10-2016

Series LLCs Part 1 — Current Status, Multi-State Issues and Potential Uniform Limited Liability Company Protected Series Act

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Recommended Citation
TAXES - THE TAX MAGAZINE, 57-70, 2016

Series LLCs Part 1—Current Status, Multi-State Issues and Potential Uniform Limited Liability Company Protected Series Act

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Leigh Griffith and Alberto R. Gonzales examine Series LLCs and discuss the current state law developments, the popularity of Series LLCs and the internal liability shield requirements for Series LLCs.

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Introduction

The Series Limited Liability Company ("Series LLC"), a variation of the traditional limited liability company (LLC), is the newest entity enterprise on the business scene today.[1] Within this legal entity, separate "series" or "cells" can be created and established under the umbrella of a single LLC. Despite being under one "umbrella," each of these cells has characteristics that make it both separate from one another as well as from the Series LLC itself. There is not yet a common term for these distinct units although the term series or cell is often used. The Drafting Committee for the Limited Liability Company Protected Series Act[2] of the National Conference of Commissioners on Uniform State Laws ("NCCUSL") ("NCCUSL Drafting Committee") refers to them as "Protected Series" and that term will be used herein.[3] Each Protected Series has associated with it specified members and assets, and statutorily—due to what have been called "internal liability shields"—if the statutory specified requirements are met, the debts and obligations of one Protected Series are neither the debts or obligations of any other Protected Series nor of the Series LLC itself. The defining features that set Series LLCs apart from other

entities are the internal liability shields and the ability to have different associated members and/or different ownership interests of members among the various Protected Series. Although cells have existed in trusts for many years,[4] and the concept is found in the Statutory Trust Entity Act,[5] the internal liability protection and potentially separate owners or beneficiaries within a business entity are unique concepts for American jurisprudence and widely used forms of business entities. The result is a single legal entity with owners associated with each Protected Series, assets associated with each Protected Series and each Protected Series functioning in a manner analogous to a separate legal entity within the Series LLC.

Part I of this article describes the characteristics of Series LLCs, the current applicable current state law developments, the current popularity of Series LLCs and the current internal liability shield requirements for Series LLCs. Part II will explore the existing impediments to greater use of Series LLCs including taxation, bankruptcy and Uniform Commercial Code matters, issues concerning multi-state activities and how these matters are addressed by the NCCUSL Drafting Committee's efforts in drafting The Limited Liability Company Protected Series Act.

The Development of LLCs and the Segue to Series LLCs

The development of legislation for LLCs, itself another relatively new business entity, may be informative in predicting the development of Series LLCs statutes. LLCs first made an appearance in the late 1970s with Wyoming passing its LLC statute in 1977.[6] Prior to this, a corporation was required to insulate all owners of an entity from the liabilities of the entity.[7] While LLCs share the limited liability aspect with corporations, LLCs did not and do not have the double federal taxation issue. This is because a multi-owner LLC could be structured under the pre-check the box federal tax law to be treated as a partnership. Now, with check the box rules under Reg. §301.7010-3,[8] the multi-owner domestic LLC is automatically taxed as a partnership unless the LLC affirmatively elects to be taxed as a corporation.[9] The LLC combined the best features of a corporation (its limited liability shield for all owners) and the best features of a partnership (its flow-through tax treatment, special allocations and profits interests) into one single business organization.[10] After the IRS found that a Wyoming LLC could be taxed as a partnership in 1980, the use of LLCs began to grow and started a chain of events that would eventually lead LLCs to become the most popular business entity today. [11,12]

In 1982, Florida was the next to pass LLC legislation.[13] During this period, the IRS was unfavorably inclined toward these entities and issued Proposed Regulations to tax any limited liability organization under state or local law as a corporation.[14] However, in 1983, these Proposed Regulations were withdrawn.[15] In 1988, Rev. Rul. 88-76[16] followed and stated that, despite having limited liability shields, Wyoming LLCs would be taxed as partnerships based on a four-factor test of which limited liability was only one factor.[17] This was a pivotal point in the evolution of LLCs. After this revenue ruling was released, other states began enacting legislation.[18] In 1990, two states passed legislation.[19] In 1991, four more states passed legislation.[20] In 1992, 10 more states passed legislation.[21] In 1993, 18 additional states passed legislation, bringing the total to 36 states with LLC legislation.[22]

By the end of 1996, after the IRS promulgated the "check the box" regulation, all 50 states had enacted LLC legislation.[23] In this same year, NCCUSL belatedly promulgated the Uniform Limited Liability Company Act ("ULLCA"), which aspired to provide a template for a uniform organization and operations of LLCs and limited liability.[24] However, NCCUSL's Uniform Act arrived to the party late and, to date, only 15 jurisdictions have enacted substantive versions of the ULLCA.[25] Notwithstanding, the initial lack of a Uniform Act, LLCs quickly became the most popular choice of business entity and that remains true today.

It took almost 20 years before all 50 states had adopted some type of LLC legislation, and a similar but somewhat slower pattern of growth could occur with Series LLCs as well.[26] The pivotal moment in LLC statutory growth was Rev. Rul. 88-76 providing tax certainty. The speed of state adoptions thereafter largely mooted the concerns as to whether an LLC doing business in a state without an LLC statute would enjoy limited liability. The pivotal moment for Series LLCs may be the finalization of the Proposed Regulations and the release of the Limited Liability Company Protected Series Act either as a Uniform Law or as a model act.

Since the first Series LLC statute emerged in Delaware in 1996,[27] 13 states and two other jurisdictions, D.C. and Puerto Rico, have passed Series LLC legislation.[28] As more states follow suit, it will become easier for Series LLCs to operate confidently on multi-state bases. With growing state acceptance, it should become clear to the courts that states do not have compelling public policy issues with the internal liability shields if there

is adequate public disclosure. Furthermore, with more Series LLCs also comes more cases before the courts regarding their internal liability shields in the context of the development of policy with respect to such internal limited liability shields and guidelines will emerge. As courts provide rulings, greater legal certainty will result and business owners can feel safer operating a Series LLC in various foreign states. The popularity of Series LLCs may further increase when the IRS finalizes the Regulations and provides other guidance that further clarify the application of various other taxes applicable to the Series LLCs. Finally, issuance or adoption of a model Series LLC law or a uniform law by NCCUSL could also provide better transparency and greater clarity with respect to bankruptcy and Uniform Commercial Code application. All of these factors combined may help stimulate the growth of this new entity and make the Series LLC a popular and mainstream business entity, particularly in the context of affiliated groups and regulated industries.

Characteristics of a Series LLC

The preamble to the Proposed Regulations[29] providing guidance for the federal taxation of Series LLCs describes a Series LLC as the following:

> In general, series LLC statutes provide that an LLC may establish separate series. Although series of a series LLC generally are not treated as separate entities for state law purposes and, thus, cannot have members, each series has 'associated' with it specified members, assets, rights, obligations, and investment objectives or business purposes. Members' association with one or more particular series is comparable to direct ownership by the members in such series, in that their rights, duties, and powers with respect to the series are direct and specifically identified. If the conditions enumerated in the relevant statute are satisfied, the debts, liabilities, and obligations of one series generally are enforceable only against the assets of that series and not against assets of other series or of the series LLC.[30]

Delaware defines its series LLC as the following:

> A limited liability company agreement [that] establish[es] or provide[s] for the establishment of one or more designated series of members, managers, limited liability company interests or assets. Any such series may have separate rights, powers or duties with respect to specified property or obligations of the limited liability company or profits and losses associated with specified property or obligations, and any such series may have a separate business purpose or investment objective.[31]

The structure of a Series LLC with its separate Protected Series is often analogized to a parent corporation and its subsidiaries, especially in those instances where there is a single member or substantially the same members of the Series LLC each having the same as or similar proportionate association with each Protected Series.[32] Even in this setting, one key difference is that, instead of distributions flowing through the parent-subsidiary structure, distributions in a Series LLC are made directly to the associated members. Income, gain and loss are also allocated directly to the associated members of the Protected Series as opposed to the Series LLC itself. Additionally, some associated members will have varying interests in the various Protected Series and some may not even have an interest in one or more, or even any, of the Protected Series. Economically, the Series LLC itself may or may not even be financially "associated" with one or more or even any of the Protected Series which is of course an impossibility in a parent-subsidiary setting. Only those members "associated" with each specific Protected Series have an economic interest in such specific Protected Series and perhaps almost have the full control of the operations of the Protected Series.[33] The Series LLC itself may have limited or no control over the governance of a Protected Series.

In another analogy which the authors prefer, the Series LLC could be described as the legal entity "wrapper" in which the different Protected Series exist with separate rights, powers or duties with respect to specified property or obligations of the Series LLC, different profits and losses associated with such specified property or obligations, potentially different associated members and may have different business purposes. Much as a box of chocolates contains separate pieces of chocolates within, the Series LLC contains multiple Protected Series. The internal shields separate each of the Protected Series with their different associated assets, liabilities, members and purposes and other unique aspects are found within the Series LLC just as the separate chocolates with different flavors and fillings are found in a box of chocolates.

While there are benefits of Series LLCs, confusion and concern have arisen regarding the how the Protected Series are firewalled from each other and from the Series LLC itself and the potential for using this as a means

for abuse. Conceptually, for Delaware Series LLCs that choose to voluntarily identify each Protected Series in the public filings of the Series LLC, there would largely be the same information concerning the Protected Series as that provided for a Delaware corporation.[34] In originally choosing to not include provisions for Series LLCs in the Revised Uniform Limited Liability Company Act (2006), the NCCUSL commissioners cited the conceptual difficulties with Series LLCs as one of the reasons in the Preface, stating: "How can a series be—and expect to be treated as—a separate legal person for liability and other purposes if the series is defined as part of another legal person?"[35]

The Series LLC structure is viewed by many as a fertile ground for fraud and nefarious actors and as simply too complicated for smaller businesses. For instance, California Bill SB 323, as introduced in 2011 to adopt the Revised Uniform Limited Liability Company Act, included provisions for the creation of Series LLCs (Article 12).[36] These provisions were dropped from the Bill at the request of the California Secretary of State on the grounds that the series provide "additional veils of secrecy to the LLC assets and liabilities," which "could create an avenue for an LLC to avoid legitimate responsibilities to third parties and/or members."[37] Maine, in contrast, did not include Series LLCs in the revision to its LLC law on the basis of complexity but attempted to allow foreign Series LLCs to register and do business in Maine.[38] If a foreign Series LLC qualifies to do business in Maine, it must provide in its filing a statement that the Series LLC is governed by an agreement that establishes or provides for the establishment of designated series having separate rights, powers or duties with respect to specified property or obligations of the foreign LLC or profits and losses associated with specified property or obligation.[39] Moreover, the statement must also declare whether the debts, liabilities and obligations incurred, contracted for or otherwise existing with respect to a particular series, if any, are enforceable against the assets of such series only, and not against the assets of the foreign LLC generally or any other series thereof, and whether any of the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to the foreign LLC generally or any other series therefore enforceable against the assets of such series.[40] It was the intent of the bar drafting committee to permit one or more Protected Series of a Series LLC formed under the laws of other states to properly qualify to do business in Maine and for the internal liability shields to be honored. Whether this intent is achieved is presently unclear. The drafters of the revisions to Florida's LLC Act did not permit a Series LLC to be created in Florida. The drafting committee seemed to be of a similar mind as was the drafting committee in Maine and felt it was "just too complicated for small business."[41] However, the law interestingly provides that the Florida Department of State may require each individual Protected Series of a foreign Series LLC that transacts business in Florida to make a separate application for certificate of authority, and to make such other filings as may be required for purposes of complying with specific statutory requirements as if each Protected Series were a separate foreign LLC.[42,43] Does this imply that with adequate disclosure and perhaps filings Florida courts will recognize the internal shields for a foreign Series LLC? Perhaps so if Florida courts conclude that Florida citizens and businesses that do business with a foreign Series LLC are on notice and adequately protected. The drafters of revisions to North Carolina's LLC Act for reasons unknown to the authors also decided not to include Series LLCs with the result the North Carolina LLC Act presently does not provide for the creation of Series LLCs.

The concept of Series LLCs appears to originate in the protected cell companies and trusts in the insurance world.[44] Delaware attorneys added this concept to the LLC world in 1996 with the financial markets in mind.[45] Mutual funds were then using the cells of Statutory Trusts,[46] and the greater flexibility with the contractual framework of an LLC was very appealing to mutual fund sponsors and managers. Forming a new legal entity and obtaining the various regulatory approvals, such as complying with the Securities and Exchange process for the approval to offer securities for a new mutual fund, require long lead times and are quite expensive. The ability to take an existing entity and create a "division" with "internal liability shields" held great appeal for an ever-growing family of mutual funds focused on specific strategies, markets and sized entities. A supplement for the entity could be prepared, filed and processed by the Securities and Exchange Commission (SEC) much more quickly than the creation and qualification of a new entity.

Despite the uneasiness felt in various quarters about Series LLCs, an ever-increasing number of states and jurisdictions are enacting Series LLC statutory provisions and the NCCUSL has reconsidered its stance.[47] There is now the NCCUSL Drafting Committee working on "The Limited Liability Company Protected Series Act" (formally "Series of Unincorporated Business Entities"),[48] a draft of which underwent its first reading at

the July 2014 NCCUSL meeting.[49] In this meeting, however, questions arose regarding the need or appropriateness of a series business entity. The draft was revised and underwent a second reading in July 2015 where the concern over the need for a series business entity continued with a particular focus on business entities other than Series LLCs. However, the concept of even Series LLCs remains controversial within NCCUSL.[50] More recently, the Drafting Committee met in March 2016 to continue the work on a revised draft as limited to Series LLCs,[51] and in July 2016, there was another reading of the draft before Commissioners at the NCCUSL annual meeting. At this point, it is unclear as to whether the end result will be a Uniform Law or a model act but, as will be described in Part II, a lot of thinking by knowledgeable people have gone into the drafting of an overlay to existing state LLC statutes to provide a sound framework for Protected Series' operations, greater certainty of the application of bankruptcy and UCC law, public transparency and rules to mitigate the risk of Series LLCs being the entity of choice for nefarious use.

Despite lacking a uniform set of Series LLC laws, the following 15 states and jurisdictions have enacted Series LLC legislation:

1. Alabama[52]
2. Delaware[53]
3. District of Columbia[54]
4. Illinois[55]
5. Indiana[56]
6. Iowa[57]
7. Kansas[58]
8. Missouri[59]
9. Montana[60]
10. Nevada[61]
11. Oklahoma[62]
12. Puerto Rico[63]
13. Tennessee[64]
14. Texas[65]
15. Utah[66]

As discussed above, some states that do not have Series LLC legislation such as Maine and Florida have adopted legislation to allow for registration of these entities. While Maine lacks a provision permitting the organization of Series LLCs, it does specifically provide for the registration of a foreign Series LLC with specific disclosure concerning the debts, liabilities and obligations incurred, contracted for or otherwise existing with respect to a particular series.[67] Similarly, the Florida LLC statute gives the Florida Department of State the authority to require each individual Protected Series doing business in Florida to register.[68]

As with other business entity legislation, most of the Series LLC statutes have been heavily influenced by the applicable Delaware statute to varying degrees. Delaware, however, does not require a public filing for the creation of the Protected Series. A statement in the certificate of formation that the Series LLC may create one or more Protected Series constitutes the entire mandatory public notice under the Delaware Statute as to the potential creation of Protected Series. The Certificate of Formation must also provide a notice that 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 Protected Series only.[69] In contrast, the District of Columbia and Illinois require a separate filing for the organization of each Protected Series, and an option exists for the Protected Series to elect to be treated as a separate legal entity by provisions set forth in its Articles of Organization.[70] Some states require a filing listing the name of each Protected Series if such Protected Series is to have the benefit of the internal shields, and other states require a filing but do not condition the internal liability shields on such filings. (See Table 1.)

Most states with Series LLC legislation expressly permit each Protected Series to file suit or be sued in its (the Protected Series) own name.[71]

Some states have "false series" provisions including California,[72] Minnesota, North Dakota and Wisconsin. These provisions, located in their LLC statutes, permit the series concept for LLCs and provide for the segregation of assets, liabilities and "owners,"[73] but these statutes do *not* provide for the internal liability protection among series or cells.[74] These statutes describe a category of ownership interest analogous to a series of stock. Consequently, where the express concept of cells or series exist but the express creation of internal limited liability shields is absent, the reader should assume such shields are not available for Series LLCs created in those states and may not be available for Series LLCs created in other states engaged in business in one of those states. The inference of "false series" is important because it may indicate a state's public policy not to honor internal liability shields for Series LLCs formed in other states and doing business in one of the states listed above. The members may create internal agreements among themselves including agreements as to liabilities and assets of these "false series" but it is unlikely that third parties will be bound by such agreements unless, perhaps, they know of and consent to such agreements.

TABLE 1. SELECT SERIES LLC FILING INFORMATION.

State/ Jurisdiction	Express Liability Shield for Protected Series in Statute	Must a Certificate of Designation be filed for each Potential Series to form such Protected Series?	Must the Protected Series include the Name of the Series LLC?	Is the Name of Each Individual Protected Series on Public Record?	Does the Certificate of Good Standing for the Series LLC Indicate Series LLC Status?	May a Protected Series Obtain a Good-Standing Certificate?	Is there Express Authorization for a Foreign Series LLC to Qualify to do Business?
Alabama	Yes	No	No	No			
Delaware	Yes	No	No	No	Yes	No	Yes
District of Columbia	Yes	Yes	Yes	Yes	Yes	Yes	No
Florida	–	–	–	–	–	–	Yes
Illinois	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Indiana	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Iowa	Yes	No	Yes	No	No	No	Yes
Kansas	Yes	No	Yes	Yes	Yes	No	Yes
Missouri	Yes	Yes[1]	Yes	Yes	No	No	Yes
Maine	-	-	-	-	-	-	Yes[2]
Montana	Yes	Yes[3]	Yes	Yes	Yes	No	Maybe[4]
Nevada	Yes	No	No	No	No	No	Yes
Oklahoma	Yes	No	No	No	No	No	Yes
Puerto Rico	Yes	No	No	No	No	No	Yes
Tennessee	Yes	No	No	No	No	No	Yes
Texas	Yes	See Footnote[5]	No	Yes	No	No	Yes
Utah	Yes	No	No[6]	No	No	No	Yes

ENDNOTES

1 Under Mo. Ann. Stat. §347.186.4, the Protected Series does not come into existence until the articles of organization for the Protected Series are filed. The form Articles of Organization (LLC-1 (Aug. 2013)) provides for the identification of each protected series (custom series) and provides that each separate series must file an Attachment Form LLCIA.

2 Me. Rev. Stat. 31 § 1622 (2011).

3 Montana uniquely requires the operating agreement of each series of members be in writing and must be filed with the Articles of Organization. Mont. Code Ann. §35-8-202(h).

4 The Montana Secretary of State has an "Application for Certificate of Authority for Foreign Series Limited Liability Company" revised October 1, 2013. This form requires a list naming each series member(s) along with his or her individual Operating Agreements.

5 H.B. No. 1624 effective September 1, 2013, amending Tex. Bus. & Com. Code §71.002(2)(H) requires each protected series doing business in Texas under a name other than the name of the LLC, for the LLC to file an assumed name certificate for the protected series.

6 Effective January 1, 2014, the name of the potential series must include the name of the Series LLC. Utah Code Ann. §48-3a-1201. Pre-existing Series LLCs had until January 1, 2016, to comply with such provision. Utah Code Ann. §48-3a-1406.

Current Popularity of Series LLCs

Although early articles and web bulletins may have been overly optimistic or exaggerated in their estimations, the current number of Series LLCs and Protected LLCs that have been created is at least in the tens of thousands. This is an impressive amount, especially considering the number of states that presently lack Series LLC legislation and the relatively few years the enabling legislation has been enacted in most states. Even in states with their own statutes, many states' Secretary of States offices, as demonstrated in the tables and footnotes below, do not differentiate filings for Series LLCs versus regular LLCs.[75] An informal poll of the Secretaries of State and other appropriate office of the jurisdictions that have passed Series LLC enabling legislation was undertaken in February and March 2016 by one of the authors to update the information the author similarly obtained in November 2013. At this time, updated information has been received from Alabama, Delaware, District of Columbia, Illinois, Iowa, Tennessee, Texas and Utah through the end of 2015 and Delaware through 2014. If not updated, the 2013 responses are used and noted in Table 2.

By the end of 2015, it appears that over 38,000 Series LLCs had been formed with an unknown number of Protected Series for each.[76] It appears that the total number materially increases each year. Illinois, which requires filings for each Series and Protected Series and is therefore an excellent source of data, shows the progressive popularity of Series LLCs. According to the Illinois Secretary of State, Illinois had 6,310 active Series at the end of 2012, 6,443 at the end of 2013, 7051 at the end of 2014 and

9,076 at the end of 2015 (a 28.7-percent increase in 2015 over 2014).[77] The number of active Protected Series in Illinois was 16,971 at the end of 2012, 19,963 at the end of 2013, 23,818 at the end of 2014 and 26,875 at the end of 2015 (a 12.8-percent increase in 2015 over 2014).[78] In three years, the number of Illinois active Series LLCs increased by 2,766 (a 30.5-percent increase) and the number of Protected Series increased by 9,904 (a 36.9-percent increase). Although the absolute numbers are small, perhaps more surprising is Tennessee's positive experience and the low activity in Texas. (See Table 3.)

In Tennessee in 2015, much to the surprise of the authors, only 171 limited partnerships were formed in Tennessee and 122 foreign limited partnerships qualified to do business in Tennessee for the first time.[79] The Secretary of State indicates that 2.35 Series LLCs were formed or qualified to do business in Tennessee for every one limited partnership that was formed or qualified to do business in Tennessee. This relative level of activity was unexpected and, to some extent, may reflect business people checking a box on the Secretary of State's forms to be a Series LLC without understanding what it means. The likely reality is that only a portion of the Series LLCs will ever have a Protected Series. Nevertheless, Series LLCs are clearly popular and being heavily used in Illinois and are rapidly growing in Tennessee. The exact number of Series LLCs and Protected Series is unclear because, as with many states, the Tennessee statute does not require the identification of each Protected Series on public record.

At first blush, it is surprising that Texas does not have more Series LLCs. On reflection, it may be because of Texas' taxation of the Series LLC as a single tax reporting entity with the creation of taxing nexus for all Protected Series and a joint and several liability for all Protected Series for the tax incurred by the Series LLC itself and each other

TABLE 2. SERIES LLC FORMATION

State/District/Territory	Series LLC Formed in State	Series LLC Formed in State in 2015 or Year Indicated	Foreign Series LLC Qualified to do business in State	Number of Protected Series formed in State
Alabama[1]	1001	1001	Unknown	NA
Delaware	7,283[2]	820	Unknown	Unknown
District of Columbia[3,4]	8[5]	3	—	24
Illinois[6]	9,076 (2015)	2,025[7]	562 (2014)	26,875 (2015)
Iowa[8]	Unknown	Unknown-	Unknown	Unknown
Kansas	91	21	Unknown	Unknown
Missouri	2	Started in 2013	1	—
Montana	0	Started 10/2013	0	—
Nevada (2013)[9]	17,920 (2013)	1,935 (2013)	124	—
Oklahoma[10]	Unknown	Unknown	Unknown	Unknown
Puerto Rico[11]	Unknown	Unknown	Unknown	Unknown
Tennessee	1585	690	Unknown	Unknown
Texas[12]	1,145	336	138[13]	Unknown
Utah[14]	–954	160	233	Unknown

ENDNOTES

1 The Alabama Secretary of State Office's website will permit a user to search Series LLCs. The 1001 number is very surprising and may indicate that many self-help business people organizing their LLC and using Alabama's form check the Series box without understanding what it means and without intent to form actual Protected Series. According to the Alabama Secretary of State's records, 11 Series LLCs were dissolved.

2 Per email from Delaware Secretary of State March 16, 2016 (copy in authors' records).

3 Per communication with the Department of Consumer and Regulatory Affairs for the District of Columbia in February 2016, officials believe that hundreds of LLCs have been formed that checked the box to be classified as a Series LLC. However, their records only indicate eight have filed actual designations for Protected Series. They estimate that each Series LLC that has filed designations averages three Protected Series.

4 In February 2016, the Department of Consumer and Regulatory Affairs for the District of Columbia indicated to the staff of one of the authors that, it did not distinguish between a foreign Series LLC and a regular foreign LLC. The registration requirements are the same. Therefore, the number of foreign Series LLCs and/or Protected Series doing business in D.C. is unknown.

5 In February 2016, the Department of Consumer and Regulatory Affairs for the District of Columbia estimated that hundreds of LLCs had checked the box to be Series LLCs. However, as indicated in the table, very few have actually filed designations for Protected Series.

6 Allan G. Donn, Bruce P. Ely, Steven G. Frost, Robert R. Keatinge & Bahar A. Schippel, Series LLCs, ALI CLE, March 18, 2016.

7 Illinois reported on the number of active Series LLCs at the end of each year. The 2,025 is net additional Series LLCs that were formed and active at the end of 2015. This undoubtedly understates the number formed as some previously formed Series LLCs will have ceased operations during the year.

8 In February 2016, a representative of Iowa Secretary of State indicated awareness of legislation permitting Series LLCs. Nevertheless, Secretary of State is currently not accepting Series LLC filings per se, but they do recognize Series LLCs. Apparently documentation forming a Series LLC in Iowa is flied and processed just as a regular LLC. The representative suggested that a Series LLC could file an application of authority and then have the option of choosing to list all names of the Protected Series or take out fictitious names and file Protected Series as d/b/a. The Secretary of State is not tracking the number of filings.

9 Per Email of April 24, 2015, 2,029 Series LLCs were formed in Nevada in 2014 and 31 foreign Series LLC qualified to do business in Nevada that year.

10 As of February 2016, Oklahoma Secretary of State Office does not currently differentiate between Series LLCs and regular LLCs. Therefore, no Series data are available.

11 As of February 2016, Puerto Rico does not differentiate between Series LLCs and regular LLCs. The only way to tell if an LLC is a Series LLC is to open up the Certificate of Organization of individual LLCs and see if they designate themselves as Series LLCs.

12 Texas Secretary of State does not track series LLCs. A computer search by the Texas Secretary of State for Series in the name of the LLC was commissioned by one of the authors and the information that was uncovered is presented. There is no assurance all of those are actually Series LLCs.

13 Foreign Series LLCs in Texas register using Form 313. The information is from the office of the Texas Secretary of State as of March 16, 2016.

14 In a February 2016 communication, a representative of the Utah Secretary of State's Office provided the information set forth herein. There were 127 foreign LLCs qualified to do business in Utah in 2015. The Secretary of State has no procedures to track Protected Series at this time.

TABLE 3. TENNESSEE AND TEXAS SERIES LLCS (DOMESTIC AND FOREIGN) BASED ON YEAR OF FILING[1]

Year	Tennessee	Texas
1994–2007	14	116[2]
2009	4	28
2010	21	42
2011	33	48
2012	127	111
2013	235	285
2014	454	310
2015	690	340

ENDNOTES

1 **Note:** An LLC that was formed in an earlier year that was converted into a Series LLC is shown as organized in the year the original LLC was formed. It is assumed that the Series LLCs that are shown as organized prior to Tennessee's or Texas' statute reflect regular LLCs that were subsequently converted into Series LLCs.

Organization data from the Tennessee Secretary of State's Office via Email on March 15, 2016, to one of the authors and the Texas Secretary of State computer search commissioned by one of the authors with information through March 16, 2016.

2 89 of these were foreign Series LLCs qualifying to do business in Texas.

Protected Series.[80] Potentially being liable for the state taxes of another Protected Series is not appealing. In addition, the statutory requirement that each member of the Series LLC has access to the books and records of each Protected Series may substantially diminish the use of Texas Series LLCs.

The high number of Series LLCs formed in Nevada is undoubtedly misleading (as it would be in the District of Columbia as the District believes hundreds of Series LLCs have been formed but only eight have properly formed Protected Series). The Nevada Secretary of State's form for the organization of LLCs has a box to check if the LLC is a Series LLC.[81] It may well be that a significant percentage of the Nevada LLCs are Series LLCs due to business people forming their own LLCs, using the Secretary of State form, and checking a box for which they have no understanding and in fact have no intention of forming Protected Series. Nevertheless, the raw numbers, even if heavily discounted, demonstrate the extensive use of Series LLCs.

The NCCUSL Drafting Committee has been unable to determine the driver for the growing popularity of the Series LLC as an operating entity:

> Although the widespread use and growing popularity of protected series is undeniable, the reasons for this use and popularity are not well understood. For the most part, the legal and business relationships established through protected series can also be established with various structures involving several limited liability companies.
>
> Some situations have been identified in which protected series provide a unique benefit, but these situations involve very specialized types of arrangements and cannot account for the widespread use and popularity. Some proponents note the potential convenience for regulatory purposes: A series limited liability company holds a single license or make on regulatory filing, and various protected series of the company function under the aegis of that license or filing.
>
> Another explanation is that the series limited liability company provides the first ever, off-the-shelf template for establishing a structure of affiliated businesses. It is debatable whether such a template increases economic efficiency, provides traps for the unwary, or both. What is not in doubt is that the protected series construct is now an established part of U.S. business law.[82]

The use and concept of the Series LLC is evolving as attorneys and their clients grapple with the practical problems and see opportunities for which the Series LLC appears to effectively and efficiently serve a purpose. The situation is similar to that which existed in the early days of the LLC when only a relatively few states had passed LLC legislation. The common issues to be resolved include (i) how are Series LLCs and the Protected Series taxed, (ii) what U.C.C. filings are required to perfect a security interest, (iii) can a Protected Series seek bankruptcy protection[83] and, most importantly (and unique to the Series LLC), (iv) will the internal liability shields be honored in the states other than the state of organization?

Internal Liability Shield Requirements

While the existence of internal liability shields coupled with the external liability shields makes the Series LLC attractive and powerful,[84] operating a Series LLC requires more careful maintenance and more precise accounting than a non-Series LLC.[85] Like non-Series LLCs, members of Series LLCs are not personally liable for the debt and liabilities of the Series LLC itself or the Protected Series. In this respect, the Series LLC is an overlay to traditional LLC statutes. Under the Series LLC overlay, however, the isolation of each Protected Series from the debts and liabilities of another Protected Series or the Series LLC is

not unconditional.[86] For instance, in Delaware, and states modeled after Delaware, the internal liability shields are conditioned on (i) the LLC agreement providing that the assets of a Protected Series are (a) associated only with that Protected Series and (b) the other Protected Series shall not be responsible for such; (ii) the books and records of the Series LLC and each Protected Series account for the assets associated with such Protected Series separately from the other assets of the Series LLC or any other Protected Series; and (iii) notice of the potential Protected Series' internal liability shields is in the certificate of formation or similar document filed with the Secretary of State.[87] The internal liability shields of some or all of the Protected Series may be lost if the books and records are not properly maintained and/or the assets are not properly associated under the statute's terms and conditions.[88]

As for filing requirements and the internal liability shields, in Delaware and several other states there is no requirement to disclose the actual existence of the Protected Series of a Series LLC nor how many Protected Series that may exist with respect to the Series LLC at any point in time. The Certificate of Formation must simply provide that Protected Series may be formed in the future and provide a notice that 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 Protected Series only.[89] However, some states require a separate filing for each Protected Series as a condition for the internal liability shields, and some other states require disclosure by filing of the existence of each Protected Series even though such disclosure by a filing is not a condition for the internal shields.[90] Although not a public disclosure, Delaware requires the LLC agreement establish or provide for the establishment of one or more Protected Series.[91]

Proper maintenance of books and records related to each Protected Series is an element found in each jurisdiction that has currently enacted Series LLC enabling legislation. Eight jurisdictions require that "separate and distinct" records be maintained for each Protected Series and the Series LLC.[92] Four states require "records maintained for" the Protected Series and the Series LLC.[93] Only Puerto Rico provides for "records maintained (directly or indirectly, including through a nominee or otherwise) for any such series."[94] If proper records are not maintained, it may be fatal to the internal liability shields.

Another common thread in each enabling statute is the association of assets with each Protected Series. Although often the books and records may provide the association of assets by clearly indicating the ownership and circumstances of ownership by the specific Protected Series and having a separate set of books for each Protected Series and, if applicable, the Series LLC itself, the association is a separately articulated requirement. The books and records requirement may properly account for assets and transactions but this requires association of the assets with the specific Protected Series or the Series LLC.

The books and records requirement and the requirement of association of assets to each specific Protected Series makes knowing the management of the Series LLC a significant issue. Unless a potential member is very comfortable with management's integrity and precision in accounting for the assets of the Series LLC and each Protected Series, the prospective member should strongly consider not becoming a member of the Series LLC associated with one or more but not all of the Protected Series, even if the Series LLC and all Protected Series are only doing business in the state of organization.[95] As a practical matter, it may be very difficult for a member not involved in the daily activities of a Protected Series reasonably to know if the books and records of the Series LLC and of each Protected Series are being properly maintained. Perhaps consideration should be given to a provision in the operating agreement granting all members of the Series LLC (that would encompass all associated members of each Protected Series) the right to inspect the books and records of the Series LLC and all Protected Series to ensure compliance with this provision of the statute.[96,97] Additionally, or *in lieu* thereof, Series LLCs with unrelated members should perhaps require at least a review if not an annual audit of the Series LLC and each Protected Series by an independent third party to confirm the maintenance of proper books and records and the appropriate association of assets with specific Protected Series or the Series LLC.[98] If audits or other reviews are to be required, it is recommended that the same independent firm perform the audit or review of all Protected Series and the Series LLC in order to have a comprehensive and consistent overview of the assets and liabilities. If the books and records are not periodically audited or reviewed by an independent accounting firm or other third party and the members do not want all members having the ability to inspect the records from time to time, consideration should be given to requiring that at least one member has the authority to inspect and copy the books and records to ensure compliance with the statute. At that point, particularly in a nonfamily setting, the question arises as to which member is willing to assume the responsibility (and liability) of having such a power unless economically compensated?

If a substantial liability is incurred with respect to a single Protected Series of a Series LLC, and the assets of such Protected Series in which the liability arose are

woefully inadequate, an unsatisfied creditor, particularly a significant judgment creditor, is very likely to attempt to challenge the adequacy of the books and records.[99] Such an unsatisfied creditor is also likely to challenge whether the assets of the various separate Protected Series not involved in the primary action were properly associated in an attempt to collapse the internal liability shields.[100] This can cause the Series LLC or the other Protected Series to incur significant costs defending their association of assets and provide a level of stress for all of the associated members.[101]

Under the current Series LLC state statutes, if the books and records of a Series LLC with multiple Protected Series have significant errors with the association of assets between two but not among all of the Protected Series and a liability arises and claims are made, are only the two Protected Series with the overlapping errors susceptible to being combined into one for purposes of satisfying a claim or judgment or are all of the Protected Series at risk? Logically, only the specific Protected Series (or Series LLC itself) with deficient books and records or deficient association of assets should have its or their assets exposed to the claims of creditors of any other Protected Series or of the Series LLC.[102] The answer must be determined on a state-by-state basis looking at the wording of the statute of the state of organization and perhaps even the law of the state in which the events subject to the underlying litigation occurred. One must remember, the accounting and property records associating assets with a particular Protected Series or the Series LLC itself are not simply factors in determining whether the corporate veil will be pierced within the Series LLC, but whether internal limited liability shields even exist.[103]

Although it may not have been the intention of the state legislatures, a potential technical reading of the statutes indicate that if assets are not properly associated, the internal liability shield of the specific Protected Series may be blown and that particular Protected Series may be exposed to the debts, liabilities and obligations of the Series LLC and that of all other Protected Series.

As Table 4 indicates, it appears that all existing statutes, with the possible exception of the District of Columbia will collapse the internal liability shield of only the Protected Series or the Series LLC with the inaccurate association of assets. Although the authors believe the better reading of the District of Columbia statute renders this result, it may be possible to argue that the District of Columbia statute could cause a loss of all internal shields in such a situation with all of the assets of each of the Protected Series and the Series LLC itself exposed to the claims of any creditor of any of the Protected Series or the Series LLC. The District of Columbia statute provides in relevant part:

> The debts, obligations and other liabilities of *a series* of a limited liability company, whether arising in contract, tort, or otherwise, shall be solely the debts, obligations, and liabilities of the series and not of the limited liability company generally or any other series thereof; provided that:
>
> (1) Separate and distinct records are *maintained* for the limited liability company and *each series*;[104]
> (2) *Assets associated with the limited liability company and each series* are held, directly or indirectly, including through a nominee or otherwise, and *accounted for separately* in the separate and distinct records; ...[105] (emphasis added)

Although it would be rather harsh for a court to interpret the above language to terminate all of the internal liability shields, the reader should reach his or her own judgment as to the meaning of the above excerpt. Arguably "a series of" introductory language should limit the damage to the specific Protected Series with the improper asset association, but the requirement language refers to separate and distinct records and association for each Protected Series and the Series LLC. Other jurisdictions use a different articulation, often specifically referring to the "particular series" or "that series" [*i.e.,* a specific Protected Series].[106]

If the association errors are minor, will a court impose a *de minimis* rule and disregard immaterial errors? If material errors exist and are subsequently corrected, do the errors jeopardize the internal shields of any Protected Series with respect to obligations or liabilities that existed while the errors exist?

- Until the error is corrected?
- If the error is corrected before a liability arises?
- If the error is corrected before a claim is made?
- If the error is corrected after a claim is made but before litigation?
- If the error is corrected after litigation commences?
- If the error is corrected after an adverse judgment but before collection proceedings?

Presumably, the answer to some of the questions above may depend on whether the errors are significant, pervasive, material or immaterial. Logically, if errors are corrected before a transaction is entered into or a tort event arises, the internal shields should hold. Under the statutes requiring the accurate association of assets, the knowledge of the other party that the association or records are deficient may be irrelevant unless the court applies equitable principles and determines the plaintiff is estopped. The statutes do not have an articulated exception from association or records if a third party is aware of the issue prior

TABLE 4. POTENTIAL CONSEQUENCE OF IMPROPER ASSOCIATION OF SERIES ASSETS				
State	No Internal Limited Liability Shield for the Series Not Properly Associated	Potentially No Internal Limited Liability for Any Series if One Series is Improper	Unassociated Asset Only is Subject to the Claims of Any Protected Series or the Series LLC[1]	Citation
Alabama	X			Ala. Code §10A-5A-11.02(a) and (b)(1)
Delaware	X			6 Del. Code §18-215(b)
District of Columbia	X	Maybe?		D.C. Code §29-802.06(b)(1) and (2)
Illinois	X			805 Ill. Comp. Stat. Ann. 180/37-40(b)
Indiana	X			H.B. 1336, 119th Gen. Assemb, Second Reg. Sess. (Ind. 2016).
Iowa	X			Iowa Code Ann. §489.1201(2)
Kansas	X			Kan. Stat. Ann. §17-76,143(b)
Missouri	X			Mo. Ann. Stat. §347.186.2(1) and (2)
Montana	X			Mont. Code Ann. §35-8-304(4)
Nevada	X			Nev. Rev. Stat. Ann. §86.296(3)
Oklahoma	X			Okla. Stat. §18-2054.4.B
Puerto Rico	X			P.R. Laws Ann. 14 §3967(b)
Tennessee	X			Tenn. Code Ann. §48-249-309(1)(b)
Texas[2]	X			Tex. Bus. Orgs. Code Ann. §101.602(a) and (b)(1)
Utah	X			Utah Code Ann. §48-3a-1201(2)(b) and (c)

ENDNOTES

1 The current draft of the Limited Liability Company Protected Series Act of NCCUSL applies an asset-by-asset approach for association failure. At this time, as the table references, no enabling statute appears to do this.

2 The Texas statute treats the Series LLC and its Protected Series as one entity for tax purposes thereby voiding the internal liability shields with respect to Texas taxes and perhaps taxes of other states if their conflict of laws would follow Texas Law. See *Franchise Tax—Frequently Asked Questions, Tex. Comptroller of Pub. Accts.*, www.window.state.tx.us/taxinfo/franchise/faq_tax_ent.html March 6,2016.#tax_ent19 (last visited Aug. 8, 2016).

to the event. In the authors' view, it is likely that if the error is outstanding when a claim is made and/or perhaps when the liability arises and prior to the claim, the internal liability shields are susceptible of being pierced. If an error occurs after the liability-creating event but is cured before the claim is made, what is the status of the internal shields? Until case law develops, we may not actually know where the line(s) is/are.

Is the degree of common ownership among or between the Protected Series that have accounting issues legally or practically relevant? There is nothing in the Series LLC statutes that would indicate any legal relevance. However, the optics of identically or similarly owned Protected Series is not good when a court is attempting to determine whether the errors are sufficient to collapse internal shields.

If the internal shields between two Protected Series are pierced, are only the assets that are not properly associated to the claims arising from the other Protected Series exposed or are all assets of both Protected Series exposed? The current draft of the Limited Liability Protected Series Act by the NCCUSL Drafting Committee adopts an asset-by-asset and liability-by-liability approach and limits the creditor rights and the asset exposure of other Protected Series in this manner.[107] Presumably this approach will cause the courts to be stricter on the requirements relating to accounting, books and records and association but make the correction narrower than it may otherwise be. This avoids the "all or nothing" risk to the members and the creditor but probably will cause specific assets to be more easily exposed for the debts and obligations of other Protected Series or that of the Series LLC itself.

If a successful claim is made against a Protected Series that is unable or difficult to satisfy, the claimant may well "investigate" the books and records of the other Protected Series and their asset association seeking to glom onto additional assets for claim satisfaction. This "investigation" can be a costly distraction for the other Protected Series or the Series LLC that had nothing to do with the events giving rise to the claim. An attorney drafting LLC agreements for Series LLCs may wish to

consider providing for cross indemnification for such expenses against the Protected Series whose actions gave rise to the claim, particularly if the associated members are substantially different between or among the Protected Series.

Conclusion of Part One

At this time, the growth in the number of Series and Protected Series is continuing unabated. The rate of state enactments of Series LLC legislation continues but has slowed. As will be discussed in Part II of this article, the failure of the IRS to finalize the tax treatment of Series LLCs may have a bearing as well as the lack of a thoughtful Uniform Act or model act that various state drafting committees can consider. As stated above, the NCCUSL Drafting Committee has been informed of a number of states that are waiting on a Uniform Act or a model act before moving forward with Series LLCs.[108]

There are many tens of thousands of Series LLCs operating in the United States today and creative attorneys are using Series LLCs to achieve efficiencies or even goals that are not met by a multitude of traditional limited liability companies. Part II of this article will discuss taxation of Series LLCs, Uniform Commercial Code and bankruptcy concerns, issues involved in Series LLCs doing business in foreign states, particularly those states which have not passed Series LLC enabling legislation, and the current thinking of the NCCUSL Drafting Committee addressing the concerns described in this article. The business community has embraced Series LLCs, and the laws now need to catch up.

ENDNOTES

* This will be published in fuller form in *The Journal of Corporation 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). The authors wish to acknowledge the assistance of Rebecca Loveday (J.D. Candidate 2017, University of Tennessee College of Law).

1 Other terms used for the Series LLC include series organization (see proposed federal tax Reg. §301.6011-6); and master LLC (see SEC Letter in Section VI.D and CAL. TAX NEWS, at 4 October 2011 and FTB 1123, Guide to Forms of Ownership, 17 (2013)). Series LLC is the term used in this article.

2 The name of the Uniform Act was previously "Series of Unincorporated Business Entities Act." The name was changed by the Executive Committee of the Uniform Law Commission on January 23, 2016, because the Uniform Act, if and when approved by the Commissioners, will now only apply to LLCs.

3 The Draft Series of Unincorporated Business Entities Act for the Sept. 27–28, 2013, NCCUSL Drafting Committee Meeting first used the term "protected series," when referring to the series (as opposed to the Series LLC) because "(i) usage in the series/asset-partitioning realm requires that the act refer to 'series' while (ii) usage elsewhere makes the term confusing when standing alone." This terminology has continued in the subsequent drafts. *See www.uniformlaws.org/shared/docs/Series%20of%20Unincorporated%20Business%20Entities/2013sep_SUBEA_MtgDraft.pdf.*

4 *See* Jeffrey Simpson & Charles J. Lavelle, *Insurance Aspects of the Proposed Series Regulations*, ABA SECTION OF TAXATION, Partnership Committee, LLC and LLP Subcommittee (May 10, 2014).

5 Unif. Statutory Trust Entity Act §401 (2009).

6 *Id.*, at 1463–1478.

7 *Id.*, at 1485.

8 Reg. §301.7701-3(a).

9 *See* John O. Everett, Cherie J. Hennig & William A. Raabe, *Converting a Corporation into an LLC: Qualifying the Tax Costs and Benefits*, J. Tax'n Aug. 2010, at 93.

10 *Id.*, at 94–95.

11 *See* Susan Pace Hamill, *The Origins Behind the Limited Liability Company*, 59 Ohio St. L.J. 1459, 1461 (1998).

12 *See* IRS Letter Ruling LTR 8106082 (Nov. 17, 1980).

13 *See* Susan Hamill, *supra* note 11, at 1469.

14 *See* 45 FR 75, 710 (1980) (codified at 26 C.F.R. pt. 301).

15 *See* Ann. 83-4, 1983-2 IRB30.

16 Rev. Rul. 88-76, 1988-2 CB 360.

17 *See* Susan Hamill, *supra* note 11, at 1469–1470.

18 *Id.*, at 1470.

19 *Id.*

20 *Id.*, at 1474.

21 *Id.*, at 1475.

22 *Id.*, at 1476.

23 *Id.*, at 1460.

24 *Id.*, at 1472.

25 Uniform Law Commission, Legislative Enactment Status of ULLCA, available online at *www.uniformlaws.org/LegislativeMap.aspx?title=Limited%20Liability%20Company%20(2006)%20(Last%20Amended%202013).*

26 Susan Hamill, *supra* note 11, at 1460.

27 6 Del. Code §18-215(a).

28 D.C. Code §29-802.06.; P.R. Laws Ann. 14 §3967 (2009).

29 Series LLCs and Cell Companies, 75 FR 55699-01 (proposed Sept. 14, 2010) (to be codified at 26 C.F.R. Part 301).

30 *Id.*

31 6 Del. Code §18-215(a).

32 Michelle Harner, Jennifer Ivey-Crickenberger & Tae Kim, *Series LLCs: What Happens When One Series Fails? Key Considerations and Issues*, BUS. L. TODAY 2 (Feb. 2013), available online at *www.americanbar.org/publications/blt/2013/02/01_harner.html* (last visited Jan. 20, 2016).

33 Although not required by the current state statutes, the authors believe that the Series LLC itself should have a degree of supervisory authority over each Protected Series and the ability to "disassociate" the Protected Series from the Series LLC. In the authors' opinion, Delaware and similar states statute's lack of the Series LLC's express mandatory power to review the books and records of each Protected Series and to dissociate a Protected Series is a statutory flaw that increases the potential for Series LLCs being used for mischief. A concept of certain limited authority and/or responsibility for the board, managers or other controlling parties of the Series LLC over each Protected Series would, in the authors' opinion, go a long way to minimize the usefulness of Series LLCs for nefarious activities.

34 *See* 8 Del. Code §102 and 6 Del. Code §18-201 and §18-215(b).

35 Rev. Unif. Ltd. Liability Co. Act Preface (2006).

36 S.B. 323, Gen Assemb., Reg. Sess. (Cal. 2011–2012).

37 Senate Judiciary Committee, CA 2012 legislative law case history re: series 01981859, at 7 (Jan. 4, 2012).

38 Maine revised its LLC statute with a new LLC act that took effect July 1, 2011, and decided not to include the series concept. *See* Kevan Lee Deckelman, Christopher McLoon & Aaron M. Pratt, *Maine's New Limited Liability Company Act*, 25 ME. B. J. 181, 185-86 (Fall 2010). ("The uncertainties surrounding the series LLC, the fact that the most suitable uses of a series

LLC are not common in Maine, and the fact that Delaware has the series LLC available in its LLC Act for those who want a series LLC all lead the Drafting Committee to decide against including the series concept in the New Act."). *See also* Christopher McLoon & Margeret Callaghan, *The Dangerous Charm of the Series LLC*, 24 Me. B. J. Fall 226, 226 (Fall 2009).

[39] Me. Rev. Stat. tit. 31, §1622.

[40] 31 MRSA §1622(i)(j).

[41] Particularly, they feared that many small business owners would fail to fully appreciate the complexity in operating Series LLCs such as maintaining separate books and records. As a result, small businesses would "expose themselves unwittingly to veil piercing lawsuits by their creditors." *See* John Alper, *Why Florida Does Not Have Series LLC Law*, Florida Asset Protection Blog (June 17, 2013), available online at *www.assetprotectionfl.com/2013/06/why-florida-does-not-have-series-llc-law/*.

[42] Fla. Stat. §605.0902(3).

[43] At this time, the Florida Secretary of State has not exercised it authority to create a separate filing for the foreign Protected Series as there is no special form for foreign Series LLCs and their Protected Series.

[44] Jeffrey Simpson & Charles Lavelle, *Insurance Aspects of the Proposed Series Regulations*, ABA Section of Taxation, LLC/LLP Subcommittee of the Partnership Committee, May 10, 2014.

[45] Daniel S. Kleinberger & Carter G. Bishop, *The Next Generation: The Revised Uniform Limited Liability Company Act*, 62 Bus. Law 515 (2007).

[46] *See*, for example, 12 Del. Code §3801 et seq.

[47] *See* at 6–7 for a discussion of states that have enacted Series LLC legislation.

[48] The drafting project was originally titled *Series of Unincorporated Business Entities* but following the decision to limit the scope of the draft to LLCs, the title was changed.

[49] Draft available online at *www.uniformlaws.org/shared/docs/Series%20of%20Unincorporated%20Business%20Entities/2014am_subea_draft.pdf*.

[50] *See www.uniformlaws.org/Committee.aspx?title=Limited%20Liability%20Company%20Protected%20Series%20Act*.

[51] Draft available online at *www.uniformlaws.org/shared/docs/series%20of%20unincorporated%20business%20entities/2016jan_SUBEA_Mtg%20draft.pdf*.

[52] Ala. Code §10A-5A-11.01.

[53] 6 Del. Code §18-215.

[54] D.C. Code §29-802.06.

[55] 805 Ill. Comp. Stat. Ann. 180/37-40.

[56] H.B. 1336, 119th Gen. Assemb, Second Reg. Sess. (Ind. 2016).

[57] Iowa Code Ann. §§489.1201 to -.1206 (West).

[58] Kan. Stat. Ann. §17-76,143 (West 2015).

[59] Mo. Ann. Stat. §§347.039, 347.153, 347.186 (West).

[60] Mont. Code Ann. §§35-8-102, 35-8-107, 35-8-108, 35-8-202, 35-8-208, 35-8-304, 35-8-307, 35-8-503, 35-8-803, 35-8-804, 35-8-901, 35-8-902.

[61] Nev. Rev. Stat. Ann. §§86.1255, 86.161, 86.286 (amended by 2015 Nevada Laws Ch. 514 (S.B. 446), 86.291, 86.544 (West).

[62] 18 Okla. Stat. §18-2054.4B.

[63] P.R. Laws Ann. 14 §3967 (2009).

[64] Tenn. Code Ann. §48-249-309 (West).

[65] Tex. Bus. Orgs. Code Ann. §§101.601, 101.622 (West).

[66] Utah Code Ann. §48-2c-606 (West).

[67] It was the intent and expectation that the internal liability shields of a foreign Protected Series would be respected. 31 Me. Rev. Stat. §1622.

[68] Fla. State Ann §605.0902 (West).

[69] 6 Del. Code §18-215.

[70] D.C. Code §29-802.06(h) and 805 ILCS 180/37-40(b).

[71] *Id.*

[72] The California statute does not use the words series or cell but provides for classes of members having relative rights, powers and duties senior to other classes of members. Cal. Corp. Code §17712.01.

[73] 31 MRSA §1623(1)(J).

[74] Cal. Corp. Code §17703.04 (West). Minn. Stat. Ann. §322 B.03, subd. 44; N.D.C.C. §10-32-02.55; Wis. Stat. Ann. §183.0504.

[75] For example, Texas does not require different filings for the organization of a Series LLC versus an LLC. *See* Formation of Texas Entities FAQs, Texas Secretary of State (2016), available online at *www.sos.state.tx.us/corp/formationfaqs.shtml#LLC*.

[76] While this many or more Series LLCs appear to have been formed, as noted, a significant number are likely to be as a result of business people using Secretary of State standard forms and checking the Series box without an understanding what it meant and with no intent to actually form Protected Series. Nevertheless, it appears that many tens of thousands of Series LLCs and Protected Series have been formed and are being used.

[77] *Donn et al.*, note 6 in Table 2.

[78] *Id.*

[79] *Id.*

[80] *See* Tex. Comptroller LTR 201005184L (May 5, 2010), available online at *http://aixtcp.cpa.state.tx.us/opendocs/open32/201005184l.html. See also* Franchise Tax Frequently Asked Questions, Tex. Comptroller of Pub. Accts., *www.window.state.tx.us/taxinfo/franchise/faq_tax_ent.html#tax_ent19* (last visited Aug. 8, 2016).

[81] Form *available at http://nvsos.gov/Modules/ShowDocument.aspx?documentid=1005*.

[82] *See* Limited Liability Company Protected Series Act, Prefatory Note—Preliminary at 5 (Proposed Official Draft July 2016).

[83] The early LLCs were clearly separate legal entities. They did not have the legal entity bankruptcy issue in determining whether they were a person as that facing the Protected Series that possess many of the attributes of a separate legal entity but are not actually legal entities.

[84] 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, 519 (2010).

[85] *See Id.*, at 1.

[86] 6 Del. Code §18-215.

[87] *Id.*

[88] *Id.*

[89] 6 Del. Code §18-215(b).

[90] *See* Table 1 "Selected Series LLC Filing Information" herein.

[91] 6 Del. Code §18-215(b).

[92] Ala. Code §10A-5A-11.02(b)(1); D.C. Code §29-802.06(b)(1); 805 Ill. Comp. Stat. Ann 180/37-40(b); Iowa Code Ann. §489.1201(2)(b); Mo. Ann. Stat. §347.186.2(1)(b); Mont. Code Ann. §35-8-304(4)(a); Nev. Rev. Stat. Ann §86.296(3)(a); Okla. Stat. §18-2054.4.B; Tenn. Code Ann. §48-249-309(b)(1)(B); and Utah Code Ann §48-3a-1201(2)(b).

[93] 6 Del. Code §18-215(b); H.B. 1336, 119th Gen. Assemb., Second Reg. Sess. (Ind. 2016); Kan. Stat. Ann §17-76, 143(b); and Tex. Bus. Orgs. Code Ann. §101.602(b)(1).

[94] P.R. Laws Ann. 14 §3967(b);

[95] *See* Jennifer Avery *et al.*, *Series LLCs: Nuts and Bolts, Benefits and Risks, and The Uncertainties that Remain*, 45 Tex. J. Bus. L. 9, 14–16 (2012).

[96] For a Series LLC in which the various Protected Series are effectively different investment vehicles this right may be seen as rather intrusive and potentially exposing proprietary information to third parties.

[97] This right of inspection is provided as a matter of the statutory law in the State of Texas. Tex. Bus. Orgs. Code §101.109(a)(4).

[98] *See* Carol R. Goforth, *The Series LLC, And A Series of Difficult Questions*, 60 Ark. L. Rev. 385, 400 (2007).

[99] *See* Amanda J. Bahena, *Series LLCs: The Asset Protection Dream Machines?*, 35 J. Corp. L. 799, 817 (2010) ("... if a series failed to follow SLLC statutory guidelines for series separateness, such as maintaining separate books and records, courts could disregard that series' liability shields by applying substantive consolidation or enterprise liability principles.").

[100] Carol R. Goforth, *supra* note 98, at 398 ("Unless and until bankruptcy law recognizes series as separate legal entities, bankruptcy of a single series might well jeopardize assets of the LLC and the other series as well. If a bankruptcy court consolidates the assets and liabilities of the series, the anticipated benefits of limited liability between the series would disappear.").

[101] As will be discussed in Part II, the NCCUSL Drafting Committee's approach of clearly placing into play on the specific assets that are not properly associated should limit plaintiff post-judgment "fishing expeditions" to only major assets.

[102] If the assets of a Protected Series are used to satisfy the liability of another Protected Series because of a failure to keep discrete books and records or to properly associate assets, does such Protected Series have a claim for unjust

enrichment against the Protected Series with the claim?

[103] Unif. Statutory Trust Entity Act §401 (2009).

[104] The statute does not say "such series" or "the series" but "each series" which can be read to require all series to comply as a condition of the internal shields.

[105] D.C. Code §29-802.06(b)(1) and (2).

[106] Ala. Code §10A-5A-11.02(b)(1) [that series]; 6 Del. Code §18-215(b) [a particular series]; 805 Ill. Comp. Stat. Ann 180/37-40(b) [a particular series]; H.B. 1336, 119th Gen. Assemb., Second Reg. Sess. (Ind. 2016); Iowa Code Ann. §489.1201(2)(b) [that series]; Kan. Stat. Ann §17-76, 143(b) [particular series]; Mo. Ann. Stat. §347.186.2(1) [particular series]; Mont. Code Ann. §35-8-304(4) [particular series]; Nev. Rev. Stat. Ann §86.296(3) [particular series]; Okla. Stat. §18-2054.4.B [particular series]; P.R. Laws Ann. 14 §3967(b) [particular series]; Tenn. Code Ann. §48-249-309(b)(1) [particular series]; Tex. Bus. Orgs. Code Ann. §101.602(a)(1) [particular series]; and Utah Code Ann. §48-3a-1201(2) [particular series].

[107] Limited Liability Protected Series Act §401-02 (Unif. Law Comm'n Jan. 2016).

[108] "Several other jurisdictions are reported as very interested in providing for protected series and awaiting the conclusion of this project." *See* LIMITED LIABILITY COMPANY PROTECTED SERIES ACT, Prefatory Note, at 5 (Proposed Official Draft June 7, 2016).

Family Tax Planning

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The Internal Revenue Code relies on life expectancy tables for the purposes of computing the following: the expected return for annuity contracts and the exclusion ratio for the recovery of cost basis on annuity contracts for income tax purposes are computed and are derived from the experience of life insurance companies that sold annuities in 1983 at the time that the §1.72 Table was published[6]; the value of Required Minimum Distributions from qualified plans are derived from the experience of life insurance companies that sold annuity contracts in 2002 at the time that Reg. §1.401(a)(9) was published.[7] The 2000 U.S. Census statistics Table 2000CM is used for computing gift and estate tax values of life estates or remainder interests in property. The §1.72 Table is based upon mortality tables that were available to insurance companies when the regulation was first published in 1983. The Reg. §1.401(a)(9) RMD Tables are based upon mortality tables that were available when the regulations were published in 2002. As should be expected, the life expectancy estimates under the RMD Tables are greater than the life expectancy estimates under the Annuity Tables.[8]

Example

As a reward for her past service, Acme enters into a DBO plan with Ann, the founder and Chair Emeritus of the Board of Directors that will pay her beneficiaries $5 million in the form of a single lump sum payment. Ann is currently 65 years of age and has a life expectancy of 21 years based on Reg. §1.401(a)(9). Using the annual long-term Applicable Federal Interest rate of 1.9 percent. The Present Value of a $1 million Lump sum receivable in 21 years under these assumptions is $3,367,535.[9]

Estate Tax Aspects of DBO Plans

If the liability is fixed and determinable, and if the value of the liability is material, then it is appropriate under Generally Accepted Accounting Principles (GAAP) to accrue and record the liability for financial statement purposes. If the value is significant, then the accrual of the liability will act to reduce the Net Worth of the business enterprise. Unlike valuation discounts which may be related to voting and nonvoting rights, which are currently under attack by the Treasury and the subject of the proposed Regulations under §20.2704 published in August of 2016, the recognition and recording of a liability would not affect liquidation rights and thus would not be addressed by the proposed regulations. A detailed discussion of the Proposed Reg. §20.2704 is beyond the scope of the column.

Estate Tax Aspects of the Benefits

Identifying a moral obligation, quantifying the obligation, reducing it to writing and converting that obligation into a liability that can be carried on the balance sheet of the business will reduce the Net Worth of the business enterprise. If the value of the business enterprise is smaller, it should be easier to transfer the equity ownership on to the next generation during life by either gift or sale.

On the flip side, the receipt of the survivors benefit will not be deemed to be and asset of the deceased employee's gross estate at death if the beneficiary is a person other than his estate or his surviving spouse. In *DiMarco,* the Tax Court ruled that if the employee irrevocably named the beneficiary of the DBO Plan and no longer had the power to change the beneficiary of the benefit, then the receipt of the benefit is not an asset of the decedent's estate.[10]

This represents a Win-Win. The acknowledgement and recording of the liability reduces the value of the business, whereas the irrevocable death benefit receivable by the heirs is excluded from the Gross Estate of the deceased.

Summary

In the second installment of this column, we will look at a second type of deferred compensation liability,

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[103] Unif. Statutory Trust Entity Act §401 (2009).

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