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COMMENTS

THE LIMITED LIABILITY COMPANY ACT

RICHARD JOHNSON

I. INTRODUCTION

The Florida Limited Liability Company Act was added to the Florida Statutes\(^1\) in 1982 creating the limited liability company (LLC or Company). The LLC is an entity possessing the corporate characteristic of limited liability, but with the added ability to conduct its affairs as a partnership and also be classified as a partnership for federal taxation purposes. Chapter 608 (LLC Act) is very similar to the limited liability company statute enacted in Wyoming in 1977,\(^2\) and the entity exists only in these two states.

The purpose behind the legislation's enactment was to lure capital to the state in order to add to the economic base of Florida. In committee hearings it was disclosed that a motivating factor was to provide a business vehicle to accommodate international investments from Central and South America.\(^3\) The LLC is similar to a business organization called a *limitada*\(^4\) which exists in these countries. It was thought that having a familiar business organization would attract foreign investment. Besides attracting international investment, it was also thought that the combination of limited liability and federal taxation as a partnership would encourage businesses to move to Florida. The committee reports were very optimistic as to the impact which the new entity would have on the business community. One report even expected a "deluge of

\(^{1}\) Florida Limited Liability Company Act, Fla. Stat. ch. 608 (Supp. 1982). Introduced as Fla. HB 475 and in the Senate as Fla. SB 666, the LLC Act was passed as an amendment to Fla. HB 43 by unanimous vote in the Florida House on Mar. 15, 1982 (Fla. H.R. Jour. 0574) and passed unanimously through the Senate on Mar. 25, 1982 (Fla. S. Jour. 0596), the last day of the regular session.


filings." As of April 1, 1983, one year after enactment of the LLC Act, only two LLC's have been organized in Florida. This is surprising since the advantages of the LLC appear to be substantial.

This comment will be an introduction to the LLC, first providing a description of its features and structure and then presenting some of the difficulties which have accompanied the entity and handicapped its usefulness.

II. THE LLC

The LLC has been compared to entities existing in Michigan, New Jersey, and Ohio known as partnership associations or limited partnership associations. However, the LLC is far superior to these organizations which have been burdened with various restrictions and are little used. The domestic organizations most similar to the LLC are the close corporation able to qualify for tax treatment under Subchapter S of the Internal Revenue Code and the limited partnership with a corporate general partner. It was thought that the LLC would be preferable to either of these two business arrangements, but this has not proved to be true.

As an entirely new statutory creation, there is no case law defining the characteristics of the LLC. The LLC Act is a collection of statutes extracted from the Florida General Corporation Act and the Florida Uniform Limited Partnership Law (Florida ULPL) in addition to legislation peculiar to the LLC. In construing the sections of the LLC Act it seemed appropriate that those parts drawn from other acts would be interpreted in a parallel and similar fashion. There was also an intent in writing the LLC Act to have the LLC resemble a partnership. The legislative committee reports placed an emphasis on the partnership status of the LLC and, on occasion, the LLC is referred to as a partnership with limited liability. Other considerations were the need to protect the public from the consequences of the Company's limited liability and the protection to be accorded to the minority interests in the

10. See supra note 3.
Company.

The LLC is a statutory entity legally distinct from its members, a fact immediately distinguishing it from the partnership. The powers that the entity is given are nearly identical to those given to the corporation. The differences which result appear inconsequential, except that the existence of an LLC is limited to thirty years.

Two persons are required to organize an LLC, with no limitation on the maximum number of members that will be permitted to join the Company. A member may be an individual or an organization. It was intended that the formation of the LLC be similar to the procedure which creates a corporation. Articles of Organization (Articles), containing basic information concerning the Company, must be filed with the Department of State. Until the Articles are filed the LLC is not in legal existence. Any persons who assume to act as an LLC without authority to do so become jointly and severally liable for all the debts and liabilities incurred.

The influence that the Florida ULPL has had on the character of the LLC can be seen in the data contained in the Articles. The Articles must state the duration of the Company's existence, which may not exceed thirty years. In stating the term, notice must be made of section 608.427(2)(c), Florida Statutes, which allows a member to rightfully demand the return of his contribution by giving proper notice to the other members, provided no time is specified in the Articles for the dissolution of the Company. An identical situation exists for the limited partnership. The Articles must also contain the total amount of cash, and a description of the

13. Fla. Stat. § 608.402 (Supp. 1982). A member is defined so as to include individuals, children, firms, associations, joint ventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations. Fla. Stat. § 1.01(3) (1981).
agreed value of property other than cash, which has been contributed or has been agreed to be contributed by the members. This will be the amount that the members will have at risk in the venture and may be compared to the capital at risk by the special partners in a limited partnership.

There are three rights which if elected by the members must be stated in the Articles. The first is the right to admit new members. This right must be stated in the Articles along with the terms and conditions which will control their admittance. The second is the right to continue the business upon the termination of a membership which otherwise would cause dissolution of the Company. If this right is not stated in the Articles, the business may be continued only on the unanimous consent of the remaining members. Finally, the members must state their adoption of centralized management, otherwise it is presumed that the management of the Company is vested in the members.

Subordinate to the Articles are the regulations. The regulations contain the agreement of the members as to the internal functioning of the Company and are comparable to the bylaws of a corporation or the operating agreement of a partnership. The power to adopt regulations is vested in the members, unless specifically vested in the managers by the Articles. The members may adopt regulations and prescribe that such regulations may not be altered, amended, or repealed by the managers. The basis on which distributions or “dividends” of the company will be made must be in the regulations.

The management of the Company may be vested in the members or in one or more elected managers. Electing centralized management will affect the tax status of the LLC as a partner-


26. Id.
27. Fla. Stat. § 608.426 (Supp. 1982). The statute does not state whether the dividends may be individually tailored or must be uniform according to contributions.
ship. This adverse tax planning consequence can be avoided if the members retain management control but agree among themselves to centralize management decisions. If there are reasons for vesting the control of the Company in a few persons so as to restrict the authority of the individual members, then the limited partnership may be a preferable alternative. However, considering the consequences of electing centralized management will be helpful in illustrating the features of the LLC.

The managers of the Company will be elected annually by the members according to a method provided in the regulations. The members appear to have broad discretion in determining the election process and in constructing the working relationship between the managers and the members. The LLC Act does not specifically address whether the members may retain certain types of business decisions and transactions to themselves. However, if the LLC is to be flexible in its operation, as is a partnership, the members should be permitted to restrict the discretion of the managers and to retain certain management decisions through use of the regulations without the need to involve the Articles. Support for such a reading of the LLC Act may be derived from inferences found in the LLC Act and in legislation concerning corporations. Corporate legislation permits shareholders to restrict the discretion of the board of directors in its management of the business by embodying restrictions in the bylaws or in an agreement in writing signed by the members. If the corporation is permitted to resemble a partnership to this degree it would be incongruous to deny an organization such as the LLC, which is designed to resemble a partnership, the same privilege.

However, a bright line is drawn between the members and the managers in business matters between the Company and the public. This dichotomy is emphasized in sections 608.424 and 608.425, Florida Statutes. The statutes indicate that when the Company

29. The election of centralized management will add to the corporate characteristics of the LLC. For federal taxation purposes, organizations are classified according to their similarity to a corporation. See infra notes 55-63.
30. See infra note 63.
32. See Fla. Stat. §§ 608.422 (managers will have responsibilities accorded to them in the operating agreement), .423 (Supp. 1982) (regulations of the company).
34. (Supp. 1982). Section 608.424 provides that, unless the Articles state otherwise, the
deals with the public, the managers are entrusted with the authority to conduct and manage the Company's affairs. Under general rules of agency, the managers will be presumed to possess those powers usually exercised by other similarly titled officers. The LLC Act expands this inherent authority by stating that "[i]nstruments and documents providing for the acquisition, mortgage, or disposition of [Company] property . . . shall be valid and binding upon the [C]ompany, if they are executed by one or more managers. . . ." The purpose of the statute is to allow outside parties dealing with the manager of a Company to enter into the business transactions specified in the statute with confidence as to their validity. The public is permitted to rely on the apparent authority of the manager unless circumstances are such as to put one on inquiry.

If centralized management is not adopted in the Articles, the management of the LLC is vested in its members in proportion to their contributions to the capital of the Company. Management decisions will be made according to a membership agreement or the regulations. As in a partnership, it may be agreed that less than a majority of the members will be able to determine action in extraordinary matters. Formalities, such as meetings, may be retained or discarded depending on the inclination of the members. Although the members may allocate varying amounts of authority to themselves, the LLC Act contemplates that when dealing with the public each member, at a minimum, has the authority to ac-

power to contract a debt or incur a liability in the name of the LLC belongs exclusively to the managers, if management has been vested in managers, or exclusively to any member, if management is retained by the membership.

Section 608.425 provides for the statutory authority to belong to the managers, if management has been vested in managers, or to the members, if management has been retained by them. See infra notes 36, 41, 94-99 and accompanying text.

35. The scope of this authority encompasses all inherent powers, that is, "powers apparent from the very nature of the office." Pan-American Constr. Co. v. Searcy, 84 So. 2d 540, 544 (Fla. 1955) (vice-president); S.H. Kress & Co. v. Powell, 180 So. 757, 760 (Fla. 1938) (general manager).


38. FLA. STAT. § 608.422 (Supp. 1982).


40. See FLA. STAT. §§ 620.60 (partner-agent of partnership), .645 (rights and duties of partners) (1981). See also J. CRANE AND A. BROMBERG, LAW OF PARTNERSHIP § 65(d), (b), 374, 382 (1968).
quire, mortgage, or dispose of Company property.\textsuperscript{41} Additionally, if the LLC is to resemble a partnership, every member should have the authority to bind the Company to any act or liability which is apparently necessary for carrying on the usual business of the LLC.\textsuperscript{42} Of course, outside parties will still be required to use reasonable diligence and prudence in ascertaining the authority of the members.\textsuperscript{43}

The sections of the LLC Act relating to the member’s interest in the LLC and the contributions and liability of the member to the Company are substantially identical to sections in the Florida ULPL. As with the limited partnership, the contributions to the capital of a Company may consist of cash or property, but may not be in the form of services.\textsuperscript{44} A member’s interest in the LLC is considered to be personal property, but it may be transferred or assigned only as provided in the operating agreement or regulations.\textsuperscript{45} There is also a statutory restriction imposed on the ability to transfer or assign the right to participate in the management of the Company by section 608.432, Florida Statutes. Unless all members of the Company approve the proposed transfer by giving written consent, the transferee will have no right to participate in the management of the Company’s affairs and will not be considered a member.\textsuperscript{46} Also, the transferee will be entitled to receive only the share of profits or income and the return of contribution to which the transferring member would have been entitled.\textsuperscript{47} This should be contrasted to similar provisions in the Florida ULPL\textsuperscript{48} and Florida UPA.\textsuperscript{49} Both acts impose restrictions on the ability to transfer the right to participate in the management of the organization, but the statutory restriction is subject to the agreement of the partnership\textsuperscript{50} or the certificate of the limited partnership.\textsuperscript{51}

\textsuperscript{41} \textit{FLA. STAT.} § 608.425 (Supp. 1982).
\textsuperscript{42} \textit{FLA. STAT.} § 620.60 (1981); \textit{J. CRANE & A. BROMBERG, supra} note 40, § 49, at 275.
\textsuperscript{43} \textit{See supra} note 37. This is a question to be decided by the courts. The members have the authority only if they have retained the management control. \textit{See infra} notes 94-99 and accompanying text.
\textsuperscript{44} \textit{FLA. STAT.} § 608.4211 (Supp. 1982). Cf \textit{FLA. STAT.} § 620.04 (1981).
\textsuperscript{46} \textit{FLA. STAT.} § 608.432 (Supp. 1982).
\textsuperscript{47} \textit{Id.}
\textsuperscript{48} \textit{FLA. STAT.} § 620.19(4) (1981).
\textsuperscript{49} \textit{FLA. STAT.} § 620.69 (1981).
\textsuperscript{50} \textit{Id.} \textit{See also}, \textit{J. CRANE & A. BROMBERG, supra} note 40 at § 5(c).
\textsuperscript{51} \textit{See supra} note 48.
Strictly construed, section 608.432 of the LLC Act may not provide the same freedom.

A member of an LLC is permitted to withdraw his contribution in the same manner and under identical circumstances as that permitted a special partner in a limited partnership. A member who receives a return of his contribution will still be liable to the Company for the amount returned, with interest, if such sum is necessary to discharge the Company's liabilities to creditors who extended credit or whose claims arose before the return.

Section 608.441, Florida Statutes, requires the dissolution of the Company on the occurrence of specified events. Dissolution is required when the period fixed for the duration of the Company has expired, when there is unanimous written agreement of the members, or upon the termination of a membership. Termination is defined as expressly including death, retirement, resignation, expulsion, bankruptcy, or dissolution of any member. However, if the Company has a “right to continue” stated in the Articles, or if the business is continued by the unanimous consent of the remaining members, then the Company will not be dissolved upon the termination of a membership.

III. DIFFICULTIES WITH THE LLC

The LLC appears to be a versatile and useful business organization, but there are at least three reasons why the LLC has not been widely accepted. One reason is the hostility of the Internal Revenue Service (IRS) toward the federal tax classification of the LLC as a partnership. The actions of the IRS created continual uncertainty as to the tax classification of the LLC for more than two years. A second factor is the difficulty in ascertaining the true character of the LLC and the resulting dependence of the LLC Act on the courts and the membership agreements to address issues not covered adequately by the statutes. A third hindrance to the general acceptance of the LLC is the availability of other established business organizations which parallel the potential of the LLC.

55. Id.
56. Id.
A. Tax Classification of the LLC

In Florida, the LLC will be classified as a corporation for taxation purposes. The underlying rationale for this classification is "the intent of the legislature in enacting the [tax code] to impose a tax on all corporations, organizations, associations, and other artificial entities which derive from this state . . . permanent and inherent attributes not inherent in or available to natural persons, such as . . . limited liability for all owners."

The classification of an unincorporated organization is important for federal tax purposes. If it is labelled an "association," it will be included in the term "corporation" as defined in section 7701 of the Internal Revenue Code and will be treated as a corporation for federal taxation. The Kintner regulations presently provide the criteria to be considered in this determination. Apparently relying on the landmark case of Morrissey v. Commissioner, the regulations list six characteristics ordinarily found in a pure corporation which distinguish it from other organizations. Only four of these features are considered relevant in separating partnerships from associations: limited liability, free transferability of interests in the organization, centralization of management, and continuity of life. Under the test of the Kintner regulations, an unincorporated organization will be classified as an association only if the organization has more corporate than non-corporate characteristics.

The LLC Act was tailored to create an organization which would have at least one corporate characteristic under the regulations, that of limited liability. Of the remaining relevant features, one is

57. FLA. STAT. §§ 220.02, 608.471 (Supp. 1982). Fla. HB 475 was amended by the House Committee on Commerce to insure that the LLC would be taxed as a corporation. See Fla. H.R., Commerce Committee, tape recording of hearing (Feb. 3, 1982) (on file with committee).
58. FLA. STAT. § 220.02 (Supp. 1982).
61. 296 U.S. 344 (1935). The Supreme Court listed as corporate features: the existence of an entity able to hold title to property, the opportunity for centralized management, security from termination or interruption by the death of the owners of beneficial interests, the transferability of beneficial interests without affecting the continuity of the enterprise, large numbers of participants, and the limitation of personal liability. Id. at 359. See also Kurzner v. United States, 413 F.2d 97, 103-04 (5th Cir. 1969).
64. Treas. Reg. § 301.7701-2(a)(3).
65. The corporate trait of limited liability exists if under local law no member is personally liable for the debts of the organization. Treas. Reg. § 301.7701-2(d)(1). The LLC Act provides that neither the members nor the managers are liable for a debt, obligation, or
predetermined to be non-corporate—free transferability of interests in the organization.\textsuperscript{66} The remaining two traits can be designed to be non-corporate,\textsuperscript{67} thereby classifying the LLC as a partnership under the Kintner regulations.

The IRS showed its disapproval of this result by proposing amendments to the Kintner regulations which would have made limited liability a determinative factor.\textsuperscript{68} An organization would be classified as an association and not as a partnership if under local law no member of the organization was personally liable for the debts of the organization. Only liability which arose solely as a result of membership in the organization was to be considered.\textsuperscript{69} It is notable that the proposed amendments were introduced the day

\begin{itemize}
\item [66.] This characteristic does not exist if the members cannot assign the right to participate in the management of the organization when they convey their interest without the consent of the other members. Treas. Reg. § 301.7701-2(e)(1). The LLC Act provides that the consent of all the other members is necessary in order to transfer the right to participate in the management of the LLC. Fla. Stat. § 608.432 (Supp. 1982).
\item [67.] An organization has centralized management if any person or group of persons, which does not include all members, has continuing exclusive authority to make management decisions. Treas. Reg. § 301.7701-2(c)(1)-(4). There is no centralization of management unless the managers have "sole authority" to make the management decisions. Id. Even if the members agree among themselves that the powers of management shall be placed exclusively in a selected few, centralization will not exist if the agreement would be ineffective under local law against an outsider who has no notice of the agreement. Id. Because each member will have the apparent authority to deal with the Company property, if the members retain management of the LLC to themselves the corporate trait of centralized management would not exist. Fla. Stat. § 608.425 (Supp. 1982). However, if the members vest the management authority in managers by exercising that choice in the Articles, centralized management will exist. Treas. Reg. § 301.7701-2(c)(1).
\end{itemize}
before the issuance of a letter concerning an LLC created in Wyoming.\textsuperscript{70}

The proposed amendments handicapped the utility of the LLC for two years, although they were never promulgated as final regulations. The effective dates for the amendments were postponed five times\textsuperscript{71} before they were finally withdrawn.\textsuperscript{72} The IRS explained that they were withdrawn after consideration of submitted public comments.\textsuperscript{73} The IRS stated that it would undertake a study of the classification test with special focus on the significance of the characteristic of limited liability.\textsuperscript{74} The study would consider the possible application of the minimum capitalization requirement of Revenue Procedure 72-13\textsuperscript{76} to all entities seeking classification as a partnership for federal tax purposes, with that requirement being applied either as an advance ruling policy or as a substantive rule.\textsuperscript{76} The IRS also stated that it would reconsider the Commissioner's acquiescence in Larson \textit{v. Commissioner}\textsuperscript{77} to the extent that the decision would be inconsistent with the minimum capitalization requirement.\textsuperscript{78}

The IRS has subsequently notified the public that advance rulings or determination letters will not be issued on the classification of limited liability companies until issues concerning the LLC have been resolved through the publication of a revenue ruling, revenue procedure, regulation or otherwise.\textsuperscript{79}

It appears that the IRS may be willing to allow an LLC to be classified as a partnership if it qualifies under a classification test. But it is possible that the IRS may attempt to alter the Kintner regulations, which have had a checkered history and are known to be decidedly in favor of classifying organizations as partnerships.\textsuperscript{80}

\textsuperscript{70} Private Letter Ruling 8106082, dated Nov. 18, 1980 (30 D.T.R. H-9, Feb. 13, 1981). In this letter the LLC was classified as a partnership. The recipient was also notified of the proposed amendments.


\textsuperscript{73} See Wall St. J., Jan. 26, 1983, at 1, col. 5 (mentions equipment-leasing trusts and foreign limited liability companies as affected industries).

\textsuperscript{74} Ann. 83-4, supra note 72.

\textsuperscript{75} Rev. Proc. 72-13, 1972-1 C.B. 735.

\textsuperscript{76} Ann. 83-4, supra note 72.

\textsuperscript{77} 66 T.C. 159 (1976).

\textsuperscript{78} Ann. 83-4, supra note 72.


\textsuperscript{80} See Larson, 66 T.C. 159; Kurzner \textit{v. United States}, 413 F.2d 97 (5th Cir. 1969). See also Fisher, \textit{Classification Under Section 7701—The Past, the Present and Prospects for the Future}, 30 Tax Law 627 (1977); Scallen, \textit{Federal Income Taxation of Professional As-
The difficulty that the IRS will have with this approach is the effect that the alterations will have on established business interests. However, the LLC is vulnerable on a few select points. First, it is a statutory entity, a trait which was considered in *Morrissey.* Second, it possesses limited liability, which could be given more weight in the classification test. Finally, there is a question as to whether "other factors" are to be considered in the determination. Although it would be an unwise policy to alter established tests in an effort to reach a desired result in one case, the history of the tax classification regulations has been one of manipulation.

**B. Uncertainty of the Law**

The LLC Act has failed to adequately address some issues which concern the LLC. Three of these problem areas will be considered below.

The first area of concern is the circumstances under which a LLC may be dissolved. A member may find that he cannot withdraw his contribution from the Company because the restrictions on his ability to dispose of his interest precluded that as a possible option. He may further be unable to dissolve the Company because the remaining members unanimously consent to continue the business, or because a right to continue the business exists in the Articles. This may be an unlikely predicament but it points up the dependence that the statutes place on the membership agreement to protect the interests of the members. This possible inability to effect a dissolution should be compared to the situation which exists for the partnership, and in particular the limited partnership.

Aside from the ability of the general partner to dissolve a partnership at will, even in contravention of an agreement between the partners, general partners and limited partners are permitted to dissolve a partnership by a decree of the court. The courts are statutorily permitted to adjudge a dissolution if a partner willfully or persistently commits a breach of the partnership agreement, or

*sociations and Corporations, 49 MINN. L. REV. 603 (1965) (an in depth history of I.R.C. § 7701).*

81. *See supra* note 61.
82. *See Kurzner, 413 F.2d* at 104; *Scallen, supra* note 80 at 717.
83. *See Larson, 66 T.C. 159; Treas. Reg. § 301.7701-2(a).*
84. *See supra,* notes 68, 80-83 and accompanying text.
85. *FLA. STAT.* § 608.441 (Supp. 1982).
86. *FLA. STAT.* §§ 620.10 (limited partnership), .71, .715 (partnership) (1981); 68 C.J.S. *Partnership* § 349 (1950).
otherwise so conducts himself that it is not reasonably practical to carry on the business of the partnership, if a partner is guilty of conduct that tends to prejudicially affect the carrying on of the business, or the business of the partnership can only be carried on at a loss.

By contrast, Florida courts have held that in the absence of a statute the courts of equity will not dissolve a going concern at the insistence of a complaining member. This unwillingness to dissolve the legal entity is based on the concession theory, which views the entity as a creature of the legislature, deriving its power and existence from the state. However, on occasion, Florida courts will liquidate an entity causing de facto dissolution. Liquidation may be ordered if the entity has reached a state of affairs where it is no longer capable of attaining its purpose. Such a state of affairs has not been readily recognized and mere mismanagement, fraud, or dissension are not sufficient reasons for liquidating an entity. It is supposed that the members can correct the affairs of the organization through their voting power, through other legal remedies, or by disposing of their interests and withdrawing. It is difficult to discern whether the courts will be more restrictive in allowing liquidation of the LLC than they have been in ordering dissolution of limited partnerships. The decisions will necessarily depend on the facts of each case. Of interest in this matter is the decision of the Florida Supreme Court in Kay v. Key West Development, Co. in which the court took into considera-

91. See Tampa Waterworks Co. v. Wood, 121 So. 789, 790 (Fla. 1929).
92. See generally 8 CAVITCH, BUSINESS ORGANIZATIONS § 186.04 (1983).
93. See Freedman v. Fox, 67 So. 2d 692, 693 (Fla. 1953); Finn Bondholders, Inc. v. Dukes, 26 So. 2d 802, 803 (Fla. 1946).
94. Freedman, 67 So. 2d 692 (animosity not sufficient justification for dissolution); Hanes v. Watkins, 63 So. 2d 625, 628 (Fla. 1953) (purpose of corporation must be impossible of attainment, or business must be practically discontinued or deadlock must be such that affairs cannot be transacted); Freedman v. Dukes, 26 So. 2d at 804 (misconduct not of sufficient degree); Bartlett v. Caines, 363 So. 2d 574 (Fla. 3d DCA 1978) (dissension and operating at a loss not sufficient cause); Keck v. Schumacher, 198 So. 2d 39, 43 (Fla. 2d DCA 1967) (misconduct not of sufficient degree).
95. See Kay v. Key West Development Co., 72 So. 2d 786, 788 (Fla. 1954); Annot., 47 A.L.R. 2d 361 (1956).
96. 72 So. 2d 786, 788 (Fla. 1954).
tion the practical inability of a member in a close corporation to dispose of his interest. The court viewed the marketplace in that case as providing no adequate solution to the problem of a deadlock which thwarted the purpose of the corporation.\(^9\) The result may be that the courts will find no significant difference between dissolving a partnership and liquidating an LLC. The most restrictive decisions were the earlier cases. There should be no difference in the court's decision in dissolving an LLC or dissolving a limited partnership, but because the LLC Act did not address the issue, the fact situation that dissolves a limited partnership may not bring the same result with an LLC.

Another area the courts will need to address is the ability of the members to bind the Company and the duty of the outside party in determining the authority of the member. In defining the ability of a member to bind the Company, the legislature could have adopted sections found in the Florida Uniform Partnership Act,\(^9\) but chose instead to make the LLC Act unique in this area.\(^9\) Section 608.425, Florida Statutes, states that a member may bind the Company in transactions which provide for the acquisition, mortgage, or disposition of Company property. There is no definition of the term "property," nor are there any sections which limit or enumerate situations where this authority will not be present.\(^1\) Also relevant in determining the authority of the members is section 608.424, Florida Statutes. Strictly construed, this section only insures that the ability to bind the LLC to debts or liabilities will be exclusively vested with either the managers or the members, and does not grant authority to either.

The courts will also need to decide what constitutes reasonable diligence and prudence on the part of outside parties in dealing with the LLC. The LLC has a chameleon-like nature and can be structured so that the members have no authority to bind the Company.\(^1\) The result may be that a member is not presumed to have any authority until the outside party has ascertained the management structure of the LLC or acts of the Company lead

\(^{97}\) Id.

\(^{98}\) FLA. STAT. §§ 620.60-.625 (1981).

\(^{99}\) Section 608.425 is unique because a majority of the provisions in the LLC Act are drawn from other acts with only minor revision. The LLC Act does not expressly cover the broad range of powers which is found in the Uniform Partnership Act, sections 620.60-.625, FLA. STAT., but relates only to acquiring, mortgaging, or disposing of Company property.

\(^{100}\) Cf. FLA. STAT. §§ 620.595, .60(3) (1981).

\(^{101}\) FLA. STAT. §§ 608.422, .424, .425 (Supp. 1982).
him to reasonably assume that such authority exists.\textsuperscript{102} This appears to place a greater burden on parties dealing with an LLC than is imposed on parties dealing with partnerships.\textsuperscript{103}

Another matter that will be of concern to members of an LLC is acceptance of the LLC in states other than Florida and Wyoming. It is doubtful that the LLC will attract substantial interest if the organization is not recognized in other jurisdictions. The commerce clause of the United States Constitution restricts the ability of the states to exclude or regulate organizations if they merely engage in interstate or foreign commerce.\textsuperscript{104} But, if the LLC enters a state to do business,\textsuperscript{105} the states have more latitude in their ability to regulate the Company. The main concern of the members will be whether the limited liability of the Company will be respected or its partnership characteristics altered.

The general rule is that a legal entity created in another state will be recognized by the host state to have all the powers and rights granted by its charter and the applicable laws of the creating state.\textsuperscript{106} Courts will disregard the presumption of comity only if the state has expressed in some affirmative way that it should not exist as a consequence of the public policy of the state.\textsuperscript{107} If the LLC is recognized in the host state as a foreign corporation, the protection of its limited liability should be respected and the partnership characteristics of the Company recognized.\textsuperscript{108} Being recognized as a foreign corporation in the host state will likely also sub-

\begin{footnotesize}
\begin{enumerate}
\item See supra notes 35-37 and accompanying text.
\item Every partner has authority to bind the partnership unless the partner so acting has in fact no such authority and the person with whom he is dealing has knowledge of that fact. FLA. STAT. § 620.60 (1981). See also J. CRANE & A. BROMBERG, supra note 40, § 49, at 275.
\item See Ulmer v. First Nat'l Bank, 55 So. 405 (Fla. 1911); 17 W. FLETCHER, Cyclopedia of the Law of Private Corporations §§ 8390, 8402 (rev. perm. ed. 1977); 20 C.J.S. Corporations §§ 1810-42 (1940).
\item "Doing business" is a term of art used to differentiate those activities which would be considered merely "interstate." See supra note 104.
\item See Christian Union v. Yount, 101 U.S. 352, 356 (1879); Duke v. Taylor, 19 So. 172 (Fla. 1896); Fletcher, supra note 104, §§ 8330-33.
\item The public policy of the state may be deduced from the general course of legislation or from settled adjudication of its highest court. Christian Union, 101 U.S. at 356. Public policy may also be discovered from the practices of the executive departments of the state government or from an expressed constitutional or statutory prohibition. Fletcher, supra note 104, § 8334.
\item Corporation acts in most states provide that a foreign corporation will not be excluded on account of the fact that the laws of the state by which it is organized permit a structuring of its internal affairs which differs from the laws and practices of the host state. See FLA. STAT. § 607.304 (1981); 2 Model Bus. Corp. Act. § 106 (1971).
\end{enumerate}
\end{footnotesize}
ject the LLC to taxation as a corporation in that state.

However, an LLC may be considered to be an unincorporated business association. If so, it will be necessary to review the host state's laws and decisions to discern its policy towards recognition of limited liability for unincorporated associations. Two cases illustrate the diversity possible between the states.

*Means v. Limpia Royalties*\(^{109}\) involved an unincorporated business trust which had been organized under the laws of Oklahoma. The trust agreement protected the members from the debts and liabilities of the organization in a manner which would have been recognized by the courts of Oklahoma. However, the business trust was adjudged guilty of misrepresentation by a Texas court for promising two purchasers of its shares that they would be protected from the debts of the organization. The Texas court stated that as to transactions conducted in Texas the public policy of that state prevented recognition of limited liability for the organization.\(^{110}\) In Texas, unless the business is organized as a limited partnership or a corporation, or specially contracts, there is personal liability for the members.\(^{111}\)

*Means* may be contrasted with *Farmers' & Merchants' National Bank v. Anderson.*\(^{112}\) *Anderson* concerned a joint-stock association organized in Texas, which had executed a promissory note in Texas, but whose defendant shareholders were found in Iowa. The articles of association provided that the members would not be responsible for the debts of the association, a provision which would not have been recognized under Texas law. The Iowa Supreme Court found that it could not accept the Texas decisions and that the "[f]oreign laws [would] not be given effect when to do so would be contrary to the settled public policy of the forum."\(^{113}\) The result is that the acceptance of the LLC will be dependent on the declared public policy of each state.

**C. The Availability of Other Organizations**

A third hindrance to the acceptance of the LLC is the availability of other business organizations which can effectively achieve federal taxation as a partnership in addition to the advantage of

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110. *Id.* at 475.
112. 250 N.W. 214 (Iowa 1933).
113. *Id.* at 218.
limited liability.

One such organization is the close corporation, which is able to qualify for treatment under Subchapter S of the Internal Revenue Code. When the LLC legislation was enacted in Wyoming, and during the time it was being considered in Florida, the LLC’s advantages over the close corporation were regarded as considerable. Before passage of the Subchapter S Revision Act, the corporation was subject to many restrictions and burdens. Many of these burdens have been lifted by the passage of the Revision Act and the tax treatment of the corporation is now very similar to the taxation of partnerships, with a pass-through of the losses and profits to the shareholders that was not available before. For these reasons the advantages of the LLC over the Subchapter S corporation have been significantly reduced. However, the Subchapter S restrictions still do not permit nonresident aliens, corporations or partnerships to be shareholders in the corporation.

Also, a Subchapter S election can be terminated by a majority vote of the shares of the corporation. Furthermore, a shareholder acquires a basis in the debts of the organization only if he actually lends money to the corporation. In most instances these differences are of no major consequence to the businessman, and therefore the Subchapter S corporation is a business organization which might be considered competitive with the LLC format.

Another alternative to the LLC is the limited partnership with a corporate general partner. The primary distinction between this organization and the LLC is the ability of the members to directly participate in the management of the organization. The members

114. The corporation must be a domestic corporation with no more than thirty-five shareholders. Each shareholder must be either an individual, an estate, or a specified trust, and there can only be one class of stock. 26 U.S.C.A. § 1361(b)(1) (West Supp. 1983).


119. 26 U.S.C.A. § 1362(d)(1)(B) (West Supp. 1983). This ability to terminate the Subchapter S election should be compared with the ability of a membership to terminate the business of an LLC.


121. See Larson, 66 T.C. at 159; Zuckman, 524 F.2d at 729.
of an LLC are permitted to manage the Company directly,\textsuperscript{122} while the special partners in the limited partnership must filter their control through the corporation to avoid the imposition of personal liability.\textsuperscript{123} However, this arrangement did not prove successful in \textit{Delaney v. Fidelity Lease Ltd.},\textsuperscript{124} where the Texas Supreme Court held that a limited partner could not escape personal liability through the use of a corporation created for that purpose. Other jurisdictions have declined to follow this lead and will not disregard the entity unless other reasons for doing so are present.\textsuperscript{125} The result is that the LLC may have only simplified the control over the organization and streamlined the organization, thereby lessening the operating expenses.

However, it is also possible that the LLC permits the members too much control. There are many situations in which the organizers may prefer to exclude the investing members from participation in the management of the affairs of the organization. In such a case, the limited partnership may be the better vehicle.\textsuperscript{126}

### IV. Conclusion

It may be considered that even if the LLC has no substantial advantage over the two business arrangements described above, it is certainly preferable to the partnership of the Florida Uniform Partnership Act.\textsuperscript{127} The advantage that the LLC will possess over the partnership is the assurance of limited liability. However, against this benefit must be weighed the disadvantages of the LLC.

The general uncertainty of the law as it will be applied to the entity and the reliance that the statutes place on the membership agreements to protect the interests of the members are some of the handicaps of the LLC. These disabilities can only be cured by time. Other disadvantages are the need to comply with a statute to

\begin{itemize}
  \item \textsuperscript{122} FLA. STAT. § 608.422 (Supp. 1982).
  \item \textsuperscript{123} A limited partner is not liable to creditors unless he takes part in control of the business or his surname appears in the partnership name. FLA. STAT. § 620.07 (1981); J. CRANE & A. BROMBERG, \textit{supra} note 40, §§ 26, 32, 65 (d); see also infra notes 124, 125.
  \item \textsuperscript{124} 526 S.W.2d 543 (Tex. 1975).
  \item \textsuperscript{125} Western Camps, Inc. v. Riverway Ranch Enterprises, 138 Cal. Rptr. 918, 926-27 (Cal. Ct. App. 1977); Frigidaire Sales Corp. v. Union Properties, Inc., 562 P.2d 244 (Wash. 1977).
  \item \textsuperscript{126} The LLC can also be organized to have centralized management, but besides adding to the corporate characteristics of the LLC, there will be no assurance that the members will be permanently excluded from the management affairs of the Company. Each member will still have voting power.
  \item \textsuperscript{127} FLA. STAT. §§ 620.57-.77 (1981).
\end{itemize}
create the organization, the Florida classification of the Company as a corporation for state taxation purposes and the probability that this same tax treatment will result in every other state in which the LLC does business, the general hostility of the IRS towards the partnership classification of the organization, and the availability of alternate business organizations.

In summary, the LLC, like any business organization, is useful for some purposes but undesirable for others. It is a familiar business organization for foreign investors and can be attractive to partners who are assured of their working relationship and rights. The uncertainties associated with the LLC are substantial but are not entirely debilitating. Its major disadvantage is its relative youth. However, with time, this aspect will be cured as the LLC is defined by business practices and court decisions.