

LOUISIANA STATE LAW INSTITUTE

MEETING OF THE COUNCIL

November 1, 2024

Friday, November 1, 2024

Persons Present:

Adams, Marguerite (Peggy) L.
Alexander, Edward King, Jr.
Baker, Pamela J.
Belanger, Kathryn (Katie)
Blunt, Shelton D.
Braun, Jessica G.
Breard, L. Kent
Crochet, Anne J.
Cromwell, L. David
Darensburg, June Berry
Drury, Lloyd
Grochowski, Mateusz F.
Hamilton, Leo C.
Hampton, Bruce
Hawthorne, George "Trippe"
Hogan, Lila Tritico
Holdridge, Guy
Janke, Benjamin West
Johnson, Rachael D.
Koch, Patricia E.

Kutcher, Robert A.
Lavergne, Luke A.
Manning, C. Wendell
Medlin, Kay C.
Miller, Gregory A.
Penzato, Allison H.
Philips, Harry "Skip", Jr.
Richardson, Sally Brown
Riviere, Christopher H.
Sole, Emmett C.
Stuckey, James A.
Surprenant, Monica T.
Talley, Patrick A.
Thibaut, Martha A.
Title, Peter S.
Tucker, Zelda W.
Waller, Mallory C.
Weems, Charles S., III
White, H. Aubrey, III
Ziober, John David

President L. David Cromwell called the November Council meeting to order at 10:00 a.m. on Friday, November 1, 2024 at the Louisiana Supreme Court in New Orleans. After asking Council members to briefly introduce themselves, the President called on Professor Trey Drury, Reporter of the Corporations Committee, to begin his presentation of materials.

Corporations Committee

Professor Drury began his presentation by reminding the Council that it was in the middle of considering the Committee's proposed revision of Louisiana LLC law, which was based primarily on ULLCA but also borrowed from existing law, the LBCA, the ABA Prototype Act, and Delaware law where appropriate. The Reporter quickly directed the Council's attention to R.S. 12:22-401(E), on page 1 of the materials, and explained that this provision had previously been included in Part 5, but that since that portion of the revision dealt with transferrable interests and this provision applies to membership interests more broadly, the Committee thought it more appropriate to include here. A motion was made and seconded to adopt the proposal as presented, and the motion passed with no objection. R.S. 12:22-401(E) reads as follows:

R.S. 12:22-401. Becoming a member

* * *

E. A member's interest in the limited liability company is an incorporeal movable. A member has no interest in limited liability company property.

After quickly recapping Sections 402 through 405, all of which had previously been approved by the Council, Professor Drury asked the Council to consider R.S. 12:22-406, beginning on page 30 of the materials. The Reporter noted that although some of the Subsections in this provision were adopted in November of 2023, others were deferred,

namely Subsections D and E. Professor Drury explained that the Committee had ultimately determined that “make demand” was the proper alternative to ULLCA’s use of “implead” and that an additional one-year period had been added in Subsection E. One Council member expressed concern over the use of the phrase “make demand” without additional explanation that the intent is for this demand to be brought in the ongoing action, as opposed to simply in a letter, and the Council engaged in a great deal of discussion with respect to procedural issues concerning third-party claims, cross-claims, joinder, and incidental demands. Ultimately, the Council agreed to add “judicial” before “demand” on lines 27 and 30 of page 30, as well as to add “either or” before “both” on line 25 of the same page. Turning to Subsection E, the Council questioned the use of “finally adjudicated” as opposed to the “final and definitive judgment” language used in the Code of Civil Procedure, ultimately agreeing to make this substitution and to consider a similar change to the corresponding provision of the LBCA. One Council member then questioned the prescriptive/peremptive period that would apply in a situation where the member or manager simply pays the amount under Subsection A and never files suit. The consensus was that the general ten-year prescriptive period would apply where payment was voluntarily made and not adjudicated, but the Council questioned whether that was the Committee’s intent. The Reporter agreed to consult the Committee with respect to this issue, as well as to change “A proceeding” to “An action” on line 41 of page 30. A motion was then made and seconded to adopt R.S. 12:22-406(D) and (E) as amended, and the motion passed with no objection. The adopted proposals read as follows:

R.S. 12:22-406. Liability for improper distributions

* * *

~~(d) D.~~ A person against which an action is commenced because the person is liable under ~~subsection (a)~~ Subsection A of this Section may do either or both of the following:

(1) ~~implead~~ Make judicial demand against any other person that is liable under ~~subsection (a)~~ Subsection A of this Section and seek to enforce a right of contribution from the person; ~~and~~.

(2) ~~implead~~ Make judicial demand against any person that received a distribution in violation of ~~subsection (c)~~ Subsection C of this Section and ~~seek to enforce a right of contribution~~ recovery from the person in the amount the person received in violation of ~~subsection (c)~~ Subsection C of this Section.

~~(e) E.~~ (1) An action under Subsection A or C of this section ~~Section~~ is ~~barred unless commenced not later than~~ perempted two years after the distribution.

(2) An action to enforce contribution or recovery under Subsection D of this Section is perempted unless it is commenced within one year after the liability of the claimant under Subsection A or C of this Section has been determined by final and definitive judgment.

Turning to R.S. 12:22-407, on page 37 of the materials, the Reporter gave a brief explanation of member-managed as opposed to manager-managed LLCs and the manner in which this election is made before turning to the provisions that had not been previously approved by the Council. With respect to Subsection B, one Council member questioned the absence of the phrase “unless otherwise provided in the operating agreement,” and Professor Drury reminded the Council that the default rule is that everything can be changed in the operating agreement, that this sentiment is not repeated throughout the revision but that there will be Comments to this effect, and that a provision in Part I specifically addresses matters that cannot be varied in the operating agreement. The President then questioned the interaction between Paragraphs (B)(2) and (3) in the context of third-party reliance upon a member’s actions, and the Council discussed provisions of general agency law and actual vs. apparent authority before concluding that

the language in existing law on lines 23 through 25 of page 48 should be incorporated here – “unless the member lacks the authority to act for the company and the person with whom the member is dealing has knowledge of the fact that the member lacks such authority.” A motion was made and second to this effect and passed with no objection. The Council then adopted Subsection B as amended and turned to Subsection C, on page 38 of the materials, where a similar change was approved. The Reporter also agreed that the numbering of the provisions on page 39 should be corrected. A motion was then made and seconded to adopt Subsection C as amended, at which time the Council discussed whether there was a definition of manager-managed and whether a manager-managed LLC for which no managers had actually been appointed would be subject to the rules concerning member-managed LLCs in the interim. The Council discussed that based on the definition of “member-managed LLC” under ULLCA, perhaps some requirement that managers actually be appointed should be included in R.S. 12:22-407(A), and the Reporter agreed to address these issues when the Committee considers the definitions of these terms in Part I.

Turning to Subsection G, on page 40 of the materials, Professor Drury explained that Paragraph (2) had been added in response to the Galatoire’s case to provide that if a member acquires another member’s interest in the LLC, the acquiring member does not have to be “voted in” like a third party, but rather their membership interest increases in proportion to the acquired interest. With respect to Paragraph (G)(1), members of the Council discussed issues concerning tacit operating agreements, such as tax returns evidencing a different division of interests than is expressly provided in a document, and provisions in the articles of organization, which will generally be treated as an operating agreement, a fact that will be noted in Comments throughout the revision. With respect to Paragraph (G)(2), the Council agreed to change “relevant” to “transferred” on line 15 and to include “all or part of” on line 13 before engaging in discussion concerning the inclusion of “transferable” on line 13 as well as the use of “membership interest” on lines 14 and 15. Professor Drury explained that the Committee’s intent was to include situations in which one member transfers “his interest” to another member without specifying whether the applicable interest is only the transferable interest (economic rights) or the entire membership interest (governance, inspection, and other noneconomic rights), providing that the membership interest of the acquiring member will increase to include the membership interest of the transferring member unless expressly provided otherwise. The Council discussed whether “transferable interest” and “membership interest” will be defined, which the Reporter answered in the affirmative, before ultimately agreeing to delete “transferable” on line 13 as well as “the” before “governance rights” on line 16. After additional discussion concerning the fact that the remaining members of the LLC can expel a member who has transferred his entire transferable interest and only retains his governance rights, a motion was made and seconded to adopt R.S. 12:22-407 as amended, and the motion passed with no objection. The adopted proposal reads as follows:

R.S. 12:22-407. Management of limited liability company

~~(a) A. A limited liability company is a member-managed limited liability company unless the articles of organization or a written provision of the operating agreement: states that the company is “manager-managed” or uses words or phrases of similar import to vest management of the company in managers.~~

~~(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)~~ B. In a member-managed limited liability company, the following rules apply:

(1) Except as expressly provided in this ~~{act}~~ Chapter, 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 and affairs~~ is a mandatary of the company for all matters in the ordinary course of its business, other than the alienation, lease, or encumbrance of its immovables, unless the member lacks the authority to act for the company and the person with whom the member is dealing has knowledge of the fact that the member lacks such authority.

(3) ~~A difference arising among members as to concerning a matter in the ordinary course of the activities and affairs of the company may company's business, and all decisions of the members not governed by another Paragraph of this Subsection, shall~~ be decided by a majority in voting power of the members.

(4) The affirmative vote or consent of all of the voting power of the members is required to take any of the following actions:

~~(A) undertake an act outside the ordinary course of the activities and affairs of the company; or~~

~~(B) (a) amend~~ Amend the operating agreement or articles of organization.

(b) Admit a person as a member.

(c) Compromise the contribution obligation of a member.

(5) A transaction governed by Part 10 of this Chapter shall require the approval of members as provided in that Part.

~~(e)~~ C. In a manager-managed limited liability company, the following rules apply:

(1) Except as expressly provided in this ~~{act}~~ Chapter, ~~any matter relating to the activities and affairs of the company is decided exclusively by the manager, or, if there is more than one manager, by a majority of the managers~~ the management and conduct of the company are vested in the managers.

(2) ~~Each manager has equal rights in the management and conduct of the company's activities and affairs~~ is a mandatary of the company for all matters in the ordinary course of its business, other than the alienation, lease, or encumbrance of its immovables, unless the manager lacks the authority to act for the company and the person with whom the manager is dealing has knowledge of the fact that the manager lacks such authority.

(3) A difference arising among managers concerning a matter in the ordinary course of the company's business, and all decisions not governed by another Paragraph of this Subsection, shall be decided by a majority of the managers.

(4) The affirmative vote or consent of all a majority in voting power of the members is required to take any of the following actions:

~~(A) undertake an act outside the ordinary course of the company's activities and affairs; or~~

~~(B)~~ amend the operating agreement.

~~(1)~~ (a) The dissolution and winding up of the ~~limited liability~~ company.

~~(2)~~ (b) The sale, exchange, lease, mortgage, pledge, or other transfer of all or substantially all of the assets of the ~~limited liability~~ company.

~~(3)~~ The merger or consolidation of the ~~limited liability~~ company.

~~(4)~~ (c) The incurrence of indebtedness by the ~~limited liability~~ company other than in the ordinary course of its business.

~~(5)~~ (d) The alienation, lease, or encumbrance of any immovables of the ~~limited liability~~ company.

~~(6)~~ An (e) The amendment ~~to~~ of the articles of organization or ~~an~~ the operating agreement for the sole purpose of appointing or removing a manager.

(5) The affirmative vote or consent of all of the voting power of the members is required to take any of the following actions:

(a) Amend the articles of organization, except to appoint or remove a manager.

(b) Amend the operating agreement, except to appoint or remove a manager.

(c) Admit a person as a member.

(d) Compromise the contribution obligation of a member.

(6) A transaction governed by Part 10 of this Chapter shall require the approval of members as provided in that Part.

~~(4)~~ (7) A manager may be chosen at any time by the affirmative vote or consent of a majority in voting power 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 affirmative vote or consent of a majority in voting power of the members without notice or cause.

~~(5)~~ (8) 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.

~~(6)~~ (9) 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 that~~ the person incurred while a manager.

~~(d)~~ D.(1) An action requiring the vote or consent of members or managers under this ~~{act}~~ Chapter may be taken without a meeting, ~~and a~~.

(2) A member may appoint a proxy or other agent to vote, consent, or otherwise act for the member by signing an appointing ~~record~~ document, personally or by the member's agent.

~~(e)~~ E. The dissolution of a limited liability company does not affect the applicability of this section 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) A limited liability company shall reimburse a member for an advance to the company beyond the amount of capital the member agreed to contribute.~~

~~(g) A payment or advance made by a member which gives rise to a limited liability company obligation under subsection (f) or Section 408(a) constitutes a loan to the company which accrues interest from the date of the payment or advance.~~

~~(h) F. A member is not entitled to remuneration for services performed for a member- managed limited liability company, except for reasonable compensation for services rendered in winding up the activities of the company.~~

G.(1) The voting power of the members of a limited liability company shall be allocated in proportion to their membership interests. If the membership interests are not allocated in an operating agreement, the voting power shall be allocated equally.

(2) When a member acquires all or part of the interest of another member, the membership interest of the acquiring member is increased to include the transferred portion of the membership interest of the transferring member, unless the transferring member expressly retains governance rights.

After breaking for lunch, the Council resumed by considering R.S. 12:22-408, on page 55 of the materials, and quickly voted to approve Subsections A and B as presented. Turning to Subsection C, Professor Drury explained that the provision referenced by the second sentence concerning protection against monetary liability modeled after the LBCA had been eliminated by the Committee due to the difference in structure between corporations and LLCs and, as a result, this sentence should also be deleted. A motion was made and seconded to adopt Subsection C as amended, and after the Council changed "who" to "that" on line 15 of page 55, the motion passed with all in favor. The Council then considered Subsection D, with one Council member questioning the use of "final disposition" as opposed to "final and definitive judgment" and others questioning whether this language is even necessary, although it appears in ULLCA and its removal here may be suggestive of a substantive change that was not intended. Another Council member questioned the cross-references to Subsections A and B on line 28 of page 55, specifically whether Subsection C should also be included or whether this reference should be to Subsection B only. The Council discussed changing lines 27 and 28 to read "determined not to be entitled to indemnification under Subsection B of this Section" before ultimately agreeing to recommit Subsection D for consideration of these changes by the Committee. The Council quickly approved Subsection E as presented, and R.S. 12:22-408 as adopted by the Council reads as follows:

R.S. 12:22-408. Reimbursement; Indemnification; advancement; and insurance

~~(a)~~ A. A limited liability company shall reimburse a member of a member-managed company or the manager of a manager-managed company for any payment made by the member or manager in the course of the member's or manager's activities on behalf of the company, if the member or manager complied with Sections R.S. 12:22-405, 407, and 409 in making the payment.

~~(b)~~ A. B. A limited liability company shall indemnify and hold harmless a person with respect to any claim or demand against the person and any debt, obligation, or other liability incurred by the person by reason of the person's former or present capacity as a member or manager, if the claim,

demand, debt, obligation, or other liability does not arise from the person's breach of Sections R.S. 12:22-405, 407, or 409.

~~B. C.~~ A limited liability company may indemnify a person that is a party to a proceeding because the person is or was a member or manager of the company against expenses and liability incurred in the proceeding.

* * *

~~(d) D. E.~~ A limited liability company may purchase and maintain insurance on behalf of a member or manager against liability asserted against or incurred by the member or manager in that capacity or arising from that status even if, ~~under Section 105(e)(7),~~ the operating agreement could not eliminate or limit the person's liability to the company for the conduct giving rise to the liability.

Next, Professor Drury directed the Council's attention to R.S. 12:22-409, on page 64 of the materials, concerning the fiduciary duties of members and managers of LLCs. Motions were quickly made and seconded to adopt Subsections A and B as presented before one Council member questioned the drafting of Subsection C, particularly whether the "including but not limited to" clause was intended to modify only a greater degree of disregard or the whole list of prohibited acts. After additional discussion concerning the fact that perhaps the language added by the Committee was not necessary, the Council voted to restore the ULLCA language of "grossly negligent or reckless conduct, willful or intentional misconduct, or knowing violation of law" on lines 29 through 31 of page 64. Turning to Subsection D, and specifically Paragraph (D)(1), one Council member questioned the use of "good faith and fair dealing" when Louisiana jurisprudence does not recognize this overarching contractual duty and R.S. 12:1314 in existing law simply sets forth a statutory obligation to act "in good faith." Ultimately, the Council determined that "in good faith" should be substituted for the language after "rights" on line 34 of page 64 and that a Comment should be added explaining that no substantive change is intended by the omission of the "contractual duty of good faith and fair dealing" language; rather, this is not an overarching duty that is recognized under Louisiana jurisprudence, and cases should be cited to this effect. A motion was then made and seconded to adopt Subsection D as amended, and the Reporter and staff attorney agreed to review the remainder of the revision for other instances where "good faith and fair dealing" is used.

With respect to the remaining provisions in R.S. 12:22-409, the Council agreed that Subsection F should be changed to provide that "All of the members, or a majority in voting power of the disinterested members" on line 12 of page 65 to address issues concerning single-member LLCs. In Subsection I, one Council member suggested deleting the reference to Paragraph (D)(2) on line 29 and changing "Paragraph (D)(1)" to "Subsection D" on line 35, which would apply the same requirements to members regardless of whether the LLC is member- or manager-managed, and the Council agreed. The Council also agreed to change "applies" to "belongs" on line 39 after being made aware that the Comment uses similar language. A motion was then made and seconded to adopt R.S. 12:22-409 as amended, and the motion passed with no objection. The adopted proposal reads as follows:

R.S. 12:22-409. Standards of conduct for members and managers

~~(a)~~ A. A member of a member-managed limited liability company owes to the company and, subject to Section R.S. 12:22-801, the other members the duties of loyalty and care stated in ~~subsections (b) and (c)~~ Subsections B and C of this Section.

~~(b)~~ B. The fiduciary duty of loyalty of a member in a member-managed limited liability company includes the following duties:

(1) ~~to~~ To account to the company and hold as trustee for it any property, profit, or benefit derived by the member:

~~(A) in (a) In~~ the conduct or winding up of the company's activities and affairs;

~~(B) from (b) From~~ a use by the member of the company's property;

~~(C) from (c) From~~ the appropriation of a company opportunity;

(2) ~~to~~ To refrain from dealing with the company in the conduct or winding up of the company's activities and affairs as or on behalf of a person having an interest adverse to the company; ~~and~~

(3) ~~to~~ To refrain from competing with the company in the conduct of the company's activities and affairs before the dissolution of the company.

~~(e) C.~~ The duty of care of a member of a member-managed limited liability company in the conduct or winding up of the company's activities and affairs is to refrain from engaging in grossly negligent or reckless conduct, willful or intentional misconduct, or knowing violation of law.

~~(d) D.(1)~~ A member shall discharge the duties and obligations under this ~~act~~ Chapter or under the operating agreement and exercise any rights ~~consistently with the contractual obligation of in~~ good faith and fair dealing.

(2) In discharging the member's duties, a member that does not have knowledge that makes reliance unwarranted is entitled to rely on any of the following:

(a) The performance of properly delegated responsibilities by one or more employees of the company whom the member reasonably believes to be reliable and competent in performing the responsibilities delegated.

(b) Information, opinions, reports, or statements, including financial statements and other financial data, prepared or presented by one or more employees of the company whom the member reasonably believes to be reliable and competent in the matters presented or by legal counsel, public accountants, or other persons retained by the company as to matters involving skills or expertise the member reasonably believes are matters within the particular person's professional or expert competence or as to which the particular person merits confidence.

~~(e) E.~~ A member does not violate a duty or obligation under this ~~act~~ Chapter or under the operating agreement solely because the member's conduct furthers the member's own interest.

~~(f) F.~~ All of the members, or a majority in voting power of the disinterested 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) G.~~ It is a defense to a claim under ~~subsection (b)(2) Paragraph (B)(2) of this Section~~ and to any comparable claim in equity or at common law that the transaction was fair to the limited liability company.

~~(h) H.~~ If, as permitted by ~~subsection (f) or (i)(6) Subsection F or Paragraph (I)(6) of this Section~~ or the operating agreement, a member enters into a transaction with the limited liability company which ~~that~~ otherwise would be prohibited by ~~subsection (b)(2) Paragraph (B)(2) of this Section~~, the member's rights and obligations arising from the transaction are the same as those of a person that is not a member.

(ii) I. In a manager-managed limited liability company, the following rules apply:

(1) Subsections ~~(a)~~, ~~(b)~~, ~~(c)~~, and ~~(g)~~ A, B, C, and G of this Section apply to the manager or managers and not the members.

(2) The duty stated under ~~subsection (b)(3)~~ Paragraph (B)(3) of this Section continues until winding up is completed.

(3) Subsection ~~(d)~~ D of this Section applies to managers and members.

(4) Subsection ~~(e)~~ E of this Section applies only to members.

(5) The power to ratify under ~~subsection (f)~~ applies Subsection F of this Section belongs only to the members.

(6) Subject to ~~subsection (d)~~ Paragraph (D)(1) of this Section, a member does not have any duty to the company or to any other member solely by reason of being a member.

Finally, the Council considered R.S. 12:22-410, on page 80 of the materials, concerning information rights applicable to LLCs. Professor Drury explained that the Committee preferred Delaware law to ULLCA in this instance because ULLCA was too permissive and amenable to member mischief. With respect to Paragraph (A)(1), one Council member noted that existing Louisiana LLC law specifies records that allow voting rights to be determined, which are required to be maintained under Subsection G, such that perhaps a reference to that provision should be included here. The Reporter accepted this change, and members of the Council discussed issues concerning whether assignees are entitled to information rights as well as the fact that "from time to time" is included to ensure that this is not interpreted as a one-time right by any member to request information. Turning to Subsection F, the Council discussed the use of the phrase "information demanded" and considered whether this language should be broader to include not only the information but the manner in which it was demanded. After considering several alternative suggestions, the Council ultimately agreed to change "demanded information" to "information as demanded" on line 7 of page 82. Members of the Council also agreed to change "copying" to "production" on line 6 of page 82 and line 13 of page 81, as well as to change "keep at its principal office" to "maintain" on line 27 because requiring these records to be physically kept on-site seems a bit antiquated, although there do not appear to be penalties for failing to comply with these requirements, which are likely not being satisfied under existing law either. A motion was then made and seconded to adopt R.S. 12:22-410 as amended, and the motion passed with no objection. The adopted proposal reads as follows:

R.S. 12:22-410. Rights to information of member, manager, and person dissociated as member Access to and confidentiality of information; records

~~(a)~~ A. Subject to the procedures and limitations set forth in this Section, each ~~Each~~ member of a limited liability company, in person or by attorney or other agent mandatary, has the right, ~~subject to such reasonable standards (including standards governing what information and documents are to be furnished at what time and location and at whose expense) as may be set forth in a limited liability company agreement or otherwise established by the manager or, if there is no manager, then by the members to obtain from the limited liability company from time to time upon reasonable demand for any purpose reasonably related to the member's interest as a member of the limited liability company:~~

(1) True and ~~full~~ complete information regarding the ~~status~~ state of the business and financial condition of the ~~limited liability company;~~ including the records described in Subsection G of this Section.

(2) Promptly after becoming available, a copy of the ~~limited liability~~ company's federal, state, and local income tax returns for each year;

(3) A current list of the name and last known business, residence, or mailing address of each member and manager;

(4) A copy of any written ~~limited liability company operating agreement and certificate of formation~~ the articles of organization and all amendments thereto, ~~together with executed copies of any written powers of attorney pursuant to which the limited liability company agreement and any certificate and all amendments thereto have been executed;~~

(5) True and ~~full~~ complete 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 that~~ each member has agreed to contribute in the future, and the date on which each became a member; ~~and~~

(6) Other information regarding the affairs of the ~~limited liability~~ company as is just and reasonable.

~~(b) B.~~ Each manager shall have the right to examine all of the information described in ~~subsection (a) of this section~~ Subsection A of this Section for a purpose reasonably related to the position of manager.

~~(c) C.~~ The manager of a limited liability company shall have the right to keep confidential from the members, for such period of time as the manager deems reasonable, any information ~~which that~~ the manager reasonably believes to be in the nature of trade secrets or other information the disclosure of which the manager in good faith believes is not in the best interest of the ~~limited liability~~ company or could damage the ~~limited liability~~ company or its business or ~~which that~~ the ~~limited liability~~ company is required by law or by agreement with a third party to keep confidential.

~~(d) D.~~ A limited liability company may maintain its records in other than a written form if ~~such the~~ form is capable of conversion into written form within a reasonable time.

~~(e) E.~~ Any demand under this ~~section~~ Section shall be in writing and shall state the purpose of ~~such the~~ demand. In every instance where an attorney or other ~~agent~~ mandatary shall be the person who seeks the right to obtain the information described in ~~subsection (a) of this section~~ Subsection A of this Section, the demand shall be accompanied by a power of attorney or ~~such other writing which that~~ authorizes the attorney or other ~~agent~~ mandatary to ~~so~~ act on behalf of the member. A limited liability company may charge a person that makes a demand under this Section the reasonable costs of production, limited to the costs of labor and material.

~~(f) Any action to enforce any right arising under this section shall be brought in the Court of Chancery. If the limited liability company refuses to permit a member, or attorney or other agent acting for the member, to obtain or a manager to examine the information described in subsection (a) of this section or does not reply to the demand that has been made within 5 business days (or such shorter or longer period of time as is provided for in a limited liability company agreement but not longer than 30 business days) after the demand has been made, the demanding member or manager may apply to the Court of Chancery for an order to compel such disclosure. The Court of Chancery is hereby vested with exclusive jurisdiction to determine whether or not the person seeking such information is entitled to the information sought. The Court of Chancery may summarily order the limited liability company to permit the demanding member to obtain or manager to examine the information described in subsection (a) of this section and to~~

~~make copies or abstracts therefrom, or the Court of Chancery may summarily order the limited liability company to furnish to the demanding member or manager the information described in subsection (a) of this section on the condition that the demanding member or manager first pay to the limited liability company the reasonable cost of obtaining and furnishing such information and on such other conditions as the Court of Chancery deems appropriate. When a demanding member seeks to obtain or a manager seeks to examine the information described in subsection (a) of this section, the demanding member or manager shall first establish:~~

~~(1) That the demanding member or manager has complied with the provisions of this section respecting the form and manner of making demand for obtaining or examining of such information, and~~

~~(2) That the information the demanding member or manager seeks is reasonably related to the member's interest as a member or the manager's position as a manager, as the case may be. The Court of Chancery may, in its discretion, prescribe any limitations or conditions with reference to the obtaining or examining of information, or award such other or further relief as the Court of Chancery may deem just and proper. The Court of Chancery may order books, documents and records, pertinent extracts therefrom, or duly authenticated copies thereof, to be brought within the State of Delaware and kept in the State of Delaware upon such terms and conditions as the order may prescribe.~~

F. An action to enforce any right arising under this Section shall be brought in the parish where the limited liability company's principal office or, if none in this state, its registered office is located. If the company does not within a reasonable time allow a member or manager who complies with the applicable provisions of this Section to obtain or examine any information described in Subsection A of this Section, the member or manager may by summary proceeding seek examination and production of the information demanded. If the court determines that the member or manager was entitled to obtain or examine the information as demanded, then the court:

(1) Shall order the company to provide copies of the demanded information at the company's expense.

(2) Shall order the company to pay the member's or manager's expenses, including reasonable attorney fees, incurred to obtain the order unless the company proves that it refused disclosure or examination in good faith because it had a reasonable basis for doubt about the right of the member to obtain or the manager to examine the information demanded.

(3) May impose reasonable restrictions on the use or distribution of the information by the demanding member or manager.

~~(g) The rights of a member or manager to obtain information as provided in this section may be restricted in an original limited liability company agreement or in any subsequent amendment approved or adopted by all of the members or in compliance with any applicable requirements of the limited liability company agreement. The provisions of this subsection shall not be construed to limit the ability to impose restrictions on the rights of a member or manager to obtain information by any other means permitted under this chapter.~~

~~(h) G. A~~ Each limited liability company shall maintain a the following:

(1) A current record that identifies the name and last known business, residence, or mailing address of each member and manager.

(2) Copies of records that would enable a member to determine the relative voting rights of the members.

(3) A copy of the articles of organization, together with any amendments thereto.

(4) Copies of the company's federal, state, and local income tax returns for the three most recent years.

(5) A copy of any operating agreement that is in writing.

(6) Copies of any financial statements of the company for the three most recent years.

H. The rights of a member to obtain information as provided in this Section may be subject to reasonable standards, including standards governing what information and documents are to be furnished at what time and location and at whose expense, as may be set forth in the articles of organization or in an operating agreement or as otherwise established by the manager or, if there is no manager, then by the members.

At this time, Professor Drury concluded his presentation, and after a brief reminder about the Law Institute's Annual Banquet beginning at 6:00 p.m. at Antoine's Restaurant, the Friday session of the November 2024 Council meeting was adjourned.

LOUISIANA STATE LAW INSTITUTE

MEETING OF THE COUNCIL

November 2, 2024

Saturday, November 2, 2024

Persons Present:

Adams, Marguerite (Peggy) L.
Baker, Pamela J.
Braun, Jessica G.
Breard, L. Kent
Crochet, Anne J.
Cromwell, L. David
Darensburg, June Berry
Gregorie, Isaac M. "Mack"
Grochowski, Mateusz F.
Hampton, Bruce
Hawthorne, George "Trippe"
Hogan, Lila Tritico
Holdridge, Guy
Koch, Patricia E.
Lavergne, Luke A.
Lovett, John A.
Manning, C. Wendell

Medlin, Kay C.
Miller, Gregory A.
Penzato, Allison H.
Philips, Harry "Skip", Jr.
Procell, Christopher A.
Richardson, Sally Brown
Roussel, Randy
Sole, Emmett C.
Tate, George J.
Thibaut, Martha A.
Thibeaux, Robert P.
Tucker, Zelda W.
Waller, Mallory C.
Weems, Charles S., III
White, H. Aubrey, III
Ziober, John David

President L. David Cromwell called the Saturday session of the November Council meeting to order at 9:00 a.m. on Saturday, November 2, 2024 at the Louisiana Supreme Court in New Orleans. The President then called on Mr. Randy Roussel, Reporter of the Common Interest Ownership Regimes Committee, to begin his presentation of materials.

Common Interest Ownership Regimes Committee

Mr. Roussel began his presentation with a reminder of the work previously done by the Committee and the Council on the Planned Community Act and its enactment by the legislature as Act 158 of the 2024 Regular Session. He then informed the Council that per Senate Concurrent Resolution No. 104 of the 2014 Regular Session, the Committee's focus had shifted to the revision of the Louisiana Condominium Act. Although the concepts are largely the same among these two types of common interest ownership, in the condominium regime the association manages, and does not own, the common elements because they are co-owned by the owners of the units. Mr. Roussel further noted that to the extent possible, the language of the recommendations mimics the Planned Community Act for consistency in application and interpretation.

The short title, designated as R.S. 9:1121.101, was quickly adopted, without discussion, as follows:

R.S. 9:1121.101. Short title

This Part shall be known and may be cited as the "Louisiana Condominium Act".

The next section, R.S. 9:1121.102, provides for the same applicability as the Planned Community Act. Discussion included the reasoning for following the corporate law structure, the redundancy of Subsection C and its inclusion as a compromise with advocates, and the overlap between Subsections A and G. With the Reporter accepting the suggestion to combine those Subsections, the following language was approved:

R.S. 9:1121.102. Applicability

~~A. This Part shall apply only to property made subject to it by a condominium declaration duly executed and filed for registry.~~

~~B. The provisions of this Part shall be applicable from, and after the effective date of this Part, to existing condominium property regimes created pursuant to the provisions of Act No. 502 of 1974 or Act No. 494 of 1962. This Part shall not affect or impair any right that is guaranteed or protected by the constitutions of this state or the United States nor shall this Part be construed to impair or affect any act done or offense committed or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred, under Act No. 502 of 1974 or Act No. 494 of 1962. This Part shall not be construed to impair or cast a cloud upon the titles to units of any condominium property regime formed prior to the effective date of this Part, notwithstanding any conflicts which may exist between this Part, Act No. 502 of 1974, or Act No. 494 of 1962.~~

A. The provisions of this Part shall be applicable to existing and future condominium regimes whose declarations have been duly executed and filed for registry. However, this Part shall not be construed to affect the validity or superiority of any provision of a condominium document filed for registry prior to the effective date of this Act including but not limited to its previously established methods of amending condominium documents or calculating and voting on assessments.

B.(1) This Part shall not apply to planned communities governed by the provisions of Part II-B of this Chapter.

(2) The provisions of Part II-A of this Chapter shall be applicable to an ownership timeshare interest created in a unit within a condominium regime to the extent that those provisions do not conflict with the provisions of this Part.

C. This Part shall not impair any right that is guaranteed or protected by the constitution of this state or the United States, nor shall this Part be construed to affect any act done, offense or violation committed, or right accrued.

D. This Part shall not be construed to impair or cast a cloud upon the titles of condominium property.

E. This Part shall not require an association existing prior to the effective date of this Act to amend or change its organizational structure or its condominium documents.

F. This Part shall not affect the ownership of common elements or limited common elements in a condominium regime in existence prior to the effective date of this Act.

Mr. Roussel next presented R.S. 9:1121.103, which is existing law relative to ordinances and zoning. He explained that some ordinances attempt to impose special rules on buildings that look identical but have different forms of ownership. The Council questioned the use of the phrase "physically identical" and wondered if this language may be interpreted more narrowly than desired. The Reporter explained that the application of the law is to the actual development structure and not whether the common elements are identical. He further stated that because the application of this provision to building codes is slightly different from the zoning and ownership issue, the phraseology in existing law adequately covers both. After further discussion, the following provision was approved:

R.S. 9:1121.406103. Applicability of ordinances, zoning, and building restrictions

A zoning, subdivision, building code, or other land use law, ordinance, or regulation may not prohibit the condominium form of ownership or impose any requirement upon condominium property which that it would not impose upon a physically identical the same development under a different form of ownership. Otherwise, no provision of this Part invalidates or modifies any provision of any zoning, subdivision, building code, or other land use law, ordinance, or regulation.

Next, the Council quickly approved the deletion of existing R.S. 9:1121.104 with the understanding that this provision has been relocated to the consumer protection Subpart of the materials. Mr. Roussel then presented the newly numbered R.S. 9:1121.104 regarding separate taxation. He explained that this provision is in existing law and ensures that the common elements and limited common elements are taxed as part of the unit and not subject to separate assessment. After the Reporter accepted a few minor changes, the following language was adopted:

R.S. 9:1121.405104. Separate taxation

~~All kinds of taxes~~ Taxes and special assessments authorized by law shall be assessed against each individual ~~condominium parcel unit~~. A multi-unit building, the condominium property as a whole, and any of the common elements, including limited common elements, shall not be deemed to be an individual parcel for tax purposes. Each unit shall be deemed to contain its percentage of undivided interest in the common elements, including limited common elements, and computation of taxes and special assessments against the unit shall include the percentage of undivided interest. The taxes and special assessments levied against a ~~condominium parcel unit~~ shall constitute a basis for claiming a lien privilege only upon the individual ~~condominium parcel unit~~ assessed. There shall be no forfeiture or sale of a multi-unit building or the common elements, including limited common elements, as a whole for delinquent taxes or assessments on individual units.

The Reporter then introduced the definition Section, R.S. 9:1121.105, and again noted that the language is identical to the Planned Community Act with the exception of any highlighted portions. The terms "affiliate of the declarant" and "assessment" were adopted without discussion. Mr. Roussel remarked that the term "association or association of unit owners" is one of the places in which the law imposes the requirement that the association be a nonprofit corporation and the benefit of doing so, which is to avoid paying taxes on the dues collected from unit owners. Moving to the definition of "condominium documents," one Council member questioned whether the plat should be included, and the Reporter responded that because the declaration requires a plat, the inclusion of the declaration in this definition also covers the plat. With respect to the definition of "complete property description," Mr. Roussel informed the Council that this language is borrowed from the Private Works Act and that the second sentence was added to highlight the fact that in condominium regimes, the term "unit" includes the interest that unit has in common elements and limited common elements.

Progressing to the definition of "declarant," the Reporter requested that the latter part of the sentence be deleted because it is covered by another provision. Members of the Council discussed how this works when a condominium is built upon leased property, and the definition was ultimately approved. In the definition of "director," Mr. Roussel accepted the addition of the word "natural" before "person" to differentiate from the corporate law that allows juridical directors. Regarding the definition of "majority vote," the Reporter informed the Council that it intentionally refers to voting interest present at a meeting and not the total voting interest in the association due to feedback from property managers struggling to entice members to attend meetings. It was suggested and accepted by the Reporter that a quorum requirement be added to the end of the definition even though without a quorum there is no voting on any matters. For the definition of

"member" or "membership," discussion included questions on the application and found that the two terms should be defined separately. Mr. Roussel agreed to take this issue back to the Committee.

Advancing to the definition of "nonresidential use," the Reporter and the Council quickly agreed to make this language conform to the definition in the Planned Community Act, which includes examples of uses that are not residential. For the definition of "residential use," members of the Council questioned the addition of the language regarding cooking and restrooms, in response to which the Reporter explained the need to differentiate from hotels due to language contained in the East Baton Rouge Residential Code and from the different rules that apply to rebuilding after a casualty. The Council remained concerned about the narrowness of the qualifiers and developments that may provide individual living spaces but shared kitchens and bathrooms. The Reporter agreed to further review this definition with the Committee and perhaps draw inspiration from the right of habitation law.

As a result of all of the discussion, the following definitions were ultimately approved by the Council:

R.S. 9:1121.403105. Definitions

As used in this Part, the following terms have the meanings indicated below:

(1) "Affiliate of the declarant" means any person who controls, is controlled by, or is under common control with a declarant. For purposes of this Paragraph:

(a) A person controls a declarant if the person satisfies any of the following:

(i) The person is a general partner, officer, director, employer, or manager of the declarant.

(ii) The person directly or indirectly, or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds the power to vote, or holds proxies representing, more than twenty percent of the voting interest in the declarant.

(iii) The person controls in any manner the election of a majority of the directors of the declarant.

(iv) The person has contributed more than twenty percent of the capital of the declarant.

(b) A person is controlled by a declarant if the declarant satisfies any of the following:

(i) The declarant is a general partner, officer, director, employer, or manager of the person.

(ii) The declarant directly or indirectly, or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds the power to vote, or holds proxies representing, more than twenty percent of the voting interest in the person.

(iii) The declarant controls in any manner the election of a majority of the directors of the person.

(iv) The declarant has contributed more than twenty percent of the capital of the person.

(c) Control does not exist if the powers described in this Paragraph are held solely as security for an obligation and are not exercised.

(2) "Assessment" means the sum allocable to each unit and due to the association pursuant to R.S. 9:1122.104.

(3) ~~"Association of unit owners" or "association of unit owners"~~ means a nonprofit corporation, or unincorporated association, owned by or composed of the unit owners and which is organized pursuant to R.S. 9:1123.101 and through which the unit owners manage and regulate the condominium property.

(4) "Board of directors" means the body, regardless of name, designated in the declaration or bylaws to conduct and supervise the affairs of the association.

(5) "Bylaws" means a written instrument that meets the requirements of R.S. 9:1123.110 and contains the procedures for the conduct of the affairs of the association, including any amendments to the instrument.

(6) "Common elements" means the portion of the condominium property not a part of the individual units.

(7) "Common expense liability" means the liability for common expenses allocated to each unit pursuant to R.S. 9:1122.104.

(8) "Common expenses" means: expenditures made by, or financial liabilities of, the association, together with any allocations to reserves for the benefit and use of the condominium regime.

~~(a) Expenses of administration, maintenance, repair, and replacement of the common elements.~~

~~(b) Expenses declared to be common expenses by provisions of this Part or by the condominium declaration or bylaws.~~

~~(c) Expenses agreed upon as common expenses by the unit owners.~~

(9) "Condominium document" or "documents" means the articles of incorporation, bylaws, declarations, building restrictions, rules and regulations, or other written instruments, including any amendment thereto, by which the association has the authority to exercise any of its powers to manage, maintain, or otherwise affect the condominium regime.

(10) "Complete property description" means any description of immovable property that, if contained in a mortgage of the immovable property filed for registry, would be sufficient for the mortgage to be effective as to third persons. A property description is complete even if the unit's undivided interest in the common elements and limited common elements is not described or referred to therein.

(11) "Condominium" is regime" means the property regime under which portions of the immovable condominium property are subject to individual ownership and the remainder thereof is designated a common element and owned in indivision by such the unit owners.

(12) "Condominium parcel" means a unit together with the undivided interest in the common elements which is an inseparable component part of the unit.

(13) "Condominium property" means all interests in land, improvements thereon, and all servitudes and rights attaching to the condominium made subject to the condominium regime.

(14) "Declarant" means: the person designated as such in the declaration or, in the absence of a designation, the owner or lessee of condominium property who executes the declaration to establish the condominium regime.

~~(a) If the condominium has not yet been created, any person who offers to dispose of or disposes of his interest in a unit not previously disposed of; or~~

~~(b) If the condominium has been created, any person who has executed a declaration, or an amendment to a declaration to add additional property to the condominium regime, other than persons holding interests in the property solely as security for a debt or persons whose interest in the property will not be conveyed to unit owners.~~

(15) "Declaration" means any instrument that meets the requirements of R.S. 9:1122.102, however denominated, and creates a condominium regime, including any amendments to the instrument.

(16) "Development right" means any right or combination of rights reserved by a declarant in the declaration to do any of the following:

(a) Add immovable property to a condominium regime.

(b) Create units, common elements, or limited common elements within a condominium regime.

(c) Convert units into common elements.

(d) Withdraw immovable property from a condominium regime.

(17) "Director" means a natural person who serves on the board of directors elected or appointed to conduct and supervise the affairs of the association.

(18) "Electronic means" includes any form of communication that does not directly involve the physical transmission of paper and that creates a record capable of being retrieved, reviewed, and retained by a recipient of the communication. A meeting conducted by electronic means includes a meeting conducted by teleconference, videoconference, internet exchange, or other electronic methods. Any term used in this Paragraph that is defined in R.S. 9:2601 et seq., the Louisiana Uniform Electronic Transactions Act, shall have the meaning set forth in that Act.

(19) "Electronic transmission" or "electronically transmitted" means any form or process of communication, not directly involving the physical transfer of paper or another tangible medium, that is both of the following:

(a) Suitable for the retention, retrieval, and reproduction of information by the recipient.

(b) Retrievable in paper form by the recipient through an automated process used in conventional commercial practice, provided that this requirement shall not apply if both of the following conditions are met:

(i) The electronic transmission is otherwise retrievable in perceivable form.

(ii) The sender and the recipient have consented in writing to the use of the form of electronic transmission or as authorized by the condominium documents.

(20) "Leasehold condominium regime" means a condominium regime in which all or a portion of the condominium property is subject to a lease, the expiration or termination of which will terminate the condominium regime or reduce its size.

(21) "Limited common elements" means ~~these common elements reserved in the condominium declaration~~ a portion of the common elements allocated by the declaration or by operation of R.S. 9:1122.105 for the exclusive use of ~~a certain unit or certain units~~ one or more but fewer than all of the unit owners and their invitees.

(22) "Majority vote" means the vote cast through a method permitted by R.S. 9:1123.108 by more than fifty percent of the voting interest present at a duly called meeting of the association at which a quorum is present.

(23) "Member" means a unit owner entitled to distributions of proceeds pursuant to R.S. 9:1122.118, or his heirs, successors, or assigns.

(24) "Nonresidential use" means any commercial, office, retail, or similar type of use, or any other use that is not a residential use.

(25) "Occupant" means any person occupying a unit, including persons occupying by permission or accommodation of the owner, former owner, or another occupant whether express or implied.

(26) "Person" means both natural persons and juridical persons as defined in Civil Code Article 24, unless otherwise indicated.

(27) "Record", used as a noun, 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.


* * *

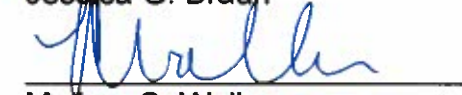
(29) "Restriction" means an obligation imposed on a unit, whether affirmative or negative, by the declaration.

(30) "Rule" means a policy, guideline, restriction, procedure, or regulation of an association, however denominated, that is not set forth in the declaration or bylaws and that governs the conduct of persons or the use or appearance of condominium property.

(31) "Security right" means any form of security as defined in Civil Code Article 3136.

At this time, a motion was made and seconded, and the November 2024 Council meeting was adjourned.



Jessica G. Braun


Mallory C. Waller