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The Delaware Series LLC: Sophisticated and Flexible Business Planning

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THE DELAWARE SERIES LLC: SOPHISTICATED AND FLEXIBLE BUSINESS PLANNING

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I. INTRODUCTION[1]

Delaware has long attempted to provide business structures that reflect the demands of the business community in an efficient, productive, and predictable manner. The Delaware series ("the series" or "Delaware series") is a prime example of a legislative response to market demands of the business community. The Delaware series is an entity structure option, which allows an entity to isolate its assets from others within designated "series"[2]—an election that is available in Delaware limited partnerships ("LPs"), limited liability companies ("LLCs"), and statutory trusts.[3] The series structure combines the internal flexibility necessary for

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1. This article references an unpublished research paper of the author. *See* Ann E. Conaway, *A Business Review of the Delaware Series: Good Business for the Informed* (Widener Law Sch. Legal Studies Research Paper Series, Working Paper No. 08-19), *available at* http://ssrn.com/abstract=1097645.

2. *See, e.g.*, DEL. CODE ANN. tit. 6, § 18-215(a) (2012) (allowing for a limited liablity company agreement to establish one or more series).

3. *See* DEL. CODE ANN. tit. 12, § 3804 (2012). Delaware also provides Captive Cell Insurance with series similar to that in series LLCs. *See* DEL. CODE ANN. tit. 18, § 6934 (2012). A "protected cell" company ("PCC") is one that utilizes segregated accounts or insurance companies of captive insurers. *See id.* However, the use of the captive cell insurance series requires adherence to specific insurance mandates that do not otherwise exist for non-insurance series entities. *See id.* On January 25, 2010, Delaware's Insurance Commissioner authorized the first series entity captive that could use the LLC form rather than the PCC form. *See* Allan G. Donn et al., *Series LLCs*, *in* CHOICE OF BUSINESS ENTITY- 2010 UPDATE:

different types of businesses and investors along with the statutory and judicial support[4] of giving the "maximum effect to the principle of freedom of contract and to the enforceability of [LLC] agreements" that Delaware promises to all of its unincorporated business organizations.[5] Several states have now imitated the Delaware series concept.[6] Other states make reference to the series concept. These states, however, do not provide all of the internal protections offered by the Delaware series.[7] Despite the

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CHOOSING AND USING BUSINESS FORMS IN UNCERTAIN TIMES 2010, at 52, ALI-ABA VIDEO L. REV., at 141, 145 (ALI-ABA Video Law Review, Course of Study Materials, 2010). By using the LLC to accomplish captive insurance, the persons forming the LLC avoids the minimum premium tax per cell imposed by the Delaware PCC act. *See* tit. 18, § 6914(a). On January 25, 2010 Delaware's Insurance Commissioner issued a statement that Delaware was the only jurisdiction in which an entity can form a series entity captive. *See* Press Release, Karen Weldin Stewart, Del. Ins. Comm'r, Delaware Insurance Commissioner Karen Weldin Stewart Licenses World's First Serial Captive Insurance Company (Jan. 25, 2010), *available at* http://delawareinsurance.gov/departments/news/012510-Press-FirstCaptiveCompany.shtml. The Commissioner further provided that the number of captive insurers in Delaware in 2010 increased from 48 to 96. *See* Press Release, Karen Weldin Stewart, Del. Ins. Comm'r, Delaware Doubles Number of Captive Domiciles in 2010 (Jan. 28, 2011), *available at* http://www.delawareinsurance.gov/departments/news/012811-Press-CaptiveDomicilesDoubled.shtml. For a discussion of the Delaware Captive Insurance Series Entity, *see* Matthew J. O'Toole & Robert L. Symonds, Jr., *A Winning Combination*, Delaware Report 19, *available at* http://www.delawarecaptive.org/files/Symonds&O'Toole2.pdf. *See generally* tit. 18, § 6934(3) (stating that "[t]he assets of a protected cell shall not be chargeable with the liabilities of any other protected cell, or . . . of the sponsored captive insurance company generally."). *See also* D.C. CODE § 31-3931.04(b) (2012) (permitting "incorporated protected cells"); MONT. CODE ANN. § 33-28-301(1) (West 2011) (authorizing a protected cell company).

4. Tit. 6 § 18-1101(b). Gerber v. Enterprise Products Holdings, LLC, 2012 WL 34442, at *9–12 (Del. Ch. Jan. 6, 2012) (interpreting an interested party transaction provision in an LP agreement under contract principles); CML V, LLC v. Bax, 6 A.3d 238, 242 (Del. Ch. 2010) (stating that there is no duty to creditors in Delaware LLC since the derivative statute does not grant standing to creditors); Lonergan v. EPE Holdings LLC, 5 A.3d 1008, 1023-25 (Del. Ch. 2010) (indicating that parties may eliminate information rights in the alternative entity context under the guise of fiduciary duties); R&R Capital, LLC v. Buck & Doe Run Valley Farms, LLC, No. 3803-CC, 2008 WL 3846318, at *4 (Del. Ch. Aug. 19, 2008) (stating that parties may waive judicial dissolution by contract); Fisk Ventures, LLC v. Segal, No. 3017-CC, 2009 WL 73957 (Del. Ch. Jan. 13, 2009).

5. Tit. 6, § 18-1101(b). *See also* tit. 6, §17-1101(c). *But see* tit. 12, § 3809 (The Delaware Statutory Trust Act defaults to trust law although the governing instrument may eliminate duties and liability for breach of duties, but it may not eliminate the contractual duty of good faith and fair dealing).

6. *See* D.C. CODE § 29-802.06; 805 ILL. COMP. STAT. ANN. 180/37-40 (LexisNexis 2007); IOWA CODE ANN. § 489.1201 (West 2009); Nev. Rev. Stat. Ann. § 86.296 (West 2010); OKLA. STAT. ANN. tit. 18, § 2054.4 (West 2012); P.R. LAWS ANN. tit. 14, § 3967 (2009); TENN. CODE ANN. § 48-249-309 (2012); TEX. BUS. ORGS. CODE ANN. § 101.601 (West 2011); UTAH CODE ANN. § 48-2c-606 (LexisNexis 2012) (to be repealed July 1, 2013 and superseded by §§ 48-3-1201 through 48-3-1210).

7. *See* MINN. STAT. ANN. § 322B.03 (2011) (providing series definition without mention of limitation of liabilities and no mention of limitation of liabilities for series elsewhere in statute); MISS. CODE ANN. § 79-29-231 (2011) (amended by 2012 Miss. Laws Ch. 382 (H.B. 1162); N.D. CENT. CODE § 10-32-02.57 (West 2011); WIS. STAT. § 183.0504 (2011).

series' increasing popularity as the preferred structure among entities, there is still considerable confusion as to how series function in general.

One aspect of confusion for practitioners utilizing the series structure is the federal tax status of the series. Some degree of this tax ambiguity is now addressed in the September 2010 proposed Internal Revenue Code Regulations on series.[8] Notwithstanding the fact that the proposed regulations are now available, there are a number of open questions with respect to general use of a series. In light of this uncertainty, this article details some of the more significant provisions of the Delaware LLC series law and its antecedent—the Delaware Statutory Trust Act (the "DSTA").

The authors conclude that the Delaware series supplies a beneficial, efficient use of a combined contractual Delaware entity form when pooled with sensible, informed planning by sophisticated business attorneys. Such benefits are particularly noticeable in investment vehicles where managers embark to minimize risk by diversifying the fund's assets or receive funding with specific covenants attached that limit the acceptable uses of the

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8. Series LLCs and Cell Companies, 75 Fed. Reg. 55699 [hereinafter Series LLCs and Cell Companies] (proposed Sep. 14, 2010) (codified at 26 C.F.R. pt. 301). Under current law, there is little specific guidance regarding whether for Federal tax purposes a series (or cell) is treated as an entity separate from other series or the series LLC (or other cells or the cell company, as the case may be), or whether the company and all of its series (or cells) should be treated as a single entity. *Id*. at 55699. Under the proposed federal tax regulations, a "series organization" is defined as a "juridical entity that establishes and maintains, or under which is established and maintained, a series. A series organization includes a series limited liability company, series partnership, series trust, protected cell company, segregated cell company, segregated portfolio company, and segregated account company." *Id.* at 55702. A series under the proposed regulations is defined as:

> a segregated group of assets and liabilities that is established pursuant to a series statute by agreement of a series organization. A series includes a cell, segregated account, or segregated portfolio, including a cell, segregated account, or segregated portfolio that is formed under the insurance code of a jurisdiction or is engaged in an insurance business. *Id.*

The Internal Revenue Bulletin also indicates:

> Although some statutes creating series organizations permit an individual series to enter into contracts, sue, be sued, and/or hold property in its own name, the IRS and the Treasury Department do not believe that the failure of a statute to explicitly provide these rights should alter the treatment of a domestic series as an entity formed under local law. These attributes primarily involve procedural formalities and do not appear to affect the substantive economic rights of series or their creditors with respect to their property and liabilities. Even in jurisdictions where series may not possess these attributes, the statutory liability shields would still apply to the assets of a particular series, provided the statutory requirements are satisfied. [Additionally] [t]he IRS and the Treasury Department believe that domestic series should be classified as separate local law entities based on the characteristics granted to them under the various series statutes. However, except as specifically stated in the proposed regulations, a particular series need not actually possess all of the attributes that its enabling statute permits it to possess . . . . The IRS and the Treasury Department believe that a domestic series should be treated as a separate local law entity even if its business purpose, investment objective, or ownership overlaps with that of other series or the series organization itself. Separate state law entities may have common or overlapping business purposes, investment objectives and ownership, but generally are still treated as separate local law entities for Federal tax purposes. *Id.* at 55703.

funds. The series is not, however, for general practitioners who have the occasional client wishing for the latest benefit Delaware has to offer its investors.

To provide context, Parts II-IV of this article provide a brief overview of how the series structure evolved and introduces the reader to the Delaware Series. Next, Part V of this article sheds light on the Delaware series LLC and provides practitioners with a useful guide to facilitate forming this specialized business entity. Part VI answers some of the commonly asked questions about a Delaware series. Finally, Part VII of this article addresses the common mistakes made by practitioners when forming a Delaware LLC series.

II. The Evolution of the Series

The concept of the series structure first arose in the context of the Delaware Business,[9] now Statutory, Trust Act.[10] The purpose of the Delaware series was to allow persons managing, controlling or operating certain business activities in a manner known at common law as a "business trust" or "Massachusetts trust"[11] to segregate similar assets. In the mutual fund industry, in particular, a single trust could be created and a

9. The original Delaware Business Trust Act was adopted in 1988. *See* S.B. No. 355, 134th Gen. Assemb., 66 Del. Laws 279 (1988). *See also* S.B. 452, 135th Gen. Assemb., 67 Del. Laws 297 (1990).

10. Del. Code Ann. tit. 12, § 3826 (2012). For additional discussion on Delaware trusts in general *see* Michael M. Gordon & Peter S. Gordon, *Why is Everyone Talking About Delaware Trusts?*, Gordon, Fournaris & Mammarella, P.A. (Sept., 2007), http://www.gfmlaw.com/sites/default/files/pdfs/Why%20Is%20Everyone%20Talking%20About%20Delaware%20Trusts%20(00295992).pdf.

11. The Massachusetts Trust was a common law trust that first appeared in 1827. A "Massachusetts Business Trust" is defined as "[a] business organization wherein property is conveyed to trustees and managed for benefit of holders of certificates like corporate stock certificates." Black's Law Dictionary 1127 (4th ed. 1968). Using a trust estate as a business entity is a practice that originated in Massachusetts. *See id.* at 1684. The Massachusetts Business Trust allowed the vesting [of] a business or certain real estate in a group of trustees, who manage it for the benefit of the beneficial owners; the ownership of the latter is evidenced by negotiable (or transferable) shares. The trustees are elected by the shareholders, or, in case of a vacancy, by the board of trustees. Provision is made in the agreement and declaration of trust to the effect that when new trustees are elected, the trust estate shall vest in them without further conveyance. The declaration of trust specifies the powers of the trustees. They have a common seal; the board is organized with the usual officers of a board of trustees; it is governed by by-laws; the officers have the usual powers of like corporate officers; so far as practicable, the trustees in their collective capacity, are to carry on the business under a specified name. The trustees may also hold shares as beneficiaries. Provision may be made for the alteration or amendment of the agreement or declaration in a specified manner. *Id.*

In the famous case of *Eliot v. Freeman*, 220 U.S. 178 (1911), the Supreme Court held that the Cushing Real Estate Trust, formed under trust law for the purpose of buying, improving, and selling land and buildings, could not be taxed as a corporation since the trust had not been organized under a United States law, such as a corporate statute, and did not have perpetual existence (applying trust law – life in being plus 20 years). With this ruling, the Massachusetts trust organizational structure granted favorable tax treatment to the entity,

centralized management, limited liability for beneficial owners who did not participate in management, and free transferability of ownership units. *Id.*

Other jurisdictions organized the "business trust" as a corporation so as to benefit from the protections of limited liability, free transferability of stock, and centralized management. *See* Herbert B. Chermside, Jr., *Modern Status of the Massachusetts or Business Trust*, 88 A.L.R.3d 704 (1978). The corporate form suffered from undesirable tax treatment and the loss of the flexible attributes of the common law trust. *Id.* The favorable tax treatment of the Massachusetts trust is now largely gone due to changes in the IRC. For example, Washington defines its Massachusetts Trust as follows:

> A Massachusetts trust is an unincorporated business association created at common law by an instrument under which property is held and managed by trustees for the benefit and profit of such persons as may be or may become the holders of transferable certificates evidencing beneficial interests in the trust estate, the holders of which certificates are entitled to the same limitation of personal liability extended to stockholders of private corporations.

Wash. Rev. Code § 23.90.020 (LexisNexis 2012).

The powers and duties of the Washington "Massachusetts Trust" are:

> (1) Any Massachusetts trust desiring to do business in this state shall file with the secretary of state a verified copy of the trust instrument creating such a trust and any amendment thereto, the assumed business name, if any, and the names and addresses of its trustees.
>
> (2) Any person dealing with such Massachusetts trust shall be bound by the terms and conditions of the trust instrument and any amendments thereto so filed.
>
> (3) Any Massachusetts trust created under this chapter or entering this state pursuant thereto shall pay such taxes and fees as are imposed by the laws, ordinances, and resolutions of the state of Washington and any counties and municipalities thereof on domestic and foreign corporations, respectively, on an identical basis therewith. In computing such taxes and fees, the shares of beneficial interest of such a trust shall have the character for tax purposes of shares of stock in private corporations.
>
> (4) Any Massachusetts trust shall be subject to such applicable provisions of law, now or hereafter enacted, with respect to domestic and foreign corporations, respectively, as relate to the issuance of securities, filing of required statements or reports, service of process, general grants of power to act, right to sue and be sued, limitation of individual liability of shareholders, rights to acquire, mortgage, sell, lease, operate and otherwise to deal in real and personal property, and other applicable rights and duties existing under the common law and statutes of this state in a manner similar to those applicable to domestic and foreign corporations.
>
> (5) The secretary of state, director of licensing, and the department of revenue of the state of Washington are each authorized and directed to prescribe binding rules and regulations applicable to said Massachusetts trusts consistent with this chapter.

WASH. REV. CODE § 23.90.040 (West 2012).

In filing for formation with the Washington Secretary of State the following sample format is suggested by the authors:

> Pursuant to the provisions of WASH. REV. CODE § 23.90 (1994), the undersigned "Massachusetts Trust" existing in the state of _____ desiring to do business in the State of Washington does hereby submit the following statements:
>
> 1. Name (and the name under which it will do business in the State of Washington)
> 2. Created under the laws of _____ state
> 3. Date of creation and term of existence
> 4. Address of principal office in state under the laws of which it was created
> 5. Purpose(s) which it proposes to pursue in the transaction of business in Washington State.
> 6. Name and address of its trustees
> 7. Name of the appointed registered agent/registered office address residing in Washington State
> 8. The number of beneficial shares or units.

distinct series of the trust could be formed for each asset class within the trust.[12] Specifically, high-yield investments could be allocated to one class of the trust; ten-year notes with a lower performance earmarked to a second series; and five-year low-interest investments allocated to a third series.

The reason for the series mutual fund was simple: a single entity could be created—typically a Massachusetts trust for tax purposes—and this legal person could achieve centralized management (a trustee or board of trustees), the ownership interests were freely transferable (like stock), the beneficial owners had limited liability so long as they did not participate in management, and the trust could then operate under a single registration for purposes of the Investment Company Act of 1940.[13] Other jurisdictions elected to utilize the corporation to achieve the same result—the downside being double taxation and decreased internal flexibility.[14] The series concept solved these downsides by providing a new entity structure that incorporated the manageability of assets assigned by series under a single umbrella entity. The structure was first codified in the former Delaware Business Trust Act. However, the most popular series formation, the Delaware LLC series is codified in Delaware's ever-popular LLC Act ("DLLCA").[15]

III. Opening Considerations

This article focuses solely upon the Delaware LLC series due to its originality and national popularity. However, since its creation, nine other jurisdictions have followed Delaware and adopted "series" legislation: (1) the District of Columbia;[16] (2) Illinois;[17] (3) Iowa;[18] (4) Nevada;[19] (5)

12. *See* Chermside, *supra* note 11.

13. *See* Nat'l Sec. Series-Indus. Stock Series v. Comm'r, 13 T.C. 884 (T.C. 1949) (holding that several series within a single investment trust could be treated as separate taxable entities). Although the trust may file a single Investment Company filing, each series is generally considered a separate investment company. *Id.*

14. *See* Chermside, *supra* note 11.

15. Del. Code Ann. tit. 6, § 18-215 (2012).

16. D.C. Code § 29-802.06 (2012).

17. 805 Ill. Comp. Stat. Ann. 180/37-40 (LexisNexis 2007).

18. *Compare* Iowa Code Ann. § 489.1205 (West 2009) (superseding § 490.A.305); *with* Del. Code Ann. tit. 6, § 18-215 (following Delaware series except that termination by consent of members requires consent of all members rather than 2/3 percentage of members required in Delaware where termination is based on consent of members).

19. Nev. Rev. Stat. Ann. §§ 86.296, 89.210, 80.110 (West 2010) (similar to Delaware series except that series provisions are found throughout statute instead of in one central location, making it more difficult for practitioner use; Nevada imposes an initial filing fee of $75.00 for an LLC and separate filing fees for each series; an annual filing fee of $125.00 is required for each series, a money-enhancer for Nevada).

Oklahoma;[20] (6) Tennessee;[21] (7) Texas;[22] (8) Utah;[23] and (9) Puerto Rico.[24] For an offshore series LLC, the Republic of the Marshall Island permits the creation of series LLCs.[25] Additionally, several jurisdictions make reference to the series concept; however, these states do not provide the internal protections offered by the Delaware series.[26] Moreover, series legislation, similar to that found in Delaware, has recently been proposed in the State of Kansas.[27]

IV. Introduction to the Delaware Series

As discussed above, the Delaware series began its life as a signature feature in the former Delaware Business Trust Act[28] (now the Delaware Statutory Trust Act or "DSTA") where transactions generally involved mutual funds or highly financed asset securitizations. In this industry, investors found it advantageous to "group," "class," or place into "series" real estate investment mortgages, real estate mortgage income investments, or similar assets that were to be used as securitization devices.

For example, consider an investment manager who is charged with supervising municipal bonds and governmental securities as well as high-yield, high-risk bonds. The manager likely will seek to separate the investments into distinct "units" or "series." In this manner, any profits or losses are allocated expressly to owners who selected that stratagem. As a fund manager, this organizational infrastructure is logical, efficient, and logistically convenient since a series allows the segregation of the *types* of income investment devices into individual series and the subsequent allocation of income from the identified investments to express individualized investment stratagem of beneficiaries, or trustees.

The series seemingly anticipates separate record keeping for these diversified investment devices with notice of the series in the certificate of

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20. Okla. Stat. Ann. tit. 18, § 2054.4 (West 2012) (following Delaware approach).

21. Tenn. Code Ann. § 48-249-309 (2006).

22. Tex. Bus. Orgs. Code Ann. § 101.601 (West 2009).

23. Utah Code Ann. § 48-2c-606 – 616 (LexisNexis 2012) (to be repealed July 1, 2013 and superseded by §§ 48-3-1201 through 48-3-1210). (following Delaware separateness test, however, like Illinois and Delaware 2007 amendments, allows a series to contract but does not consider the series to be an entity; a foreign application requires identification of protections available in the Utah act as well as any different protections not found in the Utah act).

24. P.R. Laws Ann. tit. 14, § 3967 (2009).

25. Limited Liability Company Act, 52 MIRC Part IV § 79 (1996) (Marsh. Is.).

26. *See* Fla. Stat. Ann. § 608.4351 (West 2007); Minn. Stat. § 322B.03 (2011); Miss. Code Ann. § 79-29-210, 214 (2007); N.D. Cent. Code § 10-32-02.55 (West 2011); Wis. Stat. § 183.0504 (2006).

27. *See* 2012 Kan. Sess. Laws 353-58.

28. The Delaware Business Trust Act, originally enacted in 1988, did not contain any "series" language. The true Delaware series was brought into the Act effective July 5, 1990. *See* S.B. 452, 135th Gen. Assemb., 67 Del. Laws 297 (1990).

trust that forms the statutory trust of record.[29] However, the DSTA does not require "records and notices" for the series in order for an internal limitation of liability to attach between and among series, nor does it require notice of the creation of a series in the certificate of trust.[30] In this manner, the DSTA series is quite simplified in contrast to the LLC series.[31]

The DLLCA, enacted in 1992, adopted series language in 1996 as well as the "class or group" formulation set forth in the Delaware Revised Uniform Limited Partnership Act, ("DRUPA").[32] The DLLCA series provision is significantly more detailed in its description of the series than is in the original Delaware Business Trust Act.[33] The descriptive language of the DLLCA series serves to provide notice as to how to safeguard the separate features of each series for the purpose of limiting the liability of a series obligation to that series' assets.[34] There is no legislative record indicating that either the series language set forth in the present DSTA or the

29. DEL. CODE ANN. tit. 12, § 3810 (2012). The series may be set forth in the governing instrument of the statutory trust–a document that is not a public record. Tit. 12, § 3812.

30. Tit. 12, § 3812.

31. In 2006, 96,831 new LLCs were formed in Delaware compared with 34,733 new corporations. In 2007, before the market crash, that number increased to 111,820 compared with 35,700 new corporations. For the years 2008, 2009 and 2010, LLC growth per year was 81,523, 70,274, and 78,000, respectively. For those same years, new corporate filings were 29,501, 24,955, and 27,500, respectively. Series LLC filings jumped to 2.5 percent of all LLC filings by 2007. That percentage of series LLC filings remains stable in 2011. New formation of statutory trust from 2003 to the Fall of 2010 grew as follows: 1,722; 1,913; 3,200; 3,868; 4,449; 2,581; 1,312; 1,200, respectively. *See infra* Appendix. Because sophisticated, highly-funded deals were commonly used by Delaware limited partnerships, the Delaware Revised Uniform Limited Partnership Act ("DRULPA") was amended in 1996, effective in 1997, to add the concept of series to its arsenal of contractual features. DEL. CODE ANN. tit. 6, § 17-218 (2012). The DRULPA was revised in 1996 to include a series of "limited partners, general partners, [or] partnership interests" provision. *Id.* However, the term "series" was not added to the Delaware Revised Uniform Partnership Act ("DRUPA"). The DRUPA does permit "classes and groups" of partners with such "rights, powers and duties" as the partnership agreement sets forth. DEL. CODE ANN. Tit. 6, § 15-407(a) (20012). The DRUPA adopts a "classes and groups" formulation for voting purposes. *Id.* The DRUPA does not have a series limitation on liabilities provision. The only "notice" series procedures under DRUPA exist through the partnership agreement, filing a statement of partnership existence, and filing for LLP status pursuant to title 6, section 15-1001 of the Delaware Code. Tit. 6, § 15-1001 (2012). Because series are intended to create "internal liability shields," it is highly unlikely that any court would enforce a "class or group" as a series under DRUPA, even if filed as an LLP. This result makes sense from a policy perspective since the statutory power to create a limitation on liabilities for a true statutory series is absent. Of course, the DRUPA does clearly state that the policy of the Act is to "give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements." Tit. 6, § 15-103(d). DRUPA does not, however, create a statutory series limitation on liability. *See* Tit. 6, § 15-101 *et seq.* (making no mention of any such limitation).

32. S*ee* Tit. 6, § 18-215(e).

33. *Compare* tit. 6, § 18-215, *with* tit. 12, § 3806.

34. *See* tit. 6, § 18-215.

DLLCA was intended to mean that an individual series serves as an independent and distinct "entity" within an "entity" – a current hot topic within the unincorporated organization marketplace.[35]

V. A Practitioner's Guide to the Delaware Series LLC

A. *The Delaware LLC Act*

Delaware amended the DLLCA in 1996, effective 1997, to include a series provision.[36] The amended section is titled: "Series of Members, Managers, LLC Interests, or Assets."[37] Unlike its counterpart in the DSTA, the DLLCA: (1) creates a statutory provision for a "series" of members, managers, LLC interests and assets independent of the Act's default managerial section;[38] (2) permits "series to carry on any lawful purposes . . . whether or not for profit[;]"[39] (3) creates a "records and notice" system so that "debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing" of separate series are enforceable only against that series (the "limitation on liabilities") and not against the LLC nor other series within the LLC;[40] and (4) provides for the future creation of classes or groups of members or managers, including "a class or group of the series of LLC interests that was not previously outstanding."[41] Also, in the 2006 amendments to the DLLCA, the term "series" was added to the definition of "person" so that "person" now includes: "any other individual *or entity (or series thereof)* in its own or any representative capacity."[42] The 2007 amendments to the DLLCA made several changes that will be addressed within the body of the discussion below.[43]

B. *A Practitioner's Guide to the Delaware Series LLC*

This section provides practitioners with a guide to the Delaware series LLC. In particular, this section focuses on the provisions of section 18-215

35. *See, e.g.*, *What is a Series LLC?*, Nolo.com, http://www.nolo.com/legal-encyclopedia/what-is-series-llc.html (last visited Oct. 30, 2012) (erroneously referring to each series, within the parent series, as separate entities). *See also* Carol R. Goforth, *The Series LLC, and a Series of Difficult Questions*, 60 Ark. L. Rev. 385, 397-99 (2007) (noting that the issue of whether each series will be treated as separate legal entities for bankruptcy purposes remains unresolved).

36. *See* tit. 6, § 18-215.

37. 76 Del. Laws Ch. 105 (S.B. 96) (2007); *See also* tit. 6, § 18-215 (original version at 70 Del. Laws ch. 360 (1996)).

38. *See* tit. 6, § 18-215(a).

39. *See* tit. 6, § 18-215(c).

40. *See* tit. 6, § 18-215(b).

41. *See* tit. 6, § 18-215(e).

42. Tit. 6, § 18-101(12) (emphasis added).

43. Certain re-numbering of DLLCA resulted from the 2007 amendments, effective August 1, 2007. 76 Del. Laws Ch. 105 (S.B. 96) (2007); *See also* tit. 6, § 18-215 (original version at 70 Del. Laws, ch. 360 (1996)).

of the DLLCA. Notably, practitioners may reference this section for information on, among other things, how to form a series, the powers and authorities of a series, the management of a series, and investor's rights to access books and records. This section also sheds light on issues pertaining to fiduciary duties, terminating and winding up a series, and extra-territorial concerns.

1. FORMATION OF THE SERIES

The core stages of formation according to sections 18-215(a)-(b) are: (1) the allocation of LLC property or obligations or separate allocation of profits and losses to the specified property or obligations with each series possibly having a separate business purpose or investment objective;[44] (2) a method set forth to maintain separate and distinct records concerning the allocation of the LLC assets from one series to another;[45] and (3) a notice of the limitation on liabilities between and among series expressed in the certificate of formation of the LLC.[46] The determining essence of the DLLCA series is "separateness"—separateness as to allocations, spinoff of economic rights, record keeping, and liability shields.[47]

As mentioned above, the first and second core stages of forming a Delaware series LLC, pursuant to section 18-215, is a "separateness" requirement. With respect to the first core element, the forming of an LLC begins by allocating property or obligations, or profits and losses to specific property or obligations, to individual series (each of which may have a distinct purpose).[48] The second core stage is the maintaining of separate and distinct records concerning the allocation of the LLC assets from one series to another.[49] In particular, a 2007 amendment to section 18-215(b) clarified that the term "records" includes documents of whatever nature, so long as the records "reasonably identify [the series'] assets, including by specific listing, category, type, quantity, computational or allocational formula or procedure (including a percentage or share of any asset or assets) or by any other method where the identity of such assets is objectively determinable."[50] The objective of this amendment was simply to clarify that the purpose or *nature* of the record was not as important as its *function* in identifying segregated assets in an objectively determinable manner.[51]

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44. *See* tit. 6, § 18-215(a).

45. *See* tit. 6, § 18-215(b).

46. *See id.*

47. *See* tit. 6, § 18-215.

48. *See* tit. 6, § 18-215(a).

49. *See* tit. 6, § 18-215(b).

50. *Id.*

51. *See* S.B. 95, 144th Gen. Assemb., 1st Reg. Sess., 76 Del. Laws 104 (2007); S.B. 96, 144th Gen. Assemb., 1st Reg. Sess., 76 Del. Laws 2007 105 (2007).

A third core stage in creating a Delaware LLC series is a "notice" requirement.[52] In order for the "separateness" of a series to be enforceable and the limitation of liability confined to each single series, section 18-215(b) demands that "notice" of a "series LLC" be included in a certificate of formation of the LLC.[53] "Notice in a certificate of formation of the limitation on liabilities of a series as referenced in this subsection"[54] is considered sufficient, whether or not a series is created at the time the LLC is formed.[55] Further, the notice mandated by section 18-215(b) does not require reference to any specific series, unlike the series in a Delaware statutory trust.[56]

The completion of the three core stages discussed above results in a limitation on liabilities that attaches to the assets or property of a series that is formed in compliance with the "notice" and "records" requirements of section 18-215(b).[57] Thus, if the three core elements are established, the limited liability protection of the series is enforceable against third parties.

2. SERVICE OF PROCESS

In all Delaware civil actions or proceedings involving the LLC's business or a violation by a manager or liquidating trustee of a duty owed to the LLC, a manager or liquidating trustee of an LLC may be served with process.[58] Such a manager or a liquidating trustee may also be served with process, "whether or not the manager or the liquidating trustee is a manager or a liquidating trustee at the time suit is commenced."[59] If a manager or liquidating trustee acts in such capacity, the trustee or manager consents that the resident agent of the LLC is such person's agent for purpose of service of process upon that person.[60] Once service has been made, responsive filings are processed through the Secretary of State, the Prothonotary and the Register in Chancery.[61] These same rules would apply to a manager or a liquidating trustee of a series in liquidation.

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52. *See* tit. 6, § 18-215(b). It is important to note that notice is not required to *form* a Delaware LLC series; however, as warned above, notice is required to ensure the limitiation on liability is confined to each individual series. *See id.*

53. *See id.*

54. *Id.*

55. *Id.* The fact that a series does not have to be in existence at the time "notice" of the series is provided for in the certificate of formation allows the creation of what is known as a "shelf" series - i.e., a blank series that may be "filled in" at a later date according to the limited liability agreement of the company. *Id*; KEATINGE AND CONAWAY ON CHOICE BUS. ENT. § 3:7 (2012).

56. *Compare* tit. 6, § 18-215, *with* DEL. CODE ANN. tit. 12, § 3810 (2012).

57. Tit. 6, § 18-215(b).

58. Tit. 6, § 18-109(a).

59. *Id.*

60. *Id.*

61. Tit. 6, § 18-109(b).

A manager or member to an LLC may also consent, through a written LLC agreement or other writing, to being subject to the nonexclusive jurisdiction of the courts in a specific jurisdiction or an arbitration tribunal in a specified jurisdiction.[62] Alternatively, a member or manager may consent to be bound by "the exclusive jurisdiction of the courts of Delaware or to the exclusivity of arbitration in a specified jurisdiction or the state of Delaware[.]"[63] If a member who is not a manager has not agreed to arbitrate in Delaware, however, such member may not waive its right to sue in the courts of Delaware "with respect to matters involving the internal affairs of the [LLC]."[64]

3. A SERIES' POWERS AND AUTHORITY

In addition to the new language at subsection (b), a new subsection (c) was set out in the 2007 amendments to section 18-215.[65] New section 18-215(c) provides:

> A series established in accordance with subsection (b) of this section may carry on any lawful business, purpose or activity, whether or not for profit, with the exception of the business of banking as defined in § 126 of Title 8. Unless otherwise provided in a LLC agreement, a series established in accordance with subsection (b) of this section shall have the power and capacity to, in its own name, contract, hold title to assets (including real, personal and intangible property), grant liens and security interests, and sue and be sued.[66]

Under the 2007 amendments, therefore, the "person" defined as a "series" has the capacity to contract in its own name, hold title to real estate and assets, sue and be sued, and create security interests and grant liens.[67] The nature of that "person," however, appears to be derivative of the entity whose property it holds, *i.e.*, the *LLC,* not the *series*.[68] Stated differently, the "LLC" and the "series" are "persons" within the definitions,[69]

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62. Tit. 6, § 18-109(d).

63. *Id.*

64. *Id.* It is important to note that the United States District Court recently deemed the Delaware Court of Chancery's confidential "arbitration" proceedings unconstitutional. *Delaware Coalition for Open Government v. Hon. Leo E. Strine, Jr., et al.*, D. Del. C.A. No. 1:11-1015 (Aug. 30, 2012). An appeal from this decision is promised. *See* Kevin F. Brady, *Confidential Court of Chancery Arbitration Proceedings Found Unconstitutional—Violate qualified Right to Access*, DELAWARE CORPORATE & COMMERCIAL LITIGATION Blog (Aug. 31, 2012), http://www.delawarelitigation.com/2012/08/articles/other-court-decisions/confidential-court-of-chancery-arbitration-proceedings-found-unconstitutional-violate-qualified-right-of-access/.

65. 76 Del. Laws Ch. 105 (S.B. 96) (2007); *see also* Tit. 6, § 18-215 (original version at 70 Del. Laws ch. 360 (1996).

66. Tit. 6, § 18-215(c).

67. *See id.*

68. *See* tit. 6, § 18-201 (providing for the formation of a Delaware limited liablity company); *See* tit. 6, § 18-215 ("A limited liablity company agreement may establish *or provide for the establishment of* 1 or more designated series of members, managers, limited liablity company interests or assets.") (emphasis added).

69. Tit. 6, § 18-101(12).

but only the "LLC" is considered "a separate legal *entity*" distinct from its members.[70] As a matter of sound business practice, foreign filings, granting of security interests, or recordation of liens on public records should be (or must be in the case of a security interest)[71] accomplished by execution *as a series of a named LLC* rather than by the series solely. Such an execution is not intended as an agency filing for the LLC, but only for the series itself.

4. MANAGEMENT OF A SERIES

Once a basic series is formed, section 18-215 permits the creation of "classes or groups" of members or managers associated with a series "having such rights, powers and duties" as contracted for in the LLC agreement, including the creation of future groups or classes associated with a series having rights that are senior to those already in existence.[72] The LLC agreement may also provide for the amendment of the company LLC agreement "without the vote or approval of any member or manager or class or group of members or managers," including the creation of a class or group of the series of LLC interests that did not previously exist.[73] The LLC agreement may also provide that any member or class or group of members associated with a series has no voting rights.[74] Voting by members or managers may be done separately or with all or any class or group of members or managers associated with a series.[75] Voting may also be on a per capita, number, financial interest, group, class or other agreed upon basis.[76] Thus, the LLC Agreement may provide for any management rights or duties to vest in members, managers or both in whatever manner agreed upon.

In the absence of an agreement, management of an individual series is vested in the members according to each member's percentage or other

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70. Tit. 6, § 18-201(b) (emphasis added). Under proposed federal tax regulations, a "series organization" is defined as a "juridical entity that establishes and maintains, or under which is established and maintained, a series . . . . A series organization includes a series limited liability company, series partnership, series trust, protected cell company, segregated cell company, segregated portfolio company, or segregated account company." Prop. Treas. Reg. § 301.7701-1(a)(5)(viii), 75 Fed. Reg. 55699 (Sept. 14, 2010). A "series" under the proposed regulations is defined as "a segregated group of assets and liabilities that is established pursuant to a series statute . . . by agreement of a series organization. A series includes a series, cell, segregated account, or segregated portfolio, including a cell, segregated account, or segregated portfolio that is formed under the insurance code of a jurisdiction or is in engaged in an insurance business." *Id.*

71. *See* tit. 6, §§ 9-102(70), 9-503(a)(1) (requiring a "registered owner" for the creation and perfection of a security interest and that the LLC itself, not the series, satisfies the "registered owner" definition).

72. Tit. 6, § 18-215(d).

73. Tit. 6, § 18-215(d).

74. *See id.*

75. *See* tit. 6, § 18-215(e).

76. *See id.*

interest in the series' profits owned at that time.[77] Members owning more than 50 percent of the profits control the decision-making of the series in the absence of an agreement to the contrary.[78] If a manager is appointed to manage the series, management is conducted as set forth in the LLC agreement.[79] Termination of a manager likewise will follow as set forth in the LLC agreement.[80] Unless otherwise provided in the LLC agreement, termination of a manager in one series does not, in itself, terminate the manager in another series or as manager of the LLC itself.[81]

5. INFORMATION RIGHTS IN A SERIES

Section 18-215 does not contain an independent provision addressing information rights. Section 18-215(e) states that: "[an] LLC agreement may provide for classes or groups of members or managers associated with a series having *such relative rights, powers and duties* as the LLC agreement may provide."[82] Pursuant to section 18-215(e), therefore, a Delaware LLC agreement could limit information rights of members associated with a series to only those members and not to members associated with other series. In the absence of an agreement, section 18-305 controls, allowing members access to certain information and records by default.[83]

6. DISTRIBUTIONS IN A SERIES

Distributions with respect to a series are made in accordance with the terms of the LLC agreement.[84] However, distributions shall not be made

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77. *See* tit. 6, § 18-215(f).

78. *See id.*

79. *See id.*

80. *See id.*

81. *See id.*

82. Tit. 6, § 18-305(e) (emphasis added).

83. See Tit. 6, § 18-305(a), which permits members access to:

(1) True and full information regarding the status of the business and financial condition of the limited liability company; (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 ember and manager; (4) A copy of any written limited liability company agreement and certificate of formation 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 information regarding the amount of cash and a description and statement of the agreed value of any other property or service contributed by each member and which 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.

See also Lonergan, 5 A.3d at 1023-25 (allowing for the elimination of information rights in the alternative entity context).

84. *See* tit. 6, § 18-215(i).

> to the extent that . . . , after giving effect to the distribution,[85] all liabilities of [the] series . . . exceed the fair value of the assets [of the] series, except that the fair value of property of the series that is subject to a liability for which the recourse of creditors is limited [will only] be included in the assets . . . to the extent that the fair value of that property exceeds that liability."[86]

The term "distribution" as used in section 18-215(i) does not include "reasonable compensation for present or past services or reasonable payments made in the ordinary course of business pursuant to a bona fide plan or other benefits program."[87] If a member receives a distribution in violation of section 18-215(i), and knew at the time of the distribution that it was wrongful, the member is liable to the series for the amount of the distribution.[88] If a member is obligated to make a distribution pursuant to an agreement, that agreement prevails whether or not the member had knowledge of a wrongful distribution.[89] Generally, if an action for a wrongful distribution is not brought within three years of the distribution, any action for monetary recovery from a member who received the distribution is precluded.[90]

7. ASSIGNMENT OF INTERESTS IN A SERIES

If a member assigns all of its LLC interest with respect to a series, that member ceases to be a member of the series unless provided otherwise in the LLC agreement.[91] If the member is the last member of the series, the default rule is that the series is not terminated by the cessation of the member, unless provided for by the LLC agreement.[92] In addition, the termination of the member as to one series does not, by itself, cause the member to cease being a member of another series or of the LLC itself.[93] These provisions set forth default rules that may be modified by the parties to the LLC agreement.[94]

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85. This does not include "liabilities to members on account of their limited liability company interests with respect to the series or liability for which the recourse of creditors is limited to specified property of [the] series." *Id.*

86. Tit. 6, § 18-215(i).

87. *Id.*

88. *See id.*

89. *See id.*

90. *See* tit. 6, § 18-607(c). *See also* tit. 6, § 18-215(i) (stating that there is no liability for a member who has no knowledge of the wrongfulness of the distribution at the time it is made).

91. *See* tit. 6, § 18-215(i).

92. *See id.*

93. *See id.*

94. *See* tit. 6, § 18-1101(b) ("It is the policy of [the DLLCA] to give the maximum effect to the principle of freedom of contract . . . .").

8. NATURE OF LIMITED LIABILITY COMPANY INTEREST—ASSIGNMENT OF LIMITED LIABILITY COMPANY INTEREST

An interest in an LLC is personal property and does not grant a right in specific property of the LLC.[95] For example, if member A contributes $50,000 to an LLC and member B contributes real estate worth $100,000, the LLC now owns property valued at $150,000, and members A and B respectively own "interests" in the LLC - not the property of the LLC. The members of the LLC have the right to determine their respective "profits and loss interests" in the LLC.[96] If the members fail to do so, profits and losses will be allocated on the basis of the agreed value (as provided in the company records) of the contributions made by each member to the extent the contribution has been received by the LLC and has not been returned.[97] In this manner, if A and B did not independently agree to profit and loss sharing and the LLC had $75,000 to distribute, A would receive $25,000 and B would receive $50,000.

If A assigned her interest to her daughter, A's daughter would have no right to participate in the management of the LLC except as provided in the LLC agreement, or unless A's daughter: (1) receives unanimous consent of the remaining members;[98] and (2) complies with any other procedure set forth in the LLC agreement.[99] In addition, an assignment does not grant member rights to an assignee.[100] Instead, an assignee is only entitled to receive the distributions or allocations of income, gains, loss or similar items to which the assignor was entitled.[101] Once an assignment is

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95. *See* tit. 6, § 18-701.

96. *See* tit. 6, § 18-503.

97. *See id.*

98. *See*. tit. 6, § 18-702(a).

99. *See id.*

100. *See* tit. 6, § 18-702(b)(1). In Eureka VIII LLC v. Niagara Falls Holdings LLC, the court noted that the policy that underlies subdivision (b)(3) of this section:

> [I]s that "it is far more tolerable to have to suffer a new passive co-investor one did not choose than to endure a new co-manager without consent." That is particularly the case where, as here, an LLC is closely held. When an LLC is closely held, "members often work closely with co-owners and, therefore, prefer to select their associates." Transfers of membership interests, then, "introduce potential new conflicts of interest" and "change and perhaps complicate decision-making."

Eureka VIII LLC v. Niagara Falls Holdings LLC, 899 A.2d 95, 115 (Del. Ch. 2006) (citations omitted).

Additionally, the court stated:

> Thus, the statutes reinforce the remedial conclusions clearly suggested by the provisions of the LLC Agreement [in the instant case] that were breached: [plaintiff] should not be bound to manage and operate an LLC with a co-member with which it never intended or agreed to go into business. To redress the situation [plaintiff] finds itself in, it is appropriate that [defendant] be remitted to holding merely the economic interest of an assignee of a members' interest in [the] [r]edevelopment [company]. *Id.*

101. Tit. 6, § 18-702(b)(2). A provision in an LLC agreement was held to be an ipso facto clause vis-a-vis an assignee such that the default rules granting assignee distribution rights under § 18-702(2) governed. Northrop Gruman Tech. Servs. v. Shaw Group, Inc. (*In re*

made, the assigning member ceases to be a member and ceases to have the authority to exercise any power as a member.[102] If the assignment is solely structured as a pledge, a grant of a security interest, a lien or similar encumbrance against the LLC interest, the assigning member does not cease to be a member unless otherwise provided in the LLC agreement.[103] Further, restrictions on assignments of LLC interests are enforceable in Delaware despite contrary provisions in the Uniform Commercial Code ("UCC").[104]

A judgment creditor of a member or of a member's assignee may apply to the Court of Chancery[105] for a charging order against the interest.[106] If the interest is charged, the judgment creditor has only the right to receive any distribution to which the judgment debtor would otherwise have been entitled to receive with respect to the LLC interest.[107] The charging order is the exclusive remedy[108] for a judgment creditor of a member or of a member's assignee and no creditor has any right to obtain possession of the LLC's property.[109] Stated differently, the charging order does not entitle the judgment creditor to be substituted for, or stand in the shoes of, the member whose interest is so charged. The latter rule follows because the LLC, like its partnership counterparts, is a contractual entity that permits its owners to choose with whom they desire to do business.[110]

9. TERMINATION AND WINDING UP OF A SERIES

A series may be terminated without causing the dissolution of the LLC and does not affect the limitation on liabilities of such series.[111] A series is terminated and its affairs wound up upon the dissolution of the LLC or upon the first occurrence of any of the following: (1) the passage of a time

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IT Group, Inc.), 302 B.R. 483, 487 (D. Del. 2003). *See also* Milford Power Co., LLC v. PDC Milford Power, LLC, 866 A.2d 738 (Del. Ch. 2004).

102. *See* tit. 6, § 18-702(b)(3).

103. *See* tit. 6, § 18-702(b)(3).

104. *See* tit. 6, § 18-1101(g) (providing that §§ 9-406 and 9-408 of the UCC do not apply to interests in LLCs and partnerships.).

105. *See* tit. 6, § 18-703(f) (giving the Court of Chancery jurisdiction to hear matters involving charging orders). In a recent Delaware Supreme Court ruling, creditors of a Delaware LLC did not have derivative standing to bring a breach of fiduciary duty claim against managers of an insolvent LLC. CML V, LLC v. Bax, 28 A.3d 1037, 1046 (Del. 2011). Since the Supreme Court's holding was founded on a lack of *statutory standing,* the Bax decision has potentially far-reaching effect in curtailing creditor claims against LLCs as well as series of LLCs.

106. *See* tit. 6, § 18-703.

107. *See* tit. 6, § 18-703(f).

108. *See* tit. 6, § 18-703(d).

109. *See* tit. 6, § 18-703(e).

110. *See* tit. 6 § 18-1101(b) ("It is the policy of [the DLLCA] to give the maximum effect to the principle of freedom of contract.").

111. *See* tit. 6, § 18-215(k).

set forth in the LLC agreement;[112] (2) the happening of an event specified in the LLC agreement;[113] (3) the affirmative vote or written consent of the members or class or group of members associated with the series who own more than two-thirds of the then-current percentage or other interest in the profits of the series of the LLC;[114] or (4) the termination of the series by the Court of Chancery whenever it is not reasonably practicable to carry on the business of the series in conformity with the LLC agreement.[115] An LLC agreement may alter the rules for termination as well as the vote necessary to cause the termination of a series.[116]

Unless otherwise provided in an LLC agreement, a series may be wound up by: (1) a manager associated with a series who has not wrongfully terminated the series; or if none; (2) the members associated with the series; (3) a person approved by the members associated with the series; (4) each class or group associated with the series; (5) members who own more that 50 percent of the then current percentage or other interest in the profits of the series of all the members associated with the series; or (6) the members in each class or group associated with the series as appropriate.[117] Upon a showing of cause, the Court of Chancery may wind up the affairs of a series and appoint a liquidating trustee upon the application of any member or manager[118] associated with a series or that member's personal representative or assignee.[119] The persons winding up the affairs of the series may, in the name, and on behalf of, the LLC and the series, take all actions necessary to settle and close the series' business, including providing for the claims and obligations of the series and distributing series assets as provided for in the DLLCA.[120] Actions taken pursuant to section 18-215(l) and section 18-804 to wind up the series will not affect the liability of members or impose liability on a liquidating trustee.[121]

10. FOREIGN LIMITED LIABILITY COMPANIES WITH A SERIES

If a foreign LLC registering to do business in Delaware is governed by an LLC agreement that establishes designated series of members, manag-

112. *See* tit. 6, § 18-215(k)(1).

113. *See* tit. 6, § 18-215(k)(2).

114. *See* tit. 6, § 18-215(k)(3).

115. *See* tit. 6, § 18-215(k)(4).

116. *See* tit. 6, § 18-215(k).

117. *See* tit. 6, § 18-215(l).

118. *See* H.B. 338 Section 6, 2012 Gen. Assemb. (Del. 2012).

119. *See* tit. 6, § 18-215(l).

120. *See id.*

121. *See id.*

ers, LLC interests, or assets,[122] the foreign LLC's application for registration must state that the foreign LLC has separate rights, powers, or duties with respect to specified property or obligations of the foreign LLC, or has profits and losses associated with specified property or obligations of the LLC.[123]

> In addition, the foreign limited liability company shall state on such application whether the debts, liabilities and obligations incurred, contracted for or otherwise existing with respect to a particular series . . . shall be enforceable against the assets of such series only, and not against the assets of the foreign limited liability company generally or any other series thereof, and whether any of the debts, liabilities, obligations and expenses . . . [of] the foreign limited liability company generally or another other series thereof [are enforceable against that series].[124]

The question arises whether subsection 18-215(n) is a notice requirement for foreign series LLCs doing business in Delaware or whether the subsection is intended to provide substantive recognition of foreign series LLCs. Typically, foreign registrations serve the purpose of providing notice to the domestic jurisdiction of the presence of the foreign entity as well as the nature and form of that entity.[125] As a matter of comity, courts generally recognize the organic law of the jurisdiction under which an entity is created, formed, or otherwise comes into existence.[126] This theory, commonly known as the "internal affairs doctrine," governs the affairs of the entity and its owners and managers *inter se*.[127]

Application of the internal affairs doctrine may extend into the rights of third parties against the entity if an attempt is being made to *impose personal liability* upon members.[128] However, it seems unlikely that section 18-215(n) requires, for example, a Delaware court to recognize an Illinois series LLC solely because of a registration under section 18-215(n). Yet, principles of comity strongly suggest that a Delaware court would apply the governing law of a foreign entity independent of the failure of that entity to register to do business in Delaware, at least where that foreign

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122. The term "assets" was added with the 2007 amendments to § 18-215(n). 76 Del. Laws Ch. 105 (S.B. 96) (2007); *see also* tit. 6, § 18-215(n) (original version at 70 Del. Laws ch. 360 (1996).

123. *See* tit. 6, § 18-215(n).

124. *Id.*

125. *See, e.g.*, tit. 6, § 18-201 (establishing the requirements necessary to file a certificate of formation).

126. *See, e.g.*, *In re* First Interstate Bancorp Consol. S'holder Litig., 729 A.2d 851, 865-66 (Del. Ch. 1998) (discussing the internal affairs doctrine in the corporate context).

127. *See, e.g.*, Edgar v. MITE Corp., 457 U.S. 624, 645 ("The internal affairs doctrine is a conflict of law principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs-matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders . . . .").

128. *See, e.g.*, VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108, 1115–18 (Del. 2005) (applying Delaware law to a dispute against a Delaware corporation).

entity is a defendant in a Delaware court.[129] As to the contrary question—whether a non-Delaware court would recognize the Delaware series where the foreign jurisdiction has no enabling series legislation—one case has answered in the affirmative.[130]

11. MODIFICATION OR ELIMINATION OF DUTIES AND LIABILITIES IN A LIMITED LIABILITY COMPANY AGREEMENT

Section 18-1101(b) states the general policy of the DLLCA—that the principle of freedom of contract is to be given "maximum effect."[131] It is also the policy of the DLLCA to enforce LLC agreements.[132]

In Delaware, members of LLC agreements have the right to expand, restrict or eliminate duties (including fiduciary duties) owed to an LLC or to another member, manager, or another person that is a party to or is otherwise bound by the company agreement.[133] The LLC agreement may not, however, eliminate the implied covenant of good faith and fair dealing.[134]

In addition, a member, manager or other person is not liable to an LLC or to another member, manager or another person that is a party to an LLC agreement for breach of fiduciary duty for the member's, manager's or other person's good faith reliance on provisions of the company's LLC Agreement.[135] The exculpation under subsection 1101(d) is for liability for breach of a fiduciary duty, not the elimination of that duty.[136]

As for contract liability, subsection 1101(e) provides that an LLC agreement may limit or eliminate all liabilities for breach of contract and breach of duties (including fiduciary duties) of a member, manager or other person to an LLC or to another member, manager or other person that is bound to an LLC agreement.[137] The LLC agreement may not, however, limit or eliminate liability for any bad faith violation of the implied covenant of good faith and fair dealing.[138]

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129. *See, e.g.*, Hamilton Partners, L.P. v. Englard, 11 A.3d 1180, 1217-18 (Del. Ch. 2010) ("Delaware has a related and equally important interest in affording comity to the courts of other jurisdictions when a dispute arises under foreign business law. . . . If we expect that other sovereigns will respect our state's overriding interest in the interpretation and enforcement of our entity laws, we must show reciprocal respect.").

130. *See* GxG Mgmt. LLC, v. Young Bros. & Co., No. 05-162-B-K, 2007 WL 551761 (D. Me. Feb. 21, 2007) (recognizing a Delaware series in a contract dispute).

131. DEL. CODE ANN. tit. 6, § 18-1101(b) (2012).

132. *Id.*

133. *See* tit. 6, § 18-1101(c).

134. *Id.*

135. *See* tit. 6, § 18-1101(d).

136. *Id.*

137. *See* tit. 6, § 18-1101(e).

138. *Id.*

In sum, a Delaware LLC Agreement may eliminate all traditional fiduciary duties such as the duties of care (to the extent one exists) and loyalty.[139] By doing so, liability to the primary actor (i.e., member, manager or other party to the agreement) will not attach and secondary liability of advisors, such as attorneys, accountants, banks, investment advisors and the like, will also not attach under any theory of aiding and abetting where liability of the primary actor is required.

If an LLC agreement is silent as to modifications of fiduciary duties, members, managers and other persons bound by the LLC agreement owe no fiduciary duties to the LLC or to each other where the members, managers and such other persons rely, in good faith, on provisions of the LLC agreement.[140] The DLLCA does not impose fiduciary duties but it does explicitly set forth a stated policy of "freedom of contract."[141] To this effect, all contractual duties of good faith and fair dealing remain intact, but common law fiduciary duties should be specifically addressed in the LLC agreement.[142]

As an alternative to the insertion, limitation or explicit elimination of all fiduciary duties,[143] members may choose to limit or eliminate all liabilities for breach of contract or breach of duty (including fiduciary duty) of members, managers or other persons that are bound by the LLC agreement to the LLC or among each other.[144] Under this alternative, a primary actor may escape liability for a breach of a duty but an advisor or other "secondary party" could be found liable as an aider or abettor since the "duty" remains intact.

Any of the modifications or eliminations of duties and/or liabilities that may be accomplished for a "standard" LLC may also be attained in a series LLC through the LLC agreement. In this manner, traditional fiduciary duties should not be presumed to exist within each series unless specifically drafted therein. Stated differently, the series simply adds an-

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139. *See* Ann E. Conaway, *The Multi-Facets of Good Faith in Delaware: A Mistake in the Duty of Good Faith and Fair Dealing; A Different Partnership Duty of Care; Agency Good Faith and Damages; Good Faith and Trust Law,* 10 DEL. L. REV. 89, 110-114 (2008).

140. *See* Related Westpac LLC v. JER Snowmass LLC, No. 5001–VCS, 2010 WL 2929708 (Del. Ch. July 23, 2010); Fisk Ventures, LLC v. Segal, No. 3017–CC, 2008 WL 1961156 (Del. Ch. May 7, 2008), *aff'd*, 984 A.2d 124 (Del. 2009); Abry Partners V, L.P. v. F & W Acquisition LLC, 891 A.2d 1032 (Del. Ch. 2006). *But see* Auriga Capital Corp. v. Gatz Props., LLC, 40 A.3d 839 (Del. Ch. 2012), C.A. No. 4390 (Del. Nov. 7, 2012) (affirmed on contractual grounds); *In re* Atlas Energy Res., LLC, No. 4589-VCN, 2010 WL 4273122 (Del. Ch. Oct. 28, 2010), *reprinted in* 36 DEL. J. CORP. L. 823 (2010); Kelly v. Blum, No. 4516-VCP, 2010 WL 629850 (Del. Ch. Feb. 24, 2010); Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC, No. 3658-VCS, 2009 WL 1124451 (Del. Ch. Apr. 20, 2009).

141. *See* tit. 6, § 18-1101(b).

142. *See* tit. 6, § 18-1101.

143. The contractual duty of good faith and fair dealing cannot be limited or eliminated in an LLC agreement. *See* tit. 6, § 18-1101(c).

144. *See* tit. 6, § 18-1101(e) (there is no exculpation for a bad faith breach of the implied covenant of good faith and fair dealing).

other dimension that a drafter must consider regarding contractual versus fiduciary duties and liabilities in Delaware unincorporated entities.

12. GOOD FAITH RELIANCE ON STATEMENTS AND OPINIONS IN WINDING UP

With respect to a member, manager or liquidating trustee's good faith reliance on statements and opinions in the winding up of the series LLC, the DLLCA states in pertinent part:

> A member, manager or liquidating trustee of a [Delaware LLC is] fully protected in relying in good faith upon . . . information, opinions, reports or statements presented by another manager, member or liquidating trustee, an officer or employee of the [LLC], or committees of the [LLC], members or managers, or by any other person as to matters the member, manager or liquidating trustees reasonably believe [to be] within such person's professional or expert competence.[145]

The information included under this "good faith" umbrella[146] provides additional protection from liability for members, managers or persons acting as liquidating trustees where the persons reasonably rely in good faith upon the professional statements and opinions of experts during the winding up or liquidation of the LLC business or the business of a series.[147]

13. INDEMNIFICATION

An LLC agreement may set forth any standards or restrictions regarding indemnification.[148] Consequently, an LLC agreement may provide that any member or manager or other person may be indemnified and held harmless against any and all claims and demands of whatever nature.[149] The authority granted under section 18-108 includes the advancement of legal fees to a former manager in a current manager's action for breach of contract and breach of fiduciary duty.[150] The terms "indemnify and hold harmless" are legal terms of art that do not include the unique concept of advancement of fees.[151] The public policy in Delaware for the

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145. *See* tit. 6, § 18-406.

146. The information included under this umbrella includes:

> information, opinions, reports or statements as to the value and amount of the assets, liabilities, profits or losses of the [LLC], or the value and amount of assets or reserves or contracts, agreements or other undertakings that would be sufficient to pay claims and obligations of the [LLC] or to make reasonable provision to pay such cash and obligations, or any other facts pertinent to the existence and amount of assets from which distributions to members or creditors might properly be paid.

Id.

147. *See id.*

148. *See* tit. 6, § 18-108.

149. *See* tit. 6, § 18-108.

150. *See* Senior Tour Players 207 Mgmt. Co., LLC v. Golftown 207 Holding Co., LLC, 853 A.2d 124 (Del. Ch. 2004).

151. *See* Majkowski v. Am. Imaging Mgt. Servs., LLC, 913 A.2d 572, 587-88 (Del. Ch. 2006).

advancement of legal fees is one rooted in the fundamental tenet of freedom of contract in LLC agreements.[152]

14. DUAL STATUS; DOMESTICATION OR TRANSFER OF NON-UNITED STATES ENTITIES

As with the statutory trust, the DLLCA provides that a non-United States entity may domesticate in Delaware as an LLC and continue its existence in the foreign jurisdiction as it did prior to domesticating in Delaware.[153] If the domesticating foreign entity elects "dual status," the domesticating entity and the continuing foreign entity constitute a single entity formed or created under the laws of Delaware and the laws of the foreign jurisdiction.[154] The approval necessary for the transaction is the "manner provided for by the document, instrument, agreement or other writing . . . governing the internal affairs of the non-United States entity and the conduct of its business or by applicable non-Delaware law, as appropriate."[155]

The opposite transaction is also available for transferring Delaware limited liability companies. Pursuant to section18-213, a Delaware LLC may transfer to a non-United States jurisdiction and simultaneously elect to remain a Delaware LLC.[156] If this "dual status" election is pursued, the remaining Delaware entity and the transferred non-US entity constitute a single entity governed by the laws of Delaware and the laws of the foreign jurisdiction to which the Delaware entity transferred.[157]

The requirements necessary to approve these transactions is either (1) set forth in the LLC agreement; (2) if not so specified in the LLC agreement and the transfer or domestication and continuance is not prohibited in the LLC agreement, then in the same manner as a merger or consolidation; or (3) if a merger or consolidation is not specified and a transfer or domestication and continuance is not prohibited, then by the majority agreement of the members by their then current percentage interest in profits.[158]

15. MERGING BETWEEN SERIES'

Although section 18-209 permits an LLC to merge with another entity, section 18-215 has no such language.[159] A series, however, is deemed a

152. *See id.* at 591.

153. *See* tit. 6, § 18-212.

154. *See* tit. 6, § 18-212(i).

155. *See* tit. 6, § 18-212(c)(6).

156. *See* tit. 6, § 18-213.

157. *See* tit. 6, § 18-213(e).

158. *See* tit. 6, § 18-213(b).

159. Tit. 6, § 18-209(b) ("Pursuant to an agreement of merger or consolidation, 1 or more domestic limited liability companies may merge or consolidate with or into 1 or more domestic limited liability companies or 1 or more other business entities . . . ."). The Illinios statute, on the other hand, gives a series LLC all the rights of a general LLC, suggesting that

"person"[160] and therefore has the right to, *inter alia*, contract in its own name.[161] This right to contract permits each series to internally transfer assets to other series' (as well as to other persons or external entities).[162] Transferring of assets, however, raises several issues.

First, as a practical matter, the transfer of an asset may trigger any due on sale clause that may be associated with a particular asset. Additionally, a series is still subject to other applicable law governing the transfer of assets.[163] Moreover, absent an agreement to the contrary, transferring assets requires a majority vote, pro rata, of each designated class or group.[164] This raises the issue of whether a "class or group" refers to the LLC or to a particular series within the LLC. To resolve this issue, the authors suggest that transferring assets by a series requires a majority vote, pro rata, of a "class or group" of the general LLC. This conclusion is consistent with the notion that a series is derivative of the entity whose property it holds (i.e., the general LLC).[165]

VI. Commonly Asked Questions About Series LLCs

A. *How Does a Series Work?*

1. HOW IS A SERIES CREATED?

First, in order to create a series in Delaware, there must be an allocation or "separation" of the organization's property or assets into smaller "cells" or "units."[166] This allocation of property, assets or obligations of the entity is thereafter to be chronicled in "separate and distinct records."[167] Thus, the necessary first stage in the creation of a series is characterized by an allocation of business property into smaller or "separate" units—*i.e.*, a "separating out" of property, assets or company obligations.[168]

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a series LLC may merge with another entity to the extent that a general LLC may merge with another entity. *See* Allan G. Donn et al., *Series LLCs Exhibits,* ALI-ABA Video L. Rev., at 5, Feb.17, 2012 (citing 805 Ill. Comp. Stat. Ann. Adv. Legis. Serv. 180/37-40(b) (LexisNexis 2012)).

160. *See* tit. 6, § 18-101(12). It is important to note that an individual series is a "person" and not a seperate legal entity. As such, each individual series is deriviative of the LLC entity whose property it holds. *Discussed supra* Part V.B.3.

161. *See* tit. 6, § 18-215(c).

162. *See* tit. 6, § 18-215(c).

163. *See, e.g.*, Del. Code Ann. tit. 6, § 1304 (1996) (relating to fraudulent transfers).

164. *But see* tit. 6, § 18-215(f) (allowing for the modification of voting rights among members or managers (or classes or groups of members or managers) associated with a series).

165. *See* tit. 6, § 18-215(c); *discussed supra* Part V.B.3. In particular, because each individual series holds property belonging to the general LLC, it logically follows that the transfer of such property requires a majority vote, pro rata, of a class or group of the general LLC.

166. *See* tit. 6, § 18-215(b).

167. *See id.*

168. *See* tit. 6, § 18-215(b).

The second stage involves the linking of a member, manager or membership interest with a series for the purpose of receiving profits, losses, and distributions and the determination of management rights and duties.[169] This "linkage" also serves the purpose of determining such matters as the numbers necessary to take action for ordinary and extraordinary events, adding members, managers or series, dissolution, merger or conversion, and exit rights, to name a few.[170] In sum, the second stage involves the central contractual capstone of the series that sets forth all the rights and duties of the persons associated with the series. This stage defines, and delimits, all powers of the members and managers except those that will be governed by the statutory default rules of the governing statute.[171] Other provisions of DLLCA may be added at this juncture, including the addition, modification or elimination of common law fiduciary duties,[172] elimination of liability for breach of duties or good faith breach of contract,[173] indemnification,[174] exit strategies,[175] reasonable restrictions on information rights,[176] restrictions on transfer of ownership interests,[177] and dissolution upon specified events.[178]

The critical third stage ensures a limitation on liability of one series as against any other.[179] In order to achieve limited liability, notice of the series must be referenced in a certificate of formation of the entity to be organized.[180] The certificate of formation can be amended to add a series if the original certificate did not contain a series.[181] In Delaware, a series does not have to be in existence to satisfy the required notice for an LLC.[182] Good practice suggests that any certificate of formation refer directly to the statutory language on limitation of liability in order to ensure maximum notice of the series and thus complete compliance with the statutory directive of notice of the liability limitation.[183]

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169. *See* tit. 6, § 18-215(e).

170. *See* tit. 6, § 18-215(e)-(f).

171. *See* tit. 6, § 18-215(e).

172. *See* tit. 6, § 18-1101.

173. *See* tit. 6, § 18-1101(e).

174. *See* tit. 6, § 18-108.

175. *See* tit. 6, § 18-601-607.

176. *See* Lonergan, A.3d at 1024 (Del. Ch. 2010) (parties may eliminate information rights in Delaware LLCs under the guise of fiduciary duty).

177. *See* tit. 6, §§ 18-701-705.

178. *See* tit. 6, §§ 18-801-806.

179. *See* tit. 6, § 18-215(b).

180. *See id.*

181. *See* tit. 6, § 18-215(e).

182. *See* tit. 6, § 18-215(b); tit. 6, § 18-215(a) (indicating that an LLC agreement may establish *or provide for the establishment* of individual series). In contrast, a series statutory trust requires an existing series to meet the notification requirement. *See* DEL. CODE ANN. tit. 12 § 3804 (2006).

183. *See infra* Part V.B.

If each of these three prongs is met, a statutory Delaware series LLC is created with the practical effect of providing internal liability shields for each separate allocated "unit" of entity property or assets for which separate and distinct records are maintained.[184] If distinct records are not maintained or the required statutory notice is not satisfied, independent liability shields between one failed series and the next will not be recognized.[185] In the case of a failed series, a creditor may proceed against property or assets allocated to the failed series assigned to a member according to a charging order as if the failed series had never been created.[186] However, the failure of one series does not affect the validity per se of another.[187]

2. HOW CAN PRIVATE EQUITY FUND MANAGERS AND VENTURE CAPITALISTS UTILIZE THE SERIES?

To answer the question in the subtitle, the authors created a hypothetical. Delawidener University, a non-profit hypothetical organization, has been in existence for nearly 50 years during which it has specialized in environmental research and development. In recent years, Delawidener has witnessed considerable advancements in its development of alternative energy technologies. Despite these advancements, the University's research budget was drastically cut. Knowing that it would not be able to attract investors, such as private equity funds, due to the University's non-profit formation, Delawidener converted its business form into a series LLC, becoming Delawidener University, LLC.[188] Several series—the non-profit series'—are designated for each of the University's academic programs. A second series—a for-profit series—is formed to develop alternative energy devices, including solar and wind energy programs.

As a series LLC, the University is able to attract a number of private equity investors, both foreign and domestic, that are interested in helping the environment[189] while, at the same time, realizing a profit for their investments and beneficiaries. Further, by structuring this company as a series LLC, the losses attributable to the non-profit series will not wander to the assets of the for-profit series or to the parent LLC. More important to this scenario, the series form allows the University to operate with lower administrative costs, pass-through taxation, and simplified corporate gov-

184. *See* tit. 6, § 18-215.

185. *Contra* tit. 6, § 18-215.

186. *See* tit. 6, § 18-703.

187. *See* tit. 6, § 18-215(a) (discussing the principle of "seperateness").

188. For a discussion of other entities, such as the B-Corporation and L3C, that might be utilized to achieve a similar objective (but without the benefits of using the series LLC) see Ann E. Conaway, *The Global Use of the Delaware Limited Liability Company for Socially Driven Purposes*, 38 WILLIAM MITCHELL L. REV. 772 (2012).

189. These investments may be considered "program-related investments" for tax purposes. *See* I.R.C. § 4944(c) (2006).

ernance.[190] Through these benefits, the private equity firm will more quickly realize any gain from its investment than it would have had the PE firm invested in a similar company formed with separate and distinct entities.

B. *Will the Series be Treated as an Independent "Person" for Purposes of Federal Bankruptcy Law?*

In bankruptcy, any "person" may file a petition so long as such person "resides or has a domicile, a place of business, or property in the United States[.]"[191] The term "person" is defined to include an individual, partnership, or corporation,[192] but not an estate or trust (other than a business trust). The definition of "corporation" includes "a partnership association organized under a law that makes only the capital subscriber responsible for the debts of the association.[193] This definition includes unincorporated company or association,[194] and a business trust[195] and excludes limited partnerships. As to partnerships, the defining characteristic for inclusion is the vicarious liability of the partners and their obligation to contribute for partnership debts - a trait not present in limited liability entities.[196]

So, where does that leave the Delaware series? First, the amendments to section 18-215 provide that the term "person" includes any "entity (or series thereof)[.]"[197] The amendment appears to provide that the series is a legal "person." The intended purpose of the amendment was to make clear that a "person" conducts such activities as contracting, granting liens and holding property.[198] The series cannot utilize merger statutes under the 2007 amendments.[199] The amendments also did not go so far as to imbue the series with legal personhood independent of its organizing entity status.[200] Stated another way, once a series is formed, holds property, and is vested with an individual member or manager, some "person" or "agent" must be able to act for the series. The 2007 amendments clarify

190. Other advantages include employee equity interest incentives, business asset protection and segregation, and the diversification of capital. *See* Zimmerman Law Firm, *Introducing the Series Limited Liability Company – Now Playing in Texas, Delaware, Nevada, et al* (Mar. 10, 2011), http://www.zimmermanfirm.com/introducing-the-series-limited-liability-company-now-playing-in-texas-delaware-and-nevada/.

191. 11 U.S.C. § 109(a) (2006); *see also* Shannon L. Dawson, *Series LLC and Bankruptcy: When the Series Finds Itself in Trouble, Will it Need Its Parent to Bail it Out?*, 35 DEL. J. CORP. L., 515, 517 n.13 (2010).

192. 11 U.S.C. § 101(41).

193. 11 U.S.C. § 101(9)(a)(ii).

194. 11 U.S.C. § 101(9)(a)(iv).

195. 11 U.S.C. § 101(9)(a)(v).

196. *See* Del. Code Ann. tit. 6, § 15-306 (2012) (Partner's liability).

197. *See* tit. 6, § 18-101(12).

198. *See* tit. 6, § 18-215(c).

199. *Discussed supra* Part V.B.15.

200. *Discussed supra* Part V.B.3.

that the series is a "person" for certain business reasons. It does not answer the question of "personage" for federal bankruptcy purposes.[201] As to the series being a partnership under bankruptcy law, neither its members nor managers have vicarious liability and thus fail the characteristics necessary for partnerships under bankruptcy law. By the same token, the only characteristic the series shares with a corporation is limited liability.[202]

In light of the foregoing, at this juncture it would appear that an individual Delaware series is not a "person" for purposes of federal bankruptcy law and, therefore, cannot file a petition in bankruptcy without statutory authority.[203]

C. *Will a Delaware Series be Enforced in a Non-Series Jurisdiction?*

Basic principles of comity suggest that a foreign court would recognize the Delaware series and apply Delaware law, interpreting the legal effect of a series upon members, managers or claimants to assets shielded by the internal series limitations on liability. In the only Delaware series case decided by a non-Delaware court, *GxG Management L.L.C. v. Young Brothers and Co., Inc.*, the court was not put off by the existence of the series.[204] Rather, the court looked to the Delaware Act to determine what capacity an LLC has to pursue litigation on behalf of a series or, in the alternative, what capacity a series has to pursue litigation on its own behalf or whether the series can be regarded as an entity distinct from the LLC.[205] In that case, the court found that the LLC had an interest sufficient in the series so as to permit the LLC to maintain an action as a real party in interest.[206] In a subsequent ruling, the court made clear that it had not decided that the series was a separate entity and that even if the series could otherwise maintain an action in its own name, it could not in this case because the action would arise out of the same set of facts being litigated by the LLC.[207]

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201. *But see* Series LLCs and Cell Companies, *supra* note 8, at 55699 (deeming a series an "entity" for federal income tax purposes).

202. *See* tit. 6, § 18-215(b); *See also* CML V, LLC v. Bax, 28 A.3d 1037, 1045 (Del. 2011) (holding that LLCs and corporations are different types of entities and operate under different sets of rules; most notably, LLCs, unlike corporation, did not exist at common law); Ann E. Conaway & Peter I. Tsoflias, *Challenging Traditional Thought: No Default Fiduciary Duties in Delaware Limited Liability Companies After* Auriga, 13 J. Bus. & Sec. L. at 10 n.73 (forthcoming Dec., 2012) *available at* http://papers.ssrn.com/sol3/papers.cfm.?abstract_id=1969053.

203. *See* Dawson *supra* note 191 (for additional material discussing the potential treatment of a series in bankruptcy).

204. *See* GxG Mgmt., LLC, 2007 WL 551761 (D. Me. Feb. 21, 2007).

205. *See id.*

206. *See id.*

207. *See id.*

In contrast to the Maine approach, in California the foreign law recognition of a mere LLC is quite narrow.[208] For example, in the case of *Butler v. Adoption Media, LLC*,[209] a California court interpreted a reference to "internal affairs and the liability and authority of its managers and members" to simply mean a codification of the internal affairs doctrine and not to include disputes arising as a result of negotiations by the LLC or its agents with third parties.[210]

D. *Who Owns the Assets of the Series—i.e., Is the Series a Separate Entity?*

Recall that a member of an LLC does not "own" property of an LLC.[211] Section 701 of the DLLCA provides that: "[a] member has no interest in specific LLC property."[212] Thus, it is fundamental LLC law that a member's interest in an LLC is "personal property"[213] and is an income interest only.[214] It therefore follows that if a member in an LLC cannot own "property" of an LLC, a member of a series also cannot own "property" of a series. A member or manager owns neither more nor less than that which a member or manager could own in an LLC—an "interest" in income only.[215]

Management of an LLC is non-transferable unless provided for in an LLC agreement or by consent of all members.[216] "[T]he debts, obligations and liabilities of [an LLC], whether arising in contract, tort or otherwise, [are] solely [those] of the [LLC] and no member or manager of [the LLC is] obligated personally [for those] debts, obligations or liabilities . . . solely by being a member or . . . manager."[217] The LLC, not the members or managers, has the authority to carry on the business, purpose or activity for which the LLC was formed.[218] Thus, the LLC, not its members, owns its property.

What, if anything, changes with the formation of a series LLC? Section 18-215(a) provides that an LLC agreement may contain one or more series of "members, managers, limited liability company interests or assets . . . . [having] separate rights, powers or duties with respect to specified property or obligations of the limited liability company or profits and losses

208. *See* Butler v. Adoption Media, LLC, No. C04-0135 PJH, 2005 WL 2077484, at *1 (N.D. Cal. Aug. 26, 2005).

209. *See id.*

210. *See id*.

211. *See* DEL. CODE ANN. tit. 6, § 18-701 (2012).

212. *Id.*

213. *See id*.

214. *See* tit. 6, § 18-702(a)-(b).

215. *See id*.

216. Tit. 6, § 18-702(a).

217. Tit. 6, § 18-303.

218. *See, e.g.*, tit. 6, § 18-106 ("A limited liablity company may carry on any lawful business, purpose, or activity . . . .").

associated with specified property or obligations . . . ."[219] Therefore, interpreting section 18-215(a) in a clear, reasonable manner, the LLC owns the assets of the series; the series constitutes an allocation of company assets for the purpose of limitations upon liabilities. The creation of series of property or obligations of the LLC or profits and losses associated with LLC property or obligations may be viewed simply as allocations of LLC property into "cells" or "units." If proper notice is given[220] and "separate and distinct records"[221] maintained according to subsection (b), the intended purpose of the series is a division of assets and a resulting limitation upon liability to those assets, not the creation of an independent entity.[222]

The legal and business communities, however, focus upon Delaware's 2007 amendments to section 18-215 to suggest that the series is now, in fact, an "entity."[223] In particular, the factors being debated with respect to the 2007 amendments include that the series may: (1) contract; (2) hold title to assets; (3) grant liens or security interests; and (4) sue or be sued.[224]

First, any "person" may "enter into a contract" unless that person is either a minor[225] or a mentally incapacitated person.[226] In 2006, Delaware amended the term "person" in the DLLCA to include a "limited liability company . . . or any other individual or entity (or series thereof)."[227] By this addition, Delaware clearly answered that a "series" is a "person" capable of contracting in a statutory sense.[228] Whether an individual agent acting on behalf of a particular series has capacity to contract must be determined under the common law of contracts.[229] The nu-

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219. Tit. 6, § 18-215(a). This is not to say that the LLC cannot act through it agents. However, for the purpose of representation in court, neither a member or manager may represent the LLC; Delaware legal counsel is necessary. Poore v. Fox Hollow Enters., No. 93A-09-005, 1994 Del. Super. LEXIS 193 (1994).

220. *See supra* Part V.B.1.

221. *Id.*

222. *See* tit. 6, § 18-215(b).

223. *See supra* Part V.B (detailing the relevant 2007 amendments to the DLLCA); *see also* Series LLCs and Cell Companies, *supra* note 8, at 55699 (deeming a series an "entity" for federal income tax purposes).

224. Though it is not the authors' opinion that individual series should be treated as separate legal entities, these components, according to the authors, contribute to the argument that individual series may be treated as separate entities distinct from the parent LLC. *See* tit. 6, § 18-215(a); sources cited *supra* note 35.

225. Of course, minors may enter into voidable contracts, meaning that the contract is voidable by the minor until the minor's coming of age and the acceptance, or ratification, of the contract. *See* 2 DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN § 10:1 (2012).

226. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 9-16 (1981) (discussing the parties and parties' capacity required to form a contract).

227. tit. 6, § 18-101(12).

228. *See* tit. 6, § 18-215(c) (authorizing a series LLC to contract in its own name).

229. *See* RESTATEMENT, *supra* note 226, §§ 9-16.

ance to the amended definitional section is that the term "series" appears in a derivative capacity, i.e., series modifies "entity."[230] Thus, when this "person" known as a "series" acts, it does so thereof[231] as a series of a LLC or other entity. Simply put, as its definition establishes, its personage is derivative of the LLC that is formed if in the certificate of formation. The series is not an independent "entity" as defined in the DLLCA.[232] A filing does not form the series with the Delaware Secretary of State.[233]

If the interpretation of "person" is correct, it follows that the series may hold title to assets, grant liens or security interest and sue or be sued in the same derivative manner. In other words, the series is a "person" for convenience purposes yet not as an independent legal entity that must file a public document for its creation.[234]

E. *Fiduciary Duties in a Series*

Assume, for example, a series LLC is formed with two series, each of which have one individual associated as a member of the series. Assume also that each member is assigned a 100 percent income interest in the appropriate series. Do the members owe each other default fiduciary duties from one series to the other? In the opinion of these authors, the DLLCA does not set forth any default fiduciary duties and instead supplanted the common law presumption of duties by adopting a public policy of freedom of contract.[235]

First, the LLC agreement spells out the rights and duties of the members of the LLC, including the rights and duties of members associated with series.[236] In this case, the first two series are formed with a single member associated with each independent series. Each member receives 100 percent of the income rights from the series. The question that remains is whether the members owe default fiduciary duties within and across series boundaries.

The common law in Delaware is presently in flux on the issue of whether default fiduciary duties attach where an LLC agreement is otherwise silent.[237] There is no doubt that, under the DLLCA, the members

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230. *See* tit. 6, § 18-215(c); *discussed supra* Part V.B.3.

231. *See* tit. 6, § 18-101(12). The definition of "thereof" means "of that or it." *Thereof Definition,* WEBSTER'S DICTIONARY, http://www.merriam-webster.com/dictionary/thereof) (last visited Nov. 13, 2012).

232. *But see* Series LLCs and Cell Companies, *supra* note 8, at 55699 (deeming a series an "entity" for federal income tax purposes).

233. *See* tit. 6, § 18-215(a) ("A limited liability company agreement may establish *or provide for the establishment* of 1 or more designated series . . . .") (emphasis added).

234. Notwithstanding this logical interpretation, the IRS has deemed a series an entity for federal income tax purposes. *See* 75 Fed. Reg. 55669.

235. *See* Conaway & Tsoflias, *supra* note 202.

236. *See*. tit. 6, § 18-215(a).

237. *Compare* Related Westpac LLC v. JER Snowmass LLC, No. 5001–VCS, 2010 WL 2929708 (Del. Ch. July 23, 2010), *and* Fisk Ventures, LLC v. Segal, No. 3017–CC, 2008 WL

may set forth provisions in the LLC agreement that limit or eliminate fiduciary duties to each other.[238] So long as the members act according to the agreement, the members are protected in contract for good faith reliance on those provisions and thus liability will not follow.[239] However, there is no exculpation for a bad faith breach of the implied duty of good faith and fair dealing.[240]

Yet, another interpretation is suggested. The manner in which the DLLCA is crafted mandates a different approach. Unlike the DGCL, where the common law has firmly upheld fiduciary duties of care and loyalty for centralized management,[241] the DLLCA has preempted the common law by prioritizing contractual principles above tort-based concepts.[242] The DLLCA option is both efficient and logical since an LLC may be member-managed, manager-managed, managed by a non-economic member or manager or any combination of the above.[243] In short, the LLC may organize its infrastructure with or without a manager and with or without equity members.[244] Thus, traditional notions of fiduciary obligations do not fit the ever-changing LLC infrastructure. Yet, as the Delaware series LLC is contractual in nature,[245] the duty of good faith and fair dealing will attach to the performance and execution of the parties' bargained-for exchange.[246]

1961156 (Del. Ch. May 7, 2008), *aff'd*, 984 A.2d 124 (Del. 2009), *and* ABRY Partners V, L.P. v. F & W Acquisition LLC, 891 A.2d 1032 (Del. Ch. 2006), *with* Auriga Capital Corp. v. Gatz Props., LLC, 40 A.3d 839 (Del. Ch. 2012), C.A. No. 4390 (Del. Nov. 7, 2012) (affirmed on contractual grounds), *and In re* Atlas Energy Res., LLC, No. 4589-VCN, 2010 WL 4273122 (Del. Ch. Oct. 28, 2010), *and* Kelly v. Blum, No. 4516-VCP, 2010 WL 629850 (Del. Ch. Feb. 24, 2010), *and* Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC, No. 3658-VCS, 2009 WL 1124451 (Del. Ch. Apr. 20, 2009). *See also* Conaway & Tsoflias, *supra* note 202; Myron T. Steele, *Freedom of Contract and Default Contractual Duties in Delaware Limited Partnerships and Limited Liability Companies*, 46 AM. BUS. L.J. 221 (Summer 2009) (concluding that Delaware LPs and LLCs should not have any default fiduciary duties, but rather contractual duties according to the stated statutory policy of freedom of contract articulated in each act); Nicole M. Sciotto, Note, *Opt-in vs. Opt-out: Settling the Debate Over Default Fiduciary Duties in Delaware LLCs*, 37 DEL. J. CORP. L. (forthcoming 2012) (discussing the divergent views regarding default fiduciary duties circulating among the Delaware judiciary).

238. *See* tit. 6, § 18-1101.

239. *See id.*

240. *See id.*

241. *See* Myron T. Steele, *Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies*, 32 DEL. J. CORP. L. 1, 8 (2007) (discussing common law fiduciary duties in the context of corporate governance).

242. *See* tit. 6 § 18-1101(b) ("it is the policy of [the DLLCA] to give the maximum effect to the principle of freedom of contract.").

243. *See* tit. 6, § 18-402.

244. *See id.*

245. *See* tit. 6 § 18-1101(b).

246. *See* Nemec v. Shrader, 991 A.2d 1120, 1126–27 (Del. 2010) (discussing the implied covenant of good faith and fair dealing).

Even if the LLC agreement is silent as to fiduciary duties in a series LLC, it follows that no fiduciary duty would attach since the series are being maintained as distinct cells, with independent assets, obligations, income and losses as well as with independent management.[247] The default rule should be that fiduciary duties do not run with each series and do not cross series borders. In this manner, the parties are better protected in their bargain by the enforcement of the terms of the LLC agreement as enforced by the duty of good faith and fair dealing. Each series is segregated for virtually all purposes: income, management, assets, liabilities and business intent.[248] As such, it is logical to assume that the members may manage the series independently of the other without concern of common law fiduciary duties. However, given the divergent schools of thought with respect to whether fiduciary duties apply by default in Delaware LLCs[249] (as evidenced by Delaware case law),[250] a cautious course of action might be to explicitly eliminate all fiduciary duties in the LLC agreement. This wholesale elimination may be effectuated by including a statement that all contractual duties and liabilities of each series are expressly limited to each particular series. This course of action is particularly important where two or more members are associated with one or more series.

Consider a slight variation on this example. Assume that the business mentioned above is not an investment enterprise but instead involves the operation of six liquor stores in Delaware and that only one liquor license may be obtained for the business. In this case, it makes sense for the property owners to hold each liquor store in an independent "cell" for liability and profits purposes and also to maintain all properties under one single entity due to the licensing issue. If a member or members are associated with each store for purposes of management, profits, and day-to-day decision-making, should these members owe fiduciary duties across series boundaries without question? Here, the answer should again be "no" since the reckless operation of one site could result in the loss of license for all the remaining properties.

In the above circumstance, one could conclude that reasonable parties would have considered negotiating this subject. If the agreement is silent on fiduciary duties, the parties should not be bound to a court drafting terms into their agreement based upon a "hypothetical bargain" – terms upon which neither party (likely on purpose) agree. In other words, the agreement is precisely what the parties' desire, without the imposition of common law care or loyalty obligations. Many investors gravitate to Delaware for the very purpose that they may draft their contracts in a sophisti-

247. *See* tit. 6, § 18-215.

248. *See id.*

249. *See* Sciotto, *supra* note 237 (summarizing the divergent schools of thought with respect to this issue).

250. *See* cases cited *supra* note 237.

cated manner.[251] Is it efficient and useful in the predictable development of Delaware's LLC law to return to judicial paternalism in the enforcement of LLC agreements? The authors say not. The authors posit that Delaware benefits from its courts enforcing what the General Assembly adopted so concisely in 1992.[252]

In addition, the series is clearly a "contract within a contract" with special "records" and "separateness" requirements. The most logical default rule for duties is that of the contractual obligation of good faith and fair dealing. Although this contractual legal theory currently runs counter to Delaware case law, the time is here when Delaware courts should recognize that contractual entities that trade on a premium and the stated policy of contractual freedom for Delaware LLCs should observe a default rule of contractual duties rather than gap-filling fiduciary duties. In any event, in this hypothetical, the parties are certainly free to craft their fiduciary duties to whatever suits their desires. At this stage in the development of Delaware law, it seems quite possible that a court would not impose fiduciary duties under a "hypothetical bargain" given the distinctive contractual construction and liability barriers of the series.

VII. Common Mistakes Occurring in Utilizing the Series

A. *Cross Collateralization*

In order for the limitation on liability to be enforced as among series, separate books and records, however reasonably maintained, must be kept.[253] Yet, no matter how vigorously records are maintained, if new credit is being sought and a lender requires cross-collateralization among the series, a serious question is raised whether a court would honor the liability limitation. In this circumstance, the authors recommend that security interests should not be granted across series' borders.

In addition, drafters of LLC agreements should consider provisions prohibiting members or managers from granting security interests in members' or managers' interests in the LLC. Just as the LLC can create cross-collateralization issues, members and managers can cause the same damage.

B. *Creation of a Series—Utilizing the Necessary Language*

What language is necessary to create a series? Section 18-215(b) simply provides that notice in a certificate of formation of the "limitation on lia-

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251. *See* Steele, *supra* note 237, at 237 (indicating that the choice to use the Delaware LLC business form is an intentional one, made by sophisticated parties, driven by Delaware's policy to provide contracting parties to an LLC with the maximum flexibility to customize their relationship).

252. *See generally* Conaway & Tsoflias, *supra* note 202 (identifying several reasons why Delaware benefits from avoiding the application of default fiduciary duties in the LLC context).

253. *See* tit. 6, § 18-215(b).

bilities of a series" is sufficient for all purposes, whether or not the LLC has formed a series at the time the notice is included in the certificate of formation.[254] Is stating that the LLC is a "series LLC with all the limitations provided by law" sufficient? Probably. Is simply referring to a series LLC enough? Probably not, since there is not a reference to a limitation upon liability. For practical purposes, a safer route would be to track the language of the statute that creates the series, including the recitation of the limitation on liabilities.[255]

C. *Unallocated Property in a Governing Document*

In some circumstances, an entity may terminate and be wound up with unallocated property and no mechanism for the subsequent allocation of that property.[256] Since at the time of the formation of the organization it is possible that the nature or circumstance of unallocated property makes it unadvisable to adopt a preallocation system, a method by which the property may be divided should be set forth in the LLC agreement. Thus, advisors using a series arrangement need to anticipate a decision-making mechanism whereby unallocated property may be designated among series, members, the LLC itself, or otherwise.

D. *Contracting by or on Behalf of a Series*

This topic is quite controversial. Recall that the 2007 amendments permit a "series" to contract in its own "name."[257] Recall also that a "series" is a "person" whose identity is derivative of the LLC as per the 2006 amendments.[258] Therefore, although it is technically possible for a series to contract in its own "name," its status is derivative of the LLC. Stated another way, the series is not an "entity" independent of the LLC. In practice, therefore, a safe course is to have a series sign in the capacity of

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254. *See id.*

255. The DLLCA provides:

> Notwithstanding anything to the contrary set forth in this chapter or under other applicable law, in the event that a limited liability company agreement establishes or provides for the establishment of 1 or more series, and if the records maintained for any such series account for the assets associated with such series separately from the other assets of the limited liability company, or any other series thereof, and if the limited liability company agreement so provides, and if notice of the limitation on liabilities of a series as referenced in this subsection is set forth in the certificate of formation of the limited liability company, then *the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to a particular series shall be enforceable against the assets of such series only, and not against the assets of the limited liability company generally or any other series thereof, and, unless otherwise provided in the limited liability company agreement, none of the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to the limited liability company generally or any other series thereof shall be enforceable against the assets of such series.*

Id. (emphasis added).

256. *See* tit. 6, §§ 18-803-804.

257. *See* tit. 6, § 18-215(c).

258. *See id.*; *discussed supra* Part V.B.3.

or thereof as a series of the organization formed. By statute, however, it may sign in its own capacity.[259]

VIII. Conclusion

The Delaware series is an innovative and efficient method by which attorneys and advisors may plan for "classes," "groups" or "series" of interests and provides notice of the groups, classes or series, and limit liability to the interests and assets attached to it. If the parties who use "series" or other such classifications are *informed* as to the purposes and "rules" regarding their use, series provide good business planning for the informed. Most importantly, series require careful consideration of general default rules, specific default rules within the series provision, and the specific intent of the parties using the series. The issue of whether fiduciary or contractual duties constitute the default rule for series in particular or LLCs in general has yet to be resolved. As a result, practitioners should draft with specificity in order to maximize enforceability of their clients' agreements.

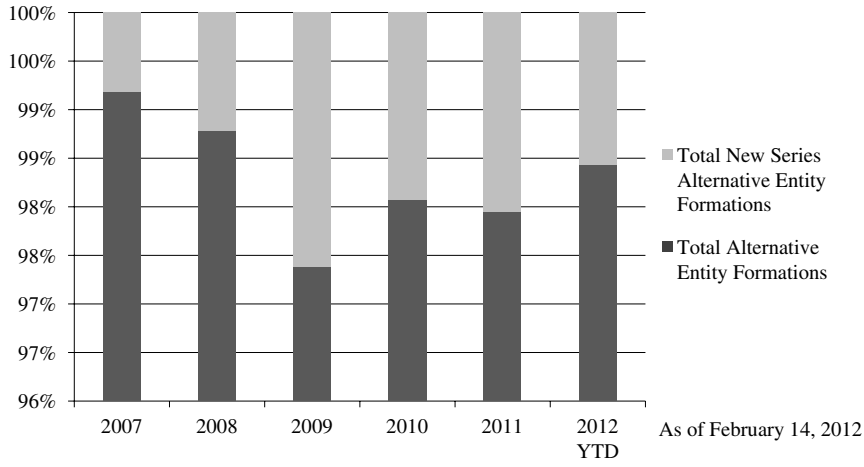
The conundrum of the enforcement of the liability shield for the series "cells" should be resolved in favor of upholding the shield where the series statute is followed by drafters. However, given that the test for the enforceability of the series shield will likely occur in a bankruptcy court makes the certainty of outcome more uncertain given the LLC's track record in bankruptcy thus far.

All in all, the Delaware series is a complex, yet innovative and efficient tool for business planning especially in the venture capital and private equity paradigm. Accordingly, close, careful drafting is needed in order for the series to succeed.

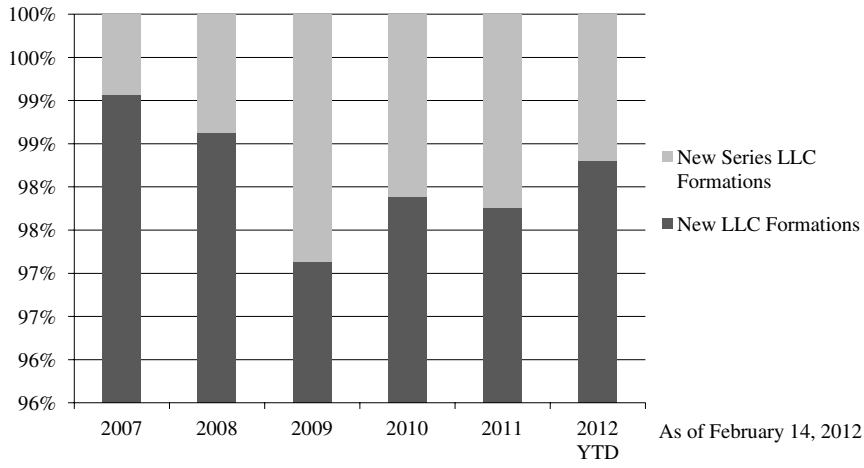
259. *See* tit. 6, § 18-215(c).

APPENDIX[260]

A. *Total New Series Alternative Entity Formations Compared to Total New Alternative Entity Formations*[261]



B. *New Series LLC Formations Compared to New LLC Formations*[262]

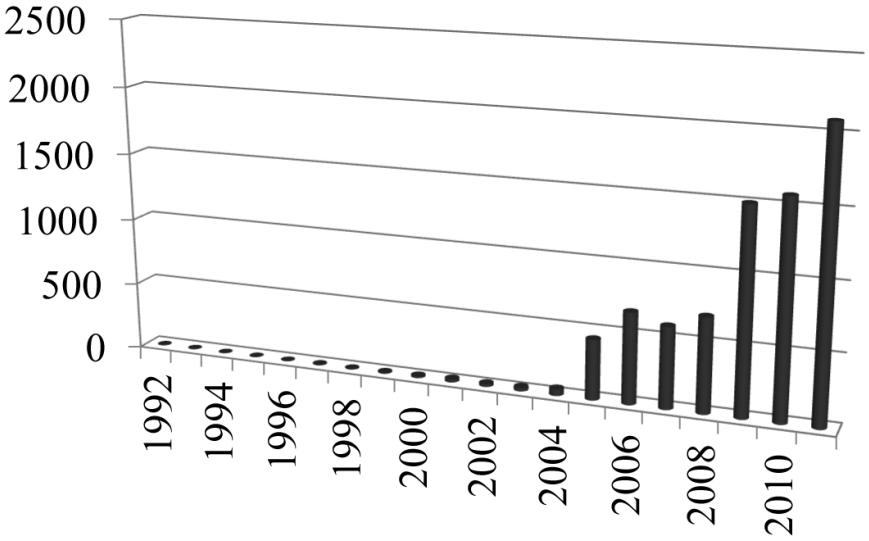


260. All statistics, which are collected from secretary of state websites, are on file with the authors.

261. 2007: 1,043/125,897 (.83%)
2008: 1,136/92,174 (1.23%)
2009: 2,072/76,893 (2.69%)
2010: 1,761/89,361 (1.97%)
2011: 2,131/101,524 (2.10%)
2012 YTD: 195/12,228 (1.59%)

262. 2007: 1,043/111,592 (.93%)
2008: 1,135/81,892 (1.39%)
2009: 2,070/70,128 (2.95%)
2010: 1,760/81,686 (2.15%)

C. *Series Formations*[263]



2011: 2,131/92,946 (2.29%)
2012 YTD: 195/11,280 (1.73%)

263. Note, this chart accounts for *all* series entity formations (not just series LLCs).