be authorized, approved, or ratified under this section by a single manager of a manager-managed company or a single managing member of a member-managed company, unless the company is a single member limited liability company. If a majority of the managers or managing members who have no such relationship or interest in the transaction vote to authorize, approve, or ratify the transaction, a quorum is present for the purpose of taking action under this section. The presence of, or a vote cast by, a manager or managing member with such relationship or interest in the transaction does not affect the validity of any action taken under paragraph (1)(a) if the transaction is otherwise authorized, approved, or ratified as provided in that subsection, but such presence or vote of those managers or managing members may be counted for purposes of determining whether the transaction is approved under other sections of this chapter.

(3) For purposes of paragraph (1)(b) only, a conflict of interest transaction is authorized, approved, or ratified if it receives the vote of a majority-in-interest of the members entitled to be counted under this subsection. Membership interests owned by or voted under the control of a manager or managing member who has a relationship or interest in the transaction described in subsection (1) may not be counted in a vote of members to determine whether to authorize, approve, or ratify a conflict of interest transaction under paragraph (1)(b). The vote of those membership interests, however, is counted in determining whether the transaction is approved under other sections of this act. A majority-in-interest of the members, whether or not present, that are entitled to be counted in a vote on the transaction under this subsection constitutes a quorum for the purpose of taking action under this section.]

[***Reporter's note:*** *this is NCCUSL VERSION of Section 410 --- See Committee's currently proposed version following this section*]

SECTION 410. RIGHT OF MEMBERS, MANAGERS, AND DISSOCIATED MEMBERS TO INFORMATION.

(a) In a member-managed limited liability company, the following rules apply:

(1) On reasonable notice, a member may inspect and copy during regular business hours, at a reasonable location specified by the company, any record maintained by the company regarding the company's activities, financial condition, and other circumstances, to the extent the information is material to the member's rights and duties under the operating agreement or this act.

(2) The company shall furnish to each member:

(A) without demand, any information concerning the company's activities, financial condition, and other circumstances which the company knows and is material to the proper exercise of the member's rights and duties under the operating agreement or this act, except to the extent the company can establish that it reasonably believes the member already knows the information; and

(B) on demand, any other information concerning the company's activities, financial condition, and other circumstances, except to the extent the demand or information demanded is unreasonable or otherwise improper under the circumstances.

(3) The duty to furnish information under paragraph (2) also applies to each member to the extent the member knows any of the information described in paragraph (2).

(b) In a manager-managed limited liability company, the following rules apply:

(1) The informational rights stated in subsection (a) and the duty stated in subsection (a)(3) apply to the managers and not the members.

(2) During regular business hours and at a reasonable location specified by the company, a member may obtain from the company and inspect and copy full information regarding the activities, financial condition, and other circumstances of the company as is just and reasonable if:

(A) the member seeks the information for a purpose material to the member's interest as a member;

(B) the member makes a demand in a record received by the company, describing with reasonable particularity the information sought and the purpose for seeking the information; and

(C) the information sought is directly connected to the member's purpose.

(3) Within 10 days after receiving a demand pursuant to paragraph (2)(B), the company shall in a record inform the member that made the demand:

(A) of the information that the company will provide in response to the demand and when and where the company will provide the information; and

(B) if the company declines to provide any demanded information, the company's reasons for declining.

(4) Whenever this act or an operating agreement provides for a member to give or withhold consent to a matter, before the consent is given or withheld, the company shall, without demand, provide the member with all information that is known to the company and is material to the member's decision.

(c) On 10 days' demand made in a record received by a limited liability company, a dissociated member may have access to information to which the person was entitled while a member if the information pertains to the period during which the person was a member, the person seeks the information in good faith, and the person satisfies the requirements imposed on a member by subsection (b)(2). The company shall respond to a demand made pursuant to this subsection in the manner provided in subsection (b)(3).

(d) A limited liability company may charge a person that makes a demand under this section the reasonable costs of copying, limited to the costs of labor and material.

(e) A member or dissociated member may exercise rights under this section through an agent or, in the case of an individual under legal disability, a legal representative. Any restriction or condition imposed by the operating agreement or under subsection (g) applies both to the agent or legal representative and the member or dissociated member.

(f) The rights under this section do not extend to a person as transferee.

(g) In addition to any restriction or condition stated in its operating agreement, a limited liability company, as a matter within the ordinary course of its activities, may impose reasonable restrictions and conditions on access to and use of information to be furnished under this section, including designating information confidential and imposing nondisclosure and safeguarding obligations on the recipient. In a dispute concerning the reasonableness of a restriction under this subsection, the company has the burden of proving reasonableness.

***Proposed Drafting Committee Version of Section 410*:**

SECTION 410. RIGHT OF MEMBERS, MANAGERS, AND DISSOCIATED MEMBERS TO INFORMATION.

(a) On 10 days' demand made in a record [received][87] by a limited liability company, a member of a limited liability company may inspect and copy during regular business hours, at a reasonable location specified by the company, any of the following:

(1) A current list of the full names and last known business, residence, or mailing addresses of all members, managers, [and managing members.][88]

(2) A copy of any then-effective [written][89] operating agreement and all amendments thereto.

(3) A copy of the certificate of organization [any certificates of conversion and merger, and any other documents,][90] and all amendments thereto, concerning the limited liability company that were filed with the Department of State, together with executed copies of any powers of attorney pursuant to which any certificate of organization or such other documents were executed.

(4) Copies of the limited liability company's federal, state, and local income tax returns and reports, if any, for the three most recent years.

(5) Copies of any financial statements of the limited liability company for the three most recent years.

[(6) *Delaware Alternate*: True and full information regarding the amount of cash and a description and statement of the agreed value of any other property or services contributed by each member and which each member has agreed to contribute in the future, and the date on which each became a member.]
[(6) *Florida LP act Alternate*: Unless contained in an operating agreement made in a record, a record stating the amount of cash and a description and statement of the agreed value of the other

[87] See footnote to subsection (d).
[88] Does this reference makes sense, inasmuch as all of the members are "managing members" in an LLC that is not "manager-managed"?
[89] Delaware uses the "written" reference and probably makes sense to use it here as well. The Florida LP act refers to any partnership agreement and amendment "made in a record." Perhaps that is the best way to go.
[90] Discuss whether this necessary as this is public information is available from DOS and not all of the documents may have been filed by the LLC. Our LP act also requires certificates ***and plans*** of conversion and merger (620.1111(3)).

benefits contributed and agreed to be contributed by each member, and the times at which, or events on the happening of which, any additional contributions agreed to be made by each member are to be made.] [91]

(b) On [10] days' demand made in a record [received][92] by a limited liability company, a member of a limited liability company may inspect and copy during regular business hours, at a reasonable location specified by the company, any record maintained by the company regarding the company's activities, financial condition, and other circumstances, to the extent the information is [material to the member's rights and duties under the operating agreement or this act][93], if:

(1) [The member seeks the information for a purpose material to the member's interest as a member][94];

(2) The member makes a demand in a record received by the company, describing with reasonable particularity the information sought and the purpose for seeking the information; and

(3) The information sought is directly connected to the member's purpose.

(c) At the discretion of the limited liability company, copies of the records and other information described in subsections (a) and (b) above may be mailed, electronically transmitted or otherwise delivered to the member at an address specified by the member for that purpose.

(d) Within 10 days after [receiving][95] a demand pursuant to subsection (b) above, the limited liability company shall in a record inform the member that made the demand:

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[91] While not yet specifically discussed by the committee, it would make sense to have a provision like this, given that the application of the contribution, distribution and allocation provisions in 403 and 404 are dependent on the this information being available to members. Note that this would be consistent with existing 608.4101(e) and the LP act as well (620.1111(9)).

[92] See footnote to subsection (d).

[93] Should we eliminate the bracketed provision? See next footnote for explanation

[94] At our last meeting we decided upon this syntax for subsection (2), but having both of the bracketed "materiality" standards would be redundant and possibly confusing in this context. Perhaps we should eliminate the first standard as the second one would seem to encompass it. The reliance on a relationship to "rights/duties in the operating agreement or act" could also be construed in a [illegible]er by the limited liability company.

(1) of the information that the company will provide in response to the demand and when and where the company will provide the information, or that the information will be provided in the manner described in subsection (c) upon receiving an address from the member for such purpose; and

(2) if the company declines to provide any demanded information, the company's reasons for declining.

(e) The company shall furnish to each member without demand, any information concerning the company's activities, financial condition, and other circumstances which the company knows and is material to the proper exercise of the member's rights and duties under the operating agreement or this act.[96]

(f) Each manager of a "manager-managed" limited liability company shall have the right to examine and receive copies of all of the information described in subsections (a) and (b) above for a purpose reasonably related to his or her position as a manager. The company shall furnish to each manager of a "manager-managed" limited liability company, without demand, any information concerning the company's activities, financial condition, and other circumstances which the company knows and is material to the proper exercise of the manager's rights and duties under the operating agreement or this act. [97]

(g) On 10 days' demand made in a record received by a limited liability company, a dissociated member may have access to information to which the person was entitled while a member if the information pertains to the period during which the person was a member, the person seeks the information in good faith, and the person satisfies the requirements imposed on a member by

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[95] This was bracketed to remind the committee to revisit the notice procedure for this section.

[96] This provision is consistent with existing LLC act (608.4101(3)(a)) and LP act (620.1304(9)). Note that Delaware does not have such a provision.

[97] This provision was not specifically discussed in our January 20, 2010 meeting, but it will be required. It is based in part on existing 608.4101(4) and Del act (18-305(b)). The Delaware scope of information is broader and consistent with NCCUSL approach of expanding information that should be available to managers of "manager-managed" LLC. Should there be a 10-day compliance procedure as in case of subsections (a) and (b)? We should probably also expand subsection (c) to include i ed to managers.

subsection (b). The company shall respond to a demand made pursuant to this subsection in the manner provided in subsection (d).

(h) A limited liability company may charge a person that makes a demand under this section the reasonable costs of copying, limited to the costs of labor and material.

(i) A member or dissociated member may exercise rights under this section through an agent or, in the case of an individual under legal disability, a legal representative. Any restriction or condition imposed by the operating agreement or under subsection (k) applies both to the agent or legal representative and the member or dissociated member.

(j) The rights under this section do not extend to a person as transferee.

(k) In addition to any restriction or condition stated in its operating agreement, a limited liability company, as a matter within the ordinary course of its activities, may impose reasonable restrictions and conditions on access to and use of information to be furnished under this section, including designating information confidential and imposing nondisclosure and safeguarding obligations on the recipient. In a dispute concerning the reasonableness of a restriction under this subsection, the company has the burden of proving reasonableness.

(l) A limited liability company shall keep at its principal office or another location the records that are subject to inspection and copying in accordance with this section. A record may be maintained in a medium other than written form if the record is [capable of conversion into written form within a reasonable time][retrievable in perceivable form]. [98]

Uniform Comment [99]

[98] The "record" references is based upon Del Code 18-305(d) and existing 608.4101(5). It may be unnecessary given the definition of "Record" under Section 102 states that a record can be in electronic form as long as it is retrievable in perceivable form. ***But*** consider which alternative phrase is appropriate given the distinction between the tangible items of "perceivable form" and "written." Does perceivable form include an electronic reading tablet like an IPad or Kindle?

[99] This will require substantial revision.

This section is derived from ULPA (2001), §§ 304 (rights to information of limited partners and former limited partners) and 407 (same re: general partners and former general partners). The rules stated here are what might be termed "quasi-default rules" – subject to some change by the operating agreement. Section 110(c)(6) (prohibiting unreasonable restrictions on the information rights stated in this section).

Although the rights and duties stated in this section are extensive, they may not necessarily be exhaustive. In some situations, some courts have seen owners' information rights as reflecting a fiduciary duty of those with management power. This act's statement of fiduciary duties is not exhaustive. *See* Comment to Section 409 (explaining that this act does not seek to "cabin in" all fiduciary duties). In contrast, the operating agreement has considerable "cabining in" power of its own. Section 110(d)(4).

Subsection (a) – Paragraph 1 states the rule pertaining to information memorialized in "records maintained by the company". Paragraph 2 applies to information not in such a record. Appropriately, paragraph (2) sets a more demanding standard for those seeking information.

Subsection (a)(2) and (3) – In appropriate circumstances, violation of either or both of these provisions might cause a court to enjoin or even rescind action taken by the LLC, especially when the violation has interfered with an approval or veto mechanism involving member consent. *E.g. Blue Chip Emerald LLC v. Allied Partners Inc*., 299 A.D.2d 278, 279-280 (N.Y. App. Div. 2002) (invoking partnership law precedent as reflecting a duty of full disclosure and holding that "[a]bsent such full disclosure, the transaction is voidable).

Subsection (a)(2) – Violation of this paragraph could give rise to a claim for damages against a member or manager [see subsection (b)(1)] who breaches the duties stated in Section 409 in causing or suffering the LLC to violate this paragraph.

Subsection (a)(3) – A member's violation of this paragraph is actionable in damages without need to show a violation of a duty stated in Section 409.

Subsection (b)(1) – This is a switching provision. A manager's violation of the duty stated in subsection (a)(3) is actionable in damages without need to show a violation of a duty stated in Section 409.

Subsection (b)(2) – This paragraph refers to "information" rather than "records maintained by the company" – compare subsection (a) – so in some circumstances the company might have an obligation to memorialize information. Such circumstances will likely be rare or at least unusual. Section 410 generally concerns providing existing information, not creating it. In any event, a member does not trigger the company's obligation under this paragraph merely by satisfying subparagraphs (A) through (C). The member must also satisfy the "just and reasonable" requirement.

Subsection (c) – This section does not control the rights of the estate of a member who dissociates by dying. In that circumstance, Section 504 controls.

Subsection (g) – The phrase "as a matter within the ordinary course of its activities" means that a mere majority consent is needed to impose a restriction or condition. *See* Section 407(b)(3) and (c)(3). This approach is necessary, lest a requesting member (or manager-member) have the power to block imposition of a reasonable restriction or condition needed to prevent the requestor from abusing the LLC.

The burden of proof under this subsection contrasts with the burden of proof when someone claims that a term of an operating agreement violates Section 110(c)(6). Under that subsection, as a matter of ordinary procedural law, the burden is on the person making the claim.

SECTION 411. COURT-ORDERED INSPECTION.

(a) If a limited liability company does not allow a member, manager or other person who complies with [section 410] to inspect and copy any records required by that section to be available for inspection, or otherwise provide such information in accordance with [section 410(c)] the circuit court in the county where the limited liability company's principal office (or, if none in this state, its registered office) is located may summarily order inspection and copying of the records demanded at the limited liability company's expense upon application of such member, manager or other person.

(b) If the court orders inspection or copying of the records demanded, it shall also order the limited liability company to pay the costs, including reasonable attorney's fees, reasonably incurred by the member, manager or other person seeking the records to obtain the order and enforce its rights under this section unless the limited liability company proves that it refused inspection in good faith because it had a reasonable basis for doubt about the right of the member, manager or such other person to inspect or copy the records demanded.

(c) If the court orders inspection or copying of the records demanded, it may impose reasonable restrictions on the use or distribution of the records by the member, manager or other person demanding them.

[ARTICLE] 5

TRANSFERABLE INTERESTS AND RIGHTS OF TRANSFEREES AND CREDITORS

SECTION 501. NATURE OF TRANSFERABLE INTEREST. A transferable interest is personal property.

Uniform Comment

Source – This Article most directly follows ULPA (2001), Article 7, because ULPA (2001) reflects the Conference's most recent thinking on the issues addressed here. However, ULPA (2001), Article 7 is quite similar in substance to ULLCA, Article 5, and both those Articles derive from Article 5 of RUPA.

Whether a transferable interest pledged as security is governed by Article 8 or 9 of the Uniform Commercial Code depends on the facts and the rules stated in those Articles.

This act does not include ULLCA § 501(a), which provided: "A member is not a co-owner of, and has no transferable interest in, property of a limited liability company." That language was a vestige of the "aggregate" notion of the law of general partnerships, and in a modern LLC statute would be at least surplusage and perhaps confusing as well.

SECTION 502. TRANSFER OF TRANSFERABLE INTEREST.

(a) A transfer, in whole or in part, of a transferable interest:

(1) is permissible;

(2) does not by itself cause a member's dissociation or a dissolution and winding up of the limited liability company's activities; and

(3) subject to Section 504, does not entitle the transferee to:

(A) participate in the management or conduct of the company's activities; or

(B) except as otherwise provided in subsection (c), have access to records or other information concerning the company's activities.

(b) A transferee has the right to receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled.

(c) In a dissolution and winding up of a limited liability company, a transferee is entitled to an account of the company's transactions only from the date of dissolution.

(d) A transferable interest may be evidenced by a certificate of the interest issued by the limited liability company in a record, and, subject to this section, the interest represented by the certificate may be transferred by a transfer of the certificate.

(e) A limited liability company need not give effect to a transferee's rights under this section until the company has notice of the transfer.

(f) A transfer of a transferable interest in violation of a restriction on transfer contained in the operating agreement is ineffective as to a person having notice of the restriction at the time of transfer.

(g) Except as otherwise provided in Section 602(4)(B), when a member transfers a transferable interest, the transferor retains the rights of a member other than the interest in distributions transferred and retains all duties and obligations of a member.

(h) When a member transfers a transferable interest to a person that becomes a member with respect to the transferred interest, the transferee is liable for the member's obligations under Sections 403 and 406(c) known to the transferee when the transferee becomes a member.

Uniform Comment

One of the most fundamental characteristics of LLC law is its fidelity to the "pick your partner" principle. This section is the core of the act's provisions reflecting and protecting that principle.

A member's rights in a limited liability company are bifurcated into economic rights (the transferable interest) and governance rights (including management rights, consent rights, rights to information, rights to seek judicial intervention). Unless the operating agreement otherwise provides, a member acting without the consent of all other members lacks both the power and the right to: (i) bestow membership on a non-member, Section 401(d); or (ii) transfer to a non-member anything other than some or all of the member's transferable interest. Section 502(a)(3). However, consistent with current law, a member may transfer governance rights to another member without obtaining consent from the other members. Thus, this act does not itself protect members from control shifts that result from transfers among members (as distinguished from transfers to non-members who seek thereby to become members).

This section applies regardless of whether the transferor is a member, a transferee of a member, a transferee of a transferee, etc. *See* Section 102(21) (defining "transferable interest" in terms of a right "originally associated with a person's capacity as a member" regardless of "whether or not the person remains a member or continues to own any part of the right").

Subsection (a) – The definition of "transfer," Section 102(20), and this subsection's reference to "in whole or in part" combine to mean that this section encompasses not only unconditional, permanent, and complete transfers but also temporary, contingent, and partial ones as well. Thus, for example, a charging order under Section 504 effects a transfer of part of the judgment debtor's transferable interest, as does the pledge of a transferable interest as collateral for a loan and the gift of a life-interest in a member's rights to distribution.

Subsection (a)(2) – Section 602(4)(B) creates a risk of dissociation via expulsion when a member transfers all of the member's transferable interest.

Subsection (a)(3) – Mere transferees have no right to intrude as the members carry on

their activities as members. When a member dies, other law may effect a transfer of the member's interest to the member's estate or personal representative. Section 504 contains special rules applicable to that situation.

Subsection (b) – Amounts due under this subsection are of course subject to offset for any amount owed to the limited liability company by the member or dissociated member on whose account the distribution is made. As to whether an LLC may properly offset for claims against a transferor that was never a member is matter for other law, specifically the law of contracts dealing with assignments.

Subsection (d) – The use of certificates can raise issues relating to Articles 8 and 9 of the Uniform Commercial Code.

SECTION 503. CHARGING ORDER.[100]

(a) On application to a court of competent jurisdiction by any judgment creditor of a member or a transferee, the court may enter a charging order against the transferable interest of the member or the member or transferee for payment of the unsatisfied amount of the judgment with interest. A charging order constitutes a lien upon a judgment debtor's transferable interest and requires the limited liability company to pay over to the judgment creditor any distribution that would otherwise be paid to the judgment debtor.

(b) This chapter does not deprive any member or transferee of the benefit of any exemption laws applicable to the transferable interest of the member or transferee.

(c) Except as provided in subsections (d) and (e), a charging order is the sole and exclusive remedy by which a judgment creditor of a member or member's transferee may satisfy a judgment from the judgment debtor's interest in a limited liability company or rights to distributions from the limited liability company.

(d) In the case of a limited liability company having only one member, if a judgment creditor of a member or member's transferee establishes to the satisfaction of a court of competent jurisdiction that distributions under a charging order will not satisfy the judgment within a reasonable time, a charging order is not the sole and exclusive remedy by which the judgment creditor may satisfy the judgment against a judgment debtor who is the sole member of a limited liability company or the transferee of the sole member, and upon such

[100] The changes to this section contain the same provisions found in the "*Olmstead p*atch amendment" to Section 608.433, as signed into law on May 31, 2011. Note that Committee also needs to conform Section 112(b) with this Section.

showing, the court may order the sale of that interest in the limited liability company pursuant to a foreclosure sale. A judgment creditor may make a showing to the court that distributions under a charging order will not satisfy the judgment within a reasonable time at any time after the entry of the judgment and may do so at the same time that the judgment creditor applies for the entry of a charging order.

(e) In the case of a limited liability company having only one member, if the court orders foreclosure sale of a judgment debtor's interest in the limited liability company or of a charging order lien against the sole member of the limited liability company pursuant to subsection (e):

(i) The purchaser at the court-ordered foreclosure sale obtains the member's entire limited liability company interest, not merely the rights of a transferee;

(ii) The purchaser at the sale becomes the member of the limited liability company; and

(iii) The person whose limited liability company interest is sold pursuant to the foreclosure sale or is the subject of the foreclosed charging order ceases to be a member of the limited liability company.

(f) In the case of a limited liability company having more than one member, the remedy of foreclosure on a judgment debtor's interest in such limited liability company or against rights to distribution from such limited liability company is not available to a judgment creditor attempting to satisfy the judgment and may not be ordered by a court.

(g) Nothing in this section shall limit:

(i) The rights of a creditor that has been granted a consensual security interest in a limited liability company interest to pursue the remedies available to such secured creditor under other law applicable to secured creditors;

(ii) The principles of law and equity which affect fraudulent transfers;

(iii) The availability of the equitable principles of alter ego, equitable lien, or constructive trust, or other equitable principles not inconsistent with this section; or

(iv) The continuing jurisdiction of the court to enforce its charging order in a manner consistent with this section.

Uniform Comment [101]

Charging order provisions appear in various forms in UPA, ULPA, RULPA, RUPA, ULLCA, and ULPA (2001). This section builds on those acts, while: (i) modernizing the language: (ii) making explicit certain points that have been at best implicit; and (iii) seeking to delineate more precisely the types of extraordinary circumstances that would have to exist before a court enforcing a charging order would be justified in interfering with an LLC's management or activities.

This section balances the needs of a judgment creditor of a member or transferee with the needs of the limited liability company and the members. The section achieves that balance by allowing the judgment creditor to collect on the judgment through the transferable interest of the judgment debtor while prohibiting interference in the management and activities of the limited liability company.

Under this section, the judgment creditor of a member or transferee is entitled to a charging order against the relevant transferable interest. While in effect, that order entitles the judgment creditor to whatever distributions would otherwise be due to the member or transferee whose interest is subject to the order. However, the judgment creditor has no say in the timing or amount of those distributions. The charging order does not entitle the judgment creditor to accelerate any distributions or to otherwise interfere with the management and activities of the limited liability company.

The operating agreement has no power to alter the provisions of this section to the prejudice of third parties. Section 110(c)(11).

Subsection (a) – The phrase "judgment debtor" encompasses both members and

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[101] Conforming changes are required. When the changes are made, to determine whether the following preambles from the 608.433 will be worked into the comment:

"WHEREAS, on June 24, 2010, the Florida Supreme Court held in Olmstead v. Federal Trade Commission (No. SC08-1009), reported at 44 So.3d 76, 2010-1 Trade Cases P 77,079, 35 Fla. L. Weekly S357, that a charging order is not the exclusive remedy available to a creditor holding a judgment against the sole member of a Florida single-member limited liability company (LLC), and

WHEREAS, a charging order represents a lien entitling a judgment creditor to receive distributions from the LLC or the partnership that otherwise would be payable to the member or partner who is the judgment debtor, and
WHEREAS, the dissenting members of the Court in Olmstead expressed a concern that the majority's holding is not limited to a single-member LLC and a desire that the Legislature clarify the law in this area, and

WHEREAS, the Legislature finds that the uncertainty of the breadth of the Court's holding in Olmstead may persuade businesses and investors located in Florida to organize LLCs under the law in other jurisdictions where a charging order is the exclusive remedy available to a judgment creditor of a member of a multimember LLC, and

WHEREAS, the Legislature further finds it necessary to amend s. 608.433, Florida Statutes, to remediate the potential effect of the holding in Olmstead and to clarify that the current law does not extend to a member of a multimember LLC organized under Florida law and to provide procedures for application of the holding in Olmstead to a member of a single-member
LLC organized under Florida law, . . ."

transferees. As a matter of civil procedure and due process, an application for a charging order must be served both on the limited liability company and the member or transferee whose transferable interest is to be charged.

Subsection (b) – Paragraph (2) refers to "other orders" rather than "additional orders". Therefore, given appropriate circumstances, a court may invoke either paragraph (1) or (2) or both.

Subsection (b)(1) – The receiver contemplated here is not a receiver for the limited liability company, but rather a receiver for the distributions. The principal advantage provided by this paragraph is an expanded right to information. However, that right goes no further than "the extent necessary to effectuate the collections of distributions pursuant to a charging order."

Subsection (b)(2) – This paragraph must be understood in the context of the balance described in the introduction to this section's Comment. In particular, the court's power to make orders "that the circumstances may of the case may require" is limited to "giv[ing] effect to the charging order."

Example: A judgment creditor with a charging order believes that the limited liability company should invest less of its surplus in operations, leaving more funds for distributions. The creditor moves the court for an order directing the limited liability company to restrict re-investment. Subsection (b)(2) does not authorize the court to grant the motion.

Example: A judgment creditor with a judgment for $10,000 against a member obtains a charging order against the member's transferable interest. Having been properly served with the order, the limited liability company nonetheless fails to comply and makes a $3000 distribution to the member. The court has the power to order the limited liability company to pay $3000 to the judgment creditor to "give effect to the charging order."

Under subsection (b)(2), the court also has the power to decide whether a particular payment is a distribution, because that decision determines whether the payment is part of a transferable interest subject to a charging order. To the extent a payment is not a distribution, it is not part of the transferable interest and is not subject to subsection (g). The payment is therefore subject to whatever other creditor remedies may apply.

Section 405(g) states a special exception to the definition of "distribution," but that exception applies only "[f]or purposes of subsection (a)" of Section 405. Therefore, whether a charging order applies to "amounts constituting reasonable compensation for present or past services or reasonable payments made in the ordinary course of business under a bona fide retirement plan or other benefits program," Section 405(g), is a question determined under this section, without regard to Section 405(g). To date, case law is scant, but there is authority holding that compensation is a distribution. *PB Real Estate, Inc. v. Dem II Properties*, 719 A.2d 73, 75 (Conn. App. Ct. 1998) (rejecting the defendants' claim that the payments at issue were merely compensation for their services to their law firm, which was organized as an LLC; noting that the defendants' characterization was at odds with the firm's business records and tax returns; holding that the payments received were distributions subject to the charging order).

This act has no specific rules for determining the fate or effect of a charging order when the limited liability company undergoes a merger, conversion, or domestication under [Article] 10. In the proper circumstances, such an organic change might trigger an order under subsection (b)(2).

Subsection (c) –The phrase "that distributions under the charging order will not pay the judgment debt within a reasonable period of time" comes from case law. *See, e.g.*, *Nigri v. Lotz*, 453 S.E.2d 780, 783 (Ga. Ct. App. 1995).

Subsection (e) – This act jettisons the confusing concept of redemption and substitutes an approach that more closely parallels the modern, real-world possibility of the LLC or its members buying the underlying judgment (and thereby dispensing with any interference the judgment creditor might seek to inflict on the LLC). When possible, buying the judgment remains superior to the mechanism provided by this subsection, because: (i) this subsection requires full satisfaction of the underlying judgment, (ii) while the LLC or the other members might be able to buy the judgment for less than face value. On the other hand, this subsection operates without need for the judgment creditor's consent, so it remains a valuable protection in the event a judgment creditor seeks to do mischief to the LLC.

Whether an LLC's decision to invoke this subsection is "ordinary course" or "outside the ordinary course," Section 407(b)(3) and (4) and (c)(3) and (4)(C), depends on the circumstances. However, the involvement of this subsection does not by itself make the decision "outside the ordinary course."

Subsection (g) – This subsection does not override Article 9, which may provide different remedies for a secured creditor acting in that capacity. A secured creditor with a judgment might decide to proceed under Article 9 alone, under this section alone, or under both Article 9 and this section. In the last-mentioned circumstance, the constraints of this section would apply to the charging order but not to the Article 9 remedies.

This subsection is not intended to prevent a court from effecting a "reverse pierce" where appropriate. In a reverse pierce, the court conflates the entity and its owner to hold the entity liable for a debt of the owner. *Litchfield Asset Mgmt. Corp. v. Howell*, 799 A.2d 298, 312 (Conn. App. Ct. 2002) (approving a reverse pierce where a judgment debtor had established a limited liability company in a patent attempt frustrate the judgment creditor).

SECTION 504. POWER OF PERSONAL REPRESENTATIVE OF DECEASED MEMBER. If a member dies, the deceased member's personal representative or other legal representative may exercise the rights of a transferee provided in Section 502(c) and, for the

purposes of settling the estate, the rights of a current member under Section 410.[102]

[***Reporter's Note*: Committee to consider following provisions in existing law and determine whether any should be added to 504:**

608.434. Power of estate of deceased or incompetent member; dissolved or terminated member. —(1)If a member who is an individual dies or if a court of competent jurisdiction adjudges a member who is an individual to be incompetent to manage the member's person or property, the member's executor, administrator, guardian, conservator, or other legal representative may exercise all the member's rights for the purpose of settling the member's estate or administering the member's property, including any power the member had to give an assignee the right to become a member.

(2)If a member is a corporation, limited liability company, trust, or other entity and is dissolved or terminated, the powers of that member may be exercised by its legal representative or successor.]

Uniform Comment

Source: ULPA (2001) § 704.

Section 410 pertains only to information rights.

[ARTICLE] 6

MEMBER'S DISSOCIATION

SECTION 601. MEMBER'S POWER TO DISSOCIATE; WRONGFUL DISSOCIATION.

(a) A person has the power to dissociate as a member at any time, rightfully or wrongfully, by withdrawing as a member by express will under Section 602(1).

(b) A person's dissociation from a limited liability company is wrongful only if the dissociation:

(1) is in breach of an express provision of the operating agreement; or

(2) occurs before the termination of the company and:

(A) the person withdraws as a member by express will;

(B) the person is expelled as a member by judicial order under Section

[102] At 9/30/10 meeting it was suggested that a cross-reference to derivative actions may be appropriate. Should transferees have the right to bring derivative action under 902 (and 903, which requires the plaintiff to be a member)? This is the language from 608.601(1) which was discussed:

"A person may not commence a proceeding in the right of a domestic or foreign limited liability company unless the person was a member of the limited liability company when the transaction complained of occurred or unless the person became a member through transfer by operation of law from one who was a member at that time."

602(5);

(C) the person is dissociated under Section 602(7)(A) by becoming a debtor in bankruptcy; or

(D) in the case of a person that is not a trust other than a business trust, an estate, or an individual, the person is expelled or otherwise dissociated as a member because it willfully dissolved or terminated.

(c) A person that wrongfully dissociates as a member is liable to the limited liability company and, subject to Section 901, to the other members for damages caused by the dissociation. The liability is in addition to any other debt, obligation, or other liability of the member to the company or the other members.

Uniform Comment

Source – ULPA (2001) § 604, which is based on RUPA Section 602. ULLCA § 602 is functionally identical in some respects but is not a good overall source, because that section presupposes the term/at-will paradigm.

SECTION 602. EVENTS CAUSING DISSOCIATION. A person is dissociated as a member from a limited liability company when:

(1) the company has notice of the person's express will to withdraw as a member, but, if the person specified a withdrawal date later than the date the company had notice, on that later date;

(2) an event stated in the operating agreement as causing the person's dissociation occurs;

(3) the person is expelled as a member pursuant to the operating agreement;

(4) the person is expelled as a member by the unanimous consent of the other members if:

(A) it is unlawful to carry on the company's activities with the person as a member;

(B) there has been a transfer of all of the person's transferable interest in the company, other than:

(i) a transfer for security purposes; or

(ii) a charging order in effect under Section 503 which has not been foreclosed;

(C) the person is a corporation and, within 90 days after the company notifies the person that it will be expelled as a member because the person has filed a certificate of dissolution or the equivalent, its charter has been revoked, or its right to conduct business has been suspended by the jurisdiction of its incorporation, the certificate of dissolution has not been revoked or its charter or right to conduct business has not been reinstated; or

(D) the person is a limited liability company or partnership that has been dissolved and whose business is being wound up;

(5) on application by the company, the person is expelled as a member by judicial order because the person:

(A) has engaged, or is engaging, in wrongful conduct that has adversely and materially affected, or will adversely and materially affect, the company's activities;

(B) has willfully or persistently committed, or is willfully and persistently committing, a material breach of the operating agreement or the person's duties or obligations under Section 409; or

(C) has engaged in, or is engaging, in conduct relating to the company's activities which makes it not reasonably practicable to carry on the activities with the person as a member;

(6) in the case of a person who is an individual:

(A) the person dies; or

(B) in a member-managed limited liability company:

(i) a guardian or general conservator for the person is appointed; or

(ii) there is a judicial order that the person has otherwise become incapable of performing the person's duties as a member under [this act] or the operating agreement;

(7) in a member-managed limited liability company, the person:

(A) becomes a debtor in bankruptcy;

(B) executes an assignment for the benefit of creditors; or

(C) seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or liquidator of the person or of all or substantially all of the person's property;

(8) in the case of a person that is a trust or is acting as a member by virtue of being a trustee of a trust, the trust's entire transferable interest in the company is distributed;

(9) in the case of a person that is an estate or is acting as a member by virtue of being a personal representative of an estate, the estate's entire transferable interest in the company is

distributed;

(10) in the case of a member that is not an individual, partnership, limited liability company, corporation, trust, or estate, the termination of the member;

(11) the company participates in a merger under [Article] 10, if:

(A) the company is not the surviving entity; or,

(B) otherwise as a result of the merger, the person ceases to be a member;

(12) the company participates in a conversion under [Article] 10;

(13) the company participates in a domestication under [Article] 10, if, as a result of the domestication, the person ceases to be a member; or

(14) the company terminates.

Uniform Comment

Source – ULLCA § 601; RUPA Section 601; ULPA (2001) §§ 601 and 603.

Paragraph (4)(B) –Under this paragraph (unless the operating agreement provides otherwise), a member's transferee can protect itself from the vulnerability of "bare transferee" status by obligating the member/transferor to retain a 1% interest and then to exercise its governance rights (including the right to bring a derivative suit) to protect the transferee's interests.

SECTION 603. EFFECT OF PERSON'S DISSOCIATION AS MEMBER.

(a) When a person is dissociated as a member of a limited liability company:

(1) the person's right to participate as a member in the management and conduct of the company's activities terminates;

(2) if the company is member-managed, the person's fiduciary duties as a member end with regard to matters arising and events occurring after the person's dissociation; and

(3) subject to Section 504 and [Article] 10, any transferable interest owned by the person immediately before dissociation in the person's capacity as a member is owned by the person solely as a transferee.

(b) A person's dissociation as a member of a limited liability company does not of itself discharge the person from any debt, obligation, or other liability to the company or the other members which the person incurred while a member.

Uniform Comment

Source – ULPA (2001) § 605, which was drawn from RUPA Section 603(b).

Subsection (a) – This provision makes no reference to power-to-bind matters, because the act provides that a member *qua* member has no power to bind the LLC. Section 301.

Subsection (a)(2) – This provision applies only when the limited liability company is member-managed, because in a manager-managed LLC these duties do not apply to a member *qua* member. Section 409(g)(5).

Subsection (a)(3) – This paragraph accords with Section 404(c) – dissociation does not entitle a person to any distribution. Like most *inter se* rules in this act, this one is subject to the operating agreement. For example, the operating agreement has the power to provide for the buy out of a person's transferable interest in connection with the person's dissociation.

Subsection (b) – In a member-managed limited liability company, the obligation to safeguard trade secrets and other confidential or proprietary information is incurred when a person is a member. A subsequent dissociation does not entitle the person to usurp the information or use it to the prejudice of the LLC after the dissociation. (In a manager-managed LLC, any obligations of a non-manager member *viz a viz* proprietary information would be a matter for the operating agreement, the obligation of good faith, or other law.)

[***Reporters note*: *the following section proposed by the DOS has not been considered by the Committee yet***:

SECTION 604. STATEMENT OF DISSOCIATION.[103]

(a) A member may file a statement of dissociation with the Florida Department of State containing:

(1) The name of the limited liability company;

(2) The name and signature of the dissociating member;

(3) The date the member withdrew or will withdraw; and

(4) A statement that the company has been notified of the dissociation in writing.

(b) A statement of dissociation is a limitation on the authority of a dissociated member for purposes of Section [302].[104]

(c) For purposes of [*reference to sections applicable to third party notice*] a person who is not [a member] is deemed to have notice of the dissociation 90 days after a statement of

[103] This is an addition made by the DOS, which was moved from Section 601. Based upon 620.8704. Requires discussion as parts already addressed by other sections of the act.
[104] Needs to be discussed further.

dissociation is filed.[105]]]

[ARTICLE] 7

DISSOLUTION AND WINDING UP

SECTION 701. EVENTS CAUSING DISSOLUTION.

A limited liability company is dissolved, and its activities must be wound up, upon the occurrence of any of the following:

(a) an event or circumstance that the operating agreement states causes dissolution;

(b) the consent of all the members; or

(c) the passage of 90 consecutive days during which the company has no members,[106] or

(d) the entry of a decree of judicial dissolution in accordance with Sections 702 and 705.

Uniform Comment[107]

[Subsection(a)(4) – The standard stated here is conventional, and this subsection (a)(4) is non-waivable. Section 110(c)(7).]

[Subsection (a)(5) – ULLCA § 801(4)(v) contains a comparable provision, although that provision also gives standing to dissociated members. Even in non-ULLCA states, courts have begun to apply close corporation "oppression" doctrine to LLCs.

This provision's reference to "those members in control of the company" implies that such members have a duty to avoid acting oppressively toward fellow members.

Subsection (a)(5) is non-waivable. *See* Section 110(c)(7).]

Subsection (b) – In the close corporation context, many courts have reached this position without express statutory authority, most often with regard to court-ordered buyouts of oppressed

[105] If left in the draft, this needs to be confirmed with Section 103(d).
[106] See footnotes to Sec. 401(c). It would also make sense to have a statutory cross-reference here to Section 401(c) since the language in Sec. 401(c) has traditionally in Florida and Delaware and other states been in the "dissolution event" provisions of the LLC statute.
[107] Will need to be completely revised.

shareholders. This subsection saves courts and litigants the trouble of re-inventing that wheel in the LLC context. However, unlike, subsection (a)(4) and (5), subsection (b) can be overridden by the operating agreement. Thus, the members may agree to a restrict or eliminate a court's power to craft a lesser remedy, even to the extent of confining the court (and themselves) to the all-or-nothing remedy of dissolution.

SECTION 702. GROUNDS FOR JUDICIAL DISSOLUTION.

A circuit court may dissolve a limited liability company:

(a) (1) In a proceeding by the Department of Legal Affairs if it is established that:

(A) The limited liability company obtained its articles of organization through fraud; or

(B) The limited liability company has continued to exceed or abuse the authority conferred upon it by law.

(2) The enumeration in paragraph (1) of grounds for involuntary dissolution does not exclude actions or special proceedings by the Department of Legal Affairs or any state official for the annulment or dissolution of a limited liability company for other causes as provided in any other law of this state.

(b) In a proceeding by a manager or member if it is established that:

(1) the limited liability company's assets are being misappropriated or wasted, causing material injury to the limited liability company;

(2) the managers or those members in control of the company have acted, are acting, or are reasonably expected to act in a manner that is illegal or fraudulent;

(3) the conduct of all or substantially all of the company's activities is unlawful;

(4) it is not reasonably practicable to carry on the company's activities in conformity with the certificate of organization and the operating agreement;

(5) the managers or those members in control of the limited liability company are

deadlocked in the management of the limited liability company affairs, the members are unable to break the deadlock, and irreparable injury to the limited liability company is threatened or being suffered; or

(6) the managers or those members in control of the company have acted or are acting in a manner that is oppressive and was, is, or will be directly harmful [to the applicant]; [108]

(c) In a proceeding by a creditor if it is established that:

(1) The creditor's claim has been reduced to judgment, the execution on that judgment returned unsatisfied, and the limited liability company is insolvent; or

(2) The limited liability company has admitted in writing that the creditor's claim is due and owing and the limited liability company is insolvent.

(d) In a proceeding by the limited liability company to have its voluntary dissolution continued under court supervision.

SECTION 703. PROCEDURE FOR JUDICIAL DISSOLUTION.

(a) Venue for a proceeding brought under Section 702 lies in the circuit court of the county where the limited liability company's principal office is or was last located, as shown by the records of the Department of State, or, if none in this state, where its registered office is or was last located.

(b) It is not necessary to make members parties to a proceeding to dissolve a limited liability company unless relief is sought against them individually.

(c) A court in a proceeding brought to dissolve a limited liability company may issue injunctions, appoint a receiver or custodian *pendente lite* with all powers and duties the court

[108] Since we've modified uniform act to permit a manager to initiate this judicial action, the bracketed phrase probably should be changed to refer only to a "member" applicant. The Committee will revisit the issue of whether this basis for judicial dissolution should be waiv of Section 110.

directs, take other action required to preserve the limited liability company's assets wherever located, and carry on the business of the limited liability company until a full hearing can be held.

(d) If the court determines that any party has commenced, continued, or participated in a proceeding brought under Section 702 and has acted arbitrarily, frivolously, vexatiously, or not in good faith, the court may, in its discretions, award attorney's fees and other reasonable expenses to the other parties the action.

[(e) In a proceeding brought under Section 702, the court may, upon a showing of sufficient merit to warrant such a remedy:

(1) appoint a receiver or custodian under Section 704;

(2) [order a purchase of a complaining member's transferable interest]; or

(3) order a remedy other than dissolution as in its discretion it may deem appropriate, including any equitable remedy.] [109]

SECTION 704. RECEIVERSHIP OR CUSTODIANSHIP. [PROVISIONAL MANAGER?][110]

(a) A court in a judicial proceeding brought to dissolve a limited liability company may appoint one or more receivers to wind up and liquidate, or one or more custodians to manage, the

[109] The Committee decided this subsection should be flagged for further discussion. The "purchase" remedy has an analog in 607.1434(3) and 607.1436. No such concept appears in the existing LLC act. If such a purchase remedy is left in the draft, then it is probably necessary to incorporate procedural provisions comparable to 607.1436 to provide a court with guidance and better reflect the purpose of such provision. The "provisional manager" remedy is also based on a corporate analog (607.1434(2)). The Committee likewise needs to determine whether the procedural provisions relating to the "provisional director"
concept (607.1435) should be incorporated into this draft. Section 704 would be at least one logical place to do this.

[110] In our meeting of June 23, 2010 it was suggested that instead of having a "provisional manager" provision we instead define more specifically the role of a custodian and clarify that a custodian can act in manner comparable to that of a provisional director under the corporate act. Suggested supplemental provisions have been added to subsection (c)(2) of this Section. To discuss whether we should add any other "provisional manager" provisions to this section.

business and affairs of the limited liability company. The court shall hold a hearing, after notifying all parties to the proceeding and any interested persons designated by the court, before appointing a receiver or custodian. The court appointing a receiver or custodian has exclusive jurisdiction over the limited liability company and all of its property wherever located.

(b) The court may appoint a person authorized to act as a receiver or custodian. The court may require the receiver or custodian to post bond, with or without sureties, in an amount the court directs.

(c) The court shall describe the powers and duties of the receiver or custodian in its appointing order, which may be amended from time to time. Among other powers:

(1) The receiver:

(A) May dispose of all or any part of the assets of the limited liability company wherever located, at a public or private sale, if authorized by the court.

(B) May sue and defend in the receiver's own name as receiver of the limited liability company in all courts of this state.

(2) The custodian:[111]

(A) [Shall be an impartial person who is not a member, manager or creditor of the limited liability company or any subsidiary or affiliate of the limited liability company, and whose further qualifications shall be determined by the court.][112]

(B) May exercise all of the powers of the limited liability company, through or in place of its managers or members, to the extent necessary to manage the affairs of the limited liability company in the best interests of its members and creditors.

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[111] Bracketed provisions are based upon provisions contained in 607.1435. The cross-reference for provisional director standard is to 607.0831 (Liability of Directors), and 406 and 408 are comparable standards for managers under this act.

[112] Discuss whether any of these conditions could conflict with subsection (d) (that is, the ability to serve as a receiver as well).

(C) [Shall not be liable for any action taken or decision made in exercising its powers, except as managers may be liable under ss. 406 and 408.]

(D) [Shall report from time to time to the court concerning the matter complained of, or the status of the deadlock, if any, and the status of the limited liability company's business, as the court shall direct. In addition, the custodian shall submit to the court, if so directed, recommendations as to the appropriate disposition of the action.]

(d) The court during a receivership may redesignate the receiver a custodian, and during a custodianship may redesignate the custodian a receiver, if doing so is in the best interests of the limited liability company and its members and creditors.

(e) The court from time to time during the receivership or custodianship may order compensation paid and expense disbursements or reimbursements made to the receiver or custodian and the receiver's or custodian's counsel from the assets of the limited liability company or proceeds from the sale of assets.

(f) The court has jurisdiction to appoint an ancillary receiver for the assets and business of a limited liability company. The ancillary receiver shall serve ancillary to a receiver located in any other state, whenever the court deems that circumstances exist requiring the appointment of such a receiver. The court may appoint such an ancillary receiver for a foreign limited liability company even though no receiver has been appointed elsewhere. Such receivership shall be converted into an ancillary receivership when an order entered by a court of competent jurisdiction in the other state provides for a receivership of the limited liability company.

SECTION 705. DECREE OF DISSOLUTION.

(a) If after a hearing the court determines that one or more grounds for judicial

dissolution described in Section 702 exist, it may enter a decree dissolving the limited liability company and specifying the effective date of the dissolution, and the clerk of the court shall deliver a certified copy of the decree to the Department of State, which shall file it.

(b) After entering the decree of dissolution, the court shall direct the winding up and liquidation of the limited liability company's business and affairs in accordance with Sections 708 through 710, subject to the provisions of subsection (c) of this Section 705.

(c) In a proceeding for judicial dissolution, the court may require all creditors of the limited liability company to file with the clerk of the court or with the receiver, in such form as the court may prescribe, proofs under oath of their respective claims. If the court requires the filing of claims, it shall fix a date, which shall not be less than 4 months from the date of the order, as the last day for filing of claims. The court shall prescribe the deadline for filing claims that shall be given to creditors and claimants. Prior to the date so fixed, the court may extend the time for the filing of claims by court order. Creditors and claimants failing to file proofs of claim on or before the date so fixed may be barred, by order of court, from participating in the distribution of the assets of the limited liability company. Nothing in this section affects the enforceability of any recorded mortgage or lien or the perfected security interest or rights of a person in possession of real or personal property.

SECTION 706. CERTIFICATE OF DISSOLUTION; FILING OF CERTIFICATE OF DISSOLUTION. [113]

(a) Upon the occurrence of an event described in subsections 701(a) - (c), the limited liability company shall file a certificate of dissolution as provided in this section.

[113] This was moved from Article 2, and then language added from existing dissolution provisions of Chapters 608 and 620 (LPA). Committee postponed discussion on the "two step" approach for dissolutions. That is, mandatory filing of a certificate of dissolution upon a dissolution event, and then permissive filing of a statement of termination upon completion of winding-up process (as provided in section 704). Subsections (c) and (d) are taken from existing 608.446(1) and (2).

(b) The certificate of dissolution shall set forth:

(1) The name of the limited liability company.

(2) The effective date of the limited liability company's dissolution.

(3) A description of the occurrence that resulted in the limited liability company's dissolution under [subsections 701(a) - (c).]

(4) If there are no members, the name, address, and signature of the person appointed in accordance with this subsection to wind up the company;

(c) The certificate of dissolution of the limited liability company shall be delivered to the Department of State. If the Department of State finds that such certificate of dissolution conforms to law, it shall, when all fees have been paid as prescribed in this chapter, file the certificate of dissolution.

(d) Upon the filing of such certificate of dissolution, the existence of the limited liability company shall cease, except for the purpose of suits, other proceedings, and appropriate action as provided in this chapter. The manager or managers in office at the time of dissolution, or the survivors of them, or, if none, the members, shall thereafter be trustees for the members and creditors of the dissolved limited liability company; and as such the trustees shall have authority to distribute any property of the limited liability company discovered after dissolution, to convey real estate, and to take such other action as may be necessary on behalf of and in the name of such dissolved limited liability company. [114]

SECTION 707. REVOCATION OF CERTIFICATE OF DISSOLUTION.

(1) A limited liability company that has dissolved as the result of an event described in subsections 701(a) - (c) and filed a certificate of dissolution with the Department of State may revoke its dissolution at any time prior to the expiration of 120 days following the effective date of its certificate of dissolution.

(2) The revocation of the dissolution shall be authorized in the same manner as the dissolution was authorized.

[114] Discuss whether a provision like that in existing 608.447 is needed (that is, that the certificate of organization will be "cancelled" by the DOS upon the filing of the certificate of dissolution). Also, discuss whether the provisions of existing 608.4431 are needed.

(3) After the revocation of dissolution is authorized, the limited liability company shall deliver a statement of revocation of dissolution to the Department of State for filing, together with a copy of its certificate of dissolution, that sets forth:

(a) The name of the limited liability company;

(b) The effective date of the dissolution that was revoked;

(c) The date that the [certificate of] revocation of dissolution was authorized;

(4) If there has been substantial compliance with subsection (3), subject to section 205, the revocation of dissolution is effective when the Department of State files the statement of revocation of dissolution.

(5) When the revocation of dissolution is effective, the revocation of dissolution relates back to and takes effect as of the effective date of the dissolution, and the limited liability company resumes carrying on its business as if dissolution had never occurred.

SECTION 708. WINDING UP.

(a) A dissolved limited liability company shall wind up its activities, and the company continues after dissolution only for the purpose of winding up.

(b) In winding up its activities, a limited liability company:

(1) shall discharge the company's debts, obligations, or other liabilities as provided in Sections 709 and 710, settle and close the company's activities, and marshal and distribute the assets of the company; and

(2) may

(A) preserve the company activities and property as a going concern for a reasonable time;

(B) prosecute and defend actions and proceedings, whether civil, criminal, or administrative;

(C) transfer the company's property;

(D) settle disputes by mediation or arbitration; and

(E) perform other acts necessary or appropriate to the winding up.

(c) If a dissolved limited liability company has no members, the legal representative of the last person to have been a member may wind up the activities of the company. If the person does so, the person has the powers of a sole manager under Section 407(c) and is deemed to be a

manager for the purposes of Section 304(a)(2).

(d) If the legal representative under subsection (c) declines or fails to wind up the company's activities, a person may be appointed to do so by the consent of transferees owning a majority of the rights to receive distributions as transferees at the time the consent is to be effective. A person appointed under this subsection has the powers of a sole manager under Section 407(c) and is deemed to be a manager for the purposes of Section 304(a)(2).

(e) A circuit court may order judicial supervision of the winding up of a dissolved limited liability company, including the appointment of a person to wind up the company's activities:

(1) on application of a member, if the applicant establishes [good cause;][115]

(2) on the application of a transferee, if:

(A) the company does not have any members;

(B) the legal representative of the last person to have been a member declines or fails to wind up the company's activities; and

(C) within a reasonable time following the dissolution a person has not been appointed pursuant to subsection (d); or

(3) in connection with a proceeding under Section 701(a)(4) or (5).

[(f) A dissolved limited liability company that has completed winding up may deliver to the Department of State for filing a statement of termination that states:

(1) The name of the limited liability company.

(2) The date of filing of its initial certificate of organization.

(3) The limited liability company has completed winding up its affairs and wishes to file a statement of termination.

(4) Any other information as determined by the [manager] [member][116] filing the statement or by a person [authorized to wind up the limited liability company].]

Uniform Comment

Source – ULPA (2001) § 803, which was based on RUPA Sections 802 and 803.

Because under this act the power to bind a limited liability company to a third party is

[115] Should "sufficient merit" standard be used (as in 703(e))? The Committee decided on 9/30/10 that a "Business Litigation Subcommittee" (to be chaired by Mark Nichols) should review this and other issues in the act dealing with judicial standards of review, venue, service of process and judicial procedural questions.

[116] Should this sentence refer simply to an "auth ve?"

primarily a matter of agency law, Section 301, Comment, this act has no need of provisions delineating the effect of dissolution on a member or manager's power to bind.

Subsection (b)(2)(A) and (F) – For the constructive notice effect of a certificate of dissolution or termination, see Section 103[(d)(3)](A) and (B).

SECTION 709. KNOWN CLAIMS AGAINST DISSOLVED LIMITED LIABILITY COMPANY.[117]

(1) A dissolved limited liability company or successor entity, as defined in subsection (14), may dispose of the known claims against it by following the procedure described in subsections (2), (3), and (4).

(2) A dissolved limited liability company or successor entity shall deliver to each of its known claimants written notice of the dissolution at any time after its effective date. The written notice shall:

(a) Provide a reasonable description of the claim that the claimant may be entitled to assert.
(b) State whether the claim is admitted or not admitted, in whole or in part, and, if admitted:
    1. The amount that is admitted, which may be as of a given date.
    2. Any interest obligation if fixed by an instrument of indebtedness.
(c) Provide a mailing address to which a claim may be sent.
(d) State the deadline, which may not be fewer than 120 days after the effective date of the written notice, by which confirmation of the claim must be delivered to the dissolved limited liability company or successor entity.
(e) State that the dissolved limited liability company or successor entity may make distributions thereafter to other claimants and to the members or transferees of the limited liability company or persons interested as having been such without further notice.

(3) A dissolved limited liability company or successor entity may reject, in whole or in part, any claim made by a claimant pursuant to this subsection by mailing notice of such rejection to the claimant within 90 days after receipt of such claim and, in all events, at least 150 days before

[117] Based upon 608.4421, 607.1406 and 620.18(

expiration of 3 years following the effective date of dissolution. A notice sent by the dissolved limited liability company or successor entity pursuant to this subsection shall be accompanied by a copy of this section.

(4)A dissolved limited liability company or successor entity electing to follow the procedures described in subsections (2) and (3) shall also give notice of the dissolution of the limited liability company to persons with known claims, that are contingent upon the occurrence or nonoccurrence of future events or otherwise conditional or unmatured, and request that such persons present such claims in accordance with the terms of such notice. Such notice shall be in substantially the form, and sent in the same manner, as described in subsection (2).

(5) A dissolved limited liability company or successor entity shall offer any claimant whose known claim is contingent, conditional, or unmatured such security as the limited liability company or such entity determines is sufficient to provide compensation to the claimant if the claim matures. The dissolved limited liability company or successor entity shall deliver such offer to the claimant within 90 days after receipt of such claim and, in all events, at least 150 days before expiration of 3 years following the effective date of dissolution. If the claimant offered such security does not deliver in writing to the dissolved limited liability company or successor entity a notice rejecting the offer within 120 days after receipt of such offer for security, the claimant is deemed to have accepted such security as the sole source from which to satisfy his or her claim against the limited liability company.

(6) A dissolved limited liability company or successor entity which has given notice in accordance with subsections (2) and (4), [and is seeking the protection offered by subsections (9) and (12),][118] shall petition the circuit court in the county in which the limited liability company's principal office is located or was located at the effective date of dissolution to determine the amount and form of security that will be sufficient to provide compensation to any claimant who has rejected the offer for security made pursuant to subsection (5).

(7) A dissolved limited liability company or successor entity which has given notice in

[118] This part in 620 but not 608.4421.

accordance with subsection (2), [and is seeking the protection offered by subsections (9) and (12),][119] shall petition the circuit court in the county in which the limited liability company's principal office is located or was located at the effective date of dissolution to determine the amount and form of security which will be sufficient to provide compensation to claimants whose claims are known to the limited liability company or successor entity but whose identities are unknown. The court shall appoint a guardian ad litem to represent all claimants whose identities are unknown in any proceeding brought under this subsection. The reasonable fees and expenses of such guardian, including all reasonable expert witness fees, shall be paid by the petitioner in such proceeding.

(8) The giving of any notice or making of any offer pursuant to the provisions of this section shall not revive any claim then barred or constitute acknowledgment by the dissolved limited liability company or successor entity that any person to whom such notice is sent is a proper claimant and shall not operate as a waiver of any defense or counterclaim in respect of any claim asserted by any person to whom such notice is sent.

(9) A dissolved limited liability company or successor entity which has followed the procedures described in subsections (2)-(7):
(a) Shall pay the claims admitted or made and not rejected in accordance with subsection (3).
(b) Shall post the security offered and not rejected pursuant to subsection (5).
(c) Shall post any security ordered by the circuit court in any proceeding under subsections (6) and (7).
(d) Shall pay or make provision for all other known obligations of the limited liability company or such successor entity.

If there are sufficient funds, such claims or obligations shall be paid in full, and any such provision for payments shall be made in full. If there are insufficient funds, such claims and obligations shall be paid or provided for according to their priority and, among claims of equal priority, ratably to the extent of funds legally available therefor. Any remaining funds shall be distributed to the members and transferees of the dissolved limited liability company; however,

[119] Ibid

such distribution may not be made before the expiration of 150 days after the date of the last notice of any rejection given pursuant to subsection (3). [In the absence of actual fraud, the judgment of the [managers][members] of the dissolved limited liability company, or other person or persons winding up the limited liability company under [section 708], or the governing persons of such successor entity, as to the provisions made for the payment of all obligations under paragraph (d), is conclusive.]

(10) A dissolved limited liability company or successor entity which has not followed the procedures described in subsections (2) and (3) shall pay or make reasonable provision to pay all known claims and obligations, including all contingent, conditional, or unmatured claims known to the dissolved limited liability company or such successor entity and all claims which are known to the dissolved limited liability company or such successor entity but for which the identity of the claimant is unknown. If there are sufficient funds, such claims shall be paid in full, and any such provision made for payment shall be made in full. If there are insufficient funds, such claims and obligations shall be paid or provided for according to their priority and, among claims of equal priority, ratably to the extent of funds legally available therefor. Any remaining funds shall be distributed to the members and transferees of the dissolved limited liability company.

(11) A member or transferee of a dissolved limited liability company the assets of which were distributed pursuant to subsection (9) or subsection (10) is not liable for any claim against the limited liability company in an amount in excess of such member's or transferee's pro rata share of the claim or the amount distributed to the member or transferee, whichever is less.

(12) A member or transferee of a dissolved limited liability company, the assets of which were distributed pursuant to subsection (9), is not liable for any claim against the limited liability company which claim is known to the limited liability company or successor entity and on which a proceeding is not begun prior to the expiration of 3 years following the effective date of dissolution.

(13) The aggregate liability of any person for claims against the dissolved limited liability

company arising under this section or [section 710] may not exceed the amount distributed to the person in dissolution.

(14) As used in this section or [section 710], the term "successor entity" [120]includes any trust, receivership, or other legal entity governed by the laws of this state to which the remaining assets and liabilities of a dissolved limited liability company are transferred and which exists solely for the purposes of prosecuting and defending suits by or against the dissolved limited liability company, enabling the dissolved limited liability company to settle and close the business of the dissolved limited liability company, to dispose of and convey the property of the dissolved limited liability company, to discharge the liabilities of the dissolved limited liability company, and to distribute to the dissolved limited liability company's members or transferees any remaining assets, but not for the purpose of continuing the business for which the dissolved limited liability company was organized.

Uniform Comment

[to be inserted later]

SECTION 710. OTHER CLAIMS AGAINST DISSOLVED LIMITED LIABILITY COMPANY.[121]

(1) In addition to filing the certificate of dissolution under [section 706] a dissolved limited liability company or successor entity, as defined in [section 709(14)], may also file with the Department of State on the form prescribed by the Department a request that persons with claims against the limited liability company which are not known to the limited liability company or successor entity present them in accordance with the notice.

(2) The notice must:

(a) Describe the information that must be included in a claim and provide a mailing address to which the claim may be sent.

(b) State that a claim against the limited liability company will be barred unless a proceeding to

[120] Perhaps this definition should be moved to Section 102 (definitions).
[121] Based upon 607.1407 and 620.1807

enforce the claim is commenced within 4 years after the filing of the notice.

(3) If the dissolved limited liability company or successor entity files the notice in accordance with subsections (1) and (2), the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved limited liability company within 4 years after the filing date:
(a) A claimant who did not receive written notice under [section 709(9)] or whose claim was not provided for under [section 709(10)] , whether such claim is based on an event occurring before or after the effective date of dissolution.[122]
(b) A claimant whose claim was timely sent to the dissolved limited liability company but not acted on.

(4) A claim may be enforced under this section:

(a) Against the dissolved limited liability company, to the extent of its undistributed assets; or
(b) If the assets have been distributed in liquidation, against a member or transferee of the dissolved limited liability company to the extent of such member's or transferee's pro rata share of the claim or the limited liability company assets distributed to such member or transferee in liquidation, whichever is less, provided the aggregate liability of any person for all claims against the dissolved limited liability company arising under this section or [section 709] may not exceed the amount distributed to the person in liquidation.

Uniform Comment

[to be inserted later]

SECTION 711. ADMINISTRATIVE DISSOLUTION.

(a) The Department of State may dissolve a limited liability company administratively if the company does not:

(1) pay any fee or penalty due to the Department of State under this act; or

[122] These cross-references are based upon 620 b ıce to (9) doesn't seem to make sense.

(2) deliver its annual report to the Department of State by 5 pm Eastern Time on the third Friday in September;

(3) appoint and maintain a registered agent as required by section 113; or

(4) deliver for filing a statement of change under section 114 within 30 days after a change has occurred in the name of the registered agent or registered office address.

(b) If the Department of State determines that a ground exists for administratively dissolving a limited liability company, the Department of State shall serve notice on the limited liability company of its intent to administratively dissolve the limited liability company. If the limited liability company has provided the Department with an electronic mail address, such notice shall be by electronic transmission. Administrative dissolution for failure to file an annual report shall occur on the fourth Friday in September of each year. The Department of State shall issue a certificate of dissolution to each dissolved limited liability company. Issuance of the certificate of dissolution may be by electronic transmission to any limited liability company that has provided the Department with an electronic mail address.

(c) If within 60 days after sending the copy pursuant to subsection (b) a limited liability company does not correct each ground for dissolution under Sections 711(a)(1), (3), or (4), or demonstrate to the reasonable satisfaction of the Department of State that each ground determined by the Department of State does not exist, the Department of State shall dissolve the limited liability company administratively and issue a certificate of dissolution that states the grounds for dissolution. Issuance of the certificate of dissolution may be by electronic transmission to any limited liability company that has provided the Department with an electronic mail address.

(d) A limited liability company that has been administratively dissolved continues in existence but, subject to Section 712, may carry on only activities necessary to wind up its activities and liquidate its assets under Sections 708 and 714 and to notify claimants under Sections 709 and 710.

(e) The administrative dissolution of a limited liability company does not terminate the authority of its agent for service of process.

Uniform Comment

Source – ULPA (2001) § 809, which was based on ULLCA §§ 809 and 810. *See also*

RMBCA §§ 14.20 and 14.21.

SECTION 712. REINSTATEMENT FOLLOWING ADMINISTRATIVE DISSOLUTION.

(1) A limited liability company that has been administratively dissolved may apply to the Department of State for reinstatement at any time after the effective date of dissolution. The company must submit a form of reinstatement prescribed and furnished by the Department of State together with all fees then owed by the company at a rate provided by law at the time the company applies for reinstatement.

(2) As an alternative to submitting the reinstatement referred to in subsection (1), the company may submit a current annual report, signed by its registered agent and a manager or managing member.

(3) If the Department of State determines that an application for reinstatement, or current annual report described in subsection (2), contains the information required by subsection (1) and that the information is correct, the Department of State shall reinstate the limited liability company.

(4) When a reinstatement becomes effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the limited liability company may resume its activities as if the administrative dissolution had not occurred.

Uniform Comment

Source – ULPA (2001) § 810, which was based on ULLCA § 811. *See also* RMBCA Section 14.22.

SECTION 713. APPEAL FROM REJECTION OF REINSTATEMENT.

(a) If the Department of State denies a limited liability company's request for reinstatement following administrative dissolution, the Department of State shall prepare, sign and record a notice that explains the reason for denial and serve the company with a copy of the notice.

(b) Within 30 days after service of a notice of denial of reinstatement under subsection (a), a limited liability company may appeal from the denial by petitioning the circuit court to set aside the dissolution. The petition must [illegible] the Department of State and contain a copy

of the Secretary of State's declaration of dissolution, the company's application for reinstatement, and the Secretary of State's notice of denial.

(c) The court may order the Department of State to reinstate a dissolved limited liability company or take other action the court considers appropriate.

Uniform Comment

Source – ULPA (2001) § 811, which was based on ULLCA § 812.

This section uses "rejection" rather than "denial" (the word used by both ULPA (2001) and ULLCA). The change is to avoid confusion with a "statement of denial" under Section 302.

SECTION 714. DISTRIBUTION OF ASSETS IN WINDING UP LIMITED LIABILITY COMPANY'S ACTIVITIES.

(a) In winding up its activities, a limited liability company must apply its assets to discharge its obligations to creditors, including members that are creditors, as provided in Sections 709 and 710.

(b) After a limited liability company complies with subsection (a), any surplus must be distributed among members and dissociated members in the manner provided in Section 404(b).[123]

(c) All distributions made under subsection (b) must be paid in money.

Uniform Comment

Source: ULLCA § 806, restyled.

Subsection (a) – This section is mostly not a default rule. *See* Section 110(c)(11) (stating that "except as provided in Section 112(b), [the operating agreement may not] restrict the rights under this act of a person other than a member or manager"). However, if the creditors are willing, a dissolved limited liability company may certainly make agreements with them specifying the terms under which the LLC will "discharge its obligations to creditors."

Subsections (b), (c) and (d) – These subsection provide default rules. Distributions under these subsections (or otherwise under the operating agreement) are subject to Section 503 (charging orders).

[123] The two "exceptions" to Sections 502 and 503 contained in the uniform version were not included in this draft because it was felt that the cross-reference here to Section 404(b) would be deemed to include the recital of those two exceptions in that section.

[ARTICLE] 8

FOREIGN LIMITED LIABILITY COMPANIES

SECTION 801. GOVERNING LAW.

(a) The law of the state or other jurisdiction under which a foreign limited liability company is formed governs:

(1) the internal affairs of the company; and

(2) the liability of a member as member and a manager as manager for the debts, obligations, or other liabilities of the company.

(b) A foreign limited liability company may not be denied a certificate of authority by reason of any difference between the law of the jurisdiction under which the company is formed and the law of this state.

(c) A certificate of authority does not authorize a foreign limited liability company to engage in any business or exercise any power that a limited liability company may not engage in or exercise in this state.

Uniform Comment

Subsection (a) – This Section parallels the formulation stated in Section 106 for a domestic limited liability company.

Subsection (a)(2) – This provision does not pertain to the "internal shields" of a foreign "series" LLC, because those shields do not concern the liability of members or managers for the obligations of the LLC. Instead, those shields seek to protect specified assets of the LLC (associated with one series) from being available to satisfy specified obligations of the LLC (associated with another series). See the Prefatory Note, *No Provision for "Series" LLCs*.

SECTION 802. APPLICATION FOR CERTIFICATE OF AUTHORITY.

(a) [A foreign limited liability company may not transact business in this state until it obtains a certificate of authority from the Department of State.][124] A foreign limited liability company may apply for a certificate of authority to transact business in this state by delivering an application to the Department of State for filing. The application must contain:

(1) the name of the company and, if the name does not comply with Section 108,

[124] ***Reporter's note: this sentence was taken from existing 608.501(1) and was inserted for consideration because there is no similar "prohibitive" language in the uniform act. Committee members should read Stu Ames and Stu Cohn commentary to 608.501 when deciding whether this sentence should remain in the draft. Without this sentence it appears that 809 serves as an implied prohibition by reciting the negative consequences of not obtaining a certificate of authority.***

an alternate name adopted pursuant to Section 805(a);

(2) the name of the state or other jurisdiction under whose law the company is formed;

(3) the principal office and mailing addresses of the company;

(4) the name and street address in this state of, and written acceptance by, the company's initial registered agent in this state; and

(5) the name and principal office and mailing address of each of the company's managers, if a it is a manager-managed limited liability company, or its members, if it is a member-managed limited liability company.

(b) A foreign limited liability company shall deliver with a completed application under subsection (a) a certificate of existence or a record of similar import signed by the Department of State or other official having custody of the company's publicly filed records in the state or other jurisdiction under whose law the company is formed, dated not more than 90 days prior to the delivery of the application to the Department of State.

Uniform Comment

Source – ULPA (2001) § 902, which was based on ULLCA § 1002.

SECTION 803. ACTIVITIES NOT CONSTITUTING TRANSACTING BUSINESS.[125]

(1) The following activities, among others, do not constitute transacting business within the meaning of [s. 802(a)]:[126]

(a) Maintaining, defending, or settling any proceeding.

(b) Holding meetings of the managers or members or carrying on other activities concerning internal company affairs.

(c) Maintaining bank accounts.

[125] The Committee decided to use the same list of "not doing business" descriptions contained in existing law (608.501).

[126] Cross-reference depends on final wording of

(d) Maintaining managers or agencies for the transfer, exchange, and registration of the limited liability company's own securities or maintaining trustees or depositaries with respect to those securities.

(e) Selling through independent contractors.

(f) Soliciting or obtaining orders, whether by mail or through employees, agents or otherwise, if the orders require acceptance outside this state before they become contracts.

(g) Creating or acquiring indebtedness, mortgages, and security interests in real or personal property.

(h) Securing or collecting debts or enforcing mortgages and security interests in property securing the debts.

(i)Transacting business in interstate commerce.

(j) Conducting an isolated transaction that is completed within 30 days and that is not one in the course of repeated transactions of a like nature.

(k) Owning and controlling a subsidiary corporation or limited liability company incorporated in or transacting business within this state or voting the stock of any corporation which it has lawfully acquired.

(l) Owning a limited partnership interest in a limited partnership that is doing business within this state, unless such limited partner manages or controls the partnership or exercises the powers and duties of a general partner.

(m) Owning, without more, real or personal property.

(2) The list of activities in subsection (1) is not exhaustive.

(3) The ownership in this state of income-producing real property or tangible personal property, other than property excluded under subsection (1), constitutes transacting business in this state for purposes of [s. 801(a).][127]

(4) This section does not apply in determining the contacts or activities that may subject a foreign limited liability company to service of process, taxation, or regulation under law of this state other than this act.

Uniform Comment

Source – ULPA (2001) § 903, which was based on ULLCA § 1003.

SECTION 804. FILING OF CERTIFICATE OF AUTHORITY. Unless the Department of State determines that an application for a certificate of authority of a foreign limited liability company to transact business in this state does not comply with the filing requirements of this act, the Department of State shall, upon payment of all filing fees, file the certificate of authority.

Uniform Comment

Source – ULPA (2001) § 904, which was based on ULLCA § 1004 and RULPA § 903.

SECTION 805. NONCOMPLYING NAME OF FOREIGN LIMITED LIABILITY COMPANY.

(a) A foreign limited liability company whose name does not comply with Section 108 may not obtain a certificate of authority until it adopts, for the purpose of transacting business in this state, an alternate name that complies with Section 108. A foreign limited liability company that adopts an alternate name under this subsection and obtains a certificate of authority with the alternate name need not comply with s.865.09. After obtaining a certificate of authority with an alternate name, a foreign limited liability company shall transact business in this state under the alternate name unless the company is authorized under s.865.09 to transact business in this state under another name.

[127] Cross-reference depends on final language of

(b) If a foreign limited liability company authorized to transact business in this state changes its name to one that does not comply with Section 108, it may not thereafter transact business in this state until it complies with subsection (a) and obtains an amended certificate of authority.

Uniform Comment

Source – ULPA (2001) § 905, which was based on ULLCA § 1005.

SECTION 806. AMENDMENT TO CERTIFICATE OF AUTHORITY.

(1) A foreign limited liability company authorized to transact business in this state shall make application to the Department of State to obtain an amended certificate of authority to:

(a) Change its name on the records of the Department of State;

(b) Amend its State or other jurisdiction;

(c) Change its managers, if a it is a manager-managed limited liability company, or its members, if it is a member-managed limited liability company; or

(d) Amend any false statement contained in its application for certificate of authority.

(2) Such application shall be made within 30 days after the occurrence of any change mentioned in subsection (1), must be signed by at least one member, manager, or authorized representative, and shall set forth:

(a) The name of the foreign limited liability company as it appears on the records of the Department of State.

(b) The jurisdiction of its formation.

(c) The date the foreign limited liability company was authorized to transact business this state.

(d) If the name of the foreign limited liability company has been changed, the name relinquished and its new name.

(e) If the amendment changes the jurisdiction of the foreign limited liability company, a statement of such change.

(f) If the amendment changes the managers, if a it is a manager-managed limited liability company, or its members, if it is a member-managed limited liability company, the name and address of each new manager or member, as applicable.

(g) If the foreign limited liability corrects a false statement, the statement it is correcting and a statement containing the corrected infor

(3) The requirements of section 802(b) for obtaining an original certificate of authority apply to obtaining an amended certificate under this section.

SECTION 807. REVOCATION OF CERTIFICATE OF AUTHORITY.

(a) A certificate of authority of a foreign limited liability company to transact business in this state may be revoked by the Department of State in the manner provided in subsections (b) and (c) if the company does not:

(1) pay any fee or penalty due to the Department of State under this act;

(2) deliver its annual report to the Department of State by 5 pm Eastern Time on the third Friday in September;

(3) appoint and maintain an agent for service of process as required by Section 113(b);

(4) deliver for filing a statement of a change under Section 114 within 30 days after a change has occurred in the name or address of the agent.

(5) failed to amend its certificate of authority as required by Section 806; or

(6) if the Department of State receives a duly authenticated certificate from the official having custody of records in the jurisdiction under the law of which the foreign limited liability company is organized stating that it has been dissolved or is no longer active on its records.

(b) If the Department of State determines that one or more grounds exist under this section for the revocation of a foreign limited liability company's certificate of authority, it shall notify the foreign limited liability company of its intent to revoke the foreign limited liability company's certificate of authority. If the foreign limited liability company has provided the Department with an electronic mail address, such notice shall be by electronic transmission. Revocation for failure to file an annual report shall occur on the fourth Friday in September of each year. The Department of State shall issue a certificate of revocation to each revoked foreign limited liability company. Issuance of the certificate of revocation may be by electronic transmission to any foreign limited liability company that has provided the Department with an electronic mail address.

(c) If within 60 days after sending a notice of intent to revoke, the foreign limited liability company does not correct each ground for revocation under section 807(a)(1), (3), (4), (5), or (6),

or demonstrate to the reasonable satisfaction of the Department of State that each ground determined by the Department does not exist, the Department shall revoke the foreign limited liability company's authority to transact business in this state and issue a certificate of revocation that states the grounds for revocation. Issuance of the certificate of revocation may be by electronic transmission to any foreign limited liability company that has provided the Department with an electronic mail address.

(d) The authority of a foreign limited liability company to transact business in this state ceases on the effective date of the certificate of revocation.

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Uniform Comment

Source – ULPA (2001) § 906, which was based on ULLCA § 1006.

SECTION 808. CANCELLATION OF CERTIFICATE OF AUTHORITY. To cancel its certificate of authority to transact business in this state, a foreign limited liability company must deliver to the Department of State for filing a notice of cancellation. The certificate is canceled when the notice becomes effective under Section 205. The notice of cancellation shall be signed by an authorized representative and state the following:

(a) the name of the company as it appears on the records of the Department of State;

(b) the jurisdiction of its formation;

(c) the date the company was authorized to transact business in this state; and

(d) the company is canceling its certificate of authority in this state.

SECTION 809. EFFECT OF FAILURE TO HAVE CERTIFICATE OF AUTHORITY.

(a) A foreign limited liability company transacting business in this state [or its successors][128] may not maintain an action or proceeding in this state unless it has a certificate of authority to transact business in this state.

(b) The successor to a foreign limited liability company that transacted business in this state without a certificate of authority and the assignee of a cause of action arising out of that business may not maintain a proceeding based on that cause of action in any court in this state until the

[128] To consider whether this clarification is need

foreign limited liability company or its successor obtains a certificate of authority.

[(c) A court may stay a proceeding commenced by a foreign limited liability company or its successor or assignee until it determines whether the foreign limited liability company or its successor requires a certificate of authority. If it so determines, the court may further stay the proceeding until the foreign limited liability company or its successor obtains the certificate.][129]

(d) The failure of a foreign limited liability company to have a certificate of authority to transact business in this state does not impair the validity of a contract or act of the company or prevent the company from defending an action or proceeding in this state.

(e) A member or manager of a foreign limited liability company is not liable for the debts, obligations, or other liabilities of the company solely because the company transacted business in this state without a certificate of authority.

(f) If a foreign limited liability company transacts business in this state without a certificate of authority or cancels its certificate of authority, it appoints the Department of State as its agent for service of process for rights of action arising out of the transaction of business in this state.

(g) A foreign limited liability company which transacts business in this state without authority to do so shall be liable to this state for the years or parts thereof during which it transacted business in this state without authority in an amount equal to all fees or penalties which would have been imposed by this act or chapter upon such limited liability company had it duly applied for and received authority to transact business in this state as required by this act. In addition to the payments thus prescribed, such limited liability company shall be liable for a civil penalty of not less than $500 or more than $1,000 for each year or part thereof during which it transacts business in this state without a certificate of authority. The Department of State may collect all penalties due under this subsection.

Uniform Comment

Source – ULPA (2001) § 907, which was based on RULPA § 907(d) and ULLCA § 1008.

SECTION 810. REINSTATEMENT FOLLOWING REVOCATION OF CERTIFICATE OF AUTHORITY.

[129] This subsection and preceding subsection were added at 9/30/10 meeting. Committee decided to bracket this one for further review.

(1) A foreign limited liability company whose certificate of authority has been revoked may apply to the Department of State for reinstatement at any time after the effective date of the revocation. The foreign limited liability company must submit a form of reinstatement prescribed and furnished by the Department of State together with all fees then owed by the foreign limited liability company at a rate provided by law at the time the company applies for reinstatement.

(2) As an alternative to submitting the reinstatement referred to in subsection (1), the company may submit a current annual report, signed by an authorized representative.

(3) If the Department of State determines that an application for reinstatement, or current annual report described in subsection (2), contains the information required by subsection (1) and that the information is correct, the Department of State shall cancel the [certificate of revocation][130].

(4) When a reinstatement becomes effective, it relates back to and takes effect as of the effective date of the revocation of authority and the foreign limited liability company may resume its activities in this state as if the revocation of authority had not occurred.

(5) The name of the foreign limited liability company the certificate of authority of which has been revoked is not available for assumption or use by another business entity until 1 year after the effective date of revocation of authority unless the limited liability company provides the Department of State with an affidavit executed as required by Section 203 permitting the immediate assumption or use of its name by another limited liability company.

(6) If the name of the foreign limited liability company has been lawfully assumed in this state by another business entity, the Department of State shall require the foreign limited liability company to comply with Section 108 before accepting its application for reinstatement.

SECTION 811. ACTION BY DEPARTMENT OF LEGAL AFFAIRS. The Department of Legal Affairs may maintain an action to enjoin a foreign limited liability company from transacting business in this state in violation of this act.

Uniform Comment

Source – ULPA (2001) § 908, which was based on RULPA § 908 and ULLCA § 1009.

[ARTICLE] 9

[130] Is this correct reference. See Section 808.

ACTIONS BY MEMBERS[131]

SECTION 901. DIRECT ACTION BY MEMBER.

(a) Subject to subsection (b), a member may maintain a direct action against another member, a manager, or the limited liability company to enforce the member's rights and otherwise protect the member's interests, including rights and interests under the operating agreement or this act or arising independently of the membership relationship.

(b) A member maintaining a direct action under this section must plead and prove an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the limited liability company.

Uniform Comment

Subsection (a) – Source: ULPA (2001) § 1001(a), which was based on RUPA Section 405(b). The subsection has been somewhat re-styled from the ULPA version, and the phrase "for legal or equitable relief" has been deleted as unnecessary. ULPA's reference to "with or without an accounting" has been deleted because the reference: (i) was to the partnership remedy of accounting, which reflected the aggregate nature of a partnership and is inapposite for an *entity* such as an LLC; and (ii) generated some confusion with the equitable claim for an accounting (in the nature of a constructive trust). The "entity-analog" to the partnership-as-aggregate notion of an accounting is the distinction between a direct and derivative claim.

The last phrase of this subsection ("or arising independently . . .") comes from RUPA § 405(b)(3), does not create any new rights, obligations, or remedies, and is included merely to emphasize that a person's membership in an LLC does not preclude the person from enforcing rights existing "independently or the membership relationship."

Subsection (b) – Source: ULPA (2001) § 1001(b). The Comment to that subsection explains:

In ordinary contractual situations it is axiomatic that each party to a contract has standing to sue for breach of that contract. Within a limited partnership, however, different circumstances may exist. A partner does not have a direct claim against another partner merely because the other partner has breached the operating agreement. Likewise a partner's violation of this act does not automatically create a direct claim for every other partner. To have standing in his, her, or its own right, a partner plaintiff must be able to show a harm that occurs independently of the harm caused or threatened to be caused to the limited partnership.

SECTION 902. DERIVATIVE ACTION.

A member may maintain a derivative action

[131] The Committee decided at the 9/30/10 meeting that a subcommittee or other group comprised of experiences commercial litigators from the Business Law Section should have the responsibility of reviewing this Article and other provisions of the act pertaining to litigation and procedural issues. Mark Wolfson volunteered to spearhead that effort.

to enforce a right of a limited liability company if:

(1) the member first makes a demand on the other members in a member-managed limited liability company, or the managers of a manager-managed limited liability company, requesting that they cause the company to bring an action to enforce the right, and the managers or other members do not bring the action within a reasonable time; or

(2) a demand under paragraph (1) would be futile.

Uniform Comment

Source – ULPA (2001) § 1002, which was a re-styled version RULPA § 1001.

SECTION 903. PROPER PLAINTIFF.

(a) Except as otherwise provided in subsection (b), a derivative action under Section 902 may be maintained only by a person that is a member at the time the action is commenced and remains a member while the action continues.[132]

(b) If the sole plaintiff in a derivative action dies while the action is pending, the court may permit another member of the limited liability company to be substituted as plaintiff.

Uniform Comment

This section abandons the traditional "contemporaneous ownership" rule, on the theory that the protections of that rule are unnecessary given the closely-held nature of most limited liability companies and the built-in, statutory restrictions on persons becoming members.

Subsection (b) – This subsection will be inapposite if the limited liability company has only two members, one of whom is the derivative plaintiff. In that limited circumstance, the plaintiff's death would cause the derivative action to abate. The "pick your partner" principal enshrined in Section 502 would prevent the decedent's heirs from succeeding to plaintiff status in the derivative action. This act does not take a position on whether the death of member abates a direct claim against the LLC or a fellow member.

SECTION 904. PLEADING. In a derivative action under Section 902, the complaint must state with particularity:

(1) the date and content of plaintiff's demand and the response to the demand by the

[132] At 9/30/10 meeting it was suggested that a cross-reference here may be appropriate to include successors in interest to a member under Section 504. Should transferees have the right to bring derivative action under 902 (and 903, which requires the plaintiff to be a member)? The following is the language from existing law (608.601(1)) which was discussed at that meeting:

"A person may not commence a proceeding in the right of a domestic or foreign limited liability company unless the person was a member of the limited liability company when the transaction complained of occurred or unless the person became a member through transfer by operation of law from one who was a member at that time."

managers or other members; or

(2) if a demand has not been made, the reasons a demand under Section 902(1) would be futile.

Uniform Comment

Source – ULPA (2001) § 1004, which was a re-styled version RULPA § 1003.

SECTION 905. SPECIAL LITIGATION COMMITTEE.

(a) If a limited liability company is named as or made a party in a derivative proceeding, the company may appoint a special litigation committee to investigate the claims asserted in the proceeding and determine whether pursuing the action is in the best interests of the company. If the company appoints a special litigation committee, on motion by the committee made in the name of the company, except for good cause shown, the court shall stay discovery for the time reasonably necessary to permit the committee to make its investigation. This subsection does not prevent the court from enforcing a person's right to information under Section 410 or, for good cause shown, granting extraordinary relief in the form of a temporary restraining order or preliminary injunction.

(b) A special litigation committee may be composed of one or more disinterested and independent individuals, who may be members.

(c) A special litigation committee may be appointed:

(1) in a member-managed limited liability company:

(A) by the consent of a majority of the members not named as defendants or plaintiffs in the proceeding; and

(B) if all members are named as defendants or plaintiffs in the proceeding, by a majority of the members named as defendants; or

(2) in a manager-managed limited liability company:

(A) by a majority of the managers not named as defendants or plaintiffs in the proceeding; and

(B) if all managers are named as defendants or plaintiffs in the proceeding, by a majority of the managers named as defendants.

(d) After appropriate investigation, a special litigation committee may determine that it is in the best interests of the limited liability company that the proceeding:

(1) continue under the control of the plaintiff;

(2) continue under the control of the committee;

(3) be settled on terms approved by the committee; or

(4) be dismissed.

(e) After making a determination under subsection (d), a special litigation committee shall file with the court a statement of its determination and its report supporting its determination, giving notice to the plaintiff. The court shall determine whether the members of the committee were disinterested and independent and whether the committee conducted its investigation and made its recommendation in good faith, independently, and with reasonable care, with the committee having the burden of proof. If the court finds that the members of the committee were disinterested and independent and that the committee acted in good faith, independently, and with reasonable care, the court shall enforce the determination of the committee. Otherwise, the court shall dissolve the stay of discovery entered under subsection (a) and allow the action to proceed under the direction of the plaintiff.

Uniform Comment

Although special litigation committees are best known in the corporate field, they are no more inherently corporate than derivative litigation or the notion that an organization is a person distinct from its owners. An "SLC" can serve as an ADR mechanism, help protect an agreed upon arrangement from strike suits, protect the interests of members who are neither plaintiffs nor defendants (if any), and bring to any judicial decision the benefits of a specially tailored business judgment.

This section's approach corresponds to established law in most jurisdictions, modified to fit the typical governance structures of a limited liability company.

Subsection (a) – On the availability of Section 410 remedies pending the SLC's investigation, compare *Kaufman v. Computer Assoc. Int'l., Inc.*, No. Civ.A. 699-N, 2005 WL 3470589 at *1 (Del.Ch. Dec. 21, 2005, as revised) (presenting "the question of whether to stay a books and records action under 8 Del. C. § 220 at the request of a special litigation committee when a derivative action encompassing substantially the same allegations of wrongdoing filed by different plaintiffs is pending in another jurisdiction;" concluding "[f]or reasons that have much to do with the light burden imposed by the plaintiff's demand in this case . . . that the special litigation committee's motion to stay the books and records action should be denied")

Subsection (d) – The standard stated for judicial review of the SLC determination follows *Auerbach v. Bennett*, 47 N.Y.2d 619, 419 N.Y.S.2d 920 (N.Y. 1979) rather than *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981), because the latter's reference to a court's business judgment has generally not been followed in other states.

Houle v. Low, 407 Mass. 810, 822, 556 N.E.2d 51, 58 (Mass. 1990) contains an excellent explanation of the court's role in reviewing an SLC decision:

The value of a special litigation committee is coextensive with the extent to which that committee truly exercises business judgment. In order to ensure that special litigation committees do act for the [entity]'s best interest, a good deal of judicial oversight is necessary in each case. At the same time, however, courts must be careful not to usurp the committee's valuable role in exercising business judgment. . . . . [A] special litigation committee must be independent, unbiased, and act in good faith. Moreover, such a committee must conduct a thorough and careful analysis regarding the plaintiff's derivative suit, ... The burden of proving that these procedural requirements have been met must rest, in all fairness, on the party capable of making that proof--the [entity].

For a discussion of how a court should approach the question of independence, *see Einhorn v. Culea*, 612 N.W.2d 78, 91 (Wis.2000).

SECTION 906. PROCEEDS AND EXPENSES.

(a) Except as otherwise provided in subsection (b):

(1) any proceeds or other benefits of a derivative action under Section 902, whether by judgment, compromise, or settlement, belong to the limited liability company and not to the plaintiff; and

(2) if the plaintiff receives any proceeds, the plaintiff shall remit them immediately to the company.

(b) If a derivative action under Section 902 is successful in whole or in part, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees and costs, from the recovery of the limited liability company.

Uniform Comment

Source – ULPA (2001) § 1005, which was a re-styled version RULPA § 1004.

[*Reporter's Note: to determine whether the following provisions of the existing law should be added*:

608.455 Waiver of notice.

—When, under the provisions of this chapter or under the provisions of the articles of organization or operating agreement of a limited liability company, notice is required to be given to a member of a limited liability company or to a manager of a limited liability company having a manager or managers, a waiver in writing signed by the person or persons entitled to the notice,

whether made before or after the time for notice to be given, is equivalent to the giving of notice.

608.461 Jurisdiction of the circuit court.

—The circuit courts shall have jurisdiction to enforce the provisions of this chapter.

608.462 Parties to actions by or against limited liability company.

—A member of a limited liability company is not a proper party to proceedings by or against a limited liability company, except when the object is to enforce a member's right against, or liability to, the limited liability company.]

[ARTICLE] 10

MERGERS AND CONVERSIONS

[Reporter's Note: as discussed at the 9/30/10 meeting the approach for this article was to use the LP Act as a template and make conforming changes and other changes discussed by Committee at that meeting. The appraisal rights provisions, however, are based upon current chapter 608 (which are generally the same as those in the LP act).]

[Reporter's Note: conforming statutory section cross-reference changes will be required in chapters 607, 617 and 620.]

[Reporter's Note: Committee to reconsider whether domestications should be permitted (the uniform act enables it while the ABA prototype does not; Florida law permits foreign profit and not for profit corporations to be domesticated in Florida .][133]

SECTION 1001. DEFINITIONS.

As used in this section and ss. 1002-1023:

(1) "Constituent limited liability company" means a constituent organization that is a limited liability company.

(2) "Constituent organization" means an organization that is party to a merger.

(3) "Converted organization" means the organization into which a converting organization converts pursuant to ss. 1002-1005.

[133] See 1010 - 1014 of the uniform act, and 607.1801 and 617.1803 of Florida Statutes. The not for profit version is based upon the model act while the 607 version is not entirely consistent with the model act. The Committee should consider the Ames and Cohn comments on these

(4) “Converting limited liability company” means a converting organization that is a limited liability company.

(5) “Converting organization” means an organization that converts into another organization pursuant to s. 1002.

(6) “Governing law” of an organization means the law that governs the organization’s internal affairs.

(7) “Organization” means a corporation; general partnership, including a limited liability partnership; limited partnership, including a limited liability limited partnership; limited liability company; common law or business trust or association; real estate investment trust; or any other person organized under a governing statute or other applicable law, provided such term does not include an organization that is not organized for profit unless the not-for-profit organization is the converted organization or the surviving organization in a conversion or a merger governed by this act. The term includes domestic and foreign organizations.

(8) “Organizational documents” means:

(a) For a domestic or foreign general partnership, its partnership agreement.

(b) For a limited partnership or foreign limited partnership, its certificate of limited partnership and partnership agreement.

(c) For a domestic or foreign limited liability company, its articles of organization and operating agreement, or comparable records as provided in its governing law.

(d) For a business trust, its agreement of trust and declaration of trust.

(e) For a domestic or foreign corporation for profit, its articles of incorporation, bylaws, and other agreements among its shareholders which are authorized by its governing law, or comparable records as provided in its governing law.

(f) For any other organization, the basic records that create the organization and determine its internal governance and the relations among the persons that own such organization, have an interest in the organization, or are members of the organization.

(9) “Personal liability” means personal liability for a debt, liability, or other obligation of an organization which is imposed on a person that co-owns, has an interest in, or is a member of the organization:

(a) By the organization's governing law solely by reason of the person's co-owning, having an interest in, or being a member of the organization; or

(b) By the organization's organizational documents under a provision of the organization's governing law authorizing those documents to make one or more specified persons liable for all or specified debts, liabilities, and other obligations of the organization solely by reason of the person or persons' co-owning, having an interest in, or being a member of the organization.

(10) "Surviving organization" means an organization into which one or more other organizations are merged. A surviving organization may preexist the merger or be created by the merger.

SECTION 1002. CONVERSION.

(1) An organization other than a limited liability company may convert to a limited liability company, and a limited liability company may convert to another organization, other than an organization which is also a domestic limited liability company governed by this act, pursuant to this section and ss. 1003-1005 and a plan of conversion, if:

(a) The other organization's governing law authorizes the conversion.

(b) The conversion is permitted by the law of the jurisdiction that enacted the governing law.

(c) The other organization complies with its governing law in effecting the conversion.

(2) A plan of conversion must be in a record and must include:

(a) The name and form of the organization before conversion.

(b) The name and form of the organization after conversion.

(c) The terms and conditions of the conversion, including the manner and basis for converting interests in the converting organization into any combination of money, interests in the converted organization, and other consideration.

(d) The organizational documents of the converted organization that are, or are proposed to be, in a record.

SECTION 1003. ACTION ON PLAN OF CONVERSION BY CONVERTING LIMITED LIABILITY COMPANY.

(1) Subject to s. 1010, a plan of conversion must be consented to by members who own a majority of the rights to receive distributions at the time the consent is effective, provided, if there is more than one class or group of members, the plan of conversion must be consented to by those members or, if there is more than 1 class or group of members, then by each class or group of members, in either case, [by members][134] who own more than 50 percent of the then current percentage or other interest in the profits of the limited liability company owned by all of the members or by the members in each class or group, as appropriate. [135]

(2) Subject to s. 1010 and any contractual rights, after a conversion is approved, and at any time before a filing is made under s. 1004, a converting limited liability company may amend the plan or abandon the planned conversion:

(a) As provided in the plan.

(b) Except as prohibited by the plan, by the same consent as was required to approve the plan.

[***Reporter's Note: the following is the Delaware approach (full text), and Committee to decide if this is better approach***:

"If the limited liability company agreement specifies the manner of authorizing a conversion of the limited liability company, the conversion shall be authorized as specified in the limited liability company agreement. If the limited liability company agreement does not specify the manner of authorizing a conversion of the limited liability company and does not prohibit a conversion of the limited liability company, the conversion shall be authorized in the same manner as is specified in the limited liability company agreement for authorizing a merger or consolidation that involves the limited liability company as a constituent party to the merger or consolidation. If the limited liability company agreement does not specify the manner of authorizing a conversion of the limited liability company or a merger or consolidation that involves the limited liability company as a constituent party and does not prohibit a conversion of the limited liability company, the conversion shall be authorized by the approval by the members or, if there is more than 1 class or group of members, then by each class or group of members, in either case, by members who own more than 50 percent of the then current percentage or other interest in the profits of the domestic limited liability company owned by all of the members or by the members in each class or group, as appropriate." (Sec. 18-216(b))]

[134] To confirm that these words used in Delaware law are redundant and can be eliminated.

[135] The Committee decided to use the Delaware approach as the "majority in interest" threshold under current law (608.4381(1)) is less clear as to what economic interest criteria should be used. The Committee should determine whether the other approval provisions in the Del apply.

SECTION 1004. FILINGS REQUIRED FOR CONVERSION; EFFECTIVE DATE.

(1) After a plan of conversion is approved:

(a) A converting limited liability company shall deliver to the Department of State for filing a certificate of conversion, which must be signed as provided in Section 203(a) and must include:

1. A statement that the limited liability company has been converted into another organization.

2. The name and form of the organization and the jurisdiction of its governing law.

3. The date the conversion is effective under the governing law of the converted organization.

4. A statement that the conversion was approved as required by this act.

5. A statement that the conversion was approved as required by the governing law of the converted organization.

6. If the converted organization is a foreign organization not authorized to transact business in this state, the street and mailing address of an office which the Department of State may use for the purposes of s. 1005(3).

(b) If the converting organization is not a converting limited liability company, the converting organization shall deliver to the Department of State for filing:

1. A certificate of organization containing the information required by s. 201, signed as required by s. 203.

2. A certificate of conversion, signed in accordance with s. 203 and by the converting organization as required by applicable law, which certificate of conversion must include:

a. A statement that the limited liability company was converted from another organization.

b. The name and form of the converting organization and the jurisdiction of its governing law.

c. A statement that the conversion was approved as required by this act.

d. A statement that the conversion was approved in a manner that complied with the converting organization's governing law.

(c) A converting limited liability company is not required to file a certificate of conversion pursuant to paragraph (a) if the converting limited liability company files a certificate of conversion that substantially complies with the requirements of this section pursuant to s. 607.1115, s. 620.2104(1), or s. 620.8914(1)(b) and contains the signatures required by this chapter. In such a case, the other certificate of conversion may also be used for purposes of s. 1005(4).

(2) A conversion becomes effective:

(a) If the converted organization is a limited liability company, when the certificate of organization takes effect.

(b) If the converted organization is not a limited liability company, as provided by the governing law of the converted organization.

SECTION 1005. EFFECT OF CONVERSION.

(1) An organization that has been converted pursuant to this act is for all purposes the same entity that existed before the conversion.

(2) When a conversion takes effect:

(a) Title to all real and other property, or any interest in such property, owned by the converting organization at the time of its conversion remains vested in the converted organization without reversion or impairment under this act.

(b) All debts, liabilities, or other obligations of the converting organization continue as debts, liabilities, or other obligations of the converted organization.

(c) An action or proceeding pending by or against the converting organization may be continued as if the conversion had not occurred.

(d) Except as prohibited by other law, all of the rights, privileges, immunities, powers, and purposes of the converting organization remain vested in the converted organization.

(e) Except as otherwise provided in the plan of conversion, the terms and conditions of the plan of conversion take effect.

(f) Except as otherwise agreed, the conversion does not dissolve a converting limited liability company for the purposes of ss. 701-714.

(3) A converted organization that is a foreign organization consents to the jurisdiction of the courts of this state to enforce any obligation owed by the converting limited liability company, if before the conversion the converting limited liability company was subject to suit in this state on the obligation. A converted organization that is a foreign organization and not authorized to transact business in this state appoints the Department of State as its agent for service of process for purposes of enforcing an obligation under this subsection and any appraisal rights of limited partners under ss. 1011-1022 to the extent applicable to the conversion. Service on the Department of State under this subsection is made in the same manner and with the same consequences as in s. 116(c) and (d).

(4) A copy of the statement of conversion, certified by the Department of State, may be filed in any county of this state in which the converting organization holds an interest in real property.

SECTION 1006. MERGER.

(1) A limited liability company may merge with one or more other constituent organizations pursuant to this section and ss. 1007-1009 and a plan of merger, if:

(a) The governing law of each of the other organizations authorizes the merger.

(b) The merger is permitted by the law of a jurisdiction that enacted each of those governing laws.

(c) Each of the other organizations complies with its governing law in effecting the merger.

(2) A plan of merger must be in a record and must include:

(a) The name and form of each constituent organization.

(b) The name and form of the surviving organization.

(c) The terms and conditions of the merger, including the manner and basis for converting the interests in each constituent organization into any combination of money, interests in the surviving organization, and other consideration.

(d) Any amendments to be made by the merger to the surviving organization's organizational documents [that are, or are proposed to be, in a record.][136]

SECTION 1007. ACTION ON PLAN OF MERGER BY CONSTITUENT LIMITED LIABILITY COMPANY.

(1) Subject to Section 1014, a plan of merger must be consented to by the members or, if there is more than one class or group of members, then by each class or group of members, in either case, [by members][137] who own more than 50 percent of the then current percentage or other interest in the profits of the limited liability company owned by all of the members or by the members in each class or group, as appropriate. [138]

(2) Subject to s. 1010 and any contractual rights, after a merger is approved, and at any time before a filing is made under s. 1008, a constituent limited liability company may amend the plan or abandon the planned merger:

(a) As provided in the plan; and

(b) Except as prohibited by the plan, with the same consent as was required to approve the plan.

[***Reporter's Note:*** *the corresponding approval provisions of Delaware law follow:*

". . . . Unless otherwise provided in the limited liability company agreement, an agreement of merger or consolidation or a plan of merger shall be approved by each domestic limited liability company which is to merge or consolidate by the members or, if there is more than one class or group of members, then by each class or group of members, in either case, by members who own more than 50 percent of the then current percentage or other interest in the profits of the domestic limited liability company owned by all of the members or by the members in each class or group, as appropriate. In connection with a merger or consolidation hereunder, rights or securities of, or interests in, a domestic limited liability company or other business entity which is a constituent party to the merger or consolidation may be exchanged for or converted into cash, property, rights or securities of, or interests in, the surviving or resulting domestic limited liability company or other business entity or, in addition to or in lieu thereof, may be exchanged for or converted into cash, property, rights or securities of, or interests in, a domestic limited liability company or other business entity which is not the surviving or resulting limited liability company or other business entity in the merger or consolidation or may be

[136] To discuss why this provision is necessary.
[137] To confirm that these words used in Delaware law are redundant and can be eliminated.
[138] See footnote to approval provisions regarding the issue here.

cancelled. Notwithstanding prior approval, an agreement of merger or consolidation or a plan of merger may be terminated or amended pursuant to a provision for such termination or amendment contained in the agreement of merger or consolidation or plan of merger." (Taken in from Sec. 18-209(b))]

SECTION 1008. FILINGS REQUIRED FOR MERGER; EFFECTIVE DATE.

(1) After each constituent organization has approved a merger, a certificate of merger must be signed on behalf of:

(a) Each constituent limited liability company in accordance with s. 203(a).

(b) Each other constituent organization, as provided in its governing law [by its authorized representative].[139]

(2) The certificate of merger must include:

(a) The name and form of each constituent organization and the jurisdiction of its governing law.

(b) The name and form of the surviving organization, the jurisdiction of its governing law, and, if the surviving organization is created by the merger, a statement to that effect.

(c) The date the merger is effective under the governing law of the surviving organization.

(d) Any amendments provided for in the plan of merger for the organizational document that created the organization [that is in a public record][140].

(e) A statement as to each constituent organization that the merger was approved as required by the organization's governing law.

(f) If the surviving organization is a foreign organization not authorized to transact business in this state, the street and mailing address of an office which the Department of State may use for the purposes of s. 1009(2).

(g) Any additional information required by the governing law of any constituent organization.

(3) Each constituent limited liability company shall deliver the certificate of merger for filing in the Department of State unless the constituent limited liability company is named as a

[139] Bracketed language is used in the LP Act.
[140] Bracketed language in uniform act but not LI

party or constituent organization in articles of merger or a certificate of merger filed for the same merger in accordance with s. 607.1109(1), s. 620.2108(1), s. 617.1108, or s. 620.8918(1) and (2) and such articles of merger or certificate of merger substantially complies with the requirements of this section. In such a case, the other articles of merger or certificate of merger may also be used for purposes of s. 1009(3).

(4) A merger becomes effective under this act:

(a) If the surviving organization is a limited liability company, upon the later of:

1. Compliance with subsection (3); or

2. Subject to s. 204(c), as specified in the certificate of merger; or

(b) If the surviving organization is not a limited liability company, as provided by the governing law of the surviving organization.

SECTION 1009. EFFECT OF MERGER.

(1) When a merger becomes effective:

(a) The surviving organization continues.

(b) Each constituent organization that merges into the surviving organization ceases to exist as a separate entity.

(c) All property owned by each constituent organization that ceases to exist vests in the surviving organization.

(d) All debts, liabilities, or other obligations of each constituent organization that ceases to exist continue as debts, liabilities or other obligations of the surviving organization.

(e) An action or proceeding pending by or against any constituent organization that ceases to exist may be continued as if the merger had not occurred.

(f) Except as prohibited by other law, all of the rights, privileges, immunities, powers, and purposes of each constituent organization that ceases to exist vest in the surviving organization.

(g) Except as otherwise provided in the plan of merger, the terms and conditions of the plan of merger take effect.

(h) Except as otherwise agreed, if a constituent limited liability company ceases to exist, the merger does not dissolve the limited liability company for the purposes of ss. 701-714.

(i) Any amendments provided for in the certificate of merger for the organizational document that created the organization become effective.

(2) A surviving organization that is a foreign organization consents to the jurisdiction of the courts of this state to enforce any obligation owed by a constituent organization, if before the merger the constituent organization was subject to suit in this state on the obligation. A surviving organization that is a foreign organization and not authorized to transact business in this state shall appoint the Department of State as its agent for service of process for the purposes of enforcing an obligation under this subsection and any appraisal rights of members under ss. 1011-1022 to the extent applicable to the merger. Service on the Department of State under this subsection is made in the same manner and with the same consequences as in s. 116(c) and (d).

(3) A copy of the certificate of merger, certified by the Department of State, may be filed in any county of this state in which a constituent organization holds an interest in real property.

SECTION 1010. RESTRICTIONS ON APPROVAL OF MERGERS AND CONVERSIONS.

(a) If a member of a constituent or converting limited liability company will have personal liability with respect to a surviving or converted organization, approval or amendment of a plan of merger or conversion are ineffective without the consent of the member, unless:

(1) the company's operating agreement provides for approval of a merger or conversion with the consent of fewer than all the members; and

(2) the member has consented to the provision of the operating agreement.

(b) A member does not give the consent required by subsection (a) merely by consenting to a provision of the operating agreement that permits the operating agreement to be amended with the consent of fewer than all the members.

SECTION 1011. APPRAISAL RIGHTS; DEFINITIONS.

The following definitions apply to this section and ss. 1012-1022:

(1) "Affiliate" means a person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with another person. For purposes of s. 1012(2)(d), a person is deemed to be an affiliate of its senior executives.

(2) "Appraisal event" means an (in s. 1012(1).

(3) “Beneficial member” means a person who is the beneficial owner of a membership interest held in a voting trust or by a nominee on the beneficial owner’s behalf.

(4) “Converted entity” means the other business entity into which a domestic limited liability company converts pursuant to ss. 1002-1005.

(5) “Fair value” means the value of the member’s membership interests determined:

(a) Immediately before the effectuation of the appraisal event to which the member objects.

(b) Using customary and current valuation concepts and techniques generally employed for similar businesses in the context of the transaction requiring appraisal, excluding any appreciation or depreciation in anticipation of the transaction to which the member objects unless exclusion would be inequitable to the limited liability company and its remaining members.

(c) For a limited liability company with 10 or fewer members, without discounting for lack of marketability or minority status.

(6) “Interest” means interest from the effective date of the appraisal event to which the member objects until the date of payment, at the rate of interest determined for judgments in accordance with s. 55.03, determined as of the effective date of the appraisal event.

(7) “Limited liability company” means the domestic limited liability company that issued the membership interest held by a member demanding appraisal and, for matters covered in ss. 1012-1022, includes the converted entity in a conversion or the surviving entity in a merger.

(8) “Record member” means each person who is identified as a member [in the current list of members maintained for purposes of s. 410(a)(1)][141] by the limited liability company, or to the extent the limited liability company has failed to maintain a current list, each person that is the rightful owner of a membership interest in the limited liability company. A transferee of a membership interest is not a record member.

(9) “Senior executive” means a manager or managing member or the chief executive officer, chief operating officer, chief financial officer, or anyone in charge of a principal business

[141] To conform after final decision made as to whether 410 will require a list of members to be maintained for inspection at all times (as provided under curren

unit or function of a limited liability company or of a manager or managing member of the limited liability company.

(10) "Member" means a record member or a beneficial member.

(11) "Membership interest" [means a member's transferable interest and all other rights as a member of the limited liability company that issued the membership interest, including any voting rights, management rights or any other rights under this chapter or operating agreement of the limited liability company][142] except, if the appraisal rights of a member under s. 1012 pertain to only a certain class or series of a membership interest, the term "membership interest" means only the membership interest pertaining to such class or series.

(12) "Surviving entity" means the other business entity into which a domestic limited liability company is merged pursuant to ss. 1006-1009.

SECTION 1012. RIGHT OF MEMBERS TO APPRAISAL.

(1) A member of a domestic limited liability company is entitled to appraisal rights, and to obtain payment of the fair value of that member's membership interest, in the following events:

(a) Consummation of a merger of such limited liability company pursuant to this act [chapter] and the member possessed the right to vote upon the merger; or

(b) Consummation of a conversion of such limited liability company pursuant to this act [chapter] and the member possessed the right to vote upon the conversion.

(2) Notwithstanding subsection (1), the availability of appraisal rights shall be limited in accordance with the following provisions:

(a) Appraisal rights shall not be available for membership interests which are:

1. Listed on the New York Stock Exchange or the American Stock Exchange or designated as a national market system security on an interdealer quotation system by the National Association of Securities Dealers, Inc.; or

[142] This definition based upon current law definition of "membership interest" as there is no corresponding definition in the uniform act.

2. Not listed or designated as provided in subparagraph 1. but are issued by a limited liability company that has at least 500 members and all membership interests of the limited liability company, including membership interests that are limited to a right to receive distributions, have a market value of at least $10 million, exclusive of the value of any such interests held by its managing members, managers, and other senior executives owning more than 10 percent of the rights to receive distributions from the limited liability company.

(b) The applicability of paragraph (a) shall be determined as of the date fixed to determine the members entitled to receive notice of, and to vote upon, the appraisal event.

(c) Paragraph (a) shall not apply, and appraisal rights shall be available pursuant to subsection (1), for any members who are required by the appraisal event to accept for their membership interests anything other than cash or a proprietary interest of an entity that satisfies the standards set forth in paragraph (a) at the time the appraisal event becomes effective.

(d) Paragraph (a) shall not apply, and appraisal rights shall be available pursuant to subsection (1), for the holders of a membership interest if:

1. Any of the members' interests in the limited liability company or the limited liability company's assets are being acquired or converted, whether by merger, conversion, or otherwise, pursuant to the appraisal event by a person, or by an affiliate of a person, who:

a. Is, or at any time in the 1-year period immediately preceding approval of the appraisal event was, the beneficial owner of 20 percent or more of those interests in the limited liability company entitled to vote on the appraisal event, excluding any such interests acquired pursuant to an offer for all interests having such voting rights if such offer was made within 1 year prior to the appraisal event for consideration of the same kind and of a value equal to or less than that paid in connection with the appraisal event; or

b. Directly or indirectly has, or at any time in the 1-year period immediately preceding approval of the appraisal event had, the power, contractually or otherwise, to cause the appointment or election of any senior executives; or

2. Any of the members' interests in the limited liability company or the limited liability company's assets are being acquired or converted, whether by merger,

conversion, or otherwise, pursuant to the appraisal event by a person, or by an affiliate of a person, who is, or at any time in the 1-year period immediately preceding approval of the appraisal event was, a senior executive of the limited liability company or a senior executive of any affiliate of the limited liability company, and that senior executive will receive, as a result of the limited liability company action, a financial benefit not generally available to members, other than:

a. Employment, consulting, retirement, or similar benefits established separately and not as part of or in contemplation of the appraisal event;

b. Employment, consulting, retirement, or similar benefits established in contemplation of, or as part of, the appraisal event that are not more favorable than those existing before the appraisal event or, if more favorable, that have been approved by the limited liability company; or

c. In the case of a managing member or manager of the limited liability company who will, during or as the result of the appraisal event, become a managing member, manager, general partner, or director of the surviving or converted entity or one of its affiliates, those rights and benefits as a managing member, manager, general partner, or director that are provided on the same basis as those afforded by the surviving or converted entity generally to other managing members, managers, general partners, or directors of the surviving or converted entity or its affiliate.

(e) For the purposes of sub-subparagraph (d)1.a. only, the term “beneficial owner” means any person who, directly or indirectly, through any contract, arrangement, or understanding, other than a revocable proxy, has or shares the right to vote, or to direct the voting of, an interest in a limited liability company with respect to approval of the appraisal event, provided a member of a national securities exchange shall not be deemed to be a beneficial owner of an interest in a limited liability company held directly or indirectly by it on behalf of another person solely because such member is the record holder of interests in the limited liability company if the member is precluded by the rules of such exchange from voting without instruction on contested matters or matters that may affect substantially the rights or privileges of the holders of the interests in the limited liability company to be voted. When two or more persons agree to act together for the purpose of voting such interests, each member of

the group formed thereby shall be deemed to have acquired beneficial ownership, as of the date of such agreement, of all voting interests in the limited liability company beneficially owned by any member of the group.

(3) A member entitled to appraisal rights under this section and ss. 1013-1022 may not challenge a completed appraisal event unless the appraisal event:

(a) Was not effectuated in accordance with the applicable provisions of this section and ss. 1013-1022, or the limited liability company's articles of organization or operating agreement; or

(b) Was procured as a result of fraud or material misrepresentation.

(4) A limited liability company may modify, restrict, or eliminate the appraisal rights provided in this section and ss. 1013-1022 in its operating agreement.

SECTION 1013. ASSERTION OF RIGHTS BY NOMINEES AND BENEFICIAL OWNERS.

(1) A record member may assert appraisal rights as to fewer than all the membership interests registered in the record member's name which are owned by a beneficial member only if the record member objects with respect to all membership interests of the class or series owned by that beneficial member and notifies the limited liability company in writing of the name and address of each beneficial member on whose behalf appraisal rights are being asserted. The rights of a record member who asserts appraisal rights for only part of the membership interests of the class or series held of record in the record member's name under this subsection shall be determined as if the membership interests to which the record member objects and the record member's other membership interests were registered in the names of different record members.

(2) A beneficial member may assert appraisal rights as to a membership interest held on behalf of the member only if such beneficial member:

(a) Submits to the limited liability company the record member's written consent to the assertion of such rights no later than the date referred to in s. 1016(2)(b)2.

(b) Does so with respect to all membership interests of the class or series that are beneficially owned by the beneficial member.

SECTION 1014. NOTICE OF APPRAISAL RIGHTS.

(1) If a proposed appraisal event is to be submitted to a vote at a members' meeting, the meeting notice must state that the limited liability company has concluded that members are, are not, or may be entitled to assert appraisal rights under this act.

(2) If the limited liability company concludes that appraisal rights are or may be available, a copy of ss. 1011-1022 must accompany the meeting notice sent to those record members entitled to exercise appraisal rights.

(3) If the appraisal event is to be approved other than by a members' meeting, the notice referred to in subsection (1) must be sent to all members at the time that consents are first solicited, whether or not consents are solicited from all members, [and include the materials described in s. 1016.][143]

SECTION 1015. NOTICE OF INTENT TO DEMAND PAYMENT.

(1) If a proposed appraisal event is submitted to a vote at a members' meeting, or is submitted to a member pursuant to a consent vote, a member who is entitled to and who wishes to assert appraisal rights with respect to any class or series of membership interests:

(a) Must deliver to a manager or managing member of the limited liability company before the vote is taken, or within 20 days after receiving the notice pursuant to s. [1014(3)] if action is to be taken without a member meeting, written notice of such person's intent to demand payment if the proposed appraisal event is effectuated.

(b) Must not vote, or cause or permit to be voted, any membership interests of such class or series in favor of the appraisal event.

(2) A person who may otherwise be entitled to appraisal rights, but who does not satisfy the requirements of subsection (1), is not entitled to payment under ss. 1011-1022.

[143] To discuss whether this should be clarified. If the form of demand under 1016(2)(a) is meant to be included in this description of "other materials" then information for that form may not yet be available to the company. Also the 40 - 60 day limiters for submitting the form may not correspond (which may be the fix to 1016 that Gary Teblum mentioned at the 9/30/10 meeting).

SECTION 1016. APPRAISAL NOTICE AND FORM.[144]

(1) If the proposed appraisal event becomes effective, the limited liability company must deliver a written appraisal notice and form required by paragraph (2)(a) to all members who satisfied the requirements of s. 1015.

(2) The appraisal notice must be sent no earlier than the date the appraisal event became effective and no later than 10 days after such date and must:

(a) Supply a form that specifies the date that the appraisal event became effective and that provides for the member to state:

1. The member's name and address.

2. The number, classes, and series of membership interests as to which the member asserts appraisal rights.

3. That the member did not vote for the transaction.

4. Whether the member accepts the limited liability company's offer as stated in subparagraph (b)4.

5. If the offer is not accepted, the member's estimated fair value of the membership interests and a demand for payment of the member's estimated value plus interest.

(b) State:

1. Where the form described in paragraph (a) must be sent.

2. A date by which the limited liability company must receive the form, which date may not be fewer than 40 nor more than 60 days after the date the appraisal notice and form described in this subsection are sent, and that the member shall have waived the right to demand appraisal with respect to the membership interests unless the form is received by the limited liability company by such specified date.

3. In the case of membership interests represented by a certificate, the location at which certificates for such certificated membership interests must be deposited, if that action is required by the limited liability company, and the date by which those certificates must

[144] Gary Teblum mentioned at 9/30/10 meeting he would provide changes to clarify or fix notice and response period requirements.

be deposited, which date may not be earlier than the date for receiving the required form under subparagraph 2.

4. The limited liability company's estimate of the fair value of the membership interests.

5. An offer to each member who is entitled to appraisal rights to pay the limited liability company's estimate of fair value set forth in subparagraph 4.

6. That, if requested in writing, the limited liability company will provide to the member so requesting, within 10 days after the date specified in subparagraph 2., the number of members who return the forms by the specified date and the total number of membership interests owned by them.

7. The date by which the notice to withdraw under s. 1017 must be received, which date must be within 20 days after the date specified in subparagraph 2.

(c) Be accompanied by:

1. Financial statements of the limited liability company that issued the membership interests to be appraised, consisting of a balance sheet as of the end of the fiscal year ending not more than 15 months prior to the date of the limited liability company's appraisal notice, an income statement for that year, a cash flow statement for that year, and the latest available interim financial statements, if any.

2. A copy of ss. 1011-1022.

SECTION 1017. PERFECTION OF RIGHTS; RIGHT TO WITHDRAW.

(1) A member who wishes to exercise appraisal rights must execute and return the form received pursuant to s. 1016(1) and, in the case of certificated membership interests and if the limited liability company so requires, deposit the member's certificates in accordance with the terms of the notice by the date referred to in the notice pursuant to s. 1016(2)(b)2. Once a member deposits that member's certificates or, in the case of uncertificated membership interests, returns the executed form described in s. 1016(2), the member loses all rights as a member, unless the member withdraws pursuant to subsection (3). Upon receiving a demand for

payment from a member who holds an uncertificated membership interest, the limited liability company shall make an appropriate notation of the demand for payment in its records.

(2) The limited liability company may restrict the transfer of such membership interests from the date the member delivers the items required by subsection (1).

(3) A member who has complied with subsection (1) may nevertheless decline to exercise appraisal rights and withdraw from the appraisal process by so notifying the limited liability company in writing by the date set forth in the appraisal notice pursuant to s. 1016(2)(b)7. A member who fails to so withdraw from the appraisal process may not thereafter withdraw without the limited liability company's written consent.[145]

(4) A member who does not execute and return the form and, in the case of certificated membership interests, deposit that member's certificates, if so required by the limited liability company, each by the date set forth in the notice described in subsection (2), shall not be entitled to payment under this chapter.

(5) If the member's right to receive fair value is terminated other than by the purchase of the membership interest by the limited liability company, all rights of the member, with respect to such membership interest, shall be reinstated effective as of the date the member delivered the items required by subsection (1), including the right to receive any intervening payment or other distribution with respect to such membership interest, or, if any such rights have expired or any such distribution other than a cash payment has been completed, in lieu thereof at the election of the limited liability company, the fair value thereof in cash as determined by the limited liability company as of the time of such expiration or completion, but without prejudice otherwise to any action or proceeding of the limited liability company that may have been taken by the limited liability company on or after the date the member delivered the items required by subsection (1).

SECTION 1018. MEMBER'S ACCEPTANCE OF LIMITED LIABILITY COMPANY'S OFFER.

[145] To consider clarification that if the withdrawal from the process occurs may still approve the plan of merger or conversion if the time period for approval is not closed. Certain rights may be available to approving members that are not available to non-approving members (such as the right to continue in the company in the case of a cash-out merger).

(1) If the member states on the form provided in s. 1016(1) that the member accepts the offer of the limited liability company to pay the limited liability company's estimated fair value for the membership interest, the limited liability company shall make such payment to the member within 90 days after the limited liability company's receipt of the items required by s. 1017(1).

(2) Upon payment of the agreed value, the member shall cease to have any interest in the membership interest.

SECTION 1019. PROCEDURE IF MEMBER IS DISSATISFIED WITH OFFER.

(1) A member who is dissatisfied with the limited liability company's offer as set forth pursuant to s. 1016(2)(b)5. must notify the limited liability company on the form provided pursuant to s. 1016(1) of the member's estimate of the fair value of the membership interest and demand payment of that estimate plus interest.

(2) A member who fails to notify the limited liability company in writing of the member's demand to be paid the member's estimate of the fair value plus interest under subsection (1) within the timeframe set forth in s. 1016(2)(b)5. waives the right to demand payment under this section and shall be entitled only to the payment offered by the limited liability company pursuant to s. 1016(2)(b)5.

SECTION 1020. COURT ACTION.

(1) If a member makes demand for payment under s. 1019 which remains unsettled, the limited liability company shall commence a proceeding within 60 days after receiving the payment demand and petition the court to determine the fair value of the membership interest and accrued interest. If the limited liability company does not commence the proceeding within the 60-day period, any member who has made a demand pursuant to s. 1019 may commence the proceeding in the name of the limited liability company.

(2) The proceeding shall be commenced in the appropriate court of the county in which the limited liability company's principal office in this state is located or, if none, the county in which its registered agent is located. If the limited liability company is a foreign limited liability company without a registered agent in this state, the proceeding shall be commenced in the

county in this state in which the principal office or registered agent of the domestic limited liability company was located at the time of the appraisal event.

(3) All members, whether or not residents of this state, whose demands remain unsettled shall be made parties to the proceeding as in an action against their membership interests. The limited liability company shall serve a copy of the initial pleading in such proceeding upon each member party who is a resident of this state in the manner provided by law for the service of a summons and complaint and upon each nonresident member party by registered or certified mail or by publication as provided by law.

(4) The jurisdiction of the court in which the proceeding is commenced under subsection (2) is plenary and exclusive. If it so elects, the court may appoint one or more persons as appraisers to receive evidence and recommend a decision on the question of fair value. The appraisers shall have the powers described in the order appointing them or in any amendment to the order. The members demanding appraisal rights are entitled to the same discovery rights as parties in other civil proceedings. There shall be no right to a jury trial.

(5) Each member made a party to the proceeding is entitled to judgment for the amount of the fair value of such member's membership interests, plus interest, as found by the court.

(6) The limited liability company shall pay each such member the amount found to be due within 10 days after final determination of the proceedings. Upon payment of the judgment, the member shall cease to have any interest in the membership interests.

SECTION 1021. COURT COSTS AND COUNSEL FEES.

(1) The court in an appraisal proceeding shall determine all costs of the proceeding, including the reasonable compensation and expenses of appraisers appointed by the court. The court shall assess the costs against the limited liability company, except that the court may assess costs against all or some of the members demanding appraisal, in amounts the court finds equitable, to the extent the court finds such members acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this chapter.

(2) The court in an appraisal proceeding may also assess the fees and expenses of counsel and experts for the respective parties, in amounts the court finds equitable:

(a) Against the limited liability company and in favor of any or all members demanding appraisal if the court finds the limited liability company did not substantially comply with ss. 1013 and 1016; or

(b) Against either the limited liability company or a member demanding appraisal, in favor of any other party, if the court finds that the party against whom the fees and expenses are assessed acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this chapter.

(3) If the court in an appraisal proceeding finds that the services of counsel for any member were of substantial benefit to other members similarly situated, and that the fees for those services should not be assessed against the limited liability company, the court may award to such counsel reasonable fees to be paid out of the amounts awarded the members who were benefited.

(4) To the extent the limited liability company fails to make a required payment pursuant to s. 1018, the member may sue directly for the amount owed and, to the extent successful, shall be entitled to recover from the limited liability company all costs and expenses of the suit, including attorney's fees.

SECTION 1022. LIMITATION ON LIMITED LIABILITY COMPANY PAYMENT.

(1) No payment shall be made to a member seeking appraisal rights if, at the time of payment, the limited liability company is unable to meet the distribution standards of s. 405. In such event, the member shall, at the member's option:

(a) Withdraw the notice of intent to assert appraisal rights, which shall in such event be deemed withdrawn with the consent of the limited liability company; or

(b) Retain the status as a claimant against the limited liability company and, if the limited liability company is liquidated, be subordinated to the rights of creditors of the limited liability company but have rights superior to the members not asserting appraisal rights and, if it is not liquidated, retain the right to be paid for the membership interest, which right the limited liability company shall be obliged to satisfy when the restrictions of this section do not apply.

(2) The member shall exercise the option under paragraph (1)(a) or paragraph (1)(b) by written notice filed with the limited liability company within 30 days after the limited liability company has given written notice that the payment for the membership interests cannot be made because of the restrictions of this section. If the member fails to exercise the option, the member shall be deemed to have withdrawn the notice of intent to assert appraisal rights.

SECTION 1023. APPLICATION OF OTHER LAWS TO PROVISIONS GOVERNING CONVERSIONS AND MERGERS.

(1) The provisions of ss. 1001-1022 do not preclude an entity from being converted or merged under other law.

(2) The provisions of ss. 1001-1022 do not authorize any act prohibited by other applicable law or change the requirements of any law or rule regulating a specific organization or industry, such as a not-for-profit organization, insurance, banking or investment establishment, or other regulated business or activity.

[ARTICLE] 11

MISCELLANEOUS PROVISIONS

SECTION 1101. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 1102. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This act modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b) [, except to the extent permitted pursuant to ss. 15.16, 116.34, and 668.50 of such act.][146]

[146] The Committee decided to defer action on this section. The bracketed "exception" is in the LP Act. A member of the Committee (Mandy Rae O'Callaghan?) volunteered to provide a report and recommendation to Committee as to whether the LP act exception should be added any other changes should be made to this section.

SECTION 1103. TAX EXEMPTION ON INCOME OF CERTAIN LIMITED LIABILITY COMPANIES.

(1) A limited liability company classified as a partnership for federal income tax purposes, or a single member limited liability company which is disregarded as an entity separate from its owner for federal income tax purposes, and organized pursuant to this chapter or qualified to do business in this state as a foreign limited liability company is not an "artificial entity" within the purview of s. 220.02 and is not subject to the tax imposed under chapter 220. If a single member limited liability company is disregarded as an entity separate from its owner for federal income tax purposes, its activities are, for purposes of taxation under chapter 220, treated in the same manner as a sole proprietorship, branch, or division of the owner.

(2) For purposes of taxation under chapter 220, a limited liability company formed in this state or authorized to transact business in this state as a foreign limited liability company shall be classified as a partnership, or a limited liability company which has only one member shall be disregarded as an entity separate from its owner for federal income tax purposes, unless classified otherwise for federal income tax purposes, in which case the limited liability company shall be classified identically to its classification for federal income tax purposes. For purposes of taxation under chapter 220, a member or an transferee of a member of a limited liability company formed in this state or qualified to do business in this state as a foreign limited liability company shall be treated as a resident or nonresident partner unless classified otherwise for federal income tax purposes, in which case the member or transferee of a member shall have the same status as such member or transferee of a member has for federal income tax purposes.

(3) Single-member limited liability companies and other entities that are disregarded for federal income tax purposes must be treated as separate legal entities for all non-income-tax purposes. The Department of Revenue shall adopt rules to take into account that single-member disregarded entities such as limited liability companies and qualified subchapter S corporations may be disregarded as separate entities for federal tax purposes and therefore may report and account for income, employment, and other taxes under the taxpayer identification number of the owner of the single-member entity.

Note that ABA prototype does not contain the exception. The DOS inquired as to what effect this section would have on its current policy concerning electronic .

SECTION 1104. APPLICATION OF CORPORATION CASE LAW TO SET ASIDE LIMITED LIABILITY.

In any case in which a party seeks to hold the members of a limited liability company personally responsible for the liabilities or alleged improper actions of the limited liability company, the court shall apply the case law which interprets the conditions and circumstances under which the corporate veil of a corporation may be pierced under the law of this state.

SECTION 1105. INTERROGATORIES BY DEPARTMENT OF STATE; OTHER POWERS OF DEPARTMENT OF STATE.

(1) The Department of State may direct to any limited liability company or foreign limited liability company subject to this chapter, and to any member or manager of any limited liability company or foreign limited liability company subject to this chapter, any interrogatories reasonably necessary and proper to enable the Department of State to ascertain whether the limited liability company or foreign limited liability company has complied with all of the provisions of this chapter applicable to the limited liability company or foreign limited liability company. The interrogatories shall be answered within 30 days after the date of mailing, or within such additional time as fixed by the Department of State. The answers to the interrogatories shall be full and complete and shall be made in writing and under oath. If the interrogatories are directed to an individual, they shall be answered by the individual, and if directed to a limited liability company or foreign limited liability company, they shall be answered by a manager of a manager-managed company, a member of a member-managed company, or a fiduciary if the company is in the hands of a receiver, trustee, or other court-appointed fiduciary.

(2) The Department of State need not file any record in a court of competent jurisdiction to which the interrogatories relate until the interrogatories are answered as provided in this chapter, and not then if the answers thereto disclose that the record is not in conformity with the requirements of this chapter or if the Department of State has determined that the parties to such document have not paid all fees, taxes, and penalties due and owing this state. The Department of State shall certify to the Department of Legal Affairs, for such action as the Department of Legal Affairs may deem appropriate, all interrogatories and answers which

disclose a violation of this chapter.

(3) The Department of State may, based upon its findings hereunder or as provided in s. 213.053(15), bring an action in circuit court to collect any penalties, fees, or taxes determined to be due and owing the state and to compel any filing, qualification, or registration required by law. In connection with such proceeding, the department may, without prior approval by the court, file a *lis pendens* against any property owned by the limited liability company and may further certify any findings to the Department of Legal Affairs for the initiation of any action permitted pursuant to this chapter which the Department of Legal Affairs may deem appropriate.

(4) The Department of State shall have the power and authority reasonably necessary to enable it to administer this chapter efficiently, to perform the duties herein imposed upon it, and to adopt reasonable rules necessary to carry out its duties and functions under this chapter.

SECTION 1106. [RESERVED] [reserved for DOS "loop hole" prevention provisions][147]

SECTION 1107. RESERVATION OF POWER TO AMEND OR REPEAL.

The Legislature has the power to amend or repeal all or part of this chapter at any time, and all domestic and foreign limited liability companies subject to this chapter shall be governed by the amendment or repeal.

SECTION 1108. SAVINGS CLAUSE. [148]

(1) Except as provided in subsection (2), the repeal of a statute by this chapter does not affect:

(a) The operation of the statute or any action taken under it before its repeal, including, without limiting the generality of the foregoing, the continuing validity of any provision of the articles of organization, regulations, or operating agreements of a limited liability company authorized by the statute at the time of its adoption;

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[147] To prevent companies from avoiding late fee by merger or conversion. DOS indicated at 9/30/10 meeting it would provide language to the effect that late filing status (annual reports) of company must be corrected before undergoing merger or conversion. Discuss whether this should go under Article 10 instead.

[148] The language below has been taken from existing chapter 608 and is the same as the ABA prototype act (but for the clause starting with "including" in subsection (a)). The uniform act and the LP act provide "This act does not affect an action commenced, proceeding brought, or right accrued before this act takes effect." To determine whether this language should be added to this se oid construction inconsistencies.

(b) Any ratification, right, remedy, privilege, obligation, or liability acquired, accrued, or incurred under the statute before its repeal;

(c) Any violation of the statute, or any penalty, forfeiture, or punishment incurred because of the violation, before its repeal;

(d) Any proceeding, merger, sale of assets, reorganization, or dissolution commenced under the statute before its repeal, and the proceeding, merger, sale of assets, reorganization, or dissolution may be completed in accordance with the statute as if it had not been repealed.

(2) If a penalty or punishment imposed for violation of a statute is reduced by this chapter, the penalty or punishment if not already imposed shall be imposed in accordance with this chapter.

SECTION 1109. APPLICATION TO EXISTING RELATIONSHIPS.

(a) Before [January 1, 2014], this act governs only:

(1) a limited liability company formed on or after [January 1, 2013]; and

(2) except as otherwise provided in subsection (c), a limited liability company formed before [January 1, 2013] which elects, in the manner provided in its operating agreement or by law for amending the operating agreement, to be subject to this act.

(b) Except as otherwise provided in subsection (c), on and after [all-inclusive date] this act governs all limited liability companies.

(c) For the purposes applying this act to a limited liability company formed before [January 1, 2013]:

(1) the company's articles of organization are deemed to be the company's certificate of organization; and

(2) for the purposes of applying Section 102(10) and subject to Section 112(d), language in the company's articles of organization designating the company's management structure operates as if that language were in the operating agreement.

(d) [All documents submitted to the Department of State on or after [January 1, 2013] must comply with the filing requirements stipulated by this act.][149]

[149] Instead of using this general reference, the DOS said at the 9/30/10 meeting it would provide a specific list of filings that must comply with this requirement.

Legislative Note: *It is recommended that the "all-inclusive" date should be at least one year after the date of enactment but no longer than two years.*

Each enacting jurisdiction should consider whether: (i) this act makes material changes to the "default" (or "gap filler") rules of jurisdiction's predecessor statute; and (ii) if so, whether subsection (c) should carry forward any of those rules for pre-existing limited liability companies. In this assessment, the focus is on pre-existing limited liability companies that have left default rules in place, whether advisedly or not. The central question is whether, for such limited liability companies, expanding subsection (c) is necessary to prevent material changes to the members' "deal."

For an example of this type of analysis in the context of another business entity act, see the Uniform Limited Partnership act (2001), § 1206(c).

Section 301 (de-codifying statutory apparent authority) does not require any special transition provisions, because: (i) applying the law of agency, as explained in the Comments to Sections 301 and 407, will produce appropriate results; and (ii) the notion of "lingering apparent authority" will protect any third party that has previously relied on the statutory apparent authority of a member of a particular member-managed LLC or a manager of a particular manager-managed LLC. *RESTATEMENT (THIRD) OF AGENCY § 3.11, cmt. c (2006).*

It is unnecessary to expand subsection (c) of this act if the state's predecessor act is the original Uniform Limited Liability Company act, revised to provide for perpetual duration.

Uniform Comment

Subsection (c) – When a pre-existing limited liability company becomes subject to this act, the company ceases to be governed by the predecessor act, including whatever requirements that act might have imposed for the contents of the articles of organization.

SECTION 1110. REPEALS. Effective [January 1, 2014], the following acts and parts of acts are repealed: [the Florida Limited Liability Company Act, ss. 608.401 - 608.705, as amended, and in effect immediately before the effective date of this act].

SECTION 1111. EFFECTIVE DATE. This act takes effect on [January 1, 2013].

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MISCELLANEOUS PROVISIONS

MIA180,290,948 /15

A bill to be entitled

An act terminating authority of health care surrogates and surrogates appointed under living wills upon dissolution or annulment of marriage; providing an effective date.

Be it Enacted by the Legislature of the State of Florida:

Section 1. Section 765.2021, Florida Statutes, is hereby created to read:

765.2021. Termination of Authority Upon Dissolution of Marriage. -- A spouse's authority as a health care surrogate shall terminate upon the dissolution or annulment of the marriage, unless the document or the final judgment of dissolution provides otherwise. After the dissolution or annulment, the document designating a health care surrogate shall be administered as if the former spouse predeceased the other spouse and is therefore unable to perform his or her duties. The remainder of the document shall be unaffected.

Section 2. Section 765.3031, Florida Statutes, is hereby created to read:

765.3031. Termination of Authority Upon Dissolution of Marriage. -- A spouse's authority as a surrogate under a living will shall terminate upon the dissolution or annulment of the marriage, unless the document or the final judgment of dissolution provides otherwise. After the dissolution or annulment, the living will shall be administered as if the former spouse predeceased the other spouse, and the remainder of the document shall be unaffected.

Section 3. This act shall take effect July 1, 2012.

RM:6724080:1

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Sean Kelley, Chair, Guardianship and Advanced Directives Committee of the Real Property Probate & Trust Law Section

Address Kelley & Kelley, P.L., 904 Anastasia Blvd., Saint Augustine, FL 32080, Telephone (904) 819-9706

Position Type Guardianship and Advanced Directives Committee, RPPTL Section, The Florida Bar

CONTACTS

Board & Legislation Committee Appearance

Sean Kelley, Kelley & Kelley, P.L., 904 Anastasia Blvd, Saint Augustine, FL 32080 Telephone (904) 819-9706
Barry Spivey, Spivey & Fallon, P.A., 1515 Ringling Blvd., Suite 885, Sarasota, FL 34236 Telephone (941) 840-1991
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, FL 32302-2095, Telephone (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533
(List name, address and phone number)

Appearances Before Legislators (SAME)
(List name and phone # of those having face to face contact with Legislators)

Meetings with Legislators/staff (SAME)
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following N/A
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position Support _X___ Oppose _____ Tech Asst. ____ Other _____

Proposed Wording of Position for Official Publication:

"Support creation of new Fla.Stats. 765.2021 and 765.3031 to terminate the authority of a health care surrogate or surrogate appointed under a living will upon the divorce or annulment of the marriage between the surrogate and the principal."

Reasons For Proposed Advocacy:

Presently, Chapter 765 does not provide for the termination of a surrogate's authority upon the dissolution or annulment of the marriage between the surrogate and the principal. If the principal becomes incapacitated after the dissolution of marriage, but before they have executed new advance directives, it would leave a former spouse in control of these important health care or end of life decisions. This is contrary to the probable intent of the incapacitated principal. The proposed statutory sections allow for the principal to override the default termination in the document itself. They also allow the Court to provide otherwise in the final judgment of dissolution in those rare cases where it would be advantageous to leave the authority of the former spouse surrogate intact.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position [NONE]

(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one)

[NONE]

(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

The Florida Bar Family Law Section	Support
(Name of Group or Organization)	(Support, Oppose or No Position)
The Florida Bar Elder Law Section	Support
(Name of Group or Organization)	(Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

WHITE PAPER

TERMINATION OF AUTHORITY OF SURROGATES UPON DISSOLOUTION OF MARRIAGE – NEW SECTIONS 765.2021 AND 765.3031

I. SUMMARY

Chapter 765 sets forth the rules for a principal to designate someone to act as a health care surrogate and as a surrogate under a Living Will if the principal is unable to make these decisions for him or herself. *See Fla.Stats. 765.202 and 765.303 respectively.* These designations remain in effect unless revoked by the principal. The Chapter does not include any other terminating events, such as dissolution of marriage, between the principal and the surrogate.

II. CURRENT SITUATION

A health care surrogate designation executed during marriage in which a spouse is designated as the health care surrogate currently remains in effect even after a final judgment of dissolution or annulment. The same is true for a surrogate designated under a Living Will. This can result in a former spouse remaining as the primary surrogate which, in almost every case, is contrary to the intent of the incapacitated principal.

III. EFFECT OF PROPOSED CHANGES

If new sections 765.2021 and 765.3031 are adopted, a final judgment of dissolution or annulment shall terminate the former spouse's authority to act as health care surrogate or as a surrogate under a living will. This statutory default can be overridden by contrary language in the final judgment or in the document itself.

IV. ANALYSIS

The existing statutes fail to provide for the revocation of a surrogate's authority upon the dissolution or annulment of the marriage between the principal and the surrogate. Although ill advised, many people fail to revoke their existing advance directives or execute new advance directives upon dissolution. This results in the former spouse retaining his or her authority under the principal's health care surrogate or living will. In the vast majority of cases (if not all cases), this would be contrary to the intent of the principal. In the instance where a principal becomes incapacitated during or after the divorce, having failed to revoke existing documents or execute revised documents, the situation may be irreversible.

This same issue has already been considered and addressed for provision affecting an former spouse in a decedent's last will (Fla.Stat. 733.507(2)) or revocable trust (Fla.Stat. 736.1105). Those statutes provide that upon the dissolution or annulment of the marriage, any provision of a will or trust executed by the decedent prior to the divorce or annulment which affects the former spouse becomes void. The issue is also being addressed for beneficiary designated assets such as

life insurance, retirement accounts, and payable on death accounts by the proposed enactment of Fla.Stat. 732.703 (being submitted simultaneously with this proposed legislation).

The proposed legislation will close this remaining statutory oversight, and will provide uniformity in the law. After enactment of this legislation, unless the final judgment of divorce or advance directive document provides otherwise, a former spouse will be considered to have predeceased the principal and the document will otherwise remain in effect. In the instance where a health care surrogate document or living will names an alternate surrogate, that alternate will then be able to act.

The proposed statutes will allow a Court to override the default termination of authority in those rare cases where the parties may want the former spouse surrogate to continue to act. The principal may also provide against termination of authority in the documents themselves. Therefore, if a principal would like a current spouse to continue as a Surrogate, even if they divorce later, he or she can provide appropriate language in the document(s) to override the statute.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

Clarity in determination of Health Care Surrogates and Surrogates appointed under Living Wills upon dissolution or annulment will save money by reducing the need for Court proceedings involving the determination of or removal of Surrogates.

VI. DIRECT IMPACT ON PRIVATE SECTOR

None anticipated.

VII. CONSTITUTIONAL ISSUES

None anticipated.

VIII. OTHER INTERESTED PARTIES

1. The Florida Bar Family Section.

2. The Florida Bar Elder Law Section.

A bill to be entitled

An act relating to the disposition of certain assets at death; creating s.732.703, F.S.; providing ~~a rebuttable presumption~~ that in the event of a divorce or judicial proceeding determining a marriage to be invalid prior to a decedent's death, the decedent's designation of his or her now ex-spouse as a post-mortem beneficiary of~~decedent did not intend for the former spouse to inherit~~ certain assets ~~in the event that the decedent did not remove the former spouse as the primary beneficiary of such assets prior to death; providing a list of assets to be included under the statute,~~ including certain insurance policies, annuities, employee benefit plans, individual retirement accounts, pay-on-death accounts and transfer-on-death accounts becomes void; providing certain exceptions to the foregoing rule~~presumption~~, including but not limited to situations where controlling federal law applies, a beneficiary designation made after the date of the order of dissolution or order determining invalidity, an asset whose disposition is governed by a will or trust, to the extent that a court order requires that the asset be maintained with a certain beneficiary designation, to the extent that the decedent could not have unilaterally changed the beneficiary designation, to the extent that the laws of a state other than Florida apply, to the extent that the asset is held in joint name, and in the event that the decedent remarried the former spouse and they were married at the time of the decedent's death; providing a means for a financial institution to determine the correct payee for certain assets depending upon information contained on the death certificate, or in the alternative, providing an affidavit for execution by the primary beneficiary claiming to be the spouse of the decedent or the

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secondary~~contingent~~ beneficiary claiming that the decedent was not married at the time of death; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 732.703, Florida Statutes, is created to read:

732.703 Effect of divorce, dissolution or invalidity of marriage on disposition of certain assets at death. --

(1) As used in this section, unless the context requires to the contrary:

(a) "asset," when not modified by other words or phrases, means an asset described in subsection (3).

(b) "beneficiary" means any person designated in the governing instrument to receive an interest in an asset upon the death of the decedent.

~~(c) "contingent beneficiary" means a beneficiary designated under the governing instrument who will receive an interest if the designation of the primary beneficiary is revoked or otherwise lapses.~~

(c)~~(d)~~ "death certificate" means a certified copy of a death certificate issued by an official or agency for the place where the decedent's death occurred.

(d) an "employee benefit plan" is any funded or unfunded plan, program or fund established by an employer to provide an employee's beneficiaries with benefits that may be payable on the employee's death.

(e) "governing instrument" means any writing or contract governing the disposition of all or any part of an asset upon the death of the decedent.

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(f) "payor" means any person obligated to make payment of the decedent's interest in an asset upon the death of the decedent, and any other person who is in control or possession of an asset.

(g) "primary beneficiary" means a beneficiary designated under the governing instrument to receive an interest in an asset upon the death of the decedent who is not a secondary ~~contingent~~ beneficiary. A person who receives an interest in the asset upon the death of the decedent due to the death of another beneficiary prior to the decedent's death is also a "primary beneficiary."

(h) "secondary beneficiary" means a beneficiary designated under the governing instrument who will receive an interest in an asset if the designation of the primary beneficiary is revoked or otherwise cannot be given effect.

(2) A designation made by or on behalf of the decedent providing for the payment or transfer at death of an interest in an asset to or for the benefit of the decedent's former spouse shall become void ~~is revoked~~ if the decedent's marriage was judicially dissolved or declared invalid by court order prior to the decedent's death, and such designation was made prior to the date of such dissolution or court order. The decedent's interest in the asset shall pass as if the decedent's former spouse predeceased the decedent. An individual retirement account described in Section 408 or 408A of the Internal Revenue Code of 1986, or an employee benefit plan, shall not be treated as a trust for purposes of this section,

(3) Subsection (2) shall apply to the following assets in which a Florida resident has an interest at the time of the resident's death:

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(a) A life insurance policy ~~held within an employee benefit plan~~, a qualified annuity or other similar tax-deferred contract held within an employee benefit plan;

(b) An employee benefit plan~~, which, for purposes of this section, is any funded or unfunded plan, program or fund established to provide an employee's beneficiaries with benefits that may be payable on the employee's death~~;

(c) An individual retirement account described in Section 408 or 408A of the Internal Revenue Code of 1986, including an individual retirement annuity described in Section 408(b) of the Internal Revenue Code of 1986;

(d) A payable-on-death account; or

(e) A security or other account registered in transfer-on-death form; or

(f) A life insurance policy, ~~an qualified~~ annuity or other similar contract that ~~are not tax-deferred or~~ is not held within an employee benefit plan or a tax-qualified retirement account.

(4) Subsection (2) shall not apply:

(a) To the extent that controlling federal law provides otherwise;

(b) If the governing instrument is signed by the decedent, or on behalf of the decedent, after the date of the order of dissolution or order declaring the marriage invalid, and such governing instrument expressly provides that benefits will be payable to the decedent's former spouse.

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(c) To the extent a will or trust ~~or will~~ governs the disposition of the assets and s. 732.507(2) or s. 736.1005 applies;

(d) If the order of dissolution or order declaring the marriage invalid requires that the decedent acquire or maintain the asset for the benefit of a former spouse or children of the marriage, payable upon the death of the decedent either outright or in trust, only if other assets of the decedent fulfilling such a requirement for the benefit of the former spouse or children of the marriage do not exist upon the death of the decedent;

(e) If, under the terms of the order of dissolution or order declaring the marriage invalid, the decedent could not have unilaterally terminated or modified the ownership of the asset, or its disposition upon the death of the decedent;

(f) If the designation of the decedent's former spouse as a beneficiary is irrevocable under applicable law;

(g)~~(f)~~ If the instrument directing the disposition of the asset at death is governed by the laws of a state other than Florida;

(h)~~(g)~~ To an asset held in two or more names as to which the death of one co-owner vests ownership of the asset in the surviving co-owner or co-owners; or

(i)~~(h)~~ If the decedent remarries the person whose interest would otherwise have been revoked hereunder and the decedent and that person are married to one another at the time of the decedent's death.

(5) In the case of an asset described in subsection (3)(a), (b) or (c), unless payment or transfer would violate a court order directed to, and served as required by law on the payor:

(a) If the governing instrument does not explicitly specify the relationship of the beneficiary to the decedent, or if the governing instrument explicitly provides that the beneficiary is not the decedent's spouse, the payor is not liable for making any payment on account of, or transferring any interest in, the asset to the beneficiary.

(b) As to any portion of the asset required by the governing instrument to be paid after the decedent's death to a primary beneficiary explicitly designated in the governing instrument as the decedent's spouse:

1. If the death certificate states that the decedent was married at the time of his or her death to that spouse, the payor is not liable for making a payment on account of, or for transferring an interest in, that portion of the asset to such primary beneficiary.

2. If the death certificate states that the decedent was not married at the time of his or her death, or if the death certificate states that the decedent was married to a person other than the spouse designated as the primary beneficiary at the time of his or her death, the payor is not liable for making a payment on account of, or for transferring an interest in, that portion of the asset to a secondary~~contingent~~ beneficiary under the governing instrument.

3. If the death certificate is silent as to the decedent's marital status at the time of his or her death, the payor is not liable for making a payment on account of, or for transferring an interest in, that portion of the asset to the primary beneficiary upon delivery to the payor of an affidavit validly executed by the primary beneficiary in substantially the following form:

STATE OF _____

COUNTY OF _____

Before me, the undersigned authority, personally appeared (name of affiant) ("Affiant"), who swore or affirmed that:

1. (Name of decedent) ("Decedent") died on (date).

2. Affiant is a "primary beneficiary" as that term is defined in Section 732.703(1)(g)~~(f)~~, Florida Statutes. Affiant and Decedent were married on (date of marriage), and were legally married to one another on the date of the Decedent's death.

_____

(Affiant)

Sworn to (or affirmed) and subscribed before me this _____ day of (month), (year), by (name of person making statement)

(Signature of Notary Public-State of_____)

(Print, Type or Stamp Commissioned name of Notary Public)

Personally known OR Produced Identification) (Type of Identification Produced).

4. If the death certificate is silent as to the decedent's marital status at the time of his or her death, the payor is not liable for making a payment on account of, or for transferring an interest in, that portion of the asset to the secondary~~contingent~~ beneficiary upon delivery to the payor of an affidavit validly executed by the secondary~~contingent~~ beneficiary affidavit in substantially the following form:

STATE OF _____

COUNTY OF _____

Before me, the undersigned authority, personally appeared (name of affiant) ("Affiant"), who swore or affirmed that:

1. (Name of decedent) ("Decedent") died on (date).

2. Affiant is a "secondary~~contingent~~ beneficiary" as that term is defined in Section 732.703(1)(h)~~(g)~~, Florida Statutes. On the date of the Decedent's death, the Decedent was not legally married to the spouse designated as the "primary beneficiary" as that term is defined in Section 732.703(1)(g)~~(f)~~, Florida Statutes.

_____

(Affiant)

Sworn to (or affirmed) and subscribed before me this ____ day of (month), (year), by (name of person making statement)

(Signature of Notary Public-State of_____)

(Print, Type or Stamp Commissioned name of Notary Public)

Personally known OR Produced Identification) (Type of Identification Produced).

(6) In the case of an asset described in subsection (3)(d),(e), or (f), the payor is not liable for making any payment on account of, or transferring any interest in, the asset to any beneficiary.

(7) Subsections (5) and (6) apply notwithstanding the payor's knowledge that the person to whom the asset is transferred is different from the person who would own the interest pursuant to subsection (2).

(8) This section does not affect the ownership of an interest in an asset as between the former spouse and any other person entitled to such interest by operation of this section, the rights of any purchaser for value of any such interest, the rights of any creditor of the former spouse or any other person entitled to such interest, or the rights and duties of any insurance company, financial institution, trustee, administrator or other third party.

(9) This section shall be effective for deaths occurring after July 1, 20__~~10~~.

Section 2. This act shall take effect July 1, 20__~~10~~.

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RM:6853107:1

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Linda S. Griffin, Chair, IRA and Employee Benefit Committee of the Real Property Probate & Trust Law Section

Address 1455 Court Street, Clearwater, Florida 33756
Telephone: (727) 449-9800 or (727) 804-0994

Position Type IRA and Employee Benefit Committee, RPPTL Section, The Florida Bar
(Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance **[Main Contact Persons]**, Kristen M. Lynch, Esquire, Ruden McCloskey 4855 N. Technology Way, Suite 630, Boca Raton, Fl. 33431, 561-962-6906; Richard F. Gans, Fergeson, Skipper, Shaw, Keyser, Baron & Tirabassi, P.A., P.O. Box 3018, Sarasota, FL. 34230, 941-957-1900; Linda S. Griffin, 1455 Court Street, Clearwater, FL. 33756, 727-449-9800.
Michael J. Gelfand, Gelfand & Arpe, P.A., Regions Financial Tower, Suite 1220, 1555 Palm Beach Lakes Blvd., West Palm Beach, FL 33401 (561) 655-6224
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533
(List name, address and phone number)

Appearances Before Legislators (SAME)
(List name and phone # of those having face to face contact with Legislators)

Meetings with Legislators/staff (SAME)
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following N/A
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position X **Support** Oppose Technical Assistance Other _____

Proposed Wording of Position for Official Publication:

"Support creation of a new statute F.S. § 732.xxxxx which provides that when an individual dies after a divorce, a beneficiary designation created by the individual prior to the divorce which designates the spouse as a beneficiary, becomes void upon the divorce and the spouse is deemed to have predeceased the decedent."

Reasons For Proposed Advocacy:

RM:6853128:1

This proposal is intended to address an inequity within the Florida Statutes as they currently exist. Currently, under Florida law, when an individual executes a will or trust prior to a divorce and provides for the spouse in the will or trust and the individual does not amend the will or trust after the divorce to remove a former spouse as a beneficiary of such will or trust, at the individual's death the provision for the former spouse is void and the former spouse is deemed to have died at the time of the divorce unless the will or trust expressly provides otherwise.

There is no such provision for certain non-probate or non-trust assets under the same circumstances. This proposed statute creates such a provision for several types of non-probate and non-trust assets, with exceptions for assets controlled by federal law, joint accounts, beneficiary designations mandated by court order, assets over which the decedent did not have the authority to change the beneficiary designation, assets whose disposition is controlled by a will or trust, and situations where the decedent remarried the former spouse and was married to that person at the time of death.

This proposal was approved by the Executive Council in 2009 and was approved by the Board of Governors on December 15, 2009. The Florida Bar Master List of Legislative Position 2010-2012 lists this provision as Item 78.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position No Prior Positions

(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one)

(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

Tax Section	Position Unknown At This Time
(Name of Group or Organization)	(Support, Oppose or No Position)
Florida Banker's Association	Do not oppose, no official Position
(Name of Group or Organization)	(Support, Oppose or No Position)
Family Law Section	Support
(Name of Group or Organization)	(Support, Oppose or No Position)

RM:6853128:1

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

RM:6853128:1

REAL PROPERTY, PROBATE & TRUST LAW SECTION OF THE FLORIDA BAR
WHITE PAPER
ON
A PROPOSED BILL TO CREATE FLORIDA STATUTE § 732.703
(Effect of Dissolution or Invalidity of Marriage on Disposition of Certain Assets at Death)

I. SUMMARY.

This proposal is intended to prevent certain assets or accounts from passing at death to a former spouse if the decedent did not intend for them to inherit, subject to certain exceptions. The proposed statute renders a designation of ~~a creates a rebuttable presumption that the~~ former spouse as void, and the former spouse shall be treated as having predeceased the decedent as of the date of the divorce. Presently, there is a similar statutory scheme~~presumption~~ for wills and trusts. There are~~is~~ currently no such provisions~~esumption~~ with regard to certain non-probate or non-trust assets in the same situation. This proposed statute applies to several types of non-probate and non-trust assets, and carves out certain exceptions, including but not limited to accounts subject to qualified domestic relations orders, settlement agreements, certain jointly owned accounts, to the extent federal law controls, to the extent Florida law does not control, and to the extent a trust or will governs the disposition of the account.

II. CURRENT SITUATION.

It is currently estimated that approximately $14 trillion dollars are currently held in Individual Retirement Accounts and Employee Benefit accounts in this country, and an even larger amount of money is currently invested in life insurance contracts and similar arrangements. These accounts do not normally pass by way of will or trust, but rather by some form of beneficiary designation as provided for in the contract. These assets are more prevalent among individuals who do not seek out traditional estate planning. Many times retirement accounts are funded by employers, as are some insurance policies. Pay-on-death and transfer-on-death accounts are often used as a simple and inexpensive substitute for more formal estate planning. Both wills and trusts are afforded protection under a statutory scheme~~presumption~~ created in F.S. § 736.1105 for trusts, and F.S. § 732.507(2) for wills, revoking the rights of a former spouse by treating the former spouse as if he or she had predeceased the grantor or testator as of the date of the divorce.

Many times, individuals holding only IRAs, retirement plan assets, insurance policies and annuities, which all pass by way of beneficiary designation, do not perceive a need for professional advice in regard to these assets, and do not seek out the help of an estate planning

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attorney or financial planner. A search of Florida case law reveals a prolific number of cases concerning situations where the decedent owned an interest in such accounts, divorced, and then subsequently died without changing the beneficiary designation to remove the former spouse. In some instances, individuals take a "pro se" approach to estate planning insofar as pay-on-death and transfer-on-death accounts are established intentionally to avoid the perceived expense and delay inflicted by the probate process. It could be argued or debated that a failure to change a beneficiary or pay-on-death designation could be attributed to poor planning or no planning at all on the part of the decedent, misunderstanding of the requirements to effect such a change, an oversight, an error, bad timing or, in the extreme, bad legal advice. Regardless of the cause, the dispositive intent of many Florida decedents is being frustrated, and the intended beneficiaries of such accounts are the individuals being harmed by a lack of consistent treatment between classes of assets within the Florida statutes. It could be argued that the only residents of Florida that are afforded protection are those that seek out the help of an attorney to draft a will or trust.

Florida Case Law

The leading case in Florida in this regard is *Cooper v. Muccitelli,* 682 So. 2d 77,78 (Fla. 1996), involving~~which involves~~ life insurance proceeds. The spouses divorced, and then the husband changed one of the policies to reflect his sister as the beneficiary, but died without changing the heneficiary designation on the second policy to someone other than his former spouse. The Appellate Court certified a question to the Florida Supreme Court regarding the Court's holding that, without specific reference in a property settlement to life insurance proceeds, the beneficiary of the proceeds is determined by looking only to the insurance contract. The Florida Supreme Court examined the dissolution terms as well as the insurance documentation. It determined that the husband was free to name anyone he liked as beneficiary of the insurance policy and that the instructions were clear as to how to accomplish a change. He did not take any steps to effectuate a change on the second policy prior to his death and, therefore, the former spouse remained as the beneficiary. The Court said:

> "The analysis that the general language in the separation agreement trumps the specific language in the policy would place the insurance carrier in an impossible position – the carrier could never be certain whom to pay in such a situation without going to court, in spite of what the policy said or how clearly it was worded." Id. at 79.

It is clear that this situation may be avoided with specific language in the settlement agreement, although there are various cases that address what language is sufficient. Recent Florida cases include:

Vaughan v. Vaughan (741 So.2d 1221) Fla. App. 2 Dist., 1999 – Decedent's daughter sought declaratory relief to determine distribution of proceeds of decedent's life insurance policy and his individual retirement account. Decedent's former wife filed a counterclaim contending she was entitled to the entire proceeds of the insurance policy and to the IRA funds free of any

claims of the daughter. The former spouse was named as the beneficiary on the life insurance policy and the IRA. The Court ruled that the wife was not entitled to the IRA, because the settlement agreement specifically referred to her forfeiture of rights in the IRA, but the Court ruled that the former spouse was entitled to the life insurance proceeds because the life insurance was not specifically mentioned.

In Re Estate of Dellinger (760 So., 2d 1016) Fla.App. 4 Dist., 2000 – In an action between the former wife, who was named as beneficiary of the decedent's IRA, and the personal representative of the decedent's estate, the lower court entered an order in favor of the estate. The former wife appealed. 4th DCA found in favor of the former spouse because the settlement agreement executed by the decedent and the former wife did not reference the IRA.

Luszcz v. Lavoie (787 So.2d 245) Fla.App. 2 Dist., 2001 – The personal representative of the decedent's estate brought an action against the former husband, seeking repayment to the estate of funds the husband received as beneficiary of the wife's IRA. The 2nd DCA held that, because the settlement agreement did not call for a change of beneficiary on the IRA, and there was no specific release of claims, the husband was entitled to the IRA proceeds. The dissenting judge in this case made the following observation:

> "The Florida Legislature has thus expressed the public policy of this state with regard to inheritance and trust rights of former spouses. I would have concluded that the courts had fashioned a similar rule, so that when assets are distributed by a final judgment of dissolution, the final judgment controls over the beneficiary designation unless expressly provided otherwise. In today's opinion, however, this court reaches a contrary conclusion. Thus, the legislature may wish to consider enacting a law similar to sections 732.507 and 737.106 to cover assets passing outside an estate or trust." Id. at 250.

Smith v. Smith, (919 So.2d 525), Fla.App. 5 Dist., 2005. The fact pattern is very familiar. The spouses divorce and sign a marital settlement agreement, in which the wife waives all rights and responsibilities regarding certain assets, including life insurance policies, an IRA and an interest in a retirement plan. Not only did this court not follow the Luszcz case, but this court also receded from the Vaughan case. The Court determined that the insurance proceeds should go to the former wife, because she had not waived her right to the *proceeds* in the policies. The Court further determined that the waiver of rights in the retirement plan fell short of an effective ERISA waiver, therefore making it payable to the former spouse. Finally, the Court determined that the IRA should also go to the former spouse because an IRA is a contract with a third party. The Court goes on to say that IRAs should be payable to the beneficiary named unless changing the beneficiary designation is a condition of the dissolution agreement.

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Barker v. Crawford, 2009 WL 2243961 (Fla. App. 3 Dist.), 34 Fla. L. Weekly D 1518 was decided as recently as July 29, 2009. This case addressed a beneficiary of a deferred compensation agreement prior to the death of either party. In Barker, a mediation agreement was signed that stated the husband, Barker, would retain retirement money and the deferred compensation agreement fund. The court determined that the language was "sufficient to waive the former husband's pre-dissolution designation of the former wife as a beneficiary". Apparently, during the negotiations of the mediation agreement, the parties agreed that the husband would receive such benefits; however, he did not change the beneficiary designation. Because Barker did not reaffirm that decision by changing the designation of beneficiary, Crawford contended that his intent was for her to be the beneficiary of the deferred compensation fund. This court cited *Cooper v. Muccitelli* and *Smith v. Smith.*

Crawford v. Barker, --- So.3d ----, 2011 WL 2224808 (Fla. Jun 09, 2011) was decided even -more recently,overturning the lower court's decision, stating:

> "For the reasons explained below, we hold that absent the marital settlement agreement providing who is or is not to receive the death benefits or specifying who is to be the beneficiary, courts should look no further than the named beneficiary in the separate document of the policy, plan, or account. General language in a marital settlement agreement, such as language stating who is to receive ownership, is not specific enough to override the plain language of the beneficiary designation in the separate document. The spouse, who owns the policy, plan, or account following the dissolution of marriage, is otherwise free to name any individual as the beneficiary; however, if the spouse does not change the beneficiary, the beneficiary designation in the separate document controls. Accordingly, we quash the Third District's decision below and approve the Fifth District's decision in Smith."

It is apparent that there is much confusion in this area and a statute would clarify the law and give certainty to the parties and to the court. It is also apparent from this sampling of holdings that the prospects of a decedent's assets ending up in the hands of the intended beneficiary is dependent not only upon the type of assets involved (probate versus non-probate or trust versus non-trust) bnt also depends in large part upon which DCA the case will be filed in.

Other States

Other states have the same type of case law history. A listing of some recent

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cases in this regard would include:

Pardee v. Pardee, (112 P,3d 308), Okla.Civ.App. Div. 2, 2004;
In re Estate of Sbarra, (17 A.D.3d 975), N.Y.S.2d 479, N.Y. 2005;
Foster v. Hurley, (444 Mass. 157), Mass., 2005;
Stephenson v. Stephenson, (163 Ohio App.3d 109), Ohio App.9 Dist., 2005;
In re Estate of Freeberg, (130 Wash.App., 202, 122 P.3d 741), 2005;
In re Estate of Wellshear, (142 P.3d 994), Okla.Civ. App.Div. 4, 2006.

The one thing that all of the above-referenced cases have in common is a dispute between the estate or beneficiaries of the decedent, and a former spouse, over insurance proceeds, retirement accounts or IRAs. The holdings in all of the above cases vary, much as they do here within the state of Florida. In some cases, more weight is given to the contractual agreement, in other cases the intent of the decedent is taken into account. UPC section 2-804 provides a model divorce revocation statute, which has been followed so far by Colorado, Utah, Wisconsin, Arizona, Washington, Michigan, Minnesota, Montana, New Mexico, South Dakota and North Dakota. States that have enacted statutes that do not completely follow the UPC include Ohio, Pennsylvania, and Texas. Our proposed statute is loosely modeled after the UPC, but specifically identifies the types of interests that the statute is intended to cover.

Potential Problems

There are two potential problems with regard to a statute of this nature. The first potential problem involves the pre-emption clause contained within the Employee Retirement Income Security Act of 1974 (ERISA). The pre-emption clause operates in such a way that state law cannot override or dictate the administration of a plan that is covered by ERISA. In regard to the proposed statute at hand, the only type of planaccount that this would effect is a retirement plan that does not falls within the scope of ERISA. The proposed statute provides an exception in regard to revocation "to the extent that controlling federal law provides otherwise", and therefore should not be perceived to attempt to have the dreaded "impermissible connection with ERISA plans" alluded to in the Egelhoff case. Egelhoff v. Egelhoff (121 S. Ct. 1322), U.S. Wash., 2001.

The other potential problem has to do with constitutional protection of contractual rights. Although there does not appear to be a clear consensus among other states of the correct approach, the biggest potential problem appears to occur when states have attempted to retroactively apply a statute, such as the one proposed here. So long as the beneficiary or pay-on-death designation is in place prior to the enactment of the statute,

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the party to the contract has not had any right impaired. The current draft of this statute does not contemplate retroactive application. The majority of states also seem to indicate that a beneficiary is not a party to a contract and has merely expectancy in an inheritance. Additionally, there has always been an exception available in regard to the contract clause when the contemplated action is in furtherance of public policy. In furtherance of public policy, the proposed revocation statute would actually complement and support the augmented elective share statute insofar as the new augmented estate includes the assets contemplated by this proposed statute. In a situation where a former spouse is still named as a beneficiary and there is a current spouse of the decedent who subsequently files for an elective share, the proposed statute would support the public policy argument underlying the need for an elective share to protect spousal rights.

The IRA and Employee Benefits Committee decided to treat pay-on-death accounts and transfer-on-death accounts slightly differently than the other assets or accounts listed in the statute. All of the other assets or accounts included have some sort of special treatment or tax deferral associated with them and as such, it was determined that the payor should already be inquiring as to whether the person claiming the assets as a spouse is indeed the spouse. With input from the Florida Bankers Association, the committee felt it would not put an undue burden on those financial institutions that handle the "special treatment" accounts or assets to inquire further; whereas the committee also felt that to require inquiry from every institution that handles TOD and POD accounts might present such an undue burden. The only difference in the treatment of those accounts is that rather than put the payor in the position of deciding whether to pay to the alleged spouse it creates a cause of action.

III. EFFECT OF PROPOSED CHANGES.

The proposed legislation is designed to provide a means for determining the rightful beneficiary or, in the alternative, provides a basis for a cause of action for the rightful beneficiary in the following manner:

A. Definitions – Section 1 of this statute contains definitions. Some are necessary to limit the scope of the definition within this statute and some are necessary because they are not defined elsewhere in the Florida Statutes. Also, because this statute is intended to cover certain accounts or assets that have federal tax implications or federal law implications, the IRA and Employee Benefit Committee felt it was necessary to include them due to the unique nature of this proposed statute

B. Purpose – The purpose of this proposed statute in Section 2, ~~is~~ to render~~create~~ a beneficiary designation naming a former spouse~~rebuttable presumption, in Section 2, that the former spouse~~ as void, and the disposition of those ~~was not the intended beneficiary of~~ certain assets or accounts~~, and~~ should be treated as though

the former spouse~~he or she pr~~predeceased the decedent, subject to certain exceptions.

C. Scope – The intended scope of this statute is to cover life insurance policies, annuities and similar contracts; employee benefit accounts; individual retirement accounts; pay-on-death accounts, and transfer-on-death accounts. Section 3 specifies the type of assets, held by a Florida resident at the time of their death, subject to this statute. Section 4 addresses the exceptions. Mindful of the pre-emption clause of the constitution, this statute is not intended to supersede any governing federal law that would otherwise control, nor does it apply if the governing document expressly provides that the interest will be payable to the designated former spouse regardless of dissolution or invalidity of the decedent's marriage. **This statute will not apply if a court order or decree required the decedent to maintain the asset for benefit of the former spouse of children of the marriage, if the decedent did not have the ability to unilaterally change the beneficiary or pay-on-death designation, if the designation of the decedent's former spouse as a beneficiary is irrevocable under applicable law, if the contract or agreement is governed by state law other than Florida, nor will it apply to jointly owned accounts.** This statute will not preclude a former spouse that has remarried the decedent and is married to the decedent at time of death from receiving benefits, nor does this statute apply to any asset that would otherwise be conveyed through the decedent's will or trust.

D. Procedures for determining beneficiary – In section 5, the statute sets forth procedures for determining who the proper payee of the account should be. If the governing document does not specify the relationship between the designated beneficiary and the decedent, the payor may pay the account to the named beneficiary without further inquiry. If the governing document specifies the beneficiary to be the spouse of the decedent, the payor must first look to the death certificate. If the death certificate states that the decedent was married to the named beneficiary at the time of death, the payor may pay out the benefits to the named beneficiary. If the death certificate states that the decedent was not married, or was married to another individual other than the person specified on the account as the spouse, the payor may pay the interest out to the secondary beneficiary under the governing document. If the death certificate is silent as to marital status of the decedent, then there are two form affidavits provided in the statute. One affidavit is for execution by someone alleging to be the surviving spouse of the decedent. If the alleged surviving spouse executes the affidavit, stating that they are the surviving spouse of the decedent and that the decedent was married to them at the time of the decedent's death, the payor may pay the

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account to such individual without further inquiry. Similarly, the other affidavit is for execution by a secondary beneficiary, stating that the primary beneficiary was not married to the decedent at the time of the decedent's death. The payor may also pay out the interest to the secondary beneficiary upon receipt of a properly executed affidavit.

Section 6 states, that in the case of pay-on-death accounts, securities or other accounts registered in transfer-on-death form, and life insurance policies, annuities or other similar contracts not held within an employee benefit plan or a tax-qualified retirement account, the payor may pay out those interests without further inquiry.

E. No liability for Payor - This statute is not intended to create any additional liability for any payor. In regard to why affidavits are required for certain accounts and not others, it was determined in the drafting of this statute that certain due diligence would already be required on the part of the payor with regard to individual retirement accounts, employee benefit accounts, and certain life insurance, annuities and similar arrangements held within such accounts or that are otherwise tax-deferred in nature. Such due diligence was not already required for pay-on-death accounts, transfer-on-death accounts, or life insurance, annuities and similar arrangements not held within employee benefit accounts or that are not otherwise given tax-deferred treatment.

F. Creation of the basis for a cause of action – The primary purpose of this statute is to create the basis for a cause of action for accounts that are paid out to former spouses as opposed to intended beneficiaries. A general cause of action is intended to be created by voiding the beneficiary designation naming the former spouse~~the presumption that the former spouse was not the intended beneficiary~~, with the exception of the situations listed in Section 4. A specific cause of action may be created if an affiant makes a false statement with regard to the marital status of the decedent.

IV. FISCAL IMPACT ON STATE OR LOCAL GOVERNMENTS.

The proposal will not have any fiscal impact on state or local governments.

V. CONSTITUTIONAL ISSUES.

No constitutional issues are expected to arise under the proposal.

A bill to be entitled

An act relating to the technical corrections of the Principal and Income Act, Florida Statutes Ch. 738; amending s.738.102, F.S.; adding a definition of "Carrying Value"; amending s. 738.103, F.S.; clarifying the applicability of Florida Statutes Ch. 738 to all trusts and estates administered in this state or under Florida law; amending s. 738.104, F.S.; removing redundant language as a result of the amendment to s. 738.103; amending s. 738.1041, F.S.; to provide the definition of "Average Fair Market Value"; adding the defined term to applicable subsections; removing redundancies; amending s. 738.105, F.S.; clarifying the applicability of the section to trustees only; amending s. 738.201, F.S.; clarifying that section applies to all fiduciaries; clarifying rules for payment of interest on pecuniary devises not in trust; amending s. 738.202, F.S.; modifying and clarifying the method by which income is to be distributed to certain beneficiaries; amending s. 738.301, F.S.; clarifying that section applies to all fiduciaries; amending s. 738.302, F.S.; clarifying that section applies to all fiduciaries; amending s. 738.303, F.S.; clarifying that section applies to all fiduciaries; amending s. 738.401, F.S.; clarifying that section applies to all fiduciaries; modifying the method by which distributions from entities are allocated between income and prir ` ` iending s. 738.402, F.S.;

clarifying that section applies to all fiduciaries; amending s. 738.403, F.S.; clarifying that section applies to all fiduciaries; correcting improper cross-reference; amending s. 738.501, F.S.; clarifying that section applies to all fiduciaries; amending s. 738.502, F.S.; clarifying that section applies to all fiduciaries; amending s. 738.503, F.S.; clarifying that section applies to all fiduciaries; amending s. 738.504, F.S.; clarifying that section applies to all fiduciaries; amending s. 738.601, F.S.; clarifying that section applies to all fiduciaries; amending s. 738.602, F.S.; clarifying that section applies to all fiduciaries; modifying section to remove disparate treatment of trusts so that all trust are treated the same; amending s. 738.603, F.S.; clarifying that section applies to all fiduciaries; modifying method used to allocate between income and principal for liquidating assets; amending s. 738.604, F.S.; clarifying that section applies to all fiduciaries; amending s. 738.605, F.S.; clarifying that section applies to all fiduciaries; amending s. 738.606, F.S.; clarifying that section applies to all fiduciaries; amending s. 738.607, F.S.; clarifying that section applies to all fiduciaries; amending s. 738.608, F.S; clarifying that section applies to all fiduciaries; amending s. 738.701, F.S.; clarifying that section applies to all fiduciaries; amending s. 738.702, F.S.; clarifying that section applies to

all fiduciaries; amending s. 738.703, F.S.; clarifying that section applies to all fiduciaries; amending s. 738.704, F.S.; clarifying that section applies to all fiduciaries; amending s. 738.705, F.S.; clarifying that section applies to all fiduciaries; clarifying the method used to allocate income taxes between income and principal; amending s. 738.804, F.S.; clarifying that section applies to all fiduciaries.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (3) through (13) of section 738.102, Florida Statutes, are renumbered as subsections (4) through (14), respectively, and a new subsection (3) is added to that section to read:

738.102 Definitions.—

(3) "Carrying Value" (also known as "Inventory Value" and "Fiduciary Acquisition Value") means the fair market value at the time the assets are received by the fiduciary. For estates of decedents, and trusts described in s. 733.707(3) after the grantor's death, the assets are considered as received at the date of death. If there is a change in fiduciaries, a majority of the continuing fiduciaries may elect to adjust the carrying values to reflect the fair market value of the assets at the beginning of their administration; if that election is made, it

must be reflected on the first accounting filed after the election. For assets acquired during the administration of the estate or trust, the carrying value will be equal to the acquisition cost of the asset.

Section 2. Subsection (3) is added to section 738.103, Florida Statutes, to read:

738.103 Fiduciary duties; general principles.—

(3) Except as provided in Section 738.1041(10), this chapter shall be construed as pertaining to the administration of a trust or estate and is applicable to any trust or estate that is administered either in this state or under Florida law.

Section 3. Subsection (11) of section 738.104, Florida Statutes, is deleted to read:

738.104 Trustee's power to adjust.—

~~(11) This section shall be construed as pertaining to the administration of a trust and is applicable to any trust that is administered either in this state or under Florida law.~~

Section 4. Paragraphs (a), (c), (d) and (e) of subsection (1) of section 738.1041, Florida Statutes, are redesignated as paragraphs (b), (d), (e) and (f), respectively, paragraph (b) is redesignated as paragraph (c) and amended, present paragraph (f) is redesignated as paragraph (g) and amended, and a new paragraph (a) is added to that subsection to read:

738.1041 Total return unitrust.—

(1)

(a) "Average fair market value" means the average of the fair market values of assets held by the trust at the beginning of the current and each of the two preceding years, or for the entire term of the trust, if fewer.

(~~a~~b) "Disinterested person" means a person who is not a "related or subordinate party" as defined in s. 672(c) of the United States Internal Revenue Code, 26 U.S.C. ss. 1 et seq., or any successor provision thereof, with respect to the person then acting as trustee of the trust and excludes the grantor and any interested trustee.

(~~b~~c) "Fair market value" means the fair market value of the assets held by the trust as otherwise determined under this chapter, reduced by all known non-contingent ~~noncontingent~~ liabilities.

(~~c~~d) "Income trust" means a trust, created by either an inter vivos or a testamentary instrument, which directs or permits the trustee to distribute the net income of the trust to one or more persons, either in fixed proportions or in amounts or proportions determined by the trustee and regardless of whether the trust directs or permits the trustee to distribute the principal of the trust to one or more such persons.

(~~d~~e) "Interested distributee" means a person to whom distributions of income or principal can currently be made who has the power to remove the existing trustee and designate as successor a person who may be a "related or subordinate party," as defined in the Internal Revenue Code, 26 U.S.C. s. 672(c), with respect to such distributee.

(e~~f~~) "Interested trustee" means an individual trustee to whom the net income or principal of the trust can currently be distributed or would be distributed if the trust were then to terminate and be distributed, any trustee whom an interested distributee has the power to remove and replace with a related or subordinate party as defined in paragraph (d), or an individual trustee whose legal obligation to support a beneficiary may be satisfied by distributions of income and principal of the trust.

(~~f~~g) "Unitrust amount" means the amount determined by multiplying the average fair market value of the assets as defined in paragraph (~~b~~1)(a) by the percentage calculated under paragraph (2)(b).

Section 5 Subparagraph 2. of paragraph (b) of subsection (2) of section 738.1041, Florida Statutes, is amended to read:

738.1041 Total return unitrust.—

(2)

(b)

2. The interested trustee or disinterested trustee administers the trust such that:

a. The percentage used to calculate the unitrust amount is 50 percent of the applicable federal rate as defined in the Internal Revenue Code, 26 U.S.C. s. 7520, in effect for the month the conversion under this section becomes effective and for each January thereafter; however, if the percentage calculated exceeds 5 percent, the unitrust percentage shall be 5 percent and if the percentage calculated is less than 3 percent, the unitrust percentage shall be 3 percent. ~~; and~~

b. The fair market value of the trust shall be determined at least annually on an asset-by-asset basis, reasonably and in good faith, in accordance with the provisions of s. 738.202(5), except the following property shall not be included in determining the value of the trust:

(I) Any residential property or any tangible personal property that, as of the first business day of the current valuation year, one or more current beneficiaries of the trust have or have had the right to occupy, or have or have had the right to possess or control (other than in his or her capacity as trustee of the trust), and instead the right of occupancy or the right to possession and control shall be deemed to be the unitrust amount with respect to such property; however, the

unitrust amount shall be adjusted to take into account partial distributions from or receipt into the trust of such property during the valuation year; ~~.~~

(II) Any asset specifically given to a beneficiary and the return on investment on such property, which return on investment shall be distributable to such beneficiary; or ~~.~~

(III) Any asset while held in a decedent's ~~testator's~~ estate. ~~.~~

Section 6 Subsection (4) of section 738.1041, Florida Statutes, is deleted, subsections (5) through (9) are renumbered as subsections (4) through (8), respectively, present subsection (10) is renumbered as subsection (9) and amended, and present subsection (11) is renumbered as subsection (10) and amended, to read as follows:

738.1041 Total return unitrust.—

(4) ~~All determinations made pursuant to sub-subparagraph (2)(b)2.b. shall be conclusive if reasonable and made in good faith. Such determination shall be conclusively presumed to have been made reasonably and in good faith unless proven otherwise in a proceeding commenced by or on behalf of a person interested in the trust within the time provided in s. 736.1008. The burden will be on the objecting interested party to prove that the determinations were not made reasonably and in good faith.~~

(9~~10~~) This section shall be construed as pertaining to the administration of a trust and is applicable to any trust that is administered either in this state or under Florida law unless:

(a) The governing instrument reflects an intention that the current beneficiary or beneficiaries are to receive an amount other than a reasonable current return from the trust;

(b) The trust is a trust described in the Internal Revenue Code, 26 U.S.C. s. 170(f)(2)(B), s. 642(c)(5), s. 664(d), s. 2702(a)(3), or s. 2702(b);

(c) One or more persons to whom the trustee could distribute income have a power of withdrawal over the trust:

1. That is not subject to an ascertainable standard under the Internal Revenue Code, 26 U.S.C. s. 2041 or s. 2514, and exceeds in any calendar year the amount set forth in the Internal Revenue Code, 26 U.S.C. s. 2041(b)(2) or s. 2514(e); or

2. A power of withdrawal over the trust that can be exercised to discharge a duty of support he or she possesses; or

(d) The governing instrument expressly prohibits use of this section by specific reference to the section. A provision in the governing instrument that, "The provisions of section 738.1041, Florida Statutes, as amended, or any corresponding provision of future law, shall not be used in the administration of this trust," or similar words reflecting such intent shall be sufficient to preclude the [illegible] of this section. ~~; or~~

~~(c) The trust is a trust with respect to which a trustee currently possesses the power to adjust under s.738.104.~~

(10~~11~~) The grantor of a trust may create an express total return unitrust which will become effective as provided in the trust instrument ~~document~~ without requiring a conversion under this section. An express total return unitrust created by the grantor of the trust shall be treated as a unitrust under this section only if the terms of the trust instrument ~~document~~ contain all of the following provisions:

(a) That distributions from the trust will be unitrust amounts and the manner in which the unitrust amount will be calculated; ~~and the method in which the fair market value of the trust will be determined.~~

(b) The percentage to be used to calculate the unitrust amount, provided the percentage used is not greater than 5 percent nor less than 3 percent; ~~.~~

(c) The method to be used in determining the fair market value of the trust; and ~~.~~

(d) Which assets, if any, are to be excluded in determining the unitrust amount.

Section 7 Subsections (1) and (3) of section 738.105, Florida Statutes, are amended to read as follows:

738.105 Judicial control of discretionary powers.—

(1) A court shall not change a trustee's ~~fiduciary~~ decision to exercise or not to exercise a discretionary power conferred by this chapter unless the court determines that the decision was an abuse of the trustee's ~~fiduciary~~ discretion. A court shall not determine that a trustee ~~fiduciary~~ abused its discretion merely because the court would have exercised the discretion in a different manner or would not have exercised the discretion.

(3) If a court determines that a trustee ~~fiduciary~~ has abused its discretion, the remedy shall be to restore the income and remainder beneficiaries to the positions they would have occupied if the trustee ~~fiduciary~~ had not abused its discretion, according to the following rules:

(a) To the extent the abuse of discretion has resulted in no distribution to a beneficiary or a distribution that is too small, the court shall require the trustee ~~fiduciary~~ to distribute from the trust to the beneficiary an amount the court determines will restore the beneficiary, in whole or in part, to his or her appropriate position.

(b) To the extent the abuse of discretion has resulted in a distribution to a beneficiary that is too large, the court shall restore the beneficiaries, the trust, or both, in whole or in part, to their appropriate positions by requiring the trustee ~~fiduciary~~ to withhold an amount from one or more future

distributions to the beneficiary who received the distribution that was too large or requiring that beneficiary to return some or all of the distribution to the trust.

(c) To the extent the court is unable, after applying paragraphs (a) and (b), to restore the beneficiaries, the trust, or both, to the positions they would have occupied if the trustee ~~fiduciary~~ had not abused its discretion, the court may require the trustee ~~fiduciary~~ to pay an appropriate amount from its own funds to one or more of the beneficiaries or the trust or both.

(4) Upon the filing of a petition by the trustee ~~fiduciary~~, the court having jurisdiction over the trust or estate shall determine whether a proposed exercise or nonexercise by the trustee ~~fiduciary~~ of a discretionary power conferred by this chapter will result in an abuse of the trustee's ~~fiduciary~~ discretion. If the petition describes the proposed exercise or nonexercise of the power and contains sufficient information to inform the beneficiaries of the reasons for the proposal, the facts upon which the trustee ~~fiduciary~~ relies, and an explanation of how the income and remainder beneficiaries will be affected by the proposed exercise or nonexercise of the power, a beneficiary who challenges the proposed exercise or nonexercise has the burden

of establishing that such exercise or nonexercise will result in an abuse of discretion.

Section 8 Section 738.201, Florida Statutes, is amended to read:

738.201 Determination and distribution of net income.—After a decedent dies, in the case of an estate, or after an income interest in a trust ends, the following rules apply:

(1) A fiduciary of an estate or of a terminating income interest shall determine the amount of net income and net principal receipts received from property specifically given to a beneficiary under the rules in ss. 738.301-738.706 ~~which apply to trustees~~ and the rules in subsection (5). The fiduciary shall distribute the net income and net principal receipts to the beneficiary who is to receive the specific property.

(2) A fiduciary shall determine the remaining net income of a decedent's estate or a terminating income interest under the rules in ss. 738.301-738.706 ~~which apply to trustees~~ and by:

(a) Including in net income all income from property used to discharge liabilities.

(b) Paying from income or principal, in the fiduciary's discretion, fees of attorneys, accountants, and fiduciaries; court costs and other expenses of administration; and interest on death taxes, but the fiduciary may pay those expenses from income of property passing to a trust for which the fiduciary

claims an estate tax marital or charitable deduction only to the extent the payment of those expenses from income will not cause the reduction or loss of the deduction.

(c) Paying from principal all other disbursements made or incurred in connection with the settlement of a decedent's estate or the winding up of a terminating income interest, including debts, funeral expenses, disposition of remains, family allowances, and death taxes and related penalties that are apportioned to the estate or terminating income interest by the will, the terms of the trust, or applicable law.

(3) If ~~A fiduciary shall distribute to~~ a beneficiary who receives a pecuniary amount outright is also entitled to receive ~~the~~ interest on that amount or any other amount provided by the will or~~,~~ the terms of the trust, a fiduciary shall distribute such amount ~~or applicable law~~ from net income determined under subsection (2) or from principal to the extent net income is insufficient. ~~If a beneficiary is to receive a pecuniary amount outright from a trust after an income interest ends and no interest or other amount is provided for by the terms of the trust or applicable law, the fiduciary shall distribute the interest or other amount to which the beneficiary would be entitled under applicable law if the pecuniary amount were required to be paid under a will.~~

(4) A fiduciary shall distribute the net income remaining after distributions required by subsections (1) through ~~subsection~~ (3) in the manner described in s. 738.202 to all other beneficiaries, including a beneficiary who receives a pecuniary amount in trust, even if the beneficiary holds an unqualified power to withdraw assets from the trust or other presently exercisable general power of appointment over the trust.

(5) A fiduciary may not reduce principal or income receipts from property described in subsection (1) because of a payment described in s. 738.701 or s. 738.702 to the extent the will, the terms of the trust, or applicable law requires the fiduciary to make the payment from assets other than the property or to the extent the fiduciary recovers or expects to recover the payment from a third party. The net income and principal receipts from the property are determined by including all of the amounts the fiduciary receives or pays with respect to the property, whether those amounts accrued or became due before, on, or after the date of a decedent's death or an income interest's terminating event, and by making a reasonable provision for amounts the fiduciary believes the estate or terminating income interest may become obligated to pay after the property is distributed.

Section 9 Subsections (1), (2) and (5) of section 738.202, Florida Statutes, are amended, and a new subsection (6) is added to that section, to read:

738.202 Distribution to residuary and remainder beneficiaries.—

(1) Each beneficiary described in s. 738.201(4) is entitled to receive a portion of the net income remaining after the application of s. 738.201(1)-(3), that is equal to the beneficiary's fractional interest in undistributed principal assets, using carrying values as of the distribution date. If a fiduciary makes more than one distribution of assets to beneficiaries to whom this section applies, each beneficiary, including one who does not receive part of the distribution, is entitled, as of each distribution date, to the net income the fiduciary has received after the date of death or terminating event or earlier distribution date but has not distributed as of the current distribution date.

(2) In determining a beneficiary's share of net income, the following rules apply:

(a) The beneficiary is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in the carrying value of the undistributed principal assets immediately prior to ~~before~~ the distribution date, excluding the

amount of unpaid liabilities ~~including assets that later may be sold to meet principal obligations~~.

(b) The beneficiary's fractional interest in the undistributed principal assets shall be calculated: ~~without regard to~~

1. At the time the interest began and adjusted for any disproportionate distributions since the interest began;

2. By excluding any liabilities of the estate or trust from the calculation;

3. By also excluding property specifically given to a beneficiary and property required to pay pecuniary amounts not in trust; and~~.~~

4.~~(c) The beneficiary's fractional interest in the undistributed principal assets shall be calculated on~~ On the basis of the aggregate carrying value of those assets determined under section (1), as of the distribution date ~~without reducing the value by any unpaid principal obligation~~.

~~(d) The distribution date for purposes of this section may be the date as of which the fiduciary calculates the value of the assets if that date is reasonably near the date on which assets are actually distributed.~~

(5) The carrying value or fair market value of trust assets shall be determined on an asset-by-asset basis and shall be conclusive if reasonable and determined in good faith.

Determinations of fair market value based upon ~~on~~ appraisals performed within 2 years before ~~or after~~ the valuation date shall be presumed reasonable. The values of trust assets shall be conclusively presumed to be reasonable and determined in good faith unless proven otherwise in a proceeding commenced by or on behalf of a person interested in the trust within the time provided in s. 736.1008.

(6) All distributions to a beneficiary shall be valued based upon their fair market value on the date of distribution.

Section 10 Subsection (4) of section 738.301, Florida Statutes, is amended to read:

738.301 When right to income begins and ends.—

(4) An income interest ends on the day before an income beneficiary dies or another terminating event occurs, or on the last day of a period during which there is no beneficiary to whom a fiduciary ~~trustee~~ may distribute income.

Section 11 Subsections (1) and (2) of section 738.302, Florida Statutes, are amended to read:

738.302 Apportionment of receipts and disbursements when decedent dies or income interest begins.—

(1) A fiduciary ~~trustee~~ shall allocate an income receipt or disbursement other than one to which s. 738.201(1) applies to principal if the due date of the receipt or disbursement occurs before a decedent dies in the case of an estate or before an

income interest begins in the case of a trust or successive income interest.

(2) A fiduciary ~~trustee~~ shall allocate an income receipt or disbursement to income if the due date of the receipt or disbursement occurs on or after the date on which a decedent dies or an income interest begins and the due date is a periodic due date. An income receipt or disbursement shall be treated as accruing from day to day if the due date of the receipt or disbursement is not periodic or the receipt or disbursement has no due date. The portion of the receipt or disbursement accruing before the date on which a decedent dies or an income interest begins shall be allocated to principal and the balance shall be allocated to income.

Section 12 Subsections (2) and (3) of section 738.303, Florida Statutes, are amended to read:

738.303 Apportionment when income interest ends.—

(2) When a mandatory income interest ends, the fidcuiary ~~trustee~~ shall pay to a mandatory income beneficiary who survives that date, or the estate of a deceased mandatory income beneficiary whose death causes the interest to end, the beneficiary's share of the undistributed income that is not disposed of under the terms of the trust unless the beneficiary has an unqualified power to revoke more than 5 percent of the trust immediately before th- ----- interest ends. In the latter

case, the undistributed income from the portion of the trust that may be revoked shall be added to principal.

(3) When a fiduciary's ~~trustee~~ obligation to pay a fixed annuity or a fixed fraction of the value of the trust's assets ends, the fiduciary ~~trustee~~ shall prorate the final payment if and to the extent required by applicable law to accomplish a purpose of the trust or its grantor relating to income, gift, estate, or other tax requirements.

Section 13 Section 738.401, Florida Statutes, is amended to read:

738.401 Character of receipts.—

(1) For purposes of this section, "entity" means a corporation, partnership, limited liability company, regulated investment company, real estate investment trust, common trust fund, or any other organization in which a fiduciary ~~trustee~~ has an interest other than a trust or estate to which s. 738.402 applies, a business or activity to which s. 738.403 applies, or an asset-backed security to which s. 738.608 applies.

(2) Except as otherwise provided in this section, a fiduciary ~~trustee~~ shall allocate to income money received from an entity.

(3) Except as otherwise provided in this section, a fiduciary ~~trustee~~ shall allocate the following receipts from an entity to principal:

(a) Property other than money.

(b) Money received in one distribution or a series of related distributions in exchange for part or all of a trust's interest in the entity.

(c) Money received in total or partial liquidation of the entity.

(d) Money received from an entity that is a regulated investment company or a real estate investment trust if the money distributed represents short-term or long-term capital gain realized within the entity.

(e) Money received from an entity that is listed on a public stock exchange, but only to the extent that the distribution exceeds ten percent of the fair market value of the property on the first day of the trust year, reduced by three percent (3%) times the carrying value of the entity, times the number of years or portion of years that the asset has been held by the trust, and then subtracting the total income distributions from that entity that have been received by the trust. If a trustee has exercised a power to adjust during the period the entity has been held by the trust, then the trustee must take into account in determining the total income distributions from that entity the extent to which the exercise of that power resulted in income to the trust from that entity, and if the income of the t[illegible] [illegible]ny prior years during which

the trust owned an interest in the entity was computed under s. 738.1041, then the amount of income distributions from the entity shall be deemed to be equal to the unitrust amount paid as a result of the ownership of the entity.

(4) If a fiduciary ~~trustee~~ elects, or continues an election made by its predecessor, to reinvest dividends in shares of stock of a distributing corporation or fund, whether evidenced by new certificates or entries on the books of the distributing entity, the new shares shall retain their character as income.

(5) Money is received in partial liquidation:

(a) To the extent the entity, at or near the time of a distribution, indicates that such money is a distribution in partial liquidation; or

(b) If the total amount of money and property received in a distribution or series of related distributions from an entity that is not listed on a public stock exchange is greater than 20 percent of the entity's gross assets, as shown by the entity's year-end financial statements immediately preceding the initial receipt. For puposes of computing the 20% limitation all distributions by the entity to all owners of the entity shall be included in the calculation.

(c) This subsectionshall not apply to any entity to which subsection (7) applies.

(6) Money may not ~~is not received in partial liquidation, nor may money~~ be taken into account under paragraph (5)(b), to the extent ~~such money does not exceed the amount of income tax a trustee or beneficiary must pay on taxable income of the entity that distributes the money.~~

(a)the cumulative distributions from the entity do not represent a cumulative annual return of at least three percent (3%) of the entity's fair market value, computed annually, for each year or portion of year that the entity was held by the fiduciary.

(b) The amount of income to be allocated under this subsection shall be reduced by any income distributions previously received.

(c) If the amount of income of a trust for any prior years during which the trust owned an interest in the entity was determined under the provisions of either § 738.104 or 738.1041, then those years will be disregarded in determining the number of years or portion of a year that the asset was held by the fiduciary.

(7) The following special rules shall apply to money ~~moneys~~ or property received by a private fiduciary ~~trustee~~ from entities described in this subsection:

(a) Money ~~Moneys~~ or property received from a targeted entity that is not an investment entity which do not exceed the

trust's pro rata share of the undistributed cumulative net income of the targeted entity during the time an ownership interest in the targeted entity was held by the trust shall be allocated to income. The balance of money ~~moneys~~ or property received from a targeted entity shall be allocated to principal.

(b) If trust assets include any interest in an investment entity, the designated amount of money ~~moneys~~ or property received from the investment entity shall be treated by the fiduciary ~~trustee~~ in the same manner as if the fiduciary ~~trustee~~ had directly held the trust's pro rata share of the assets of the investment entity attributable to the distribution of such designated amount. Thereafter, distributions shall be treated as principal.

(c) For purposes of this subsection, the following definitions shall apply:

1. "Cumulative net income" means the targeted entity's net income as determined using the method of accounting regularly used by the targeted entity in preparing its financial statements, or if no financial statements are prepared, the net book income computed for federal income tax purposes, for every year an ownership interest in the entity is held by the trust. The trust's pro rata share shall be the cumulative net income multiplied by the percentage ownership of the trust.

2. "Designated amount" means money ~~moneys~~ or property received from an investment entity during any year that is equal to the amount of the distribution that does not exceed the greater of:

a. The amount of income of the investment entity for the current year, as reported to the fiduciary ~~trustee~~ by the investment entity for federal income tax purposes; or

b. The amount of income of the investment entity for the current year and the prior 2 years, as reported to the fiduciary ~~trustee~~ by the investment entity for federal income tax purposes, less any distributions of money ~~moneys~~ or property made by the investment entity to the fiduciary ~~trustee~~ during the prior 2 years.

3. "Investment entity" means a targeted entity that normally derives 50 percent or more of its annual cumulative net income from interest, dividends, annuities, royalties, rental activity, or other passive investments, including income from the sale or exchange of such passive investments.

4. "Private fiduciary ~~trustee~~" means a fiduciary ~~trustee~~ who is an individual, but only if the fiduciary ~~trustee~~ is unable to utilize the power to adjust between income and principal with respect to receipts from entities described in this subsection pursuant to s. 738.104. A bank, trust company,

or other commercial fiduciary ~~trustee~~ shall not be considered to be a private fiduciary ~~trustee~~.

5. "Targeted entity" means any entity that is treated as a partnership, subchapter S corporation, or disregarded entity pursuant to the Internal Revenue Code of 1986, as amended, other than an entity that is listed on a public stock exchange, or is described in s. 738.403.

6. "Undistributed cumulative net income" means the trust's pro rata share of cumulative net income, less all prior distributions from the targeted entity to the trust that have been allocated to income.

(d) This subsection shall not be construed to modify or change any of the provisions of ss. 738.705 and 738.706 relating to income taxes.

(8) A fiduciary ~~trustee~~ may rely upon a statement made by an entity about the source or character of a distribution, about the amount of profits of a targeted entity, or about the nature and value of assets of an investment entity if the statement is made at or near the time of distribution by the entity's board of directors or other person or group of persons authorized to exercise powers to pay money or transfer property comparable to those of a corporation's board of directors.

Section 14 Section 738.402, Florida Statutes, is amended to read:

738.402 Distribution from trust or estate.— A fiduciary ~~trustee~~ shall allocate to income an amount received as a distribution of income from a trust or an estate in which the trust has an interest other than a purchased interest and shall allocate to principal an amount received as a distribution of principal from such a trust or estate. If a fiduciary ~~trustee~~ purchases an interest in a trust that is an investment entity, or a decedent or donor transfers an interest in such a trust to a fiduciary ~~trustee~~, s. 738.401 or s. 738.608 applies to a receipt from the trust.

Section 15 Section 738.403, Florida Statutes, is amended to read:

738.403 Business and other activities conducted by fiduciary ~~trustee~~.—

(1) If a fiduciary ~~trustee~~ who conducts a business or other activity determines that it is in the best interest of all the beneficiaries to account separately for the business or activity instead of accounting for the business or activity as part of the trust's general accounting records, the fiduciary ~~trustee~~ may maintain separate accounting records for the transactions of such business or other activity, whether or not the assets of such business or activity are segregated from other trust assets.

(2) A fiduciary ~~trustee~~ who accounts separately for a business or other activity may determine the extent to which the net cash receipts of such business or activity must be retained for working capital, the acquisition or replacement of fixed assets, and other reasonably foreseeable needs of the business or activity, and the extent to which the remaining net cash receipts are accounted for as principal or income in the trust's general accounting records. If a fiduciary ~~trustee~~ sells assets of the business or other activity, other than in the ordinary course of the business or activity, the fiduciary ~~trustee~~ shall account for the net amount received as principal in the trust's general accounting records to the extent the fiduciary ~~trustee~~ determines that the amount received is no longer required in the conduct of the business.

(3) Activities for which a fiduciary ~~trustee~~ may maintain separate accounting records include:

(a) Retail, manufacturing, service, and other traditional business activities.

(b) Farming.

(c) Raising and selling livestock and other animals.

(d) Management of rental properties.

(e) Extraction of minerals and other natural resources.

(f) Timber operations.

(g) Activities to whi[illegible] 607 ~~738.608~~ applies.

Section 16 Section 738.501, Florida Statutes, is amended to read:

738.501 Principal receipts.—A fiduciary ~~trustee~~ shall allocate to principal:

(1) To the extent not allocated to income under this chapter, assets received from a transferor during the transferor's lifetime, a decedent's estate, a trust with a terminating income interest, or a payor under a contract naming the trust or its fiduciary ~~trustee~~ as beneficiary.

(2) Money or other property received from the sale, exchange, liquidation, or change in form of a principal asset, including realized profit, subject to this section.

(3) Amounts recovered from third parties to reimburse the trust because of disbursements described in s. 738.702(1)(g) or for other reasons to the extent not based on the loss of income.

(4) Proceeds of property taken by eminent domain but a separate award made for the loss of income with respect to an accounting period during which a current income beneficiary had a mandatory income interest is income.

(5) Net income received in an accounting period during which there is no beneficiary to whom a fiduciary ~~trustee~~ may or shall distribute income.

(6) Other receipts as provided in ss. 738.601-738.608.

Section 17 Section 738.502, Florida Statutes, is amended to read:

738.502 Rental property.—To the extent a fiduciary ~~trustee~~ accounts for receipts from rental property pursuant to this section, the fiduciary ~~trustee~~ shall allocate to income an amount received as rent of real or personal property, including an amount received for cancellation or renewal of a lease. An amount received as a refundable deposit, including a security deposit or a deposit that is to be applied as rent for future periods, shall be added to principal and held subject to the terms of the lease and is not available for distribution to a beneficiary until the fiduciary's ~~trustee~~ contractual obligations have been satisfied with respect to that amount.

Section 18 Subsections (1) through (3) of section 738.503, Florida Statutes, are amended to read:

738.503 Obligation to pay money.—

(1) An amount received as interest, whether determined at a fixed, variable, or floating rate, on an obligation to pay money to the fiduciary ~~trustee~~, including an amount received as consideration for prepaying principal, shall be allocated to income without any provision for amortization of premium.

(2) Except as otherwise provided herein, a fiduciary ~~trustee~~ shall allocate to principal an amount received from the

sale, redemption, or other disposition of an obligation to pay money to the fiduciary ~~trustee~~.

(3) The increment in value of a bond or other obligation for the payment of money bearing no stated interest but payable at a future time in excess of the price at which it was issued or purchased, if purchased after issuance, is distributable as income. If the increment in value accrues and becomes payable pursuant to a fixed schedule of appreciation, it may be distributed to the beneficiary who was the income beneficiary at this time of increment from the first principal cash available or, if none is available, when the increment is realized by sale, redemption, or other disposition. When unrealized increment is distributed as income but out of principal, the principal shall be reimbursed for the increment when realized. If, in the reasonable judgment of the fiduciary ~~trustee~~, exercised in good faith, the ultimate payment of the bond principal is in doubt, the fiduciary ~~trustee~~ may withhold the payment of incremental interest to the income beneficiary.

Section 19 Subsections (1) and (2) of section 738.504, Florida Statutes, are amended to read:

738.504 Insurance policies and similar contracts.—

(1) Except as otherwise provided in subsection (2), a fiduciary ~~trustee~~ shall allocate to principal the proceeds of a life insurance policy or ' ' 'ract in which the trust or

its fiduciary ~~trustee~~ is named as beneficiary, including a contract that insures the trust or its fiduciary ~~trustee~~ against loss for damage to, destruction of, or loss of title to a trust asset. The fiduciary ~~trustee~~ shall allocate dividends on an insurance policy to income if the premiums on the policy are paid from income and to principal if the premiums are paid from principal.

(2) A fiduciary ~~trustee~~ shall allocate to income proceeds of a contract that insures the fiduciary ~~trustee~~ against loss of occupancy or other use by an income beneficiary, loss of income, or, subject to s. 738.403, loss of profits from a business.

Section 20 Section 738.601, Florida Statutes, is amended to read:

738.601 Insubstantial allocations not required.—If a fiduciary ~~trustee~~ determines that an allocation between principal and income required by s. 738.602, s. 738.603, s. 738.604, s. 738.605, or s. 738.608 is insubstantial, the fiduciary ~~trustee~~ may allocate the entire amount to principal unless one of the circumstances described in s. 738.104(3) applies to the allocation. This power may be exercised by a cofiduciary ~~cotrustee~~ in the circumstances described in s. 738.104(4) and may be released for the reasons and in the manner described in s. 738.104(5). An allocation is presumed to be insubstantial if:

(1) The amount of the allocation would increase or decrease net income in an accounting period, as determined before the allocation, by less than 10 percent; or

(2) The value of the asset producing the receipt for which the allocation would be made is less than 10 percent of the total value of the trust's assets at the beginning of the accounting period.

Section 21 Section 738.602, Florida Statutes, is amended to read:

738.602 Payments from deferred compensation plans, annuities, and retirement plans or accounts.—

(1) For purposes of this section:

(a) "Fund" means a private or commercial annuity, an individual retirement account, an individual retirement annuity, a deferred compensation plan, a pension plan, a profit-sharing plan, a stock-bonus plan, an employee stock-ownership plan, or another similar arrangement in which federal income tax is deferred.

(b) "Income of the fund" means income that is determined according to subsection (2) or subsection (3).

(c) "Nonseparate account" means a fund for which the value of the participant's or account owner's right to receive benefits can be determined only by the occurrence of a date or event as defined in the instrument governing the fund.

(d) "Payment" means a distribution from a fund that a fiduciary ~~trustee~~ may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payor in exchange for future payments. The term includes a distribution made in money or property from the payor's general assets or from a fund created by the payor or payee.

(e) "Separate account" means a fund holding assets exclusively for the benefit of a participant or account owner and:

1. The value of such assets or the value of the separate account is ascertainable at any time; or

2. The administrator of the fund maintains records that show receipts and disbursements associated with such assets.

(2)(a) For a fund that is a separate account, income of the fund shall be determined:

1. As if the fund were a trust subject to the provisions of ss. 738.401-738.706; or

2. As a unitrust amount calculated by multiplying the fair market value of the fund as of the first day of the first accounting period and, thereafter, as of the last day of the accounting period that immediately precedes the accounting period during which a payment is received by the percentage determined in accordance with s. 738.1041(2)(b)2.a. The

fiduciary ~~trustee~~ shall determine such percentage as of the first month that the fiduciary's ~~trustee~~ election to treat the income of the fund as a unitrust amount becomes effective. For purposes of this subparagraph, "fair market value" means the fair market value of the assets held in the fund as of the applicable valuation date determined as provided in this subparagraph. The fiduciary ~~trustee~~ is not liable for good faith reliance upon any valuation supplied by the person or persons in possession of the fund. If the fiduciary ~~trustee~~ makes or terminates an election under this subparagraph, the fiduciary ~~trustee~~ shall make such disclosure in a trust disclosure document that satisfies the requirements of s. 736.1008(4)(a).

(b) The fiduciary ~~trustee~~ shall have discretion to elect the method of determining the income of the fund pursuant to this subsection and may change the method of determining income of the fund for any future accounting period.

(3) For a fund that is a nonseparate account, income of the fund is a unitrust amount determined by calculating the present value of the right to receive the remaining payments under 26 U.S.C. s. 7520 of the Internal Revenue Code as of the first day of the accounting period and multiplying it by the percentage determined in accordance with s. 738.1041(2)(b)2.a. The fiduciary ~~trustee~~ shall determine the unitrust amount as of

the first month that the fiduciary's ~~trustee~~ election to treat the income of the fund as a unitrust amount becomes effective.

(4) Except for those trusts described in subsection (5), the fiduciary ~~trustee~~ shall allocate to income the lesser of the payment received from a fund, or the income determined under subsection (2) or subsection (3). Any remaining amount of the payment shall be allocated to principal. ~~a payment from a fund as follows:~~

~~(a) That portion of the payment the payor characterizes as income shall be allocated to income, and any remaining portion of the payment shall be allocated to principal.~~

~~(b) To the extent that the payor does not characterize any portion of a payment as income or principal and the trustee can ascertain the income of the fund by the fund's account statements or any other reasonable source, the trustee shall allocate to income the lesser of the income of the fund or the entire payment and shall allocate to principal any remaining portion of the payment.~~

~~(c) If the trustee, acting reasonably and in good faith, determines that neither paragraph (a) nor paragraph (b) applies and all or part of the payment is required to be made, the trustee shall allocate to income 10 percent of the portion of the payment that is required to be made during the accounting period and shall allocate the balance to principal. If no part~~

~~of a payment is required to be made or the payment received is the entire amount to which the trustee is entitled, the trustee shall allocate the entire payment to principal. For purposes of this paragraph, a payment is not "required to be made" to the extent the payment is made because the trustee exercises a right of withdrawal.~~

(5) For a trust which, to qualify for the estate or gift tax marital deduction under the Internal Revenue Code, entitles the spouse to all of the income of the trust, and the terms of the trust are silent as to the time and frequency for distribution of the income of the fund, then:

(a) For a fund that is a separate account, unless the spouse directs the fiduciary ~~trustee~~ to leave the income of the fund in the fund, the fiduciary ~~trustee~~ shall withdraw and pay to the spouse, no less frequently than annually:

1. All of the income of the fund determined in accordance with subparagraph (2)(a)1.; or

2. The income of the fund as a unitrust amount determined in accordance with subparagraph (2)(a)2.

(b) For a fund that is a nonseparate account, the fiduciary ~~trustee~~ shall withdraw and pay to the spouse, no less frequently than annually, the income of the fund as a unitrust amount determined in accordance with subsection (3).

(6) This section does not apply to payments to which s. 738.603 applies.

Section 22 Section 738.603, Florida Statutes, is amended to read:

738.603 Liquidating asset.—

(1) For purposes of this section, "liquidating asset" means an asset the value of which will diminish or terminate because the asset is expected to produce receipts for a period of limited duration. The term includes a leasehold, patent, copyright, royalty right, and right to receive payments during a period of more than 1 year under an arrangement that does not provide for the payment of interest on the unpaid balance. The term does not include a payment subject to s. 738.602, resources subject to s. 738.604, timber subject to s. 738.605, an activity subject to s. 738.607, an asset subject to s. 738.608, or any asset for which the fiduciary ~~trustee~~ establishes a reserve for depreciation under s. 738.703.

(2) A fiduciary ~~trustee~~ shall allocate to income 5 ~~10~~ percent of the receipts from the carrying value of a liquidating asset and the balance to principal. Amounts allocated to principal will reduce the carrying value of the liquidating asset, but not below zero. Amounts received in excess of the remaining carrying value are to be allocated to principal.

Section 23 Subsections (1) and (4) of section 738.604, Florida Statutes, are amended to read:

738.604 Minerals, water, and other natural resources.—

(1) To the extent a fiduciary ~~trustee~~ accounts for receipts from an interest in minerals or other natural resources pursuant to this section, the fiduciary ~~trustee~~ shall allocate such receipts as follows:

(4) If a trust owns an interest in minerals, water, or other natural resources on January 1, 2003, the fiduciary ~~trustee~~ may allocate receipts from the interest as provided in this chapter or in the manner used by the fiduciary ~~trustee~~ before January 1, 2003. If the trust acquires an interest in minerals, water, or other natural resources after January 1, 2003, the fiduciary ~~trustee~~ shall allocate receipts from the interest as provided in this chapter.

Section 24 Subsections (1), (2) and (4) of section 738.605, Florida Statutes, are amended to read:

738.605 Timber.—

(1) To the extent a fiduciary ~~trustee~~ accounts for receipts from the sale of timber and related products pursuant to this section, the fiduciary ~~trustee~~ shall allocate the net receipts:

(2) In determining net receipts to be allocated pursuant to subsection (1), a fiduciary ~~trustee~~ shall deduct and transfer to principal a reasonable amount for depletion.

(4) If a trust owns an interest in timberland on January 1, 2003, the fiduciary ~~trustee~~ may allocate net receipts from the sale of timber and related products as provided in this chapter or in the manner used by the fiduciary ~~trustee~~ before January 1, 2003. If the trust acquires an interest in timberland after January 1, 2003, the fiduciary ~~trustee~~ shall allocate net receipts from the sale of timber and related products as provided in this chapter.

Section 25 Subsection (1) of section 738.606, Florida Statutes, is amended to read:

738.606 Property not productive of income.—

(1) If a marital deduction is allowed for all or part of a trust the income of which is required to be distributed to the grantor's spouse and the assets of which consist substantially of property that does not provide the spouse with sufficient income from or use of the trust assets, and if the amounts the fiduciary ~~trustee~~ transfers from principal to income under s. 738.104 and distributes to the spouse from principal pursuant to the terms of the trust are insufficient to provide the spouse with the beneficial enjoyment required to obtain the marital deduction, the spouse may ' ''e fiduciary ~~trustee~~ to make

property productive of income, convert property within a reasonable time, or exercise the power conferred by ss. 738.104 and 738.1041. The fiduciary ~~trustee~~ may decide which action or combination of actions to take.

Section 26 Subsections (2) and (3) of section 738.607, Florida Statutes, are amended to read:

738.607 Derivatives and options.—

(2) To the extent a fiduciary ~~trustee~~ does not account under s. 738.403 for transactions in derivatives, the fiduciary ~~trustee~~ shall allocate to principal receipts from and disbursements made in connection with those transactions.

(3) If a fiduciary ~~trustee~~ grants an option to buy property from the trust whether or not the trust owns the property when the option is granted, grants an option that permits another person to sell property to the trust, or acquires an option to buy property for the trust or an option to sell an asset owned by the trust, and the fiduciary ~~trustee~~ or other owner of the asset is required to deliver the asset if the option is exercised, an amount received for granting the option shall be allocated to principal. An amount paid to acquire the option shall be paid from principal. A gain or loss realized upon the exercise of an option, including an option granted to a grantor of the trust for services rendered, shall be allocated to principal.

Section 27 Subsections (2) and (3) of section 738.608, Florida Statutes, are amended to read:

738.608 Asset-backed securities.—

(2) If a trust receives a payment from interest or other current return and from other proceeds of the collateral financial assets, the fiduciary ~~trustee~~ shall allocate to income the portion of the payment which the payor identifies as being from interest or other current return and shall allocate the balance of the payment to principal.

(3) If a trust receives one or more payments in exchange for the trust's entire interest in an asset-backed security during a single accounting period, the fiduciary ~~trustee~~ shall allocate the payments to principal. If a payment is one of a series of payments that will result in the liquidation of the trust's interest in the security over more than a single accounting period, the fiduciary ~~trustee~~ shall allocate 10 percent of the payment to income and the balance to principal.

Section 28 Section 738.701, Florida Statutes, is amended to read:

738.701 Disbursements from income.—A fiduciary ~~trustee~~ shall make the following disbursements from income to the extent they are not disbursements to which s. 738.201(2)~~(a) or (c)~~ applies:

(1) One-half of the regular compensation of the fiduciary ~~trustee~~ and of any person providing investment advisory or custodial services to the fiduciary ~~trustee~~.

(2) One-half of all expenses for accountings, judicial proceedings, or other matters that involve both the income and remainder interests.

(3) All of the other ordinary expenses incurred in connection with the administration, management, or preservation of trust property and the distribution of income, including interest, ordinary repairs, regularly recurring taxes assessed against principal, and expenses of a proceeding or other matter that concerns primarily the income interest.

(4) Recurring premiums on insurance covering the loss of a principal asset or the loss of income from or use of the asset.

Section 29 Subsection (1) of section 738.702, Florida Statutes, is amended to read:

738.702 Disbursements from principal.—

(1) A fiduciary ~~trustee~~ shall make the following disbursements from principal:

(a) The remaining one-half of the disbursements described in s. 738.701(1) and (2).

(b) All of the fiduciary's ~~trustee's~~ compensation calculated on principal as a fee for acceptance, distribution,

or termination and disbursements made to prepare property for sale.

(c) Payments on the principal of a trust debt.

(d) Expenses of a proceeding that concerns primarily principal, including a proceeding to construe the trust or will or to protect the trust, estate or its property.

(e) Premiums paid on a policy of insurance not described in s. 738.701(4) of which the trust or estate is the owner and beneficiary.

(f) Estate, inheritance, and other transfer taxes, including penalties, apportioned to the trust.

(g) Disbursements related to environmental matters, including reclamation, assessing environmental conditions, remedying and removing environmental contamination, monitoring remedial activities and the release of substances, preventing future releases of substances, collecting amounts from persons liable or potentially liable for the costs of such activities, penalties imposed under environmental laws or regulations and other payments made to comply with those laws or regulations, statutory or common law claims by third parties, and defending claims based on environmental matters.

(h) Payments representing extraordinary repairs or expenses incurred in making a capital improvement to principal, including special assessments. However, a fiduciary ~~trustee~~ may

establish an allowance for depreciation out of income to the extent permitted by s. 738.703.

Section 30 Subsection (2) of Section 738.703, Florida Statutes, is amended to read:

738.703 Transfers from income to principal for depreciation.—

(2) A fiduciary ~~trustee~~ may transfer to principal a reasonable amount of the net cash receipts from a principal asset that is subject to depreciation but may not transfer any amount for depreciation:

(a) Of that portion of real property used or available for use by a beneficiary as a residence or of tangible personal property held or made available for the personal use or enjoyment of a beneficiary;

(b) During the administration of a decedent's estate; or

(c) Under this section if the fiduciary ~~trustee~~ is accounting under s. 738.403 for the business or activity in which the asset is used.

Section 31 Subsections (1) through (3) of section 738.704, Florida Statutes, are amended to read:

738.704 Transfers from income to reimburse principal.—

(1) If a fiduciary ~~trustee~~ makes or expects to make a principal disbursement described in this section, the fiduciary ~~trustee~~ may transfer an appropriate amount from income to

principal in one or more accounting periods to reimburse principal or to provide a reserve for future principal disbursements.

(2) Principal disbursements to which subsection (1) applies include the following, but only to the extent the fiduciary ~~trustee~~ has not been and does not expect to be reimbursed by a third party:

(a) An amount chargeable to income but paid from principal because the amount is unusually large.

(b) Disbursements made to prepare property for rental, including tenant allowances, leasehold improvements, and broker's commissions.

(c) Disbursements described in s. 738.702(1)(g).

(3) If the asset the ownership of which gives rise to the disbursements becomes subject to a successive income interest after an income interest ends, a fiduciary ~~trustee~~ may continue to transfer amounts from income to principal as provided in subsection (1).

Section 32 Section 738.705, Florida Statutes, is amended to read:

738.705 Income taxes.—

(1) A tax required to be paid by a fiduciary ~~trustee~~ based on receipts allocated to income shall be paid from income.

(2) A tax required to be paid by a fiduciary ~~trustee~~ based on receipts allocated to principal shall be paid from principal, even if the tax is called an income tax by the taxing authority.

(3) A tax required to be paid by a fiduciary ~~trustee~~ on the trust's or estate's share of an entity's taxable income shall be paid proportionately:

(a) From income to the extent receipts from the entity are allocated to income; and

(b) From principal to the extent ~~(1).~~ receipts from the entity are allocated to principal; ~~: and~~

(c) From principal and income to the extent that receipts from the entity are allocated to both income and principal: and

(d) From principal to the extent that the income taxes payable by the trust or estate exceed the total distributions from the entity.

~~2. The trust's share of the entity's taxable income exceeds the total receipts described in paragraph (a) and subparagraph 1.~~

After applying subsections (1) through (3), the fiduciary shall adjust income or principal receipts to the extent that the trust's or estate's income taxes are reduced, but not eliminated, because the trust or estate receives a deduction for payments made to a beneficiary.

(4) For purposes of this section, if income taxes are reduced, but not eliminated, because the trust or estate receives a deduction for payments made to a beneficiary, then the actual amount distributable to such beneficiary as a result of the distribution from the entity is equal to (a)the cash received by the trust or estate reduced by (b) the entity's taxable income allocable to the trust or estate multiplied by the trust's or estate's income tax rate; this amount is then divided by (c) of the difference between one (1) and the trust's or estate's income tax rate ~~receipts allocated to principal or income shall be reduced by the amount distributed to a beneficiary from principal or income for which the trust receives a deduction in calculating the tax~~.

Section 33 Section 738.804, Florida Statutes, is amended to read:

738.804 Application.—Except as provided in the trust instrument, the will, or this chapter, this chapter shall apply to any receipt or expense received or incurred and any disbursement made after January 1, 2003, by any trust or decedent's estate, whether established before or after January 1, 2003, and whether the asset involved was acquired by the fiduciary ~~trustee or personal representative~~ before or after January 1, 2003. Receipts or expenses received or incurred and disbursements made before [illegible] 2003, shall be governed by

the law of this state in effect at the time of the event, except as otherwise expressly provided in the will or terms of the trust or in this chapter.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By ED KOREN, Chair,UNIFORM PRINCIPAL & INCOME ACT Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date_____, 2011)

Address 100 North Tampa Street, Suite 4100, Tampa, FL 33602

Telephone: (813)227-8500 _____

Position Type RPPTL Section, The Florida Bar
(Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance

Ed Koren, Holland & Knight,100 North Tampa Street, Suite 4100, Tampa, FL 33602, Telephone (813) 227-8500.
Michael J. Gelfand, Gelfand & Arpe, P.A., Regions Financial Tower, Suite 1220, 1555 Palm Beach Lakes Blvd., West Palm Beach, FL 33401 Telephone (561) 655-6224
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533
(List name, address and phone number)

Appearances Before Legislators (SAME)
(List name and phone # of those having face to face contact with Legislators)

Meetings with Legislators/staff (SAME)
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following N/A
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position Support _____ Oppose _____ Tech Asst. _____ Other _____

Proposed Wording of Position for Official Publication:

"Support the proposed amendments to F.S. Chapter 738 to bring the Florida Uniform Principal and Income Act into conformity and alignment with the Uniform Act and Federal tax law and to clarify existing ambiguities representing further and ongoing technical corrections to our Act."

Reasons For Proposed Advocacy:

Attached is a White Paper describing the proposed changes to Chapter 738 and explaining the need for them.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section po ie to include opposing positions. Contact the Governmental Affairs office if assistance is ... eting this portion of the request form.

Most Recent Position NONE

(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one)

NONE

(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

The Florida Bar Tax Section

(Name of Group or Organization) (Support, Oppose or No Position)

The Florida Bankers Association
(Joan Crain, FBA representative to Drafting Committee)

(Name of Group or Organization) (Support, Oppose or No Position)

The Florida Institute of Certified Public Accountants
(Gordon Spoor, CPA, FICPA representative to Drafting Committee)

(Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

WHITE PAPER
ON
A PROPOSED BILL TO MAKE TECHINICAL CORRECTIONS TO THE FLORIDA UNIFORM PRINCIPAL AND INCOME ACT, CHAPTER 738, FLORIDA STATUTES

I. SUMMARY

The 2002 Florida Legislature enacted the Florida Uniform Principal and Income Act effective January 1, 2003. Contained in Chapter 2002-42, Laws of Florida, the UPIA made sweeping changes to Florida's principal and income laws. Technical corrections were made in 2003, 2005 and 2009.

Interested industry groups that were proponents of the UPIA, have continued working together to clarify language and to identify other shortfalls with this new law. As a result, technical corrections to the UPIA have been identified and are set forth below.

II CURRENT SITUATION

Florida's current version of the Uniform Principal and Income Act, Chapter 738 (the Act) has greatly improved the guidance offered to fiduciaries in administering trusts and estates in Florida. Certain provisions of the Act were in need of clarification as they related to both trustees and personal representatives. Additionally, the Internal Revenue Service issued a Revenue Ruling (Rev. Rul. 2006-17) which required clarification of the treatment of retirement plan distributions. Additional clarity was also needed in the computation of income payable to residual devises and pecuniary devises.

III SECTION-BY-SECTION ANALYSIS

A. Summary of specific changes to multiple chapters:

Current Situation:

Florida's Uniform Principal and Income Act (The Act) was written to apply to all fiduciaries including, but not limited to, trustees and personal representatives.(See F.S. §738.102(4)) However, certain sections of The Act that pertained to all fiduciaries contained the word Trustee.

Effect of Proposed Changes:

This Technical Correction Bill removes reference to the word "trustee(s)" and replaces it with "fiduciary (ies)" where appropriate. Additionally, the word "fiduciary (ies) was used in some sections meant to apply only to "trustee(s)" The sections of The Act impacted by this change are as follows:

F.S. 738 Principal and Income Act heading page In ss. 738.403
F.S. 738.105 Judicial control of discretionary powers.

F.S. 738.301 When right to income begins and ends.
F.S. 738.302 Apportionment of receipts and disbursements when decedent dies or income interest begins.
F.S. 738.303 Apportionment when income interest ends.
F.S. 738.401 Character of receipts.
F.S. 738.403 Business and other activities conducted by trustee.
F.S. 738.501 Principal receipts.
F.S. 738.502 Rental property.
F.S. 738.503 Obligation to pay money.
F.S. 738.504 Insurance policies and similar contracts.
F.S. 738.601 Insubstantial allocations not required.
F.S. 738.602 Payments from deferred compensation plans, annuities, and retirement plans or accounts.
F.S. 738.603 Liquidating asset.
F.S. 738.604 Minerals, water, and other natural resources.
F.S. 738.605 Timber.
F.S. 738.606 Property not productive of income.
F.S. 738.607 Derivatives and options.
F.S. 738.608 Asset-backed securities.
F.S. 738.701 Disbursements from income.
F.S. 738.702 Disbursements from principal.
F.S. 738.703 Transfers from income to principal for depreciation.
F.S. 738.704 Transfers from income to reimburse principal.
F.S. 738.705 Income taxes.
F.S. 738.804 Application.

B. Section 738.102

Current Situation:

The Florida Principal and Income Act ("1962 Act") as it existed prior to the 2002 adoption of the current version of "The Act" included a definition of "Inventory Value" (F.S. §738.01(2), 1962 Act) also known as carrying value. The definition was abandoned because it was only referenced in F.S. §738.11 (1962 Act). However, with the removal of this definition Florida Statutes did not contain a definition. The only definition is found in Probate Rule 5.346 when referencing the inclusion of "carrying values" in the preparation of the accountings. This revision is meant to clarify the meaning of "carrying value" for purposes of preparing fiduciary accountings and is also needed because proposed revisions to F.S. 738.603 make use of the term carrying value when computing the allocation of receipts from a liquidating asset between principal and income.

Effect of proposed changes:

The proposed amendment allows for an adjustment of carrying value when there is a change in fiduciaries. This is in line with the Model Fiduciary Accounting Standards adopted by the American Bar Association, American Bankers Association and the American Institute of Certified Public Accountants. This adjustment is not mandatory but is intended to allow the new fiduciaries to adjust carrying values to establish the amount over which they are responsible so that the beneficiaries have a benchmark to measure subsequent performance of the fiduciary. This would typically be applied when the prior fiduciary had incurred substantial unrealized losses that had yet to be recognized for fiduciary accounting purposes. Absent the adjustment, the new fiduciary will be starting out with negative performance as reflected on the fiduciary accounting.

This is addressed in the comments to the Model Fiduciary Accounting Standards Section IV wherein illustration 4.2 acknowledges that it may be appropriate, when allowed under applicable local law, to adjust carrying value of assets to reflect values at the start of his/her administration.

As the proposed amendment makes the election to adjust carrying values when there is a change in fiduciary elective and not mandatory, no additional burden is imposed upon successor trustees without their assent.

Additionally, if the fiduciary elects to adjust carrying values, such adjustment must be reported on the first accounting filed after the election is made.

The proposed addition to F. S. 738.102 is as follows:

738.102(3) "Carrying Value" (also known as "Inventory Value" and "Fiduciary Acquisition Value") means the fair market value at the time the assets are received by the fiduciary. For estates of decedents, and revocable trusts after the grantor's death, the assets are considered as received at the date of death. If there is a change in fiduciaries, a majority of the continuing fiduciaries may elect to adjust the carrying values to reflect the fair market value of the assets at the beginning of their administration; if that election is made, it must be reflected on the first accounting filed after the election. For assets acquired during the administration: of the estate or trust, the carrying value will be equal to the acquisition cost of the asset.

C. Section 738.103(3)

Current Situation:

F.S. 738.103" Fiduciary duties; general principle" outlines default duties that apply to all trusts. However, as written, it is not clear that these duties are owed to all trusts administered within the state of Florida or under Florida law regardless of any prior administrative situs the trust may have had in the past.

Effect of Proposed Changes:

The changes will clarify the applicability of F.S. 738 to all trusts administered in Florida or under Florida law and will delete the limiting reference in s. 738.1041 F.S..

The addition to F.S. 738.103 is as follows:

738.103(3) Except as provided in Section 738.1041(10), this chapter shall be construed as pertaining to the administration of a trust or estate and is applicable to any trust or estate that is administered either in this state or under Florida law.

In addition similar language currently included in F. S. 738.104(11) will be removed as being redundant after the above change.

F.S. 738.1041 ~~(11) This section shall be construed as pertaining to the administration of a trust and is applicable to any trust that is administered either in this state or under Florida law.~~

D. Section 738.1041

Current Situation:

F.S. §738.1041 Total return unitrust provides for both the creation of an express unitrust and the conversion to or from a unitrust. The unitrust provision has gained wide acceptance with fiduciaries due to its ease of administration.

Effect of Proposed Changes:

Large market fluctuations either up or down can cause large differences in income from year to year. In order to alleviate this the proposed revisions to The Act provide for the addition of a "smoothing rule" which uses an average of the fair market value of the trusts assets computed for the current and two preceding years. The proposed revisions include a definition of both "Average Fair Market Value" and "Fair Market Value". This will allow for more consistency of income distributions to the income beneficiaries. The following changes are proposed.

F.S. 738.1041(1) (a) "Average Fair market value" means the average of the fair market values of assets held by the trust at the beginning of the current and each of the two preceding years, or for the entire term of the trust, if fewer.

(c) "Fair Market Value" means the fair market value of the assets held by the trust as otherwise determined under this chapter, reduced by all known non-contingent liabilities.

(g) "Unitrust amount" means the amount determined by multiplying the average fair market value of the assets as defined in paragraph (1)(a) by the percentage calculated under paragraph (2)(b).

Additionally, F.S. 1041(4) contains a paragraph that is duplicative of F.S. 738.1041(2)(b)(2)(b). The following deletion is proposed.

F.S. 738.1041 ~~(4) All determinations made pursuant to sub-subparagraph (2)(b)2.b. shall be conclusive if reasonable and made in good faith. Such determination shall be conclusively presumed to have been made reasonably and in good faith unless proven otherwise in a proceeding commenced by or on behalf of a person interested in the trust within the time provided in s. 736.1008. The burden will be on the objecting interested party to prove that the determinations were not made reasonably and in good faith.~~

Additionally, F.S. 738.1041(10)(e) contains a prohibition of the use of a unitrust if the trustee currently possessed the power of appointment granted under F.S. 738.104. Because the power to adjust is automatically granted to disinterested trustees of trusts becoming irrevocable after January 1, 2003, absent anything to the contrary in the trust document, this section implied that such trustees could not use the unitrust provisions of F.S. 738.1041. However, F. S. 738.104(5)(a) provides that a trustee may release the entire power to adjust allowing the use of a unitrust but no method of release if provided. By removing F.S. §738.1041(10)(e) any possible conflict between the two sections is avoided. The change proposed is the removal of the following language: (Notice renumbering due to the deletion above.)

F.S. 738.1041 (10) ~~(e) The trust is a trust with respect to which a trustee currently possesses the power to adjust under s. 738.104.~~

A minor change is proposed to remove a sentence in F.S. 738.1041(11)(a) which contains language that is duplicative of F.S. 738.1041(10)(c) as follows.

F.S. 738.1041(11)(a) That distributions from the trust will be unitrust amounts and the manner in which the unitrust amount will be calculated ~~and the method in which the fair market value of the trust will be determined~~;

References to "trust document" have been changed to "trust instrument" to achieve uniformity with the Florida Trust Code.

E. Section 738.201

Current Situation:

F.S. 738.201(1) & (2) contained wording that implied that estates may not be subject to all provisions of the chapter.

Effect of Proposed Changes:

This revision removes the applicable wording.

F.S. 738.201(1) A fiduciary of an estate or of a terminating income interest shall determine the amount of net income and net principal receipts received from property specifically given to a beneficiary under the rules in ss. 738.301-738.706 ~~which apply to trustees~~ and the rules in subsection (5). The fiduciary shall distribute the net income and net principal receipts to the beneficiary who is to receive the specific property.

(2) A fiduciary shall determine the remaining net income of a decedent's estate or a terminating income interest under the rules in ss. 738.301-738.706 ~~which apply to trustees~~ and by:

F.S. 738.201(3) made reference to the payment of statutory interest on pecuniary devises not in trust. Because Florida Statutes contain no such provision it was felt that the wording should be changed as follows:

(3) ~~A fiduciary shall distribute to~~ Aa beneficiary who receives a pecuniary amount outright ~~the~~ is also entitled to receive interest on that amount or any other amount provided by the will, or the terms of the trust, ~~or applicable law~~a fiduciary shall distribute such amount from net income determined under subsection (2) or from principal to the extent net income is insufficient. ~~If a beneficiary is to receive a pecuniary amount outright from a trust after an income interest ends and no interest or other amount is provided for by the terms of the trust or applicable law, the fiduciary shall distribute the interest or other amount to which the beneficiary would be entitled under applicable law if the pecuniary amount were required to be paid under a will.~~

F. Section 738.202

Current Situation:

The 2002 revisions to The Act required distributions to pecuniary devises in trust and remainder beneficiaries in proportion to their respective interests in the assets fair

market value of the assets on the date of distribution. From an administrative perspective, this required a revaluation of all assets on each distribution date. The 1962 Act provided that distributions were to be based upon relative carrying values and not fair market value. This simplified administration and did not require recomputation of a beneficiaries fractional interest as long as no disproportionate distributions were made. (F.S. 738.04 1962 Act).

Effect of Proposed Changes:

The proposed changes will simplify administration by returning to the method of allocating income used prior to the adoption of the Act. The proposed revisions are as follows:

738.202 Distribution to residuary and remainder beneficiaries.--

(1) Each beneficiary described in s. 738.201(4) is entitled to receive a portion of the net income remaining after the application of s. 738.201(1)-(3), that is equal to the beneficiary's fractional interest in undistributed principal assets, using carrying values as of the distribution date. If a fiduciary makes more than one distribution of assets to beneficiaries to whom this section applies, each beneficiary, including one who does not receive part of the distribution, is entitled, as of each distribution date, to the net income the fiduciary has received after the date of death or terminating event or earlier distribution date but has not distributed as of the current distribution date.

(2) In determining a beneficiary's share of net income, the following rules apply:

(a) The beneficiary is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in the carrying value of the undistributed principal assets immediately ~~before~~ prior to the distribution date, excluding the amount of ~~principal~~ unpaid liabilities.

(b) The beneficiary's fractional interest in the undistributed principal assets shall be calculated ~~without~~:

1. At the time the interest began and adjusted for any disproportionate distributions since the interest began;

2. By excluding any liabilities of the estate or trust from the calculation;

3. By also excluding property specifically given to a beneficiary and property required to pay pecuniary amounts not in trust; and

4. ~~(c) The beneficiary's fractional interest in the undistributed principal assets shall be calculated on~~ On the basis of the aggregate carrying value of those assets determined under section (1), as of the distribution date ~~without reducing the value by any unpaid principal obligation.~~.

~~(d) The distribution date for purposes of this section may be the date as of which the fiduciary calculates the value of the assets if that date is reasonably near the date on which assets are actually distributed.~~

(3) If a fiduciary does not distribute all of the collected but undistributed net income to each person as of a distribution date, the fiduciary shall maintain appropriate records showing the interest of each beneficiary in that net income.

(4) A fiduciary may apply the rules in this section, to the extent the fiduciary considers appropriate, to net gain or loss realized after the date of death or terminating event or earlier distribution date from the disposition of a principal asset if this section applies to the income from the asset.

(5) The carrying value or fair market value of trust assets shall be determined on an asset-by-asset basis and shall be conclusive if reasonable and determined in good faith. ~~Determinations~~ Determination of fair market value based ~~on~~upon appraisals performed within 2 years before ~~or after~~ the valuation date shall be presumed reasonable. The ~~value~~values of trust assets shall be conclusively presumed to be reasonable and determined in good faith unless proven otherwise in a proceeding commenced by or on behalf of a person interested in the trust within the time provided in s. 736.1008.

(6) All distributions to a beneficiary shall be valued based upon their fair market value on the date of distribution.

Example 1

Gross estate	$21,000,000
Debts & Exp	(1,000,000)
Net	$20,000,000
Marital	$15,000,000
Family	5,000,000

Income will be allocated 75% 25% computed using the $20,000,000 denominator. If the statute did not exclude assets that later may be used to meet unpaid obligations the fraction would change each time a debt is paid.

Example 2

Same facts as above except marital share is a pecuniary gift of $8,000,000. The fraction will be 45.584% for the marital share after adjusting for the payment of estate taxes of $2,450,000. ($8,000,000/($21,000,000-$1,000,000-$2,450,000)=45.584%)

G. Section 738.401

Current Situation:

This section deals with receipt from all "entities". The Act as originally adopted provided a default rule that required that payments in excess of 20% of the entities assets were presumed to be liquidating distributions. This became a problem for entities involved in the service industry that paid large dividends in proportion to their asset base. This also became a problem when Microsoft Corp. declared its first dividend

which exceeded 20% of its total assets. Notwithstanding the fact that the distribution represented accumulated profits the amount was treated as a principal distribution.

Effect of Proposed Changes:

The proposed revision keeps the 20% rule for non publicly traded entities but allows for the computation of a cumulative minimum return of 3% annually. This will serve to protect the interest of both the income and remainder beneficiaries.

738.401(3)(e) Money received from an entity that is listed on a public stock exchange, but only to the extent that the distribution exceeds ten percent of the fair market value of the property on the first day of the trust year, reduced by three percent (3%) times the carrying value of the entity, times the number of years or portion of years that the asset has been held by the trust, and then subtracting the total income distributions from that entity that have been received by the trust. If a trustee has exercised a power to adjust during the period the entity has been held by the trust, then the trustee must take into account in determining the total income distributions from that entity the extent to which the exercise of that power resulted in income to the trust from that entity, and if the income of the trust for any prior years during which the trust owned an interest in the entity was computed under s. 738.1041, then the amount of income distributions from the entity shall be deemed to be equal to the unitrust amount paid as a result of the ownership of the entity.

738.401(5)(b) If the total amount of money and property received in a distribution or series of related distributions from an entity that is not listed on a public stock exchange is greater than 20 percent of the entity's gross assets, as shown by the entity's year-end financial statements immediately preceding the initial receipt. For purposes of computing the 20% limitation all distributions by the entity to all owners of the entity shall be included in the calculation.

(c) This subsection shall not apply to any entity to which subsection (7) applies.

(6) Money may not be taken int er paragraph (5)(b), to the extent

(a)The cumulative distributions from the entity do not represent a cumulative annual return of at least three percent (3%) of the entity's fair market value, computed annually, for each year or portion of year that the entity was held by the fiduciary.

(b) The amount of income to be allocated under this subsection shall be reduced by any income distributions previously received.

(c) If the amount of income of a trust for any prior years during which the trust owned an interest in the entity was determined under the provisions of either § 738.104 or 738.1041, then those years will be disregarded in determining the number of years or portion of a year that the asset was held by the fiduciary.

F.S. 738.401(7) was added in 2005 to address potential abuses of entities by private trustees. The section has been effective but it was found to impose an undue burden on trusts that have a private trustee and invest in a publicly traded partnership. Because the private trustee is not involved with determining the dividend policy of such entities the conflict of interest addressed in 738.401(7) does not exist. The following revision is proposed to F.S. 738.401(7)(c)(5):

5. "Targeted entity" means any entity that is treated as a partnership, subchapter S corporation, or disregarded entity pursuant to the Internal Revenue Code of 1986, as amended, other than an entity that is listed on a public stock exchange, or is described in s. 738.403.

H. Section 738.602

Current Situation:

This section was amended in 2009 to change the method used to compute the income from such payments in response to an IRS Ruling that declared the language in the Revised Uniform Principal and Income Act could jeopardize the qualification of a trust for the marital deduction. The amendment adopted a method of computation of income from such assets held in marital trusts similar to that adopted by NCCUSL.

However, non marital trusts continued to compute the allocation of income and principal using the method included in the original Act.

Effect of Proposed Changes:

The proposed revision would result in only one set of rules for all trusts holding such interests thereby simplifying administration. The proposed changes are as follows:

F.S. 738.602(4) Except for those trusts described in subsection (5), the fiduciary shall allocate to income the lesser of the payment received from a fund, or the income determined under subsection (2) or subsection (3). Any remaining amount of the payment shall be allocated to principal. ~~Except for those trusts described in subsection (5), the trustee shall allocate a payment from a fund as follows:~~

~~(a) That portion of the payment the payor characterizes as income shall be allocated to income, and any remaining portion of the payment shall be allocated to principal.~~

~~(b) To the extent that the payor does not characterize any portion of a payment as income or principal and the trustee can ascertain the income of the fund by the fund's account statements or any other reasonable source, the trustee shall allocate to income the lesser of the income of the fund or the entire payment and shall allocate to principal any remaining portion of the payment.~~

~~(c) If the trustee, acting reasonably and in good faith, determines that neither paragraph (a) nor paragraph (b) applies and all or part of the payment is required to be made, the trustee shall allocate to income 10 percent of the portion of the payment that is required to be made during the accounting period and shall allocate the balance to principal. If no part of a payment is required to be made or the payment received is the entire amount to which the trustee is entitled, the trustee shall allocate the entire payment to principal.~~ For purposes of this ~~paragraph, a payment is not "required to be made" to the extent the payment is made because the trustee exercises a right of withdrawal.~~

I. Section 738.603

Current Situation:

This section is used to allocate receipts from assets from which payments will diminish or terminated because the asset is expected to produce receipts for a period of limited duration such as royalties, patents and leaseholds. NCCUSL's Uniform Principal and Income Act allocated 10% of such payments to income and the balance to principal. Florida adopted this approach in 2002. In light of the adverse ruling issued by the IRS relative to using a payment of 10% of total payments received to income and the balance to principal this section should be amended to remove such language.

Effect of Proposed Changes:

The proposed amendments adopt the same rules that existed under the 1962 Act in F.S. 738.11 required that payments be allocated first to income to the extent of 5% of the assets carrying value at the beginning of the year and the balance to principal. The proposed revisions are as follows:

F.S. 738.603(2) A ~~trustee~~fiduciary shall allocate to income ~~10~~5 percent of the ~~receipts from~~carrying value of a liquidating asset and the balance to principal. Amounts allocated to principal will reduce the carrying value of the liquidating asset, but not below zero. Amounts received in excess of the remaining carrying value are to be allocated to principal.

J. Section 738.705

Current Situation:

Since its original adoption on 2002 NCCUSL has amended the Uniform Principal and Income Act to clarify the method of income tax allocation for pass through entities such as partnerships and S Corporations.

Effect of Proposed Changes:

The proposed amendment adopts the methodology employed by NCCUSL in their whitepaper comments. The formula used by NCCUSL to determine the amount of a receipt from a pass through entity that is allocable to income and distributable to the income beneficiary is a follows:

$$D = [C- (R \times K)]/(1-R)$$

D = Distribution to income beneficiary

C = Cash paid by the entity to the trust

R = Tax rate on income

K = Entity's K-1 taxable income

Example: ABC Trust receives a K-1 from Partnership reflecting taxable income of $1 million. Partnership distributes $500,000 to the trust, which it represents to be income. The trust is in the 35 percent tax bracket.

In the example above, the partnership distribution exceeds the trust's $350,000 tax on the K-1 income by $150,000 ($500,000 - $350,000 = $150,000) allowing it to distribute the remaining $150,000 to the beneficiary. But because the trust can deduct the $150,000 paid to the beneficiary in computing the trust's income tax liability, it must apply the algebraic formula above to derive the amount owed the beneficiary. After deducting the payment, the trust should have exactly enough to pay its tax on the remaining share of entity taxable income.

Taxable income per K-1	1,000,000
Payment to beneficiary	(230,769)
Trust taxable income	$ 769,231
Trust tax-35 Percent	269,231
Partnership distribution	$ 500,000

Trust tax	(269,231)
Payable to the beneficiary	$ 230,769

The amendments proposed to accomplish this are as follows:

738.705 Income taxes.--

(1) A tax required to be paid by a ~~trustee~~ fiduciary based on receipts allocated to income shall be paid from income.

(2) A tax required to be paid by a ~~trustee~~ fiduciary based on receipts allocated to principal shall be paid from principal, even if the tax is called an income tax by the taxing authority.

(3) A tax required to be paid by a ~~trustee~~ fiduciary on the trust's or estate's share of an entity's taxable income shall be paid proportionately:

(a) From income to the extent receipts from the entity are allocated to income; ~~and~~

(b) From principal to the extent receipts from the entity are allocated to principal;

~~(1) Receipts from the entity are allocated to principal; and~~

~~(2) The trust's share of the entity's taxable income exceeds the total receipts described in paragraph (a) and subparagraph 1.~~

(c) From principal land income to the extent that receipts from the entity are allocated to both income and principal; and

(d) From principal to the extent that the income taxes payable by the trust or estate exceed the total distributions from the entity.

After applying subsections (1) through(3), the fiduciary shall adjust income or principal receipts to the extent that the trust's or estate's income taxes are reduced, but not eliminated, because the trust or estate receives a deduction for payments made to a beneficiary.

(4)~~For purposes of this section, receipts allocated to principal or income shall be reduced by the amount distributed to a beneficiary from principal or income for which the trust receives a deduction in calculating the tax.~~ For purposes of this section, if income taxes are reduced, but not eliminated, because the trust or estate receives a deduction for payments made to a beneficiary, then the actual amount distributable to such beneficiary as a result of the distribution from the entity is equal to (a) the cash received by the trust or estate reduced by (b) the entity's taxable income allocable to the trust or estate multiplied by the trust's or estate's income tax rate; this amount is then divided by (c) the difference between one (1) and the trust's or estate's income tax rate.

A bill to be entitled

An act relating to descent of homestead; amending s. 732.401; clarifying the period in which an attorney-in-fact or guardian must file a petition for authority to make an election to take a tenancy in common interest in a homestead and clarifying the tolling effect such a petition has on the election deadline; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (c) of subsection (2) of section 732.401, Florida Statutes, is amended to read:

732.401. Descent of homestead

(c) A petition by an attorney in fact or guardian of the property for approval to make the election ~~tolls the time for making the election until 6 months after the decedent's death or 30 days after the rendition of an order authorizing the election, whichever occurs last~~ must be filed within six months after the decedent's death and during the surviving spouse's lifetime. If the petition is timely filed, the time for making the election shall be extended for a period of time which is not less than 30 days after the rendition of the order allowing the election.

Section 2. This act shall take effect October 1, 2012.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

4A

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By	Probate Law and Procedure Committee of the Real Property Probate & Trust Law Section
Address	Tae Kelley Bronner, Chair, Tae Kelley Bronner, PL, 10006 Cross Creek Blvd., PMB #428 Tampa, FL 33647; Telephone: (813) 907-6643
Position Type	Real Property Probate & Trust Law Section and its Probate Law Committee

CONTACTS

Board & Legislation Committee Appearance	Tae Kelley Bronner, Tae Kelley Bronner, PL, 10006 Cross Creek Blvd., PMB #428 Tampa, FL 33647, (813) 907-6643 Barry F. Spivey, Adams and Reese LLP, P.O. Box 49017, Sarasota, Florida 34230-6017 (941) 316-7600 William T. Hennessey, 777 South Flagler Drive, Suite 500 East, West Palm Beach, FL33401, (561) 650-0663 Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533 Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533
Appearances before Legislators	Same
Meetings with Legislators/staff	Same

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following (Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position **XX** Support Oppose Technical Assistance Other

Proposed Wording of Position for Official Publication Support clarification of the period in which an attorney-in-fact or guardian must file a petition for authority to make an election to take a tenancy in common interest in a homestead and support clarification of the tolling effect such a petition has on the election deadline

Reasons For Proposed Advocacy Uncertainty exists as to the deadline for a guardian of the property or attorney in fact to file a petition for authority to make an election on behalf of the spouse to take an undivided tenant in common interest in lieu of a life estate in the decedent's protected homestead and when such a petition tolls the statutory time period for making such election. The proposed language clarifies when the petition must be filed and how long the election period may be tolled.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position None
(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one) None
(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

1. n/a
(Name of Group or Organization) (Support, Oppose or No Position)

2.
(Name of Group or Organization) (Support, Oppose or No Position)

3.
(Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

WHITE PAPER

PROPOSED AMENDMENTS TO §§ 732.401(2)(c), FLA. STAT.

I. SUMMARY

There has been some confusion regarding the deadline for an attorney in fact or guardian to make an election to take a tenancy in common interest in a homestead pursuant to § 732.401(2)(c), FLA. STAT. and the tolling effect such a petition has on the election deadline. The proposed changes are submitted to clarify the period in which an attorney-in-fact or guardian must file a petition for authority to make such an election.

II. ANALYSIS

Current Situation

Section 732.401(1), Florida Statutes, provides that if a homestead is not devised as authorized by law and the constitution, the homestead shall descend in the same manner as other intestate property except that if the decedent is survived by a spouse and one or more minor descendants, the surviving spouse takes a life estate in the homestead with a vested remainder to the descendants in being at the time of the decedent's death per stirpes. During the 2010 legislative session, Section 732.401(2), Florida Statutes, was amended to provide the surviving spouse with a choice as to whether to take the life estate in the homestead or elect to take an undivided one-half interest in the homestead as a tenant in common in lieu of the life estate. This alternative creates a tenancy in common relationship between the spouse and the decedent's descendants. The law applicable to tenancy in common interests is clearer in the areas of valuation, allocation of ownership expenses, and division of sale proceeds. In addition, the surviving spouse can utilize the partition procedures under Chapter 64 which are not available to a life tenant.

In addition to providing for the election, subsection (2) also describes who may make the election, when the election must be made, and the manner of making the election. Subsection (2)(a) provides that in addition to the surviving spouse, the election may also be made on behalf of the surviving spouse by either an attorney in fact or the guardian of an incapacitated spouse. When the election is made by the surviving spouse's guardian or attorney-in-fact, the election

can be made only after the court finds that the election is necessary for the spouse's best interests, taking into account the surviving spouse's life expectancy.

Subsection (2)(b) provides that the election must be filed within six months of the decedent's death. The time for making the election cannot be extended except as provided on subsection 2(c). That subsection provides,

> A petition by an attorney in fact or guardian of the property for approval to make the election tolls the time for making the election until 6 months after the decedent's death or 30 days after the rendition of an order authorizing the election, whichever occurs last.

The language in subsection 2(c) has created some confusion as to when such a petition must be filed and the tolling effect of filing such a petition. It was intended that such a petition must be filed prior to the expiration of the six month deadline. If a petition was timely filed, the time for making the election would be tolled for a time not less than thirty days after rendition of an order approving the election if the order were not rendered until after the six month deadline. The proposed statutory amendment will clarify these issues

Effect of Proposed Changes to Section 732.401(2)(c)

The proposed changes to section 732.401(2)(c) are intended to clarify that a petition by an attorney in fact or guardian of the property to make an election on behalf of a surviving spouse to take a tenancy in common interest in homestead property must be timely filed within the six month deadline provided in subsection (2)(b). If the petition is timely filed, then the time for the attorney in fact or guardian shall have no less than 30 days after rendition of the order approving the election to make the actual election. These changes will eliminate confusion regarding the current statutory language.

III. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The homestead ad valorem property tax exemption is found in Article VII, section 6, as implemented in chapter 193, Florida Statutes. The Florida Supreme Court, in *Snyder v. Davis*,[1] noted that there are three categories of homestead, each with distinct constitutional and statutory provisions: creditor protection, restrictions on devise, and exemption from ad valorem property

[1] 699 So. 2d 999 (Fla. 1997).

taxes. As the proposed changes are only clarifying manner in which an election is made by a surviving spouse when homestead is devise restricted, the proposed changes will have no impact on ad valorem property taxes or the exemptions relating thereto. Accordingly, there will be no impact on state and local governments.

IV. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

There will be no direct economic impact on the private sector. The proposed changes are only intended to clarify the existing language regarding the timing and effect of an election which is made on behalf of a surviving spouse either by an attorney in fact or guardian of an incapacitated spouse.

V. CONSTITUTIONAL ISSUES

Article X, section 4 of the Florida Constitution prohibits the devise of homestead real property when the decedent is survived by a spouse or minor child. The descent of homestead property which cannot be devised, or which is the subject of an invalid devise, is controlled by the Florida Statutes and is not addressed in the Florida Constitution. Accordingly, the proposed clarifications to the statute do not conflict with constitutional provisions and are consistent with the public policy underlying the constitutional restrictions on the devise of homestead.

VI. OTHER INTERESTED PARTIES

There should be no other interested parties in this proposed clarification to the existing statue.

A bill to be entitled

An act relating to probate; amending s. 731.201; clarifying that the definition of protected homestead does not include property owned by the decedent as a joint tenant with rights of survivorship; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (33) of section 731.201, Florida Statutes, is amended to read:

731.201 General Definitions. – Subject to additional definitions in subsequent chapters that are applicable to specific chapters or parts, and unless the context otherwise requires, in this code, in s. 409.9101, and in chapters 736, 738, 739, and 744, the term:

(33) "Protected homestead" means the property described in s. 4(a)(1), Art. X of the State Constitution on which at the death of the owner the exemption inures to the owner's surviving spouse or heirs under s. 4(b), Art. X of the State Constitution. For purposes of the code, real property owned ~~as tenants by the entirety~~ in tenancy by the entireties or joint tenancy with rights of survivorship is not "protected homestead."

Section 2. This act shall take effect October 1, 2012

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

4B

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By	Probate Law and Procedure Committee of the Real Property Probate & Trust Law Section
Address	Tae Kelley Bronner, Chair, Tae Kelley Bronner, PL, 10006 Cross Creek Blvd., PMB #428 Tampa, FL 33647; Telephone: (813) 907-6643
Position Type	Real Property Probate & Trust Law Section and its Probate Law Committee

CONTACTS

Board & Legislation Committee Appearance	Tae Kelley Bronner, Tae Kelley Bronner, PL, 10006 Cross Creek Blvd., PMB #428 Tampa, FL 33647, (813) 907-6643 Barry F. Spivey, Adams and Reese LLP, P.O. Box 49017, Sarasota, Florida 34230-6017 (941) 316-7600 William T. Hennessey, 777 South Flagler Drive, Suite 500 East, West Palm Beach, FL33401, (561) 650-0663 Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533 Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533
Appearances before Legislators	Same
Meetings with Legislators/staff	Same

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following (Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position **XX** Support Oppose Technical Assistance Other

Proposed Wording of Position for Official Publication Support clarification that defined term "protected homestead" for purposes of the probate code does not include property owned by the decedent in joint tenancy with rights of survivorship.

Reasons For Proposed Advocacy Confusion exists as to whether as a result of the omission from the current exclusions contained in the definitional statute the term "protected homestead" included property owned by the decedent in joint tenancy with rights of survivorship. The proposed amendment clarifies that property owned by the decedent in a joint tenancy without rights of survivorship for the purposes of the probate code is not included within the definition of protected homestead as any interest owned by the decedent in the property terminates at the decedent's death. The amendment is a codification of current case law.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position None

(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one)

None

(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

1. n/a
   (Name of Group or Organization) (Support, Oppose or No Position)
2. (Name of Group or Organization) (Support, Oppose or No Position)
3. (Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

WHITE PAPER

PROPOSED AMENDMENT TO § 731.201, FLA. STAT.

I. SUMMARY

The proposed changes to section 731.201 of the Florida Statutes are intended to conform to changes to section 732.401 during the 2010 legislative session. Property owned in tenancy by the entireties or joint tenancy with rights of survivorship passes by operation of law at the death of one owner, and is not subject to the constitutional restrictions on the devise of homestead. Such property may still qualify for various homestead protections, but is not "protected homestead" for purposes of the Probate Code, the Trust Code, or the Medicaid Estate Recovery Act.

II. ANALYSIS

Current Situation

Constitutional Homestead Protections. The Florida Constitution provides for protections for the owners of homestead property and their spouses and heirs. The Constitution also provides restrictions on the alienation and devise of homestead, designed to protect surviving spouses and minor children. Article X, section 4 provides protections for the homestead owner and his or her family, both during the owner's lifetime and after the owner's death:

> (a) There shall be exempt from forced sale under any process of court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, ...the following property owned by a natural person:
>
> > (1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon...; or if located in a municipality, to the extent of one-half acre of contiguous land,

> which shall be limited to the residence of the owner or the owner's family; ....
>
> (b) These exemptions shall inure to the benefit of the surviving spouse or heirs of the owner.
>
> (c) The homestead shall not be subject to devise if the owner is survived by a spouse or minor child, except that the homestead may be devised to the owner's spouse if there be no minor child....

Ownership Required for Homestead Protection. The Florida Supreme Court has recognized that various types of real estate ownership may qualify for homestead protection and in 1941 stated:

> The Constitution limits the homestead land area that may be exempted, but it does not define or limit the estates in land to which homestead exemption may apply; therefore, in the absence of controlling provisions or principals of law to the contrary, the exemptions allowed by section 1, article 10 [now Article X, Section 4], may attach to any estate in land owned by the head of a family residing in this state, whether it is a freehold or less estate, if the land does not exceed the designated area and it is in fact the family home place. When the estate or interest of the owner in the homestead land terminates, the homestead exemption of such owner therein necessarily ceases. *Menendez v. Rodriguez*, 106 Fla. 214, text page 221, 143 So. 223, text page 226.

Coleman v. Williams, 146 Fla. 45, 200 So. 207 (Fla. 1941). An owner's interest in tenancy by the entireties or joint tenancy with rights of survivorship may qualify for the protection against creditor's claims during the lifetime of the owners, and may also be subject to restrictions on the alienation of homestead during the owners' lifetime.

Descent of Homestead. If the owner of homestead real property attempts to devise homestead in a manner not permitted by the constitution, or fails to make a devise of the homestead, ownership descends as provided in section 732.401, Florida Statutes, which provides:

> ... the homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and one or more descendants, the

surviving spouse shall take a life estate in the homestead, with a vested remainder to the descendants in being at the time of the decedent's death per stirpes.

Section 731.402 was amended in 2010, recognizing that ownership in the form of tenancy by the entireties or joint tenancy with rights of survivorship is not subject to the constitutional devise restrictions because ownership does not pass as a result of a testamentary devise.

The Term "Protected Homestead" Applies Only Where the Owner has Died. Section 732.201 defines terms used in specific Florida statutes:

> Section 409.9101 (the Medicaid Estate Recovery Act);
> Chapters 731 through 735 (The Florida Probate Code);
> Chapter 736 (The Florida Trust Code);
> Chapter 738 (The Florida Uniform Principal and Income Act);
> Chapter 739 (The Florida Uniform Disclaimer of Property Interests Act); and
> Chapter 744 (The Florida Guardianship Law).

The term "protected homestead" is used only in situations where:

(1) The real property was the decedent's homestead at the time of his or her death as set forth in section 4, Article X, Fla. Const.; and

(2) The inurement of the protection against creditor claims during the owner's lifetime as set forth in paragraph (a) of section 4, Article X, inured to the benefit of the decedent's surviving spouse or heirs as set forth in paragraph (b) of section 4, Article X.

The term "protected homestead" is found in the following statutory sections:

> Section 409.9101 – Recovery of payments made on behalf of Medicaid-eligible persons (Medicaid Estate Recovery Act);
> Section 731.201 – General definitions (The Florida Probate Code);
> Section 732.2045 – Exclusions and overlapping application;
> Section 732.402 – Exempt property;
> Section 732.403 – Family allowance;
> Section 733.607 – Possession of estate;
> Section 733.608 – General power of personal representative;
> Section 733.617 – Compensation of personal representative;
> Section 733.6171 – Compensation of attorney for the personal representative;
> Section 733.817 – Apportionment of estate taxes.

The following statutes specifically reference Article X, section 4 for situations where the owner has died, but the term "homestead" is not qualified by the word "protected."

> Section 732.227 – Homestead Defined (Florida Uniform Disposition of Community Property Rights at Death Act.)
> Section 732.401 – Descent of Homestead
> Section 732.401 – Devise of Homestead
> Section 739.203 – Disclaimer of rights of property held as tenancy by the entirety.

Amendment to Section 732.401 in 2010. Prior to its amendment in 2010, section 732.401(2) provided that the restrictions on the devise of homestead were not applicable to homestead owned by the decedent and surviving spouse as tenants by the entireties. The changes were as follows:

> 732.401 Descent of homestead. ----
>
> ~~(2)~~(5) This section does ~~Subsection (1) shall~~ not apply to property that the decedent ~~and the surviving spouse~~ owned in tenancy by the entireties or joint tenancy with rights of survivorship ~~as tenants by the entirety~~.

Case law provides that homestead owned by the decedent and another individual in joint tenancy with rights of survivorship is not subject to the restrictions on devise. *Ostyn v. Olympic*, 455 So. 2d 1137 (Fla. 2d DCA 1984); *Marger v. De Rosa*, ___ So. 3d ___, 2011 WL 252942 (Fla. App. 2 Dist.). The addition of "joint tenancy with rights of survivorship" to section 732.401 was intended to prevent the argument that its omission reflected the legislature's intent to treat such interests differently. (The subsection was renumbered as subsection (7).) The same concern would apply to section 732.201(33), which defines "protected homestead" for purposes of a limited number of statutes, all of which involve situations where the owner has died.

III. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The restrictions on the devise of homestead are found in Article X, section 4 of the Florida Constitution. The homestead ad valorem property tax exemption is found in Article VII, section 6, as implemented in chapter 193, Florida Statutes. The Florida Supreme Court, in *Snyder*

v. Davis, 699 So. 2d 999 (Fla. 1997), noted that there are three categories of homestead, each with distinct constitutional and statutory provisions: creditor protection, restrictions on devise and alienation, and exemption from ad valorem property taxes. Therefore, the proposed changes will have no impact on ad valorem property taxes or the exemptions relating thereto. There will be no impact on state and local governments.

IV. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

There will be no direct economic impact on the private sector. In certain individual situations, the proposed changes could result in a benefit by providing certainty with regard to the ownership of real property.

V. CONSTITUTIONAL ISSUES

Article X, section 4 prohibits the devise of homestead real property when the decedent is survived by a spouse or minor child, but permits a devise to the surviving spouse if the decedent is not survived by a minor child. The descent of homestead property which cannot be devised, or homestead which is the subject of an invalid devise, is left to the legislature. The proposed change does not conflict with constitutional provisions and is consistent with the judicial interpretation of the nature of ownership in the form of joint tenancy with rights of survivorship. *Ostyn v. Olympic*, 455 So. 2d 1137 (Fla. 2d DCA 1984)); *Marger v. De Rosa*, ___ So. 3d ___, 2011 WL 252942 (Fla. App. 2 Dist.).

The proposed change will have no impact on the constitutional homestead exemption for ad valorem property taxes, as provided in Article VII, section 6 and Chapter 196, Florida Statutes.

The proposed change will have no impact on the constitutional protection against the claims of the owner's creditors during the owner's lifetime, as provided in Article X, section 4(a) and Chapter 222, Florida Statutes.

VI. OTHER INTERESTED PARTIES

None are known at this time.

RM:6724080:1

A bill to be entitled

An act relating to probate, creating s. 732.1081, barring inheritance rights of a natural or adoptive parent whose parental rights have been previously terminated and providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. section 732.1081, Florida Statutes is created to read:

732.1081. Termination of Parental Rights.—

For the purpose of intestate succession by a natural or adoptive parent, a natural or adoptive parent is barred from inheriting from or through a child if the natural or adoptive parent's parental rights were terminated pursuant to Chapter 39 and shall be treated as if the parent predeceased the child.

Section 2. This act shall take effect on October 1, 2012.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

4c

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By	Probate Law and Procedure Committee of the Real Property Probate & Trust Law Section
Address	Tae Kelley Bronner, Chair, Tae Kelley Bronner, PL, 10006 Cross Creek Blvd., PMB #428 Tampa, FL 33647; Telephone: (813) 907-6643
Position Type	Real Property Probate & Trust Law Section and its Probate Law Committee

CONTACTS

Board & Legislation Committee Appearance	Tae Kelley Bronner, Tae Kelley Bronner, PL, 10006 Cross Creek Blvd., PMB #428 Tampa, FL 33647 Telephone: (813) 907-6643 Barry F. Spivey, Spivey and Fallon, 1515 Ringling Blvd., Suite 885, Sarasota, FL 34236 (941) 840-1991 William T. Hennessey, 777 South Flagler Drive, Suite 500 East, West Palm Beach, FL33401, (561) 650-0663 Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533 Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533
Appearances before Legislators	Same
Meetings with Legislators/staff	Same

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following

(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position	**XX**	Support	Oppose	Technical Assistance	Other

Proposed Wording of Position for Official Publication Support creation of statute barring inheritance through intestate succession of a natural or adoptive parent from or through a child for whom their parental rights have previously been terminated.

Reasons For Proposed Advocacy Currently natural or adoptive parents, whose parental rights have been terminated pursuant to Chapter 39, may still inherit from their child if the child dies intestate, and has not been adopted. The proposed statute provides that for purposes of intestate succession, if a natural or adoptive parent's parental rights have been terminated pursuant to Chapter 39, that parent is barred from inheriting from or through the child and the natural or adoptive parent is treated as if the parent predeceased the child.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position

	SB 1050/HB 721 RPPTL Section opposed bills, containing similar provisions, but opposition was on other grounds.	Oppose	3/16/11

Others
(May attach list if more than one)

None

(Indicate Bar or Name Section)	(Support or Oppose)	(Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

1. (Name of Group or Organization) (Support, Oppose or No Position)
2. (Name of Group or Organization) (Support, Oppose or No Position)
3. (Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

Real Property, Probate and Trust Law Section of The Florida Bar
White Paper on Proposed New Section in Chapter 732, Florida Statues

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I. SUMMARY

The proposed legislation is the product of study and analysis by the Probate Law and Procedure Committee (the "Committee") of the Real Property, Probate and Trust Law Section of The Florida Bar.

The new legislative proposal would create a new section in Florida Statutes Chapter 732 entitled "Termination of Parental Rights". The proposal provides that for purposes of intestate succession, a natural or adoptive parent whose parental rights have been terminated is barred from inheriting from or through the child and shall be treated as having predeceased the child.

II. CURRENT SITUATION

Florida law, Chapter 39 governs proceedings terminating parental rights. These proceedings are not criminal in nature, but are civil proceedings designed to protect the rights of abused, neglected or abandoned children. The parental rights of one parent may be severed without severing the parental rights of the other parent under the circumstances set forth in Section 39.811 (6) Florida Statutes.

If a parent's parental rights are terminated, neither Chapter 39 nor Chapter 63 (governing adoption) terminate inheritance rights or prohibit that parent from inheriting from the estate of the child where the child dies without a will. If the child is adopted pursuant to Chapter 63, section 732.108, Florida Statutes, provides for the purposes of intestate succession for the termination of inheritance rights of the natural parents in favor of the adoptive parent or parents. However, if the child is not legally adopted, for purposes of intestate succession, the inheritance rights of the natural parent whose parental rights have been legally terminated, continue to

remain. If the child makes a will after attaining majority, that child can elect whether or not to include a parent whose parental rights have been terminated. If the child is a minor, however, the child has no legal ability to disinherit that parent. The laws of intestacy essentially make a will where a decedent has failed to or cannot make a will and attempt to duplicate the dispositive scheme which he or she would have wanted if he or she had made a will. Generally, individuals would not choose to provide for a parent whose has committed wrongful acts sufficient to justify the termination of their parental rights.

Section 732.802, which provides that a killer is not entitled to receive property or other benefits by reason of the victim's death, is the only current provision of Florida law where the conduct of an individual will prevent that individual from inheriting. After study of the laws of other states and the Uniform Probate Code, the Committee determined that it would be appropriate for Florida law to bar inheritance by a parent whose parental rights have been terminated.

III. EFFECT OF PROPOSED CHANGES

The legislative proposal would create Section 732.1081, Florida Statute, providing that for the purpose of intestate succession by a natural or adoptive parent, the natural or adoptive parent is barred from inheriting from or through a child if the natural or adoptive parent's rights were terminated pursuant to Chapter 39. In that case, the parent would be treated as if the parent predeceased the child.

IV. ANALYSIS:

Under the current law, when the termination of parental rights is determined Chapter 39, but inheritance rights are determined under Chapter 732. Chapter 732 provides for the termination of a natural parent's inheritance rights for purposes of intestate succession when a

child is adopted. However, Chapter 732 does not address a situation where a child is removed from a natural or adoptive parent and the parental rights are terminated, but the child is not otherwise adopted. If the child dies prior to reaching the age of majority, the child has no ability to prevent that parent from inheriting through or from them. In such a case, the law of intestate succession provides a default will for that child. This statute closes the loophole that currently exists in the law of intestate succession and prevents the injustice of a reprobate parent from inheriting from a child against whom they have committed severe neglect or abuse and receiving a windfall for that child's death. It also brings the law of intestate succession in line with what most individuals would expect in the current situation.

VI. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT - None.

VII. FISCAL IMPACT ON PRIVATE SECTOR - None.

VIII. CONSTITUTIONAL ISSUES - None apparent.

IX. OTHER INTERESTED PARTIES - None.

280541

A bill to be entitled

An act relating to probate, creating s. 732.5011, requiring the inclusion of identifying information of the drafting attorney for wills and codicils and providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. section 732.5011, Florida Statutes is created to read:

732.5011. Attorney's name on will.---

An attorney who drafts a will or codicil must have his or her name and business address affixed to the instrument and indicate that he or she is the drafter. The failure to include such information on a will or codicil executed in conformity with s.732.502 shall not affect the validity of the instrument.

Section 2. This act shall take effect on October 1, 2012.

RM:6724080:1

CODING: Words ~~stricken~~ are deletions, words underlined are additions.

40

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Probate Law and Procedure Committee of the Real Property Probate & Trust Law Section

Address Tae Kelley Bronner, Chair, Tae Kelley Bronner, PL, 10006 Cross Creek Blvd., PMB #428 Tampa, FL 33647;
Telephone: (813) 907-6643

Position Type Real Property Probate & Trust Law Section and its Probate Law Committee

CONTACTS

Board & Legislation Committee Appearance Tae Kelley Bronner, Tae Kelley Bronner, PL, 10006 Cross Creek Blvd., PMB #428 Tampa, FL 33647, (813) 907-6643
Barry F. Spivey, Spivey and Fallon, 1515 Ringling Blvd., Suite 885, Sarasota, FL 34236 (941) 840-1991
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533

Appearances before Legislators Same

Meetings with Legislators/staff Same

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following (Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position **XX** Support Oppose Technical Assistance Other

Proposed Wording of Position for Official Publication Support statute to impose requirement on attorneys who draft wills or codicils to include identifying information to assist in locating the drafting attorney on the death of the decedent.

Reasons For Proposed Advocacy The proposed statute is intended to facilitate the identification of the attorney who drafted the Decedent's will or codicil. The identification of the attorney will reduce probate costs and streamline the probate process in situations where testimony of witnesses to the will or the drafting attorney is necessary.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assist n completing this portion of the request form.

Most Recent Position None
(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one) None
(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

1. n/a
(Name of Group or Organization) (Support, Oppose or No Position)

2.
(Name of Group or Organization) (Support, Oppose or No Position)

3.
(Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

WHITE PAPER
Proposed Legislation to Create §732.5011, Florida Statutes

I. SUMMARY

The purpose of the proposed creation of §732.5011 of the Florida Statutes is to facilitate the identification of the drafting attorney for a will or codicil after the death of the decedent. While the statute requires the inclusion of identifying information by all attorneys who draft wills and codicils, the failure to include such information does not affect the validity of the will or codicil which otherwise properly executed in accordance with Florida law.

II. CURRENT SITUATION:

Under the current law, there is no requirement that an attorney who drafts a will or codicil include his or her name or office address on the will or identify him or herself in any way on the document. While many attorneys routinely include their name, office address, and phone number as a footer on the document, many do not. After the decedent's death, it is difficult, if not impossible, to identify the drafting attorney without such information. The document may have been executed many years before and the decedent may not have discussed the document with his or her family or the ultimate beneficiaries of the estate. The family routinely has no idea who the decedent retained to draft the will. If the will does not include a self-proof clause in accordance with s. 732.502, the witness to the will, who were most likely employees of the drafting attorney, must be located to execute an oath before the will may be admitted to probate. If the validity of the will is challenged, the drafting attorney's file and testimony is often vital to the litigation.

III. EFFECT OF THE PROPOSED CHANGE GENERALLY:

The proposed change would facilitate the identification of the drafting attorney for wills and codicils after the death of a decedent. The drafting attorney would be required to affix his or her name and business address to the will or codicil and indicate that he or she is the drafter. The failure to include the identifying information would not affect the validity of the will or codicil.

IV. ANALYSIS:

Practitioners express frustration in the difficulty of locating a drafting attorney for a will or codicil after the death of a decedent when the drafting attorney has failed to include any identifying information on the document. The proposed statute will impose little burden on the drafting attorney but will greatly reduce the costs associated with validating a will which did not include a self proof provision or which has been challenged on the basis of improper execution, undue influence, or lack of capacity. Because the information does not relate to the testamentary disposition of the decedent's property, the statute provides that an otherwise valid will or codicil cannot be invalidated for failure to include the identifying information.

VI. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT - None.

VII. FISCAL IMPACT ON PRIVATE SECTOR - None.

VIII. CONSTITUTIONAL ISSUES - None apparent.

IX. OTHER INTERESTED PARTIES - None.

Informational Item by Probate Law Committee
Overview of New Rule 2.425 and SC08-2443.

The following items are of particular importance to Probate and Real Estate Practitioners.

- **Minor's Names.** The court accepted the PRC position raised at oral argument and agreed that the name of a minor child should be included in pleadings when the pleading affects the ownership interests in real property. (page 39 of the opinion). The court accepted the language proposed by incoming RJA chair Keith Park and Jeff Goethe (chair of the PRC) as submitted following oral argument.

- **Social Security Numbers.** In general, no part of a social security number may be included in a pleading under Rule 2.425 or the information must be redacted before the pleading is filed unless required by another rule or statute. The court, however, accepted the PRC position that the last four digits of the social security number be included in various probate pleadings, including the petition for administration and petition for summary administration and amended our probate rules to provide an exception to this general rule. This should create uniformity and certainty for the clerks of court and probate judges, some of whom seem to want either the full number, a redaction of the entire number, or only the last four. **This affects Rule 5.200 (Petition for Administration), Rule 5.210 (Probate of Wills without Administration), and Rule 5.530 (Summary Administration).**

- **Account Numbers.** In general, no part of a bank account number may be included in a pleading under Rule 2.425 or the information must be redacted before the pleading is filed unless required by another rule or statute. For probate purposes, however, note the exception in subdivision (b)(1) which will impact our Petition for Summary Administration and accountings:

  "(b) Exceptions. Subdivision (a) does not apply to the following:
  (1) An account number which identifies the property alleged to be the subject of a proceeding;"

- Be mindful that **Rule 9.330** does apply and includes specific legal criteria for a motion for rehearing, as well as a 15 day deadline.

- The rule amendments take effect **October 1, 2011**.

(*The above report is an excerpt from report prepared by Jeff Goethe as outgoing Probate Rules Committee Chair)

INFORMATION ITEM

Informational Item by PLC
SC10-1928 - Caveats

The Florida Supreme Court issued **SC10-1928** on July 7, 2011, adopted new changes to Rule 5.260 based upon the Comment filed by RPPTL Section. In its prior opinion, the court removed the requirement from Rule 5.260(b) that identifying information regarding the decedent be included in a caveat. The RPPTL Section filed a comment in opposition to those changes, which was adopted by the Court. Rule 5.260 has been amended (**effective as of July 7, 2011**) to read:

RULE 5.260. CAVEAT; PROCEEDINGS

(a) [No change]

(b) Contents. The caveat shall contain the ~~decedent's~~ name~~,~~ of the person for whom the estate will be, or is being, administered, the last 4 digits of the person's social security number or year of birth, if known, a statement of the interest of the caveator in the estate, and the name and specific mailing address of the caveator.

(b) - (f) [No change]

Supreme Court of Florida

No. SC10-1928

IN RE: AMENDMENTS TO THE FLORIDA PROBATE RULES.

[July 7, 2011]

PER CURIAM.

In the December 9, 2010, opinion in this case, the Court amended the Florida Probate Rules, in response to recent changes to the Florida Probate Code. In re Amendments to the Florida Probate Rules, 51 So. 3d 1146 (Fla. 2010). The opinion gave interested persons sixty days to comment on the amendments. Id. After considering the sole comment filed by the Real Property, Probate and Trust Law Section of The Florida Bar and the Probate Rules Committee's response to that comment, we further amend Probate Rule 5.260(b).[1]

We amend subdivision (b) (Content) of rule 5.260 (Caveat; Proceedings) to reincorporate the deleted requirement that a caveat contain certain personal information about the decendent and the caveator. We deleted from the rule the

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1. We have jurisdiction. See art. V, § 2(a), Fla. Const.

requirement that a caveat contain certain personal information because the requirement had been deleted from section 731.110, Florida Statutes by chapter 2010-132, section 3, Laws of Florida. See 51 So. 3d at 1146. In its comment, the Real Property, Probate and Trust Law Section explained that the Section's Probate Law Committee had urged the deletion of the content requirements from the statute because the committee determined the requirements was more properly addressed by the rule than by statute. See Fla. Prob. R. 5.010 comm. note (1988) (providing that the Rules Committee, through the Section, will seek repeal of procedural portions of the Probate Code that are addressed by rule). The Rules Committee agrees with the Section's suggested changes to the rule. Accordingly, we amend rule 5.260(b), as reflected in the appendix to this opinion.

First, as suggested by the Section, we replace the term "decedent" with "the person for whom the estate will be, or is being, administered" to account for the fact that an interested person other than a creditor may now file a caveat prior to the death of the subject of the caveat. We also replace the deleted requirement that a caveat contain the subject of the caveat's social security number or birth date, and a statement of the caveator's interest in the estate. However, as amended, subdivision (b) now limits the listing of the social security number to the last four digits and birth date to the year of birth. These limitations are consistent with amendments intended to minimize personal information filed with the court made

in In re Implementation of Committee on Privacy & Court Records Recommendations, No. SC08-2443 (Fla. June 30, 2011).

Accordingly, we amend the Florida Probate Rules as reflected in the appendix to this opinion. New language is underscored, and deleted language is struck through. The amendments shall become effective immediately upon the release of this opinion.

It is so ordered.

CANADY, C.J., and PARIENTE, LEWIS, QUINCE, POLSTON, LABARGA, and PERRY, JJ., concur.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THESE AMENDMENTS.

Original Proceeding – The Florida Probate Rules Committee

Jeffrey Scott Goethe, Chair, Florida Probate Rules Committee, Bradenton, Florida, John F. Harkness, Jr., Executive Director and Krys Godwin, Staff Liaison, The Florida Bar, Tallahassee, Florida,

for Petitioner

Brian J. Felcoski, Chair, Real Property, Probate and Trust Law Section of The Florida Bar, Coral Gables, Florida,

Responding with comments

APPENDIX

RULE 5.260. CAVEAT; PROCEEDINGS

(a) [No change]

(b) Contents. The caveat shall contain the ~~decedent's~~ name~~,~~ of the person for whom the estate will be, or is being, administered, the last 4 digits of the person's social security number or year of birth, if known, a statement of the interest of the caveator in the estate, and the name and specific mailing address of the caveator.

(c) - (f) [No change]

Committee Notes

[No Change]

Rule History

1977 Revision – 2010 Out-of-Cycle Report Revision: [No change]

2011 Revision : Subdivision (b) amended to replace language removed in 2010 out-of-cycle revision, to replace term "decedent" with "person for whom the estate will be, or is being, administered," and to limit listing of a social security number to the last four digits and a date of birth to the year of birth.

Statutory Reference

[No Change]

Rule Reference

[No Change]

AGREEMENT

THIS AGREEMENT entered into as of this ___day of _____ 2011, by and between the REAL PROPERTY PROBATE, AND TRUST LAW SECTION OF THE FLORIDA BAR ("Section") and PETER M. DUNBAR of the law firm of Pennington, Moore, Wilkinson, Bell & Dunbar ("Legislative Consultant"), in exchange for the consideration expressed, agree that the Legislative Consultant shall serve for two years beginning September 1, 2011, as Legislative Consultant for the Section as described in this instrument. The Legislative Consultant agrees to comply with all policies adopted by The Florida Bar Board of Governors and by the Section and the provisions of this Agreement shall apply to all professional personnel at the Legislative Consultant's law firm. The Legislative Consultant and the Section further agree:

1. That the Legislative Consultant shall serve as consultant regarding legislative, administrative and regulatory matters which affect the Section. Although other professional personnel at his law firm shall assist and support him, the Legislative Consultant shall be the lead contact and shall be personally primarily responsible for performing the services (including coordinating and reporting) to the Section under this Agreement. In that regard, the Legislative Consultant shall make a presentation at the Section's Annual Legislative Update Seminar and shall personally attend each Section Executive Council meeting held within the State of Florida. The Legislative Consultant anticipates that Martha Edenfield, Gene Adams, Josh Aubuchon and Meredith W. Snowden shall perform work under his direction. Any other professional personnel from the Legislative Consultant's law firm may only provide service under this Agreement with the prior approval of the Section.

2. The Legislative Consultant agrees that if the Legislative Consultant individually, or the Legislative Consultants law firm intend or desire to represent any client before the Florida Legislature or any regulatory or administrative body (other than those disclosed on the attachment to this Agreement), the Legislative Consultant shall notify, in writing, the Executive Director of The Florida Bar, the Chair of The

Florida Bar's Legislation Committee, the Chair of the Section, and the Chair of the Section's Legislative Committee at least five (5) days prior to commencement of that representation.

3. If an actual conflict, or even the potential for a conflict, arises between a position of the Section and a position of any other client represented by the Legislative Consultant or his law firm, the Legislative Consultant shall immediately notify, in writing, the Chair of the Section and the Chair of the Section's Legislative Committee. The Legislative Consultant and the Section acknowledge that the services to be provided under this Agreement are governed by The Florida Bar's Rules of Professional Conduct, including those provisions relating to conflict of interest between clients. Consequently, the Legislative Consultant shall not represent any other client which would have a position which would conflict with a position of the Section. If a conflict arises between a position of the Section and another existing client of the Legislative Consultant or his law firm, unless such conflict is waived by the affected clients, then the Legislative Consultant agrees that neither he nor his law firm may represent either the Section or the other party. Under such circumstances, an appropriate reduction in the fee otherwise due under this Agreement shall be made and the Section may engage other representation for the particular matter.

4. The Legislative Consultant agrees to work on The Florida Bar legislative matters when directed by the Executive Director of The Florida Bar when the Executive Director believes that such participation is necessary and in the best interest of the membership of The Florida Bar. In this event, the fee for such services performed by the Legislative Consultant shall be assessed against the Section unless this creates a shortage or hardship on the Section. In that event, The Florida Bar may reimburse the Section for the appropriate amount of the legislative expense. This fee, if any, is deemed included within the total fee specified within this Agreement. The Legislative Consultant shall keep the Section advised of all such legislative matter requests from the

Executive Director, and shall track and report to the Section the time expended and costs incurred by the Legislative Consultant in responding to such requests.

5. The Legislative Consultant agrees to coordinate all activities regarding the Florida Legislature which might affect the Section. "Coordination" shall include, but is not limited to, the following:

A. The Legislative Consultant shall identify legislative issues likely to come before the Legislature during the term of the Agreement and which shall require services under the Agreement.

B. The Legislative Consultant, in advance of (as well as during) the legislative session, shall notify the Section of any committee hearings of the Legislature dealing with an issue affecting or concerning any area within the purview of the Section.

C. The Legislative Consultant shall work with Section designated contacts to prepare presentations, where appropriate, to be made to legislators and their committee staff.

D. The Legislative Consultant shall provide to the Section summaries of prefiled and filed bills dealing with the areas within the purview of the Section and copies of the actual bills when appropriate. Special procedures approved by the Section shall be used to insure timely distribution during the legislative session.

E. The Legislative Consultant shall, during the legislative session, provide weekly written reports on the status of legislative matters on which the Section has taken a position or has a pending legislative proposal. Additionally, reports shall be given upon any new matters which are filed and which are within the purview of the Section.

F. The Legislative Consultant shall provide all services necessary to promote and support the Section's legislative proposals and other matters affecting the Section's areas of practice. The Legislative Consultant shall coordinate, with Section designated contacts, obtaining legislative sponsors for the Section's

proposals. The Legislative Consultant shall use best efforts, working with Section representatives, to ensure that there is a diversity of legislators who sponsor Section legislation from year to year. The Section's policy is to use as wide a group of sponsors as possible while at the same time recognizing that a sponsor must be an ardent proponent of the proposal.

G. The Legislative Consultant shall alert the Section to the activities of other interested groups relating to legislative proposals promoted, supported, or opposed by the Section.

6. The Legislative Consultant shall coordinate other matters which might affect, or be of interest to, the Section and its legislative program, including but not limited to regulation, rulemaking, and the provisions of technical assistance to the Executive Branch, executive branch agencies and the Florida Legislature.

7. The Section shall pay the Legislative Consultant for the provision of services, as set forth herein, a fee in the amount of $110,000 a year for the two years beginning September 1, 2011 to August 31, 2013. The fees shall be payable each year in four equal payments (on September 30, December 31, March 31 and June 30), which shall include all out-of-pocket costs and expenses other than for attendance at Executive Council meetings and certain incidental expenses approved by the Section. The Section shall reimburse the Legislative Consultant for transportation (at the minimum rates approved by The Florida Bar for mileage and at the lowest coach class airfare available) and lodging (at the lowest negotiated group rates) when attending Executive Council meetings. With respect to incidental expenses, the Section shall reimburse the fees paid by Legislative Consultant to register as the Section's legislative and executive lobbyist, an appropriately prorated portion of Legislative Consultant's online research, Lobby Tools and in-session mobile phone charges, and such other incidental expenses that may be approved from time to time by the Section.

8. The Legislative Consultant shall identify himself at all times as a representative of the Section and not as a representative of The Florida Bar when working on Section matters.

THIS AGREEMENT is not assignable by either party and may be terminated by (i) either party upon sixty (60) days written notice being given, (ii) the Section immediately upon the Legislative Consultant withdrawing from his current law firm of Pennington, Moore, Wilkinson, Bell & Dunbar, (iii) the Section, prior to the second year of the contract, if the Section determines that budgetary restrictions would prevent it from meeting its obligation under the contract, or (iv) The Florida Bar if it decides that the Legislative Consultant or any professional personnel of the Legislative Consultant's law firm does not act within the best interest of The Florida Bar. In the event the Agreement is terminated, then the amount payable shall be decreased to an amount reflective of the services provided prior to the termination.

WITNESS our hands and seals as of the date first set forth above.

_____
Witness

_____
Witness

The Florida Bar
Real Property, Probate & Trust Law Section
George J. Meyer, Chair

_____
Witness

_____
Witness

The Florida Bar

_____
Witness

_____
Witness

PETER M. DUNBAR
Legislative Consultant
Pennington, Moore, Wilkinson, Bell
& Dunbar, P.A.

PENNINGTON, MOORE, WILKINSON, BELL & DUNBAR, P.A.

Names of Clients	Name of Agencies
AMEX Assurance Company	Executive Branch
Anesthesiologist Professional Assurance Co.	Legislative & Executive Branch
Albriton Insurance Services, LLC	Executive Branch
American Association of Insurance Services	Executive Branch
American Express	Executive Branch
Anesthesiologist Professional Assurance Co.	Legislative & Executive Branch
Auto Club Insurance Company of Florida	Executive Branch
Avis Budget Group	Legislative & Executive Branch
Behavior Analyst Certification Board	Legislative & Executive Branch
B.J. Alan Companies	Legislative & Executive Branch
Central United Life Insurance Company	Executive Branch
Cincinnati Insurance Companies, The	Executive Branch
Citrus County Board of County Commissioners	Legislative & Executive Branch
City of Clearwater	Legislative & Executive Branch
City of Ormond Beach	Legislative & Executive Branch
City of Palm Coast	Legislative & Executive Branch
City of South Daytona	Legislative & Executive Branch
CLVL Solutions, Inc.	Legislative & Executive Branch
Coastal Conservation Association Florida	Legislative & Executive Branch
Coca-Cola Refreshments USA, Inc.	Legislative & Executive Branch
Conference of Circuit Judges of Florida	Legislative & Executive Branch
Daiichi Sankyo, Inc.	Legislative & Executive Branch
Deanne's Office & Computer Supply, Inc. d/b/a DOCS	Legislative Branch
Doctors Company, The	Executive Branch
Endurance American Insurance Company	Executive Branch
Endurance Reinsurance Corporation of America	Executive Branch
FCCI Insurance Group	Legislative & Executive Branch
First Floridian Auto & Home Insurance Company	Legislative & Executive Branch
First Professionals Insurance Company	Legislative & Executive Branch
Florida Association of Realtors	Legislative & Executive Branch
Florida Brewers Guild	Legislative
Florida Chamber of Commerce	Legislative & Executive Branch
Florida Children's Services Council, Inc.	Legislative & Executive Branch
Florida Citrus, Business & Industries Fund	Executive Branch
Florida Distillers	Legislative & Executive Branch
Florida Feed Association	Legislative Branch
Florida Governmental Utility Authority	Legislative Branch
Florida Justice Reform Institute	Legislative & Executive Branch
Florida Outdoor Advertising Association	Legislative & Executive Branch
Florida Physical Therapy Association	Legislative & Executive Branch
Florida Pinball & Amusement Association, Inc.	Legislative Branch
Florida Portable Building Manufacturers Association	Legislative & Executive Branch
Florida Recreational Vehicle Trade Association	Legislative & Executive Branch
Florida Sheriff's Self Insurance Fund	Legislative & Executive Branch

Names of Clients	Name of Agencies
Florida Sheriff's Workers Compensation Self Insurance Fund	Legislative & Executive Branch
Florida Sheriff's Auto Risk Program	Legislative & Executive Branch
Franz, Inc.	Executive Branch
Funeral Services, Inc.	Legislative & Executive Branch
Gateway Community Services, Inc.	Legislative & Executive Branch
Gulfstream Park Racing Association, Inc.	Legislative & Executive Branch
Hanover Insurance Company, The	Executive Branch
Harbor Branch Oceanographic Institution, Inc.	Legislative & Executive Branch
HealthCare Resource Development, Inc	Legislative Branch
Home State Insurance Group, Inc.	Executive Branch
Hudson Insurance Company	Executive Branch
Hudson Insurance Group	Executive Branch
Insurance Services Offices, Inc.	Legislative & Executive Branch
John Alden Life Insurance Company	Executive Branch
Lost Tree Village Property Owners' Association	Legislative Branch
MAG Mutual Insurance Company	Legislative & Executive Branch
McDonald's Corporation	Legislative & Executive Branch
Malcolm Pirnie, Inc.	Legislative & Executive Branch
Marriott International, Inc.	Legislative & Executive Branch
Medco Health Solutions, Inc. & Affiliates	Legislative & Executive Branch
Medico Insurance Company	Executive Branch
MEDJETAssistance LLC	Executive Branch
Mutual of Omaha	Executive Branch
National Association of Industrial & Office Properties	Legislative & Executive Branch
New York Life Insurance Company	Legislative & Executive Branch
North Springs Improvement District	Legislative & Executive Branch
Old Republic National Title Insurance Company	Legislative & Executive Branch
Parkway Maintenance & Management Company	Legislative & Executive Branch
Physicians Preferred Insurance Company	Executive Branch
Pinellas County Board of County Commissioners	Legislative & Executive Branch
Polaris Industries, Inc.	Legislative & Executive Branch
Preferred Governmental Insurance Trust	Legislative & Executive Branch
ProAssurance Corporation	Legislative & Executive Branch
Professional Security Insurance Company	Legislative & Executive Branch
Progressive Insurance Company	Legislative & Executive Branch
QBE Insurance Company	Legislative & Executive Branch
Real Property, Probate & Trust Law Section	Legislative & Executive Branch
Restat, LLC	Executive Branch
Safety Net Hospital Alliance of Florida	Legislative & Executive Branch
Shands Teaching Hospitals & Clinics, Inc dba Shands HealthCare	Legislative & Executive Branch
State Farm Florida Insurance Company	Legislative & Executive Branch
State Farm Mutual Automobile Insurance Companies	Legislative & Executive Branch
Stewart-Marchman-Act Behavioral Healthcare	Legislative & Executive Branch
Tallahassee Memorial Healthcare, Inc.	Legislative Branch
Tampa Bay Water	Legislative & Executive Branch

Names of Clients	Name of Agencies
Teaching Hospital Council of Florida, Inc.	Legislative & Executive Branch
Time Insurance Company	Executive Branch
TW Telecom of Florida LP	Legislative & Executive Branch
Universal Property and Casualty Insurance Company	Legislative & Executive Branch
USMD/Visionary Medical Systems, Inc.	Legislative & Executive Branch
Volusia County	Legislative & Executive Branch
Westcor Land Title Insurance Company	Legislative & Executive Branch

Updated (July 2011)

CONTRACT ADDENDUM

By mutual consent of the parties hereto and consistent with the enactment of revisions to Sections 11.045 and 112.3215 and related provisions of the Florida Statutes during the 2005-B Special Session of the Legislature, the contract with Pennington, Moore, Wilkinson, Bell & Dunbar, P.A. ("Pennington") is revised to identify the services and the compensation for said services in the following categories:

1. **Lobbying before the Legislature:** The client and Pennington agree that the portion of time and services under the Agreement that is to be devoted to influencing or attempting to influence legislative action or non-action through oral or written communication or attempting to obtain the goodwill of members of the Legislature and employees of the Legislature shall be equal to forty percent (40%) of the total time and services to be provided under this Agreement. The annual compensation to be paid for these services shall be $44,000.00.

2. **Lobbying before the Executive Branch:** The client and Pennington agree that the portion of time and services under the Agreement that is to be devoted to influencing or attempting to influence an agency with respect to a decision of the agency in the area of policy through oral or written communication or attempting to obtain the goodwill of an agency official or employee shall be equal to twenty percent (20%) of the total time and services to be provided under this Agreement. The annual compensation to be paid for these services shall be $22,000.00.

3. **Other Non-Lobbying Services:** The client and Pennington agree that the portion of time and services under the Agreement to be devoted to non-lobbying services for the client, its members and employees, including, but not limited to, preparation of CLE educational written and oral offerings and briefings, legal research, attendance at meetings of the client and related travel, communications with judicial and court administration officials and the preparation of written articles, opinions and reports for the client, shall be equal to forty percent (40%) of the total time and services to be provided under this Agreement. The annual compensation to be paid for these services shall be $44,000.00.

Except as modified hereby, the terms and conditions of the contract with Pennington, Moore, Wilkinson, Bell and Dunbar, P.A., are ratified and confirmed to be effective this ____ day of _____, 2011.

PENNINGTON, MOORE, WILKINSON, BELL & DUNBAR, P.A.

By:_____
Peter M. Dunbar

REAL PROPERTY, PROBATE & TRUST LAW SECTION OF THE FLORIDA BAR

By:_____

THE FLORIDA BAR

By:_____

RPPTL 2011-2012 CLE Calendar				
DATE	**SEMINAR**	**COURSE #**	**CITY**	**HOTEL**
July 22, 2011	The Florida Power of Attorney Act	1386	*Tampa	Airport Marriott
August 3, 2011			Palm Beach	The Breakers Resort
August 26, 2011			Orlando	Hyatt Regency Airport
August 5, 2011	RPPTL Legislative Update	1282	*Palm Beach	The Breakers Resort
October 7, 2011	RPPTL Mortgage Law	1292	*Tampa	Airport Marriott
November 4, 2011	RPPTL Estate & Trust Tax Law	1301	*Tampa	Airport Marriott
January 27, 2011	RPPTL Environmental & Land Use Law Seminar	1315	*Tampa	Airport Marriott
March 9-10, 2012	Real Property Certification Review Course	1344	*Orlando	Hyatt Regency Airport
March 9-10, 2012	Wills, Trust & Estate Certification Review Course	1345	*Orlando	Hyatt Regency Airport
March 22, 2012	RPPTL Probate Law	1325	Fort Lauderdale	TBD
March 23, 2012	RPPTL Probate Law	1325	*Tampa	Airport Marriott
March 22-34, 2012	Construction Law Certification Review Course	1335	Orlando	TBD
March 29-31, 2012	4th Annual Construction Law Institute	1336	Orlando	TBD
April 27, 2012	RPPTL Condo Association Law	1346	* Tampa	Airport Marriott
May 10, 2012	RPPTL Trust & Estate Symposium	1349	Fort Lauderdale	TBD
May 11, 2012	RPPTL Trust & Estate Symposium	1349	*Tampa	Airport Marriott
June 1, 2012	RPPTL Convention Seminar	1360	St. Petersburg	Don Ce Sar
June 14-15, 2012	Attorney/Trust Officer Liaison Conference	1363	* Naples	Ritz Carlton Golf Resort

* Webcast & Live