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Series LLCs Part 2—Current Status, Multi-State Issues and Potential Uniform Limited Liability Company Protected Series Act

*By J. Leigh Griffith and Alberto R. Gonzales**

Leigh Griffith and Alberto R. Gonzales discuss the existing impediments to greater use of Series LLCs including taxation, bankruptcy, the Uniform Commercial Code and issues concerning multi-state activities and how these matters are being addressed by the National Conference of Commissioners on Uniform State Laws (NCCUSL).

I. Introduction

Although its emergence on the business scene is fairly recent, the Series LLC has been gaining popularity as a business entity. Under the Series LLC umbrella, this entity is able to create multiple Protected Series, each with its own separate rights, powers, assets, obligations, business purposes and associated members. The aim is that the internal liability shields will maintain such “separateness” and protect the other Protected Series and the Series LLC itself from the others’ debts and obligations. It is likely that the internal shields will be maintained if a Protected Series engages in business outside its jurisdiction only in other states that have enacted Series LLC enabling legislation, provided the foreign Protected Series has qualified to do business in such second state or, if qualification is not required, it meets at least the particular jurisdiction’s

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formalities or perhaps, even if less, the formalities of the jurisdiction of organization. In states without such statutes, however, it is far from clear whether the internal shields will be respected. Part I of this article described the characteristics of Series LLCs, the current applicable

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state law developments, the popularity of Series LLCs and the internal liability shield requirements. Part II discusses the existing impediments to greater use of Series LLCs including taxation, bankruptcy and the Uniform Commercial Code matters and issues concerning multi-state activities and how these matters are currently being addressed by the NCCUSL Drafting Committee's (the "Drafting Committee") efforts in drafting the Limited Liability Company Protected Series Act (the "Draft Act").

II. Tax Treatment of Series LLCs

The guidance of the Proposed Regulations has likely resolved the basic federal income tax treatment of Series LLCs and Protected Series.¹ Under these Proposed Regulations, the Series LLC itself will be considered a tax reporting entity only with respect to any assets, liabilities and business activity undertaken by the Series LLC itself (as opposed to the activities of the Protected Series with an associated member other than the Series LLC). For federal income tax purposes, the Proposed Regulations also provide that (i) each Protected Series with multiple associated members will be considered an income tax reporting entity with respect to the assets, obligations and activities associated with the Protected Series, and (ii) each member associated with the Protected Series will be considered an owner of such Protected Series.²

Under the Proposed Regulations, normal federal tax entity classification rules are applicable to Series LLCs and each Protected Series. For instance, a partnership is the default classification applicable to a multi-member Series LLC and each Protected Series that has two or more associated members. A single-member Series LLC

and each Protected Series that only has one associated member will be disregarded for federal income tax purposes. However, the Series LLC can elect to be treated as an association taxable as a corporation while each of its Protected Series has its own classification. In turn, each Protected Series may elect to be treated as an association taxable as a corporation while other Protected Series and/or the Series LLC itself are taxable as partnerships or, if another Protected Series has a single associated member, a disregarded entity.

Although normal federal tax entity classification rules apply, the employment tax treatment of Series LLCs and Protected Series is presently unknown. The IRS requested comments with respect to the employment tax treatment of Series LLCs.³ The American Bar Association Tax Section, in a joint task force of the Partnership Committee's Subcommittee on LLCs and LLPs and the State and Local Tax Committee, polled the 50 states, Washington, D.C. and Puerto Rico concerning the state taxation of Series LLCs. At that time, all of the states that provided an affirmative position followed the federal income tax treatment except Texas, which treated the Series LLC and each of the Protected Series as a single-tax entity.⁴

As a practical matter, the general income tax rule (outside of Texas) is to follow the IRS Proposed Regulations even when the state does not have an official position. Therefore, for federal income tax purposes and most state income tax purposes, the anticipated tax treatment is generally known and will be absolutely clear when the Proposed Regulations are finalized. The major exception is the employment tax. With respect to other state taxes, there are variations which provide potential planning opportunities. For a state tax analysis of Series LLCs, see Tax Management Memorandum.⁵

III. U.C.C. Article 9 and Lenders' Concerns

As with Series LLCs and some other areas of the law, it is still unclear how the Protected Series will be treated under the Uniform Commercial Code ("U.C.C.") Article 9. Many Series LLC state acts permit assets associated with a given Protected Series to be held in a number of different ways.⁶ For example, the Delaware LLC Act permits holding such assets either in the name of the Series LLC, in the name of the Protected Series, in the name of a nominee, or "otherwise."⁷ The option selected helps determine who, in fact, is the "debtor" within the meaning of U.C.C. RA9-102(a)(28).⁸ One area of concern is that,

despite language in the state of organization (many now expressly provide the Protected Series can sue or be sued⁹), it is uncertain whether Protected Series are even viewed as the equivalent of legal entities or a person with the power to sue and be sued in a majority of the jurisdictions (*i.e.*, those which have not passed Series LLC-enabling legislation or legislation permitting a protected series to sue or be sued in its own name) and litigation may have to be in the name of the Series LLC.

Interestingly, the District of Columbia permits the Articles of Organization to provide that a Protected Series be treated as a separate legal entity.¹⁰ Such an election would perhaps be helpful for U.C.C. filings but would do away with much of the perceived advantages of Series LLCs as a single legal entity. An interesting approach is found in the statutes of Illinois, Indiana, Iowa, Kansas, Missouri and Utah¹¹ with language to the effect "A [Protected] series with limited liability must be treated as a separate entity to the extent set forth in the articles of organization of the master limited liability company."¹² Does this mean the Articles of Organization can pick specific characteristics and say that, for purposes of such characteristic, the Protected Series shall be treated as a separate entity or does this simply mean that the Articles of Organization can provide that a Protected Series is an entity and it will be treated as such for all state law purposes? Statutes in Alabama, Delaware, Montana, Nevada, Oklahoma, Puerto Rico and Tennessee¹³ are not explicit as to the status of a Protected Series and do not have the power to create entity status through their Articles of Organization but rather contain the concept of Protected Series as something other than a separate legal entity. Many of the statutes expressly give the Protected Series the power to contract and the power to sue and be sued in their own name.¹⁴

Creditors should be aware that there is an argument that a Protected Series that is not a legal or commercial entity is, by definition, incapable of being an Article 9 debtor.¹⁵ Regardless, in no jurisdiction, other than perhaps Illinois, Kansas and Missouri,¹⁶ is the filing of a public organic record presently necessary to the formation of a Protected Series. Contrast this with the effect of a filing of a public organic record on the issue of whether a Protected Series enjoys internal liability shields.¹⁷ Generally, Protected Series formed in a state other than Illinois, Kansas and Missouri are not "registered organizations" as that term is used in U.C.C. Article 9.¹⁸ Arguably that may also be true for D.C. and Montana, as they either require a certificate of designation or the Protected Series operating agreement¹⁹ to be filed for the internal liability shields. Instead, most Protected Series are analogous to limited liability

partnerships, which are not registered organizations for precisely the same reason.²⁰ Thus, even if a Protected Series is properly an Article 9 debtor, its location is not necessarily the jurisdiction in which it is formed (the special rule of 9-307(e) is for registered organizations).²¹ The Series LLC itself, however, would be an Article 9 debtor and a registered organization.

IV. The Relationship Between Series LLCs and Bankruptcy

Similar to Article 9, it is not certain how the interplay between Protected Series and the bankruptcy code will unfold. Under the Bankruptcy law, any "person" may file a bankruptcy petition.²² Therefore, the first issue that attorneys may face is whether a Protected Series, as opposed to the Series LLC itself, is a "person" for purposes of filing for bankruptcy protection. For this purpose, a person includes an individual, partnership or corporation.²³ The defined term "person" does not include an estate or trust (other than a business trust).²⁴ Under the bankruptcy code the definition of a "person" is "inclusive" and not "exclusive."²⁵ Therefore, although not specifically identified as a "person," the LLC was considered to be a "person" eligible to file because its characteristics originated from both corporations and partnerships. As a result, the LLC is "similar enough to those entities to be eligible."²⁶ Per the bankruptcy code, the definition of "corporation" encompasses a partnership association organized under a law that makes only the capital subscribed responsible for the debt of the association.²⁷ Section 101(9)(A)(iv) of the bankruptcy code²⁸ includes an unincorporated company or association and Subparagraph (9)(B) excludes a limited partnership.²⁹ The Senate legislative history regarding the passage of the Bankruptcy Reform Act of 1978 clarifies this issue³⁰:

The definition of 'corporation' in paragraph (8) is similar to the definition in current law, section 1(8) [section 1(8) of former title 11]. The term encompasses any association having the power or privilege that a private corporation, but not an individual or partnership, has; partnership associations organized under a law that makes only the capital subscribed responsible for the debts of the partnership; joint-stock company; unincorporated company or association; and business trust. "Unincorporated association" is intended specifically to include a labor union, as well as other bodies that

come under that phrase as used under current law. The exclusion of limited partnerships is explicit, and not left to the case law.

At this time, however, it is unclear whether a Protected Series that is not defined as an entity, even though it has entity characteristics and attributes (which are encompassed by a legal entity), may be a “person” under the bankruptcy code *via* the definition of “corporation” or otherwise.³¹ Given that the laws in those states that have passed Series LLC legislation make only the capital subscribed responsible for the debts of the Protected Series (arguably an unincorporated association within the definition of a corporation), many attorneys are comfortable that a Protected Series, will be a “person”—at least in the states with Series LLC statutes.³² This is particularly true if it can expressly sue or be sued. Others, however, are uncertain.

In a trilogy of recent cases in Boston, the bankruptcy court accepted the filings of Protected Series in *Crush Real Estate Series, LLC 917 East Broadway Series, Sole Beneficiary of 917 East Broadway Realty Trust*,³³ *Crush Real Estate Series LLC Sole Beneficiary of 427 East Sixth Street Realty Trust*³⁴ and *Crush Real Estate Series LLC Sole Beneficiary of 427 K Street Realty Trust*.³⁵ Although the court did take jurisdiction, there is no indication that the bankruptcy court specifically considered whether the Protected Series had standing to file for bankruptcy. Steven J. Boyajian, lawyer for the Trustee, reported that because the petition for these were dismissed for other reasons, the court never actually reached the question whether a Protected Series could file for bankruptcy.³⁶

Assuming that the Protected Series is a “person” under the bankruptcy code, two questions arise. The first is whether a Protected Series that is not itself in financial distress can be placed into bankruptcy if the Series LLC itself is in financial distress under the rationale of *General Growth Properties, Inc.*,³⁷ or whether one or more of the separate Protected Series can be subject to “substantive consolidation” with the Series LLC itself and/or other Protected Series of the same Series LLC.

Although a discussion of the *General Growth Properties, Inc.* case and its impact on special purpose entities is beyond the scope of this article, a short analysis of the case and how it is distinguishable in the context of Protected Series is in order. General Growth Properties, Inc. was the largest commercial real estate collapse in American history and involved 388 subsidiaries that also filed for bankruptcy. Many of the subsidiaries were special purpose entities that directly held a single piece of commercial real estate (generally shopping centers)

in a structure that was considered “bankruptcy remote.” Many of these bankruptcy remote subsidiaries were not in financial distress. The issue of concern in *General Growth Properties, Inc.* was whether these solvent subsidiaries could be placed into bankruptcy and whether their cash flow, which historically had been handled in a common joint operating account or cash management system, could be used in the proceedings of the parent. The bankruptcy court answered in the affirmative, relying on a “corporate family” rationale to allow the use of the comingled cash flow in a restructure. It did so on the belief that even the solvent subsidiaries would have trouble refinancing their debt in the market conditions that existed at the time and that the directors anticipated carrying into the future. The bankruptcy court found the directors of a solvent subsidiary owed a fiduciary duty to its corporate parent, which was operating an integrated enterprise or corporate family.³⁸ The question then is how do the principles of *General Growth Properties, Inc.* apply to the Protected Series “family” of a Series LLC?

The judge’s holding focused on the fiduciary duty of the board of directors of the solvent subsidiaries to the respective subsidiary’s shareholders. In a Protected Series structure, the Series LLC itself may not even be a member associated with the Protected Series but rather the members of the Series LLC itself or a subset of such members are likely associated with the Protected Series. In that case, the managers’ or directors’ duties running to its owners would not run to the Series LLC itself, and the principles set forth in *General Growth Properties, Inc.* would not apply. If, on the other hand, the Series LLC was itself the sole member (or perhaps the controlling member or almost sole member) associated with the Protected Series, the holding of *General Growth Properties, Inc.* would likely apply. The Protected Series with its direct association of the members of the Series LLC, as opposed to the Series LLC itself, may provide substantially more protection for the creditors of each Protected Series than a parent corporation with a number of wholly owned corporate subsidiaries provides for creditors of each subsidiary.

Independent of whether solvent Protected Series could bankrupt as part of a corporate family as discussed in *General Corporate Growth Properties, Inc.*, there is the issue of substantive consolidation. It has yet to be decided whether one or more of the separate Protected Series and/or the Series LLC itself would be subject to “substantive consolidation.” Under the equitable doctrine of substantive consolidation, a bankruptcy court treats the bankrupt estate as if it is composed of the assets of two or more persons—even including, in some instances, the assets

of debtors and nondebtors.³⁹ Unfortunately, there is not a uniform standard for invoking this equitable remedy.⁴⁰ It is generally considered appropriate where creditors or owners have disregarded the separate identities of persons or where those persons have entangled financial affairs.⁴¹ In essence, the requirement that the assets of the Protected Series be carefully accounted for and associated with the particular Protected Series as a condition of obtaining or maintaining the internal liability shield is really a variation of anti-consolidation on steroids.⁴² Whether the courts will look outward beyond the associated assets of a particular Protected Series when it comes to Series LLCs may be important. In circumstances where the Protected Series is formed in a state in which the Protected Series is not required to separately file a notice of its existence and the Protected Series in fact does not file, and/or where the titled assets are not held in the name of a particular Protected Series, there is an argument that as far as the public is concerned, the owners have perhaps disregarded the separate entities and substantive consolidation may be appropriate.⁴³ This will be particularly true where business operations of each are entwined. On the other hand, if appropriate records are maintained and the assets and members are properly associated with respect to the Protected Series, it is hard to see how the owners complying with state law have disregarded the separate Protected Series. Indeed, the requirements of appropriate books and records and proper association makes it much more likely that the internal shields would fail before a traditional consolidation analysis would call for substantive consolidation.

Each state's statutes will need to be examined to determine if a Protected Series can avail itself of that particular state's debtor-relief laws. In the event the Series LLC must file for bankruptcy instead of a single Protected Series, the other Protected Series are likely to have complications, at least until the courts have an opportunity to sort out the relationships and establish precedent.

V. Internal Liability Shields

Part I discussed the requirements for the validity of the internal liability shields in each state with enabling Series LLC legislation. All but one jurisdiction with enabling Series LLC legislation is clear that, in a multi-Protected Series LLC, only the Protected Series with improper association of assets is at risk with respect to the internal shields.⁴⁴ In Part I, the authors also raised the illogical specter of asset exposure to creditors of Series LLC itself or those of other Protected Series of the Series LLC of even properly-associated assets of a

Protected Series when some assets of such Protected Series are not properly associated. The current enabling state statutes do not appear to specifically establish that only the unassociated assets are subject to the claims of any Protected Series or the Series LLC. Hopefully, the courts determine that this is implicit in the conceptual framework of their statutes, but it would be much better if such a result were to be expressly stated.

The aim is that the internal liability shields will maintain such "separateness" and protect the other Protected Series and the Series LLC itself from the others' debts and obligations.

A fundamental issue in doing business utilizing the Series LLCs is the uncertainty as to what will happen with the Series LLC if one or more of the Protected Series engages in business outside the state of organization and a large liability arises in such second state with respect to one Protected Series of a Series LLC with a number of Protected Series, especially if the associated members of each such Protected Series are different. This risk is especially acute if the Series LLC is engaging in business in one or more states that have not passed enabling Series LLC legislation. Will the internal liability shields among the Protected Series and the Series LLC be honored in such second state?

VI. Respecting Liability Shields of Series LLCs in States Other Than State of Organization

As discussed in Part I, while 14 states, Puerto Rico and the District of Columbia have passed Series LLC statutes, most states have yet to enact Series LLC legislation. Consequently, Series LLCs doing business in those states without enabling legislation run a serious risk because the law remains unsettled or unknown as to the effectiveness of the internal liability shield of a Protected Series in these foreign states. The Full Faith and Credit Clause in the United States Constitution and perhaps the Internal Affairs Doctrine provide protection for liability shields of corporations.⁴⁵ It is unclear, however, how these doctrines will be applied to Series LLCs, especially from state to

state.⁴⁶ Those wishing to expand the operations of their Series LLCs into foreign jurisdictions must therefore consider their options carefully. If there is a diversity of associated members or their proportionate ownership among the various Protected Series, consideration should be given to inserting provisions in the operating agreement or even the Articles of Organization restricting the Series LLC and/or each Protected Series from engaging in business in other jurisdictions (or perhaps jurisdictions that have not passed enabling legislation). Such activity in other jurisdictions could potentially produce liability for all of the Protected Series and the Series LLC.⁴⁷ If the ownership is essentially the same, especially if in the same proportions, a Series LLC doing business in a state without Series LLC legislation is in no worse position than if such business were conducted in a single regular LLC, and due to the complexity and uncertainty, it may be in a much better position than if only a single traditional LLC were to be involved.

It is commonly assumed that if a state has enacted Series LLC legislation, it will recognize all Series LLCs created in other states and honor the internal liability shields.⁴⁸ While this is probably true, the authors believe there is a possibility this assumption may not always be correct, depending on the circumstances. If a Protected Series is formed in a state that requires separate filings identifying each Protected Series, then the foreign state having enacted Series LLC legislation should recognize the Series LLC and Protected Series and honor the internal liability shields whether or not the Series LLC legislation of such foreign jurisdiction requires such filings. However, it is conceivable that the internal liability shields for Series LLCs created in states such as Delaware, which do not require the filing of identifying information for each Protected Series, may not be honored in at least some of the states with Series LLC legislation which require the specific identification of the Protected Series as a condition for the internal liability shield. This is particularly true if the Series LLC and/or the Protected Series did not qualify to do business in such second state in accordance with such second state's laws.⁴⁹

In the absence of a foreign Series LLC provision in the state's statute to the contrary, a state's general public policy may require a minimum level of public disclosure to honor the foreign Series LLC's internal liability shields and quasi-entity or person status of the Protected Series and the Series LLC for such purposes in absence of complying with such second state's foreign Series LLC's provisions. This concern is based on the belief that the courts, in absence of a foreign Series LLC provision to the contrary, may examine the public

disclosure concerning the creation and existence of the specific Protected Series as a basis to determine if such are similar enough to the disclosure required of affiliated corporations or LLCs to conclude whether Series LLCs and their Protected Series are not repugnant to the laws of the jurisdiction of the court to uphold the internal shields.

Perhaps the only absolutely certain "safe" way to use a Series LLC at this point is within the state in which it is formed, although the authors believe if the Series LLC and/or the Protected Series has qualified to do business in such second state in accordance with its foreign Series LLC provisions, it is "safe" to use a Protected Series in such second state. If the business or other activity of the foreign Series LLC or foreign Protected Series is such that the Series LLC or the particular Protected Series is not required to file and qualify to do business in such second state and the second state's Series LLC law require the same or lesser disclosure concerning Protected Series as the state of the Series LLC's organization, the authors believe it is "safe" to use a Protected Series in such second state. If the business or other activity of the foreign Series LLC or foreign Protected Series is such that the Series LLC or the particular Protected Series is not required to file and qualify to do business in such second state and does not do so, but the second state's Series LLC law requires greater disclosure concerning Protected Series than the state of the Series LLC's organization, the situation may be a bit more problematic. If the second state has not passed Series LLC enabling legislation, there would appear to be significant risk that the "internal affairs doctrine" or "full faith and credit clause" may not carry the day. The second state may well apply its conflict of laws principles to determine whether to honor the internal shields. If the public filings and disclosure in the state of the Series LLC's organization provides similar information to that required for the formation of a corporation in the second state, there is at least an argument that the public policy of the second state is not offended and the internal shields should be respected. There is, however, no known precedential authority as to what the courts will determine in such situations. The Court of Special Appeals of Maryland⁵⁰ heard a case involving multiple traditional LLCs operating in an integrated manner in which the appellant argued that the trial court's analysis created in essence a Series LLC with Protected Series which the appellant argued was an impermissible corporate structure in Maryland since the Maryland General Assembly had not passed Series LLC enabling legislation. *In dicta* the court states:

While certainly true, to the best of our knowledge, the legislature hasn't even considered whether to adopt such [Series LLC] legislation. It certainly hasn't done anything to suggest that adoption of the series LLC form will violate an important public policy of the State Thus, we think the third step in Honey G-R's argument, that a Maryland court is prohibited from ordering the creation of a series LLC (if that is what happened here), assumes a prohibition that simply does not exist.⁵¹

The court, also *in dicta*, perceived few differences between a family of traditional LLCs with one parent LLC and a Series LLC. The court stated, "Many of the benefits of a series LLC can be obtained by creating a family of traditional LLCs The only differences that we perceive—at least in the abstract—are differences of nomenclature and the requirement for filing fees."⁵²

It should be noted that in the case before the court, the LLCs involved were actually traditional LLCs with traditional entity filings disclosing their existence, and the case involved a dispute among the owners and not a dispute involving third parties. However, this case may indicate that at least some courts in states that have not passed Series LLC enabling legislation will not perceive the Series LLC and internal liability shields contrary to public policy or particularly alien.

VII. Brevity May Be the Soul of Wit but Not the Soul of a Business Organization

The existing Series LLC statutory provisions for the most part were "parachuted in" and attached to the jurisdiction's LLC Act. The provisions often fail to address specific nuances of Series LLCs and Protected Series that have no analog in the context of a traditional LLC. In absence of statutory limitations, it is likely the general rules of the particular LLC statute will apply to the Series LLC provisions but exactly how such rules apply and how they are to be implemented may be much less than clear. For example, this likely means that the Series LLC can merge, convert or engage in an interest exchange. How those events impact the Protected Series may be unknown. A conversion of the Series LLC into a corporation would almost surely terminate all of the Protected Series as the series concept with internal or horizontal liability shields does not exist in the corporate world. Would a merger of a Series LLC into a regular LLC terminate all of the Protected Series of the merged Series LLC? What rights,

other than dissenters' rights, do the members associated with a particular Protected Series of the former Series LLC with several Protected Series have under the applicable statute? If a Series LLC liquidated, implicitly all of the Protected Series will also liquidate as the entity no longer exists. While the members associated with each specific Protected Series would receive the assets associated with such Protected Series, this can be most disruptive, have tax ramifications and perhaps require new licenses to continue to engage in business even if all of the associated members fully cooperate with each other. The general LLC statutory provisions may not provide adequate protections for the disparate members of a multi-member and multi-Protected Series LLC as this situation was not contemplated and does not exist in a regular LLC. Special precautions should be taken in the operating agreement of the Series LLC to require a very high vote of members associated with all Protected Series before actions taken by the Series LLC that would significantly impact one or more Protected Series are permitted to occur. These operating agreements need to be carefully considered and contain rather detailed provisions.

VIII. Approach of the Uniform Laws Committee on the Limited Liability Company Protected Series Act

The Drafting Committee is not proposing anything that should impact the federal income tax treatment of Protected Series as set forth in the Proposed Regulations.⁵³ The Drafting Committee is not attempting to alter the Limited Liability Company Acts of the various states as they apply to ordinary limited liability companies and, indeed, is attempting to develop an Act that overlays and by extrapolation utilizes much of the jurisdiction's existing LLC law but addresses the areas that have no analogue either by (i) mandatory nonvariable provisions or (ii) default provisions that may be affirmatively modified. The Drafting Committee is also attempting to walk the line of providing public and creditor protection, internal rules of governance and understandable requirements for the maintenance of internal liability shields and a clear articulation of what happens if one or more assets of a Protected Series or the Series LLC are not properly associated at specific times. Amazingly, as identified in Table 4, "Potential Consequence of Improper Association of Series Assets" found in Part I,⁵⁴ most of the existing statutes can be read to provide that mistakes in properly associating assets to a specific Protected Series can jeopardize all assets of such Protected Series as the proper association is a

pre-requisite for the internal shields. The Draft Act makes it clear that failure to properly associate one or more assets only exposes those improperly associated assets and does not jeopardize the internal shields as a whole. The Drafting Committee is wrestling with the practical problems of what association of assets means and the burden of proof that an asset was associated. A Protected Series having to go back many years to demonstrate proper association would be very burdensome. Crooks and those who play fast and loose are unlikely to suddenly retain proper records for a few years. The purpose of association is to encourage/require accurate and clear records of ownership and identification to minimize bad actors using Series LLCs and Protected Series in “shell games,” not to provide a windfall to third-party creditors at the expense of honest businessmen and investors.

The Draft Act requires the identification in the public record of the existence of the specific Protected Series in existence and through the name of each such Protected Series tie the Protected Series to the Series LLC itself in a manner distinguishable from the names of the other Protected Series. This is viewed by the draftsmen as an important anti-fraud provision. The Draft Act contains provisions for foreign Series LLCs and foreign Protected Series (*i.e.*, those formed under the laws of another state) engaging in business in states that substantively pass the Draft Act, as it is finalized, to identify the Protected Series and put such on record even if the state of organization of the Series LLC does not so require. Transparency of existence and a path to determine information concerning the Protected Series is an important public protection. The Drafting Committee is attempting to prevent the use of a foreign state’s loose or nonexistent disclosure laws concerning the existence of Protected Series to be able to hide information regarding the existence of specific Protected Series and other public safeguards that the second state requires of Series LLCs and Protected Series formed under its laws.

As discussed earlier in this article, the prerequisite for “something” to file a bankruptcy petition and to avail oneself of the protection of such law, the “something” must be a person. Although as discussed, many conclude that the existing enabling statutes create a “person” for this purpose, the Draft Act specifically provides that the Protected Series is a “person.”⁵⁵ The statutory classification of each Protected Series as a person is designed to address the bankruptcy issues and cause the Protected Series to be eligible for bankruptcy protection in the event it is otherwise not eligible under the existing enabling statutes.

The Draft Act provides that a Protected Series is not only a “person” but also a person that comes into existence through a public filing. The intent and hope of the

draftsmen is that U.C.C. Article 9 will treat a Protected Series as a registered organization and therefore provide certainty for U.C.C. filings.

The Draft Act’s characterization of a Protected Series as a person and the requirement that each Protected Series be identified in a public filing is also an anti-abuse measure and permits third parties to determine what Protected Series they are dealing with and the number of existing Protected Series of a Series LLC that exist at a given time. The requirement that the registered agent be identical for the Series LLC and each of the Protected Series associated with a Series LLC also minimizes third-party confusion should the need arise for a service of process.

Many on the Drafting Committee recognize the need for Protected Series to acquire or dispose of assets by merger. However, the complexities of mergers are very high with many permutations. The current Draft Act prohibits mergers of Protected Series with other Protected Series within or without the Series LLC or mergers with or into other entities. Conversions and interest exchanges may well be prohibited at this time due to complexity. The current Draft Act permits a merger of the Series LLC into another Series LLC formed in the same jurisdiction but not in a foreign jurisdiction. While complex, the authors’ believe that the failure to permit the exit strategy of merging a Protected Series into an LLC (or perhaps other entity) creates a business trap for many as the only exit strategy for a particular Protected Series is a sale of assets which is often difficult and/or expensive.

Appendix I (accompanying this article) lists some of the provisions that are addressed by the July 2016 draft of the Drafting Committee’s Draft Act⁵⁶ and compares each to the Series LLC Acts passed in each of the present jurisdictions. There are many places that current state law is not clear with the result that some of the comparisons are somewhat speculative and may prove to be incorrect. The Draft Act continues to evolve as thoughtful comments from a large number of Commissioners and Advisors are digested and incorporated.

IX. Conclusion

It is unclear whether the Series LLC will be a long-term and broad-based viable form of business entity such as with the traditional LLCs. The authors believe, however, that creative legal minds will find legitimate uses for Series LLCs to meet the business needs of their clients as time goes on and the law becomes more established. As more states pass Series LLC legislation, particularly if the Series LLC provisions are more thought-out and detailed, many concerns about Protected Series will be resolved, and the

U.C.C. and bankruptcy issues will likely be resolved as well. As discussed, the Drafting Committee is currently developing a set of uniform provisions for Series LLCs and their Protected Series. A uniform law by NCCUSL or a well-reasoned model act should aid states in developing consistent statutes and addressing various policy concerns such as creating uniform registration requirements. Further, attorneys and courts will have fewer potential concerns about a Protected Series of a Series LLC formed in one state doing business in a second state that has passed Series LLC legislation. In addition, the public policy arguments may be muted as it becomes clear that states do not have a concern about internal liability shields, particularly if the Protected Series are “on record” and clearly linked to the Series LLC.

As discussed, the major impediment to broader acceptance of Series LLCs at this time appears to be concerns about the integrity of the internal liability shields in states without Series LLC-enabling statutes and the wide differences in the requirements of identifying the Protected Series and the titling of assets. Caution by lenders continues to be a significant business detriment to the usage of Series LLCs until the U.C.C. issues are better resolved, but Series LLCs are presently borrowing money from many banks and other lending institutions. In states in which the enabling legislation does not specifically provide that a Protected Series can own property in its own name, some title insurance companies are declining to write policies. Clarity as to the ability of a Protected Series to file for bankruptcy without the Series LLC itself being required to file is also needed, and it is expected this will develop in the near future as there is already somewhat favorable development in Massachusetts where the bankruptcy court accepted the petitions for bankruptcy of three Protected Series. However, as previously discussed, the standing issue was not raised. While most new businesses do not form and plan for bankruptcy, an attorney is often concerned about such matters. Finally, while the Proposed Regulations have reduced the stress for most concerning federal income taxation, employment taxes and the appropriate state taxation of the Protected Series, particularly in the non-income tax areas, continue to be confusing. Texas’ outlier position of applying its taxes to the Series LLC and all of its linked Protected Series makes the utilization of Texas Series LLCs and their Protected Series somewhat problematic and engaging in business in Texas using Series LLCs a bit more challenging on the tax front. Texas in essence pierces the internal liability shields for its taxes and a foreign state in which a Texas Series LLC or a linked Protected Series may have the same piercing power.

If the Protected Series’ internal liability shields are

honored as a matter of law and the books and records are appropriately maintained, in the absence of activities that indicate a fraud on the plaintiff, the specific prohibition of one Protected Series’ assets being subject to the liabilities of another would seem to make piercing the “corporate veil” within the Series LLC and among the linked Protected Series very difficult. In all cases, however, the members associated with each Protected Series and/or the Series LLC itself should have the limited liability protection of an LLC, as all of the Series LLC statutes are

It is unclear whether the Series LLC will be a long-term and broad-based viable form of business entity such as with the traditional LLCs.

found within the general LLC statutes and generally are overlay provisions to the general LLC statutes. A failure of the internal liability shields should not lead to a failure of the external liability shields for the members but will rather place the Series LLC in the same position as a regular LLC. This situation will obviously not be satisfactory for members associated with a Protected Series not involved in the issue giving rise to the liability and not participating in the economics of the offending Protected Series. For commonly-owned enterprises in multi-state businesses where multiple entities are not practical, the Series LLC does not appear to have significant drawbacks and may offer potential protection.

All in all, there are now legitimately several tens of thousands of Series LLCs and Protected Series, over 25 percent of the states have adopted Series LLC legislation, and 40 percent of the states have either Series LLC legislation or recognize Statutory Trusts with internal liability shields. The possibility of a Uniform Limited Liability Protected Series Act or at least a model act entering the picture should cause more states to take notice of the Series LLC Act and perhaps cause some of the states with an existing Series LLC Act to review its enabling statute to make the laws more uniform, fulsome and more likely to be supported when foreign Series LLCs and their linked Protected Series engage in business in states without Series LLC enabling legislation. The massive growth in the number of Series LLC organizations⁵⁷ with all the impediments discussed in this article clearly demonstrates that there is a business demand for such entities. Series LLCs are now entities with which both attorneys and courts should become more familiar.

APPENDIX 1. ALL JURISDICTIONS OF SELECTED UNIFORM LAWS V. STATE LAW COMPARISON—JANUARY 8, 2017							
Provisions Protecting Creditors or Providing Certainty	LLCPSA	Alabama	Delaware	District of Columbia	Illinois	Indiana	Iowa
Is a separate public filing necessary to establish each protected series?	Yes; § 201(b)	No	No	Yes, D.C. CODE § 29-802.06(e) and (f)	Yes; 805 ILL. COMP. STAT. 180/37-40(d)	Yes; IND. CODE § 23-18.1-6-2	Yes (to establish limited liability); IOWA CODE § 489.1201(2)
Is protected series defined as a legal person?	Yes; § 102(7)	No	Yes; DEL. CODE ANN. tit. 6, § 18-101(12)	No, however see EN 4	No; however see EN 6	No; however see EN 8	No, however see EN 9
Is the duration of protected series expressly limited to the duration of series limited liability company? EN 1	Yes; § 105(c)(1)	Yes; ALA. CODE § 10A-5A-11.09(a)	No	Yes; D.C. CODE § 29-802.06(g)	Yes; 805 ILL. COMP. STAT. 180/37-40(m)	Yes; IND. CODE § 23-18.1-6-4(e)	No; IOWA CODE § 489.1205(1)
Must name of protected series include name of series limited liability company?	Yes; § 202	No	No	Yes; D.C. CODE § 29-802.06(d)(1)	Yes; 805 ILL. COMP. STAT. 180/37-40(c)	Yes; IND. CODE § 23-18.1-6-7(c)(1)	Yes; IOWA CODE § 489.1201(1)
Does each protected series have same registered agent as series limited liability company?	Yes; § 203	Apparently, See EN 3	Apparently, See EN 3	Yes; D.C. CODE § 29-802.06(p)	Yes; 805 ILL. COMP. STAT. 180/37-40(f)	Yes; IND. CODE § 23-18.1-6-8(b)	Apparently, See EN 3
Can service on protected series be made by serving series limited liability company?	Yes; § 204	No	Apparently, See EN 3	Yes; D.C. CODE § 29-802.06(p) See EN 5	Yes; 805 ILL. COMP. STAT. 180/37-40(f)	Yes; IND. CODE § 23-18.1-6-8(b)	Apparently, See EN 3
Does the statute specify rules for disregarding the internal shields that protect the assets of one protected series from the creditors of another, other than a general recordkeeping requirement and a notice in the articles that protected series may exist??	Yes; § 401	No	No	No	Yes; 805 ILL. COMP. STAT. 180/37-40(b) requires filing of certificate of designation	Yes; IND. CODE § 23-18.1-5-1; I.C. § 23-18.1-6-9	No
Are there express "asset by asset" consequences for assets not properly associated with a protected series, even if the internal shields remain in place?	Yes; § 402	No	No	No	No	No	No
Does the statute specifically preclude associating property after a claim against the property has been made to avoid exposure?	Yes; § 402	No	No	No	No	No	No
Do special recordkeeping requirements apply to transfers between a series limited liability company and a protected series of the company and between protected series of the company?	Yes; § 301(b)	No	No	No	No	No	No
If the statute expressly permits associated assets to be held by a nominee, etc., does the statute limit permission in any way?	Yes; § 301(c)	No	No	No	No; 805 ILL. COMP. STAT. 180/37-40(b)	No; IND. CODE § 23-18.1-5-2	No
Does the statute address specifically the rights of judgment creditors of associated members?	Yes; 403(1)	No	No	No	No; but see EN 7	No	No; but see EN 10
Does the statute expressly and directly require membership in the limited liability company as prerequisite to being associated member of protected series? EN 2	Yes; § 103(a)(2)	Yes; ALA. CODE § 10A-5A-11.01(c)	No	No	No	No; but implied by IND. CODE § 23-18.1-8(b)	No; but implied by IOWA CODE § 489.1204
Does the statute expressly address how provisions in the limited liability company statute apply at the protected series level?	Yes; §§ 103, 107(c)	Yes	No	Yes; D.C. CODE § 29-802.06	Yes; 805 ILL. COMP. STAT. 180/37-40(j)	No	Yes; IOWA CODE § 489.1201(7)
Does the statute address whether associated members of a protected series have veto rights to operating agreement amendments affecting the protected series?	Yes; § 304(d)	No	No	No	No	No	Yes; IOWA CODE § 489.1202(3)(d)(1)

Kansas	Missouri	Montana	Nevada	Oklahoma	Tennessee	Texas	Utah	Puerto Rico
Yes; KAN. STAT. ANN. § 17-76,143(b)	Yes; MO. REV. STAT. § 347.039(2) & (4)	Yes; MONT. CODE ANN. § 35-8-202(1)(h) & (j). See EN 15 and 16	No	No	No TENN. CODE ANN. §48-249-309(b)(2)	No	No; UTAH CODE ANN. 1953 § 48-3a-1202(2)	No
No, however see EN 11	No, however see FN 13	No	No	No	No	No; but see Texas EN 21 and 22	No, however see EN 24	No
Yes; KAN. STAT. ANN. § 17-76,143(e)	Yes; MO. REV. STAT. § 347.186(4)(d) & (4)(3)	No	No	Yes; 18 OKLA. STAT. ANN. § 2054.4(j)	No	Yes; TEX. BUS. ORGS. CODE § 101.616(1)	Yes; UTAH CODE ANN. 1953 § 48-3a-1208(3)	No
Yes; KAN. STAT. ANN. § 17-76,143(c)	Yes; MO. REV. STAT. § 347.186(3)	No	No	No	No	No	Yes; UTAH CODE ANN. 1953 § 48-3a-1201(1)	No
Yes; KAN. STAT. ANN. § 17-76,143(f)	Yes; MO. REV. STAT. § 347.186(4)(4)	Apparently, See EN 3	Apparently, See EN 3	Apparently, See EN 3	Apparently, See EN 3	Apparently. See EN 3 and 23	No	No
Yes; KAN. STAT. ANN. § 17-76,143(f)	Yes; MO. REV. STAT. § 347.186(4)(4)	Apparently, See EN 3	Apparently, See EN 3	Apparently, See EN 3	Apparently, See EN 3	Apparently. See EN 3 and 23	No	Unclear, presumably so.
Yes, a certificate of designation is required. KAN. STAT. ANN. §17-76,143(d)	Yes; Articles of Organization must identify each Protected Series with limited liability MO. REV. STAT. § 347.186(1)(f)	No	No	No	No	No	Yes; UTAH CODE ANN 1953 §48-3a-1201(2)	No
No	No	No	No	No	No	No	No	No
No	No	No	No	No	No	No	No	No
No	No	No	No	No	No	No	No	No
No	No	No	No	No	No	No; TEX. BUS. ORGS. CODE § 101.603(a)	No	No
No; but see EN 12	No; but see EN 14	No	No	No	No	No	No; however see EN 25	No
No; but perhaps implied by KAN. STAT. ANN. § 17-76,143(l)	No	No	No	No	No; however see EN 20	No	No	No
Yes; KAN. STAT. ANN. § 17-76,143(j)	Yes; MO. REV. STAT. § 347.186(5)(4)	Yes; MONT. CODE ANN. § 35-8-107(2)	No	No	No	Yes; TEX. BUS. ORGS. CODE §§ 101.609 and 101.617	Yes; UTAH CODE ANN. 1953 § 48-3a-1201(6)	No
No	No	NO	No	No	No	No	No	No

APPENDIX 1. ALL JURISDICTIONS OF SELECTED UNIFORM LAWS V. STATE LAW COMPARISON—JANUARY 8, 2017							
Provisions Protecting Creditors or Providing Certainty	LLCPSA	Alabama	Delaware	District of Columbia	Illinois	Indiana	Iowa
Does the statute contain rules for protected series that the operating agreement cannot vary?	Yes; § 109	Yes, but limitation applies only to requirements for maintaining internal shields; ALA. CODE § 10A-5A-1.08(c)(15) (referring to ALA. CODE § 10A-5A-11.02(b)).	No	Yes; D.C. CODE § 29-802.06(k)-(q)	No	Yes; IND. CODE § 23-18.1-1-5	No
Does the statute provide for registering foreign protected series to do business in the state?	Yes; § 604	No	No	Yes; D.C. CODE § 29-802.06(f)	Yes; 805 ILL. COMP. STAT. 180/37-40(o)	Yes; IND. CODE § 23-18.1-3-1; IND. CODE § 23-18.1-7-1; IND. CODE § 23-18.1-7-2	Yes; IOWA CODE § 489.1206
Does the statute require foreign protected series doing business in the state to comply with same name requirements as domestic protected series?	Yes; § 604(c)	No	No	No	No; 805 ILL. COMP. STAT. 180/37-40(c)	Yes; IND. CODE § 23-18.1-7-1	No
Does the statute require a foreign protected series to disclose either (i) information regarding the foreign series limited liability company and other foreign protected series of the company comparable to the information available from the public record regarding a domestic protected series or (ii) the identity of an individual who has this information?	Yes; §§ 605, 604(b)(2)	No	No	No; D.C. CODE §§ 29-802.06(f)	Yes; 805 ILL. COMP. STAT. 180/37-40(o)	Yes; IND. CODE § 23-18.1-7-1	Yes; IOWA CODE § 489.1206
Does the statute permit a court to use enacting state's piercing law on foreign protected series if foreign state's law "repugnant" to the public policy of the enacting state?	Yes; § 601(b)	No	No	No	No	No	No
Does the statute expressly address whether the series limited liability company may own an interest in a protected series of the company?	Yes; § 303(a)	No	No	No	No	No	No

EN 1 The authors believe it is implicit in the statutes as the Protected Series, unless perhaps it has under the applicable statutes elected to be an entity, is a part of the Series LLC and cannot survive the "death" of the Series LLC. Surprisingly this is not made explicit.

EN 2 Although a number of the statutes provide that the disassociation of a member from a Protected Series does not by itself disassociate the member from the Series LLC, an explicit requirement that a member associated with the Protected Series had to be a member of the Series LLC was not found. Several statutes permit a Series LLC to associate members with a Protected Series which implicitly means the associated member must be a member of the Series LLC.

EN 3 The statute does not provide for a registered agent to be appointed for the Protected Series. Therefore the registered agent of the Series LLC must be the registered agent for each Protected Series as well and service on such registered agent is service on the Protected Series.

EN 4 D.C. CODE §29-802.06(h) The articles of organization may provide that a series be treated as a separate entity distinct from the limited liability company, other series or the limited liability company, or the members of the limited liability company.

EN 5 D.C. CODE § 29-802.06(d)(2) Strangely even though D.C. CODE § 29-802.06(p) provides for the same registered agent for Series LLC and each Protected Series, this section provides for the certificate of designation to provide name and address of registered agent if different from that of the Series LLC. Perhaps this was meant to apply to foreign Series LLCs and Protected Series?

EN 6 805 ILL. COMP. STAT. 180/37-40(b) A series with limited liability shall be treated as a separate entity to the extent set forth in the articles of organization.

EN 7 805 ILL. COMP. STAT. 180/37-40(j) Except to the extent modified by this Section, the provisions of this Act, which are generally applicable to limited liability companies, ... shall be applicable to each particular series with respect to the operation of such series.

EN 8 IND. CODE § 23-18.1-4 A series with limited liability must be treated as a separate entity to the extent set forth in the articles of organization of the master limited liability company.

EN 9 IOWA CODE § 489.1201(3) A series meeting all of the conditions of subsection 2 shall be treated as a separate entity to the extent set forth in the certificate of organization.

EN 10 IOWA CODE § 489.1201(7) Except to the extent modified by this article, the provisions of this chapter which are generally applicable to a limited liability company ... shall be applicable to each series with respect to the operations of such series.

EN 11 KAN. STAT. ANN. § 17-76,143(b) A series with limited liability shall be treated as a separate entity to the extent set forth in the articles of organization.

EN 12 KAN. STAT. ANN. § 17-76,143(j) Except to the extent modified in this section, the provisions of this act which are generally applicable to limited liability companies ... shall be applicable to each particular series with respect to the operation of such series.

EN 13 MO. REV. STAT § 347.186(2)(4) A series with limited liability shall be treated as a separate entity to the extent set forth in the articles of organization.

EN 14 MO. REV. STAT § 347.186.1(4) Except as modified by this section, the provisions of this chapter which are general applicable to limited liability companies ... shall be applicable to each particular series with respect to the operating of such series.

Kansas	Missouri	Montana	Nevada	Oklahoma	Tennessee	Texas	Utah	Puerto Rico
No	Yes; MO. REV. STAT. § 347.039(3); MO. REV. STAT. § 347.186(6)(7); MO. REV. STAT. § 347.186(7)	Yes; MONT. CODE ANN. §§ 35-8-202(3) and 35-8-109	Yes; NEV. REV. STAT. § 86.286(7); see EN 17	No; however see EN 19	Yes; TENN. CODE ANN. § 48-249-309(c)-(h)	Yes, but limitation applies only to requirements for maintaining internal shields; TEX. BUS. ORGS. CODE § 101.054(a)(2) (referring to TEX. BUS. ORGS. CODE § 101.602(b))	No	Yes; but very limited 14 P.R. LAWS ANN. § 3967(c) and (h)
Yes; KAN. STAT. ANN. § 17-76,143(o)	Yes; MO. REV. STAT. § 347.153	Yes; MONT. CODE ANN. § 35-8-1003 requires identification of each Protected Series	No	No	Yes; TENN. CODE ANN. § 48-249-309(i)	No	No	Yes; 14 L.P.R.A. § 3967(m); see EN 27
No	Yes; MO. REV. STAT. § 347.186(3)	Yes; but statute has no name requirements for Protected Series	Yes; but statute has no name requirements for Protected Series	Yes; but statute has no name requirements for Protected Series	Yes	No	No	No
Yes; KAN. STAT. ANN. § 17-76,143(b)	Yes; MO. REV. STAT. § 347.153	Yes; MONT. CODE ANN. § 35-8-108 combined with § 35-8-202	Yes; NEV. REV. STAT. § 86.544.2(i); see EN 18	Yes; 18 OKLA. STAT. ANN. § 2054.4(m)	No	No	Yes; UTAH CODE ANN. 1953 § 48-3a-1209	Yes; 14 P.R. LAWS ANN. § 3967(m)
No	No	No	No	No	No	No	No	No
No	No	No	No	No	No	No	No	No

- EN 15 MONT. CODE ANN. § 35-8-202(1)(h) Requires the operating agreement of each Protected Series be in writing and filed. In addition, although not a requirement for formation, § 35-8-205(3) requires naming all Protected Series in filings with secretary of state.
- EN 16 MONT. CODE ANN. § 35-8-202(1)(j) Requires a statement setting forth the relative rights, powers, and duties of each series of members or indicating that the relative rights, powers, and duties of each series of members will be set forth in the operating agreement or established as provided in the operating agreement.
- EN 17 NEV. REV. STAT. ANN. § 86.286.7 OPA may not limit or eliminate liability for any conduct that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.
- EN 18 NEV. REV. STAT. ANN. § 86.161.1(e)
- EN 19 18 OKLA. STAT. ANN. § 2054.4(h) The statute does have certain nonwaivable provisions concerning distributions and on ability of district court to decree termination of the Protected Series.
- EN 20 TENN. CODE ANN. § 48-249-309(a) Statute provides that the LLC documents may establish one or more designated series of members having separate rights, powers or duties with respect to specified property, etc. This seems to implicitly provide that the member is a member of the Series LLC that is designated.
- EN 21 TEX. BUS. ORGS. CODE § 101.609 (a) To the extent not inconsistent with this subchapter, this chapter applies to a series and its associated members and managers. (b) -reference to "limited liability company" ... means the "series" ... (c) grants certain rights and for purposes of specific provisions "(1) a reference to "entity", "domestic entity" or "filing entity" includes the "series".
- EN 22 TEX. BUS. ORGS. CODE § 101.622 For purposes of this chapter and Title 1, a series has the rights, powers, and duties provided by this subchapter to the series but is not a separate domestic entity or organization.
- EN 23 TEX. BUS. ORGS. CODE Form 313 Form 313 entitled "General Information (Application for Registration of a Foreign Series Limited Liability Company)" provides a Series LLC treated as a single legal entity under the laws of the jurisdiction of its organization is treated as a single legal entity for purposes of registration. One registered agent for the Series LLC is required. This would indicate to the authors that service or process on the registered agent. Is service of process on its Protected Series.
- EN 24 UTAH CODE ANN. 1953 § 48-3a-1201 (3) A series meeting all of the conditions of Subsection (2) shall: (a) be treated as a separate entity to the extent set forth in the certificate or organization.
- EN 25 UTAH CODE ANN. 1953 § 48-3a-1201(6) Except to the extent modified by this part, the provisions of this chapter which are generally applicable to a limited liability company - shall be applicable to each series with respect to the operations of such a series.
- EN 27 14 P.R. LAWS ANN. § 3967(m) Provides for registration of foreign Series LLC.

ENDNOTES

- J. Leigh Griffith is the ABA Tax Section observer to the Uniform Laws Commission Drafting Committee of "The Limited Liability Company Protected Series Act." He is recognized in Best Lawyers in America in the categories of Government Relations Practice, Litigation & Controversy—Tax, and Tax Law. Alberto R. Gonzales is former Counsel to the President and the United States Attorney General under the George W. Bush Administration. The authors wish to acknowledge the assistance of Rebecca Loveday (J.D. Candidate 2017, University of Tennessee College of Law).
- This article will be published in fuller form in *The Journal of Corporate Law* in Spring 2017, Alberto R. Gonzales and J. Leigh Griffith, *Challenges of Multi-State Series and Framework for Judicial Analysis*, 42 J. CORP. L. (forthcoming 2017).
- Proposed Reg. §301.7701-1(a)(5). Reliance on a Proposed Regulation is often considered to be protected as a safe harbor against future Treasury enforcement where other guidance does not exist. See Mitchell Rogovin & Donald Korb, *The Four R's Revisited: Regulations, Rulings, Reliance and Retroactivity in the 21st Century: A View from Within*, TAXES, at 22, Aug. 2009 ("...taxpayers generally may not rely on proposed regulations for planning purposes, except if there are no applicable final or temporary regulations in force and there is an express statement in the proposed regulations that taxpayers may rely on them currently."). This Proposed Regulation states it will be effective when finalized and provides for grandfathering of certain Series LLCs that are treating the Series LLC and all of its linked Protected Series as a single tax reporting entity.
- It should be noted that until the Proposed Regulations are finalized and taxpayers are required to follow them, the Series LLC itself may report the income, gain and loss of all of the Protected Series. While this can create a very complex tax return, in some cases it can be used as a form of mixing bowl to mitigate the application of some passive loss and at risk limitation rules in appropriate circumstances.
- Series LLCs and Cell Companies, 75 FR 55699-01 (proposed Sept. 14, 2010) (to be codified at 26 C.F.R. Part 301).
- The collateral consequence of this is a failure of the internal liability shields for Texas taxes (perhaps for all Series LLCs with Protected Series doing business in Texas) and perhaps, for Texas Series LLCs, taxes of other states. Potentially, the activities of one Protected Series may generate tax nexus for the other Protected Series if Texas law were to be applied by another state. This makes a Texas Series LLC even more difficult to use in multi-state applications than those formed under the statutes of other states.
- J. Leigh Griffith & James E. Long, Jr., *Advisory Board Analysis Series LLCs—December 2013 Update on Recent State Legislative and Taxation Developments*, TAX MANAGEMENT MEMORANDUM (Mar. 24, 2014).
- Minn. Stat. Ann. §322 B.03, subd. 44.
- Del. Code Ann. tit. 6, §18-215.
- Id.*
- For example, Delaware (Del. Code Ann. tit. 6, §18-215(c)); District of Columbia (D.C. Code §29-802.06(j)); Illinois (805 Ill. Comp. Stat. Ann. 180/37-40(b)); Indiana (Ind. Code §23-18.1-4-4 (effective Jan. 1, 2017)); Kansas (Kan. Stat. Ann. §17-76,143(b)); Missouri (Mo. Ann. Stat. §347.186.2(4)); Texas (Tex. Bus. & Comm. Code §101.6050); and Utah (Utah Code Ann. §48-3a-1201(3)).
- D.C. Code §29-802.06(h).
- 805 Ill. Comp. Stat. Ann. 180/37-40(b); Ind. Code §23-18.1-4-4(a) (effective Jan. 1, 2017); Iowa Code Ann. §489.1201(7); Kan. Stat. Ann. §17-76.143(b); Mo. Ann. Stat. §347.186.2(4); and U.C.A. 1953 §48-3a-1201(6).
- Ind. Code §23-18.1-4-4(a) (effective Jan. 1, 2017).
- Ala. Code §10A-5A-11.01; Del. Code Ann. tit. 6, §18-215; Mo. Ann. Stat. §347.039; Nev. Rev. Stat. Ann. §86.1255; 18 Okla. Stat. §18-2054.4B; P.R. Laws Ann. 14 §3967 (2009); Tenn. Code Ann. §48-249-309.
- Del. Code Ann. tit. 6, §18-215(c); D.C. Code §29-802.06; 805 Ill. Comp. Stat. 190/37-40(b); Ind. Code Ann. §23-18.1-4-4(a) (effective Jan. 1, 2017); Kan. Stat. Ann. §17-76,143(b); Mo. Ann. Stat. §347.186.2(4); Tex. Bus. & Comm. Code §101.605(1); Utah Code Ann. §48-3a-1201(3)(b).
- See U.C.C. §1-201(b)(25) definition of "organization"; U.C.C. §1-201(b)(27) definition of "person."
- 805 Ill. Comp. Stat. Ann. 180/37-40(d); Kan. Stat. Ann. §17-76, 143(d); and Mo. Ann. Stat. §347.186(4) each provides the Protected Series existence begins upon the filing of the certificate of designation or the articles of organization, as applicable.
- D.C. Code §29-803.06(b)(4) requires filing with the Mayor's office as a condition of the internal liability shields.
- U.C.C. §9-102(a)(71).
- Mont. Code Ann. §35-8-202 requires the filing of the operating agreement of each Protected Series.
- See Permanent Editorial Board Commentary No. 17.
- Id.*
- 11 U.S.C. §109(a).
- 11 U.S.C. §101(41).
- 11 U.S.C. §101(15).
- Under the bankruptcy code, the term "corporation" includes (i) an association having a power or privilege that a private corporation, but not an individual or a partnership, possesses; (ii) a partnership association organized under a law that makes only the capital subscribed responsible for the debts of such association; (iii) a joint-stock company; (iv) an un-incorporated company or association; or (v) a business trust; but ... does not include a limited partnership. Thus, the definition purports to be an illustrative list, not an exhaustive list. 11 U.S.C.A. §101 (West).
- In re ICLNDS Notes Acquisition, LLC*, 259 BR 289, 202 (Bankr. N.D. Ohio 2001).
- 11 U.S.C. §101(9)(A)(ii).
- 11 U.S.C. §101(9)(A)(iv).
- 11 U.S.C. §101(9)(B).
- Senate Report No. 95-989.
- The term "person" includes individual, partnership and corporation. 11 U.S.C.A. §101 (West).
- See Amanda J. Bahena, *Series LLCs: The Asset Protection Dream Machines?*, 35 J. CORP. L. 799, 806-807 (2010).
- In re Crush Real Estate Series LLC Sole Beneficiary of 917 East Broadway Realty Trust*, No. 1:15-BK-12105 (Bankr. E.D. Mass. May 28, 2015) (Chap. 11 voluntary petition).
- In re Crush Real Estate Series LLC Sole Beneficiary of 427 East Sixth Street Realty Trust*, No. 1:15-BK-10237 (Bankr. E.D. Mass. Jan. 22, 2015) (Chap. 11 voluntary petition).
- In re Crush Real Estate Series LLC Sole Beneficiary of 427 K Street Realty Trust*, No. 1:15-BK-12106 (Bankr. E.D. Mass. May 28, 2015) (Chap. 11 voluntary petition).
- Allan G. Donn, Bruce P. Ely, Steven G. Frost, Robert R. Keatinge & Bahar A. Schippel, *Series LLCs*, ALI CLE, Mar. 18, 2016.
- In re General Growth Properties, Inc.*, No. 09-11977 (ALG) (Bankr. S.D.N.Y., Apr. 16, 2009).
- For an excellent discussion of *General Growth Properties, Inc.* and its ramifications to the structured finance market, see Committee on Structured Finance, *Structuring Commercial Mortgage Securitization Special Purpose Entities After General Growth Properties*, NEW YORK CITY BAR (July 2010), available online at www.nycbar.org/pdf/report/uploads/20071978-StructuringCommercialMortgageSecuritizations.pdf.
- Jennifer Avery, et al., *Series LLCs: Nuts and Bolts, Benefits and Risks, And The Uncertainties That Remain*, 45 Tex. J. Bus. L. 9, 23-25 (2012).
- Id.*, at 24 (discussing the "Augie/Restivo Banking" test and the "Auto-Train" test for substantive consolidation).
- Dominick T. Gattuso, *Series LLCs—Let's Give the Frog a Little Love*, 17 BUS. L. TODAY 33, 37 ("Substantive consolidation frequently occurs where creditors extended credit to entities with interrelated activities.").
- See Michelle Harner, Jennifer Ivey-Crickenberger, & Tae Kim, *Series LLCs: What Happens When One Series Fails? Key Considerations and Issues*, BUS. L. TODAY, 3 ("...series LLC statutes require each series to maintain separate books and records with separate accounting of their assets and liabilities. This often is a factor considered under substantive consolidation.").
- The Drafting Committee for the Limited Liability Company Protected Series Act of the National Conference of Commissioners on Uniform State Laws is considering prohibiting the Series LLC or a Protected Series from holding title to assets as a nominee for this purpose as well as to minimize nefarious games that some may try to play.

- ⁴⁴ J. Leigh Griffith & Alberto R. Gonzales, *Series LLCs Part 1—Current Status, Multi-State Issues and Potential Uniform Limited Liability Company Protected Series Act*, TAXES, at 73, Oct. 2016.
- ⁴⁵ Bryan F. Egan, *Choice of Entity Decision Tree After Margin Tax and Texas Business Organizations Code*, 42 TEX. J. BUS. L. 71, 209 (2007).
- ⁴⁶ Since states differ in their approach to creation and recognition of Series LLCs, one can infer that states will also differ in their interpretation of these doctrines as applied to Series LLCs.
- ⁴⁷ Note, the liability would be at the entity level, not the member level. Series LLCs are limited liability companies and are entitled

to the protection for their members just as a regular LLC.

- ⁴⁸ Adrienne Randle Bond & Allen Sparkman, *The Series LLC: A New Planning Tool*, 45 TEX. J. BUS. L. 57, 83–84 (Fall 2012). In addition, the discussions of the Drafting Committee for the Limited Liability Company Protected Series Act seem to assume that if a state passes an enabling statute for the Series LLC that any Series LLC and the associated Protected Series formed in another state would be honored—at least if it properly qualified to do business in the state foreign to its organization.
- ⁴⁹ All states that have passed enabling Series LLC statutes appear to provide for foreign Series

LLC registration and have something regarding Protected Series.

- ⁵⁰ *Kurz v. AMCP-1, LLC*, No. 1301, 2016 WL 547146 (Md. Ct. Spec. App. Feb. 10, 2016).
- ⁵¹ *Id.*, at *7.
- ⁵² *Id.*
- ⁵³ J. Leigh Griffith & Alberto R. Gonzales, *Supra* note 44, at 73.
- ⁵⁴ *Id.*
- ⁵⁵ LIMITED LIABILITY COMPANY PROTECTED SERIES ACT (Proposed Official Draft July 2016).
- ⁵⁶ The Drafting Committee continues its work and the Draft Act will continue to evolve.
- ⁵⁷ J. Leigh Griffith & Alberto R. Gonzales, *Supra* note 44, at 69.

Tax Trends

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executive order has basically put a halt to publication of significant IRS regulations, rulings and procedures, including the many regulatory projects on which tax professionals are begging for guidance. It is assumed that internal progress on these projects continues, with promulgations being held up until the new team has a chance to review these projects and perhaps seek exemptions from the two for one requirement. It would probably be very difficult for the IRS to pay for any new regulations by repealing old ones of equivalent cost, and not an outcome that most tax practitioners would likely favor. Indications are that private letter rulings and routine guidance will not be affected by the order.

On February 24, 2017, President Trump signed an additional executive order directing federal agencies to establish regulatory reform task forces to assess whether regulations are burdensome to the economy and job creation. Certainly, some tax regulations can be viewed as burdensome as they try to implement tax laws, but it remains to be seen what additional impact this executive order might have on current tax regulations and future IRS regulatory activity.

The Administration has not been alone in its look at IRS regulations. Congress has decided to use some seldom used Congressional review authority to take a look at late term actions of the Obama Administration. Legislation has been introduced in Congress to roll back the Code Sec. 385 regulations that were finalized in the final weeks of the Obama Administration. The Code Sec. 2704 proposed regulations are also not viewed with great favor by Congress, but those regulations were never finalized and, at this point, may never be finalized. The corporate inversion regulations are also coming under Congressional scrutiny.

Summary

Hopefully, before too much more of 2017 passes, the fog will clear and we will start to get a better idea of what the tax legislative and regulatory environment might look like going forward. The IRS will be able to return to its slow but steady regulatory process, perhaps with even a few more funds in the budget to speed up the pace a bit. Tax reform may fulfill the initial post-election optimism that it might actually happen in 2017, even if some of the more grandiose ideas have to be scaled back somewhat to achieve the compromises necessary to finally get something enacted.

Family Tax Planning

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taken a stepped up basis of \$1.2 million in the stock, saving \$280,000 when the stock was sold.

Retaining Powers over Transferred Assets

A basis step up is available not only for property owned at death but also for property transferred during life that is included in the gross estate under one of the estate tax string provisions (Code Secs. 2035–2038 and 2042). Historically, taxpayers tried to avoid application of these sections to minimize estate inclusion. Assuming they do not have a taxable estate, however, taxpayers may now wish to intentionally trigger one of these provisions. By doing so they can transfer property during life and still get a basis step up for the property at death under Code Sec. 1014(b)(9).

General Power of Appointment for the Surviving Spouse

As explained above, property transferred during life is included in the gross estate if the transferor retains too much control over it.