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LLCS ARE THE NEW KING OF THE HILL: AN EMPIRICAL STUDY OF THE NUMBER OF NEW LLCS, CORPORATIONS, AND LPS FORMED IN THE UNITED STATES BETWEEN 2004-2007 AND HOW LLCS WERE TAXED FOR TAX YEARS 2002-2006

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*Rodney D. Chrisman**

INTRODUCTION

A revolution has occurred in the world of business organizations law.¹ The limited liability company (LLC) is now undeniably the most

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1. Professor Howard Friedman correctly noted in his excellent article *The Silent LLC Revolution* that this revolution began with practitioners. Howard M. Friedman, *The Silent LLC Revolution: The Social Cost of Academic Neglect*, 38 CREIGHTON L. REV. 35, 44-49 (2004). While it largely remains there today, there are signs that the academy is beginning to take notice of the monumental change that this revolution has wrought in the world of business organizations law. See, e.g., Sandra K. Miller, *The Duty of Care in the LLC: Maintaining Accountability While Minimizing Judicial Interference*, 87 NEB. L. REV. 125, 132-34 (2008) (stating that “[t]he emergence of the LLC is astounding” and discussing the breadth of the economic role of the LLC in America today); Walter D. Schwidetzky, *Integrating Subchapters K and S—Just Do It*, 62 TAX LAW. 749, 751 (2009) (noting that LLCs are popular and “ubiquitous”). Certainly, the number of articles relating to LLC issues is growing, but such articles are still dwarfed by the huge number of articles relating to other business entities. Further, little has changed since Professor Friedman wrote of the state of business organizations casebooks. See Friedman, *supra*. Most articles still provide far more coverage to LPs than LLCs, while, as this article demonstrates, the number of new LPs formed in the United States is miniscule in comparison to the number of new LLCs formed.

popular form of new business entity in the United States. This is amazing, especially because for most of America's history the general partnership and the corporation dominated the business organizations' landscape. Rising from near obscurity in the 1990s, the LLC has now taken its place as the new "king-of-the-hill" among business entities, utterly dominating its closest rivals. As the research reported in this article indicates, the number of new LLCs formed in America in 2007 now outpaces the number of new corporations formed by a margin of nearly two to one.² In several "bellwether" states,³ the numbers are even more impressive. For example, in Delaware and Colorado in 2007, over three new LLCs were formed for every one new corporation formed.⁴ Only four states had more new corporations formed than new LLCs in 2007;⁵ ten states and the District of Columbia had ratios of new LLCs to new corporations formed in excess of four to one;⁶ Connecticut came in with the highest, at a ratio of new LLCs to new corporations formed of 11.826 to 1.⁷

2. See *infra* Table I-D showing the total number of new domestic LLCs formed in 2007 to be 1,375,148, as opposed to 747,533 new domestic corporations. Thus, there were 1.839 new domestic LLCs formed in 2007 for every one new domestic corporation.

3. See, e.g., *Preface* to ABA REVISED PROTOTYPE LLC ACT Version 2.02, at 1 (noting that Delaware, Virginia, and Colorado are "bellwether states" in regards to LLC law).

4. See *infra* Table I-D showing the total number of new domestic LLCs formed in Delaware in 2007 to be 112,982, as opposed to 34,144 new domestic corporations. Thus, the ratio of new domestic LLCs to new domestic corporations formed in Delaware in 2007 was 3.308 to 1. See *infra* Table I-D showing the total number of new domestic LLCs formed in Colorado in 2007 to be 52,463, as opposed to 15,746 new domestic corporations. Thus, the ratio of new domestic LLCs to new domestic corporations formed in Colorado in 2007 was 3.331 to 1. Virginia came in at about the national average with just over two new domestic LLCs formed for every one new domestic corporation formed in 2007. See *infra* Table I-D showing the total number of new domestic LLCs formed in Virginia in 2007 to be 35,820, as opposed to 17,721 new domestic corporations. Thus, the ratio of new domestic LLCs to new domestic corporations formed in Virginia in 2007 was 2.021 to 1.

5. See *infra* Table I-D showing only California, Florida, Illinois, and New York with more new domestic corporations formed than new domestic LLCs in 2007.

6. See *infra* Table I-D showing, in order of the highest ratio of new domestic LLCs formed to new domestic corporations formed: Connecticut (11.826), Missouri (6.614), Wisconsin (6.399), New Hampshire (5.886), South Carolina (5.584), New Mexico (4.831), Arizona (4.531), Louisiana (4.437), Ohio (4.371), Idaho (4.144), and the District of Columbia (4.074).

7. See *infra* Table I-D showing the total number of new domestic LLCs formed in

The number of general partnerships formed each year cannot be tracked since no filing is required.⁸ In 2004, Professor Howard Friedman noted that general partnerships were now unlaywered transactions.⁹ He wrote:

The LLC can replace the general partnership with a business that furnishes all of the advantages of the partnership, but also provides owners with limited liability. The general partnership has essentially disappeared as a “lawyered” business form. General partnerships that exist today are either holdovers from pre-LLC days or they are businesses entered into informally without legal advice that by default are subjected to the rules found in the Uniform Partnership Act. The once-elaborately drafted partnership agreement has gone the way of the buggy whip and slide rule. It has been replaced by the LLC operating agreement.¹⁰

That is presumably even more accurate today. Thus, one can safely assume that most general partnerships are unlaywered transactions because nearly any imaginable advantage to the general partnership form can easily be achieved in the LLC form but with the added benefit of limited liability. Given the small cost of forming and operating an LLC, this additional benefit is almost always worth more than the additional costs. In fact, this author has suggested before in his classes that the act of a lawyer forming a general partnership in most states may well amount to malpractice. Accordingly, the number of general partnerships formed by lawyers each year is presumably very small and inconsequential. Assuming that the formation of the vast majority of general partnerships occurs in unlaywered transactions, LLCs dominate general partnerships as well in terms of the numbers formed for even the simplest of business operations.

Other business forms have fared no better against the LLC. While data for hybrid and newer business structures is more difficult to compile,¹¹ the data in this Article relating to limited partnerships (LPs)

Connecticut in 2007 to be 22,789, as opposed to 1,927 new domestic corporations. The ratio of new domestic LLCs formed to new domestic corporations formed in Connecticut in 2007 was 11.826 to 1.

8. See generally REV. UNIFORM PARTNERSHIP ACT § 202 (1997).

9. Friedman, *supra* note 1, at 60.

10. *Id.* at 49.

11. There is a proverbial alphabet soup of business entities available today including LLPs (limited liability partnerships), LLLPs (limit liability limited partnerships), PSCs (professional service corporations), PCs (professional

demonstrate that the LLC's dominance of these entities is even more staggering. For example, the number of new LLCs formed in 2007 outpaced the number of new LPs formed in that same year by a margin of over 34 to 1.¹² In seventeen states, the ratio of new LLCs formed in 2007 to new domestic LPs exceeds 100 to 1. In every jurisdiction at least six new domestic LLCs were formed in 2007 for every one new LP. Such a level of dominance should be enough to nearly relegate the LP to the dustbin of history. Further, there is no other alternative entity on the horizon that shows the promise or potential to unseat the LLC as the new king of the hill.

The only areas that have not been dominated by the LLC are those of publicly traded companies, companies that plan to become publicly traded companies, and non-profit entities. Many state statutes now permit LLCs to be organized for non-profit purposes, but presumably the requirements for tax-exempt status are such that nonprofit corporations will continue to be the entity of choice in this area. Further, regarding publicly traded companies or emerging publicly traded companies, most, including this author, thought that this would forever be the domain of the corporation. However, cracks in the dam have begun to emerge.¹³ Should the LLC succeed in becoming a viable competitor to the corporation in the publicly traded arena as well, then the oft-desired comprehensive business organization code will have been realized, albeit in a very different path than many of its supporters had

corporations), PAs (professional associations), PLLCs (professional limited liability companies), and business trusts, among others. Data on the numbers of these entities formed per state is not widely available, and therefore is not useful for comparison. Efforts were made to compile more of this data, but it was too incomplete to be helpful. However, my research indicates that the numbers for these entities are very small in relation to LLCs and are frequently isolated to certain states or industries. For instance, in many states, professional organizations such as law firms are often organized as LLPs while other types of organizations often are not.

12. See *infra* Table I-D showing the number of new LLCs formed in 2007 to be 1,375,148, as opposed to a mere 40,229 LPs. Thus, there were 34.183 new LLCs formed in 2007 for each new LP formed. As noted, the other so-called "hybrid" entities were not analyzed due to the lack of data. However, there is every indication that the other hybrid forms fare no better against the LLC.

13. See Miller, *supra* note 1, at 134 ("[m]ost LLCs are privately owned; however . . . [t]hey may elect to become publicly-traded"). See *Wood v. Baum*, 953 A.2d 136 (Del. 2008) (upholding a fiduciary duty opt-out clause in an LLC operating agreement for a publicly-held LLC traded on the New York Stock Exchange).

hoped.¹⁴

Yet, despite the LLC's undisputable dominance in the arena of closely held business entities and its potential in the publicly traded arena, as Professor Friedman laments:

Law schools, law professors, law publishers, bar examiners and others usually responsible for disseminating cutting edge developments have been surprisingly absent from the playing field much of the time [T]hey remain in denial, acting as if the general partnership were still the chief rival to the corporation. In the 21st century, they still live in the 1990's.¹⁵

There has been, however, some progress since the 1990s. Still, there remains much to be done to bring the state of legal education into alignment with the current state of the practice of business organizations law. For evidence of this, one need look no further than the casebooks available for business organizations courses.¹⁶ Most have more pages covering LPs than LLCs and far more pages covering both general partnerships and corporations. Legal education has been oft-criticized in recent years for its detached lack of practicality and failure to prepare students for the actual practice of law.¹⁷ This failure is demonstrated by academia's relative dismissal of the LLC as the corporation's and general partnership's little brother. The little brother has grown up and, as in the story of Joseph in the Bible, it is now time for the other brothers to bow down to the LLC in the law school curriculum as they do in the real world of the practicing lawyer.¹⁸

Perhaps due to the inattention given the LLC in law school, within academia, and even within the practicing bar, numerous misconceptions exist regarding some of its most basic issues. This Article addresses one of the most basic misconceptions—namely, that LLCs are always taxed as sole proprietorships or partnerships. While there are promising signs

14. See, e.g., Judd F. Sneirson, *Soft Paternalism for Close Corporations: Helping Shareholders Help Themselves*, 2008 WIS. L. REV. 899, 913 (discussing the growth and popularity of the LLC).

15. Friedman, *supra* note 1, at 35.

16. See *id.* at 58-68. As noted above, very little has changed since Professor Friedman wrote. Casebooks, still dominated by partnership, corporation, and LP law, leave LLC law as something of an afterthought.

17. See, e.g., Scott E. Thompson, *Developing a Comprehensive Approach to Teaching Lawyering Skills: A Response to the MacCrate Report* (Aug. 2008) (unpublished manuscript, on file with and to be published in the *Liberty Law Journal*).

18. *Genesis* 37, 42-45 (NASB).

that this is changing, much of the literature simply assumes that LLCs will be taxed as sole proprietorships while hardly recognizing that other possibilities are available by election.¹⁹ As the research in this article shows, the majority of LLCs are currently taxed as sole proprietorships and partnerships, but the number of LLCs taxed as S-Corporations is growing at an astonishing rate. This appears to be an area where another practitioner-driven revolution is in the making. This is an area, therefore, that desperately needs attention because properly drafting forms to organize an LLC as an S-Corporation is a challenging matter and is largely unaddressed in the available literature and forms books.

This Article is written (1) to present data demonstrating that the LLC is now undeniably the most popular form of new business entity in America; (2) to report data demonstrating that the taxation of LLCs is quickly becoming more varied than most commentators have assumed; and (3) to raise awareness of these two basic issues so that commentators will focus more of their considerable talents on issues related to the LLC. To accomplish these goals, this Article begins by detailing data from all 50 states and the DC on the number of new business entities formed in the years 2004-2007. This Article then reports on data from the Internal Revenue Service regarding the taxation of LLCs for tax years 2002-2006. Finally, this Article concludes by using the data compiled and reported to argue for increased attention to the LLC by commentators.

19. See, e.g., STATE LIMITED LIABILITY COMPANY AND PARTNERSHIP LAWS (2009) (apparently assuming that no LLC would be taxed as an S-corporation); CARTER G. BISHOP & DANIEL S. KLEINBERGER, LIMITED LIABILITY COMPANIES: TAX AND BUSINESS LAW (2009) (noting in Chapter 2 that LLCs can elect to be taxed as S-Corporations but then spending the entirety of Chapter 4 comparing the LLC and the S-Corporation as if the two are mutually exclusive); DWIGHT DRAKE, BUSINESS PLANNING 41-45 (2d ed. 2008) (assuming that an LLC and an S-Corporation are mutually exclusive); JEROLD A. FRIEDLAND, UNDERSTANDING PARTNERSHIP AND LLC TAXATION (2d ed. 2003) (the title indicates that partnership and LLC taxation are essentially synonymous). *But see* LARRY E. RIBSTEIN & ROBERT R. KEATINGE, LIMITED LIABILITY COMPANIES (2d ed. 2004, 2008) (better indicating that other election options are available to the LLC); Stephen R. Looney & Ronald A. Levitt, *Limited Liability Companies Classified as S Corporations—Part II*, SN067 ALI-ABA 961 (2008) (noting that LLCs can elect to be taxed as S-Corporations and even providing a form operating agreement for an LLC so electing). None of these resources are cited to disparage the authors or their works. In fact, the author uses these sources frequently. Rather, this citation is merely meant to demonstrate that this is an often-overlooked area in LLC law.

I. LLCs ARE THE NEW KING OF THE HILL:
THE NUMBER OF NEW LLCs, CORPORATIONS, AND LPS
FORMED IN THE UNITED STATES BETWEEN 2004-2007

For much of the United States' history, there were only two available choices for those wanting to form a new business entity with two or more owners: the partnership and the corporation.²⁰ The partnership was the default form of business and provided the benefit of pass-through taxation, but lacked the important feature of limited liability.²¹ The corporation, on the other hand, required a state filing and provided limited liability protection but at the expense of double taxation.²² Thus, prospective business owners faced a dilemma: receive the benefit of pass-through taxation and risk their personal assets in the business; or pay the penalty of double taxation but protect their personal assets.²³ Neither option was ideal.

Thus, a quest for a more satisfying option began. An early attempt at solving the dilemma came from the states in the form of the limited partnership. LPs provide limited liability protection for the limited partners, but there must be at least one general partner with unlimited personal liability.²⁴ Further, limited partners who become too involved in the business run the risk of forfeiting their status as limited partners and its commensurate limited liability protections.²⁵ Therefore, while the LP was an improvement in certain instances, it did not truly solve the

20. See, e.g., THOMAS LEE HAZEN & JERRY W. MARKAM, CORPORATIONS AND OTHER BUSINESS ENTERPRISES (3d ed. 2009); ROBERT RAGAZZO & DOUGLAS K. MOLL, CLOSELY HELD BUSINESS ORGANIZATIONS: CASES, MATERIALS, AND PROBLEMS (2006); Friedman, *supra* note 1, at 35. Please note that this discussion is not meant to be exhaustive as the primary purpose of this Article is not to discuss the history and development of the LLC, but rather to report the results of the author's research regarding the number of new LLCs, corporations, and LPs formed and how LLCs are being taxed.

21. See, e.g., HAZEN & MARKAM, *supra* note 20; RAGAZZO & MOLL, *supra* note 20; Friedman, *supra* note 1, at 40-42.

22. See, e.g., HAZEN & MARKAM, *supra* note 20; RAGAZZO & MOLL, *supra* note 20; Friedman, *supra* note 1, at 40-42.

23. See, e.g., BISHOP & KLEINBERGER, *supra* note 19 (referring to this as the "tax shield conundrum"); HAZEN & MARKAM, *supra* note 20; RAGAZZO & MOLL, *supra* note 20; Friedman, *supra* note 1, at 40-42.

24. See, e.g., REV. UNIFORM LIMITED PARTNERSHIP ACT (2001); HAZEN & MARKAM, *supra* note 20; RAGAZZO & MOLL, *supra* note 20.

25. See, e.g., REV. UNIFORM LIMITED PARTNERSHIP ACT (2001); HAZEN & MARKAM, *supra* note 20; RAGAZZO & MOLL, *supra* note 20.

problem.

Congress also tried to provide an answer by enacting Subchapter S of the Internal Revenue Code.²⁶ Under Subchapter S, a corporation could elect to be taxed as a Small Business Corporation (“S-Corporation”).²⁷ Congress has changed the requirements over the years, generally loosening them, but there are significant restrictions on who can own shares in an S-Corporation and what form those shares may take.²⁸ Therefore, the S-Corporation tax regime did not fully solve the problem either.

Then came the LLC. LLCs started out rather inauspiciously, and for many years did not appear to be destined for anything more than a specialized area of law for certain business owners in certain industries.²⁹ The hope of the LLC is that it would provide the protections of limited liability for all of its owners while securing the blessings of pass-through taxation as well. This hope was not immediately realized because the taxation of LLCs was uncertain under the Kintner regulations.³⁰ With the promulgation of the “check-the-box” regulations, however, the issue of how the IRS would treat an LLC for tax purposes was clearly settled, and the LLC began its rapid and steady ascent to its current status as the most commonly formed new business entity in the United States.³¹

The following tables clearly demonstrate this fact, conclusively showing that the LLC has been the first choice for most prospective new business owners in the United States beginning as early as 2004.³² Unless otherwise indicated, the data on the following tables was

26. I.R.C. §§ 1361-79 (2007).

27. *Id.* §§ 1361(a)-(b), 1362a.

28. *Id.* § 1361(b).

29. RAGAZZO & MOLL, *supra* note 20; Friedman, *supra* note 1, at 44-49.

30. DRAKE, *supra* note 19, at 39-41; RAGAZZO & MOLL, *supra* note 20; Friedman, *supra* note 1, at 48.

31. DRAKE, *supra* note 19, at 39-41; RAGAZZO & MOLL, *supra* note 20; Friedman, *supra* note 1, at 48.

32. Obviously, there are a number of other business entities not mentioned here including limited liability partnerships, limited liability limited partnerships, business trusts, professional service corporations, etc. Many have well noted that there is a proverbial alphabet soup of options available to the prospective business owner today. However, none of these entities have gained the universal popularity of the LLC, and, in the opinion of this author, are not likely to in the future. Accordingly, this Article focuses on the general partnership, the limited partnership, the corporation, and the LLC.

compiled primarily from the International Association of Commercial Administrators (IACA)³³ Annual Reports of Jurisdictions for the years in question and the IACA website.³⁴ Some data was compiled by contacting the filing office for the particular jurisdiction directly via telephone or email or by visiting the filing office's website. The tables below set out the raw data and are followed by an analysis of some conclusions to be drawn from them.

Before presenting the data, it should be noted that this Data builds upon the excellent work of Professor Friedman in *The Silent LLC Revolution*. The data presented, in many ways, picks up where the data in that article leaves off. There are, however, a few distinctions worth noting. As Professor Friedman noted, his data suffered from the fact that both domestic and foreign new LLCs were often lumped together, making it difficult to get a good handle on how many new LLCs were truly being formed across the country compared with new corporations.³⁵ Except where indicated, beginning in 2004, domestic and foreign entities were separated, thereby alleviating the problem with Professor Friedman's data. Finally, this Article includes a comparison with both corporations and LPs, thus giving the fullest picture possible of the current state of formation of new business entities.

Since Professor Friedman's article, no one appears to have conducted any exhaustive research as set out in his article and herein.³⁶ Accordingly, the author felt that, given the value of Professor Friedman's work, the academy and the practicing bar would greatly benefit from an update to the figures discovered and discussed by Professor Friedman in 2004. This was the impetus for the research that

33. According to its Web site, IACA "is a professional association for government administrators of business organization and secured transaction record systems at the state, provincial, territorial, and national level in any jurisdiction which has or anticipates development of such systems." Int'l Ass'n of Commercial Adm'rs (IACA), <http://www.iaca.org/node/16> (last visited Dec. 29, 2009).

34. The IACA Web site is <http://www.iaca.org>, and the relevant data and reports can be found at <http://www.iaca.org/node/80>.

35. Friedman, *supra* note 1, at 39.

36. There are some partial exceptions. For instance, Sandra Miller in the *The Duty of Care in the LLC* sets out a table showing the ratio of LLC filings to corporate filings for 2006. Miller, *supra* note 1, app. I, at 195-96. However, the aim of that article and data presented there was principally to show the great increase in the importance of LLCs in the economy. This Article, by contrast, aims to report on extensive empirical research into the number of LLCs, corporations, and LPs formed from 2004-2007 conducted by the author.

led to the compilation of the following data.

Table I-A: Number of New LLCs, Corporations, and
LPs Formed in 2004

State	2004 New LLCs		2004 New Corps		2004 New LPs	
	Total	%	Total	%	Total	%
AL	11,799	64.45%	6,339	34.63%	168	0.92%
AK	2,057	68.09%	865	28.63%	99	3.28%
AZ	33,461	69.71%	12,200	25.42%	2,341	4.88%
AR	7,340	54.71%	5,904	44.01%	171	1.27%
CA	49,884	33.82%	92,949	63.01%	4,679	3.17%
CO	38,817	67.45%	18,156	31.55%	580	1.01%
CT	25,250	91.03%	2,383	8.59%	104	0.37%
DE	68,807	62.76%	33,047	30.14%	7,782	7.10%
DC	3,094	71.45%	1,112	25.68%	124	2.86%
FL	94,342	35.38%	170,207	63.83%	2,115	0.79%
GA	34,637	52.75%	30,013	45.71%	1,016	1.55%
HI	5,785	65.33%	2,962	33.45%	108	1.22%
ID	6,967	67.28%	3,254	31.42%	135	1.30%
IL	21,394	32.02%	44,576	66.72%	838	1.25%
IN	15,098	57.01%	11,060	41.77%	323	1.22%
IA	6,462	58.38%	4,514	40.78%	93	0.84%
KS	6,580	59.46%	4,351	39.32%	135	1.22%
KY	14,886	72.31%	5,479	26.62%	220	1.07%
LA	22,158	79.92%	5,417	19.54%	149	0.54%
ME	3,624	55.72%	2,821	43.37%	59	0.91%
MD	24,096	64.89%	12,899	34.74%	138	0.37%
MA	10,990	48.13%	11,484	50.30%	359	1.57%
MI	45,604	68.46%	20,757	31.16%	252	0.38%
MN	17,719	56.16%	13,056	41.38%	776	2.46%
MS	7,738	65.20%	3,948	33.26%	183	1.54%
MO	24,539	71.99%	9,048	26.55%	498	1.46%
MT	6,601	71.06%	2,688	28.94%	³⁷	³⁸

37. E-mail from Tana Gormely, Deputy, Business Services Office of Montana Secretary of State, to David M. Graham, Research Assistant to Rodney Chrisman (Mar. 11, 2009) (on file with the author) [hereinafter Gormely E-mail] (indicating that a corrupted data file resulted in this information being lost and currently unavailable).

State	2004 New LLCs		2004 New Corps		2004 New LPs	
	Total	%	Total	%	Total	%
NE	3,595	40.56%	5,169	58.32%	99	1.12%
NV	30,100	46.27%	32,373	49.77%	2,574	3.96%
NH	7,218	79.80%	1,781	19.69%	46	0.51%
NJ	47,518	68.79%	21,215	30.71%	339	0.49%
NM	6,366	71.72%	2,391	26.94%	119	1.34%
NY	42,798	34.89%	79,231	64.58%	654	0.53%
NC	26,403	52.46%	23,532	46.75%	398	0.79%
ND	845	42.04%	1,082	53.83%	83	4.13%
OH	36,693	72.20%	13,556	26.68%	569	1.12%
OK	12,206	63.14%	6,799	35.17%	326	1.69%
OR	17,971	67.12%	8,602	32.13%	200	0.75%
PA	21,252	23.46%	65,268	72.05%	4,071	4.49%
RI	3,627	62.81%	2,102	36.40%	46	0.80%
SC	16,899	73.21%	5,919	25.64%	264	1.14%
SD	1,538	50.71%	1,399	46.13%	96	3.17%
TN	9,261	54.46%	7,283	42.83%	461	2.71%
TX	45,168	44.43%	37,081	36.47%	19,421	19.10%
UT	15,669	64.87%	7,994	33.10%	490	2.03%
VT	2,801	64.55%	1,538	35.45%	³⁹	⁴⁰
VA	28,951	58.26%	20,295	40.84%	445	0.90%
WA	22,380	62.20%	13,261	36.85%	342	0.95%
WV	3,873	73.32%	1,370	25.94%	39	0.74%
WI	25,268	81.40%	5,571	17.95%	203	0.65%
WY	3,682	54.49%	2,937	43.47%	138	2.04%
Tot.	1,041,811	52.20%	899,238	45.05%	54,868	2.75%

38. *Id.*

39. E-mail from Betty Poulin, Director of Corporations Division, Vermont Secretary of State's Office, to David M. Graham, Research Assistant to Rodney Chrisman (Feb. 23, 2009) (on file with the author) [hereinafter Poulin E-mail] (indicating that Vermont does not track the number of LPs filed each year).

40. *Id.*

Table I-B: Number of New LLCs, Corporations, and
LPs Formed in 2005

State	2005 New LLCs		2005 New Corps		2005 New LPs	
	Total	%	Total	%	Total	%
AL	13,773	70.24%	5,706	29.10%	130	0.66%
AK	2,573	69.62%	1,000	27.06%	123	3.33%
AZ	48,663	76.34%	14,171	22.23%	909	1.43%
AR	7,730	57.01%	5,678	41.87%	152	1.12%
CA	59,431	36.82%	97,432	60.36%	4,560	2.82%
CO	45,302	69.71%	19,028	29.28%	653	1.00%
CT	26,247	90.60%	2,595	8.96%	127	0.44%
DE	87,360	66.98%	34,377	26.36%	8,696	6.67%
DC	3,357	73.98%	1,069	23.56%	112	2.47%
FL	123,437	42.00%	168,182	57.22%	2,289	0.78%
GA	41,063	58.32%	28,431	40.38%	919	1.31%
HI	6,560	68.58%	2,903	30.35%	103	1.08%
ID	10,283	73.89%	3,514	25.25%	119	0.86%
IL	23,575	34.23%	44,412	64.49%	879	1.28%
IN	17,362	61.08%	10,718	37.71%	345	1.21%
IA	7,658	62.69%	4,474	36.62%	84	0.69%
KS	7,382	62.21%	4,331	36.50%	153	1.29%
KY	14,028	72.59%	5,084	26.31%	212	1.10%
LA	25,323	83.37%	4,888	16.09%	165	0.54%
ME	4,056	60.50%	2,608	38.90%	40	0.60%
MD	27,944	68.52%	12,663	31.05%	177	0.43%
MA	12,283	52.29%	10,953	46.62%	256	1.09%
MI	47,215	70.55%	19,454	29.07%	257	0.38%
MN	18,899	59.18%	12,687	39.73%	350	1.10%
MS	9,665	68.30%	4,316	30.50%	169	1.19%
MO	28,440	80.02%	6,614	18.61%	485	1.36%
MT	7,972	73.79%	2,831	26.21%	⁴¹	⁴²
NE	3,855	56.26%	2,939	42.89%	58	0.85%
NV	37,402	49.25%	35,779	47.11%	2,766	3.64%
NH	7,333	79.74%	1,804	19.62%	59	0.64%
NJ	51,668	71.79%	19,965	27.74%	339	0.47%

41. Gormely E-mail, *supra* note 37.

42. *Id.*

State	2005 New LLCs		2005 New Corps		2005 New LPs	
	Total	%	Total	%	Total	%
NM	7,824	75.81%	2,240	21.70%	257 ⁴³	2.49%
NY	48,564	38.49%	76,999	61.03%	604	0.48%
NC	27,763	57.42%	20,280	41.94%	308	0.64%
ND	907	42.80%	1,120	52.86%	92	4.34%
OH	40,180	75.85%	12,226	23.08%	568	1.07%
OK	13,606	67.88%	6,162	30.74%	275	1.37%
OR	20,154	69.98%	8,476	29.43%	169	0.59%
PA	24,631	51.79%	18,844	39.62%	4,081	8.58%
RI	3,437	61.73%	2,083	37.41%	48	0.86%
SC	20,767	78.64%	5,455	20.66%	186	0.70%
SD	1,933	55.61%	1,446	41.60%	97	2.79%
TN	11,117	59.59%	7,145	38.30%	395	2.12%
TX	53,101	48.36%	35,867	32.66%	20,837	18.98%
UT	19,626	67.99%	8,793	30.46%	449	1.56%
VT	3,124	74.90%	1,047	25.10%	⁴⁴	⁴⁵
VA	33,204	61.21%	20,609	37.99%	435	0.80%
WA	28,310	67.89%	13,099	31.41%	291	0.70%
WV	3,660	72.62%	1,336	26.51%	44	0.87%
WI	26,653	83.39%	5,104	15.97%	203	0.64%
WY	5,120	60.28%	3,242	38.17%	131	1.54%
Tot.	1,221,520	57.65%	842,179	39.75%	55,156	2.60%

Table I-C: Number of New LLCs, Corporations, and
LPs Formed in 2006

State	2006 New LLCs		2006 New Corps		2006 New LPs	
	Total	%	Total	%	Total	%
AL	15,797	75.10%	5,146	24.46%	93	0.44%
AK	3,123	72.56%	1,091	25.35%	90	2.09%
AZ	48,345	78.72%	12,366	20.14%	699	1.14%
AR	7,859	58.07%	5,519	40.78%	155	1.15%
CA	61,911	38.16%	96,278	59.35%	4,033	2.49%

43. E-mail from Patricia Herrera, Director of the Operations Division, New Mexico Secretary of State's Office, to David M. Graham, Research Assistant to Rodney Chrisman (Feb. 26, 2009) (on file with the author) (providing data to obtain this total).

44. Poulin E-mail, *supra* note 39.

45. *Id.*

State	2006 New LLCs		2006 New Corps		2006 New LPs	
	Total	%	Total	%	Total	%
CO	47,512	72.99%	16,989	26.10%	591	0.91%
CT	22,548	91.74%	1,979	8.05%	51	0.21%
DE	97,508	69.22%	33,449	23.75%	9,901	7.03%
DC	3,440	76.77%	972	21.69%	69	1.54%
FL	123,055	43.65%	157,310	55.80%	1,543	0.55%
GA	28,622	34.73%	52,871	64.15%	930	1.13%
HI	7,781	72.67%	2,811	26.25%	116	1.08%
ID	7,371	66.03%	3,586	32.12%	206	1.85%
IL	23,804	35.68%	42,315	63.42%	603	0.90%
IN	18,300	63.95%	10,027	35.04%	287	1.00%
IA	8,006	65.95%	4,066	33.49%	68	0.56%
KS	7,837	65.90%	3,961	33.31%	94	0.79%
KY	13,105	73.16%	4,631	25.85%	177	0.99%
LA	29,420	85.71%	4,613	13.44%	294	0.86%
ME	4,001	63.51%	2,271	36.05%	28	0.44%
MD	29,613	64.75%	15,893	34.75%	226	0.49%
MA	12,639	55.46%	9,831	43.14%	320	1.40%
MI	46,946	71.49%	18,436	28.08%	284	0.43%
MN	18,866	61.99%	11,216	36.85%	352	1.16%
MS	10,437	70.11%	4,185	28.11%	265	1.78%
MO	30,351	83.57%	5,596	15.41%	372	1.02%
MT	9,070	75.98%	2,753	23.06%	114	0.96%
NE	4,399	60.23%	2,825	38.68%	80	1.10%
NV	39,796	51.15%	35,578	45.73%	2,429	3.12%
NH	8,135	83.98%	1,524	15.73%	28	0.29%
NJ	52,344	73.25%	18,819	26.33%	301	0.42%
NM	8,807	79.36%	2,177	19.62%	114	1.03%
NY	48,451	38.61%	76,474	60.94%	560	0.45%
NC	29,736	59.34%	20,107	40.12%	268	0.53%
ND	1,099	49.50%	980	44.14%	141	6.35%
OH	44,991	79.74%	10,692	18.95%	740	1.31%
OK	15,328	72.32%	5,571	26.29%	295	1.39%
OR	22,629	72.79%	8,243	26.52%	214	0.69%
PA	27,698	58.44%	16,420	34.65%	3,275	6.91%
RI	3,578	65.64%	1,829	33.55%	44	0.81%
SC	23,144	81.49%	4,855	17.09%	403	1.42%
SD	2,164	60.28%	1,344	37.44%	82	2.28%

State	2006 New LLCs		2006 New Corps		2006 New LPs	
	Total	%	Total	%	Total	%
TN	12,285	63.21%	6,817	35.08%	333	1.71%
TX	58,288	52.46%	36,473	32.82%	16,355	14.72%
UT	22,860	71.86%	8,445	26.55%	506	1.59%
VT	3,263	77.30%	958	22.70%	⁴⁶	⁴⁷
VA	33,727	62.84%	19,612	36.54%	329	0.61%
WA	30,457	70.37%	12,524	28.94%	300	0.69%
WV	5,488	71.69%	2,115	27.63%	52	0.68%
WI	26,842	84.89%	4,554	14.40%	222	0.70%
WY	5,680	62.87%	3,246	35.93%	108	1.20%
Tot.	1,268,456	59.00%	832,343	38.71%	49,140	2.29%

Table I-D: Number of New LLCs, Corporations, and
LPs Formed in 2007

State	2007 New LLCs		2007 New Corps		2007 New LPs	
	Total	%	Total	%	Total	%
AL	16,058	75.36%	5,146	24.15%	104	0.49%
AK ⁴⁸	N/A	N/A	N/A	N/A	N/A	N/A
AZ	49,085	81.15%	10,834	17.91%	567	0.94%
AR	8,484	62.41%	4,951	36.42%	160	1.18%
CA	68,136	41.10%	94,594	57.05%	3,068	1.85%
CO	52,463	76.45%	15,746	22.95%	413	0.60%
CT	22,789	92.03%	1,927	7.78%	46	0.19%
DE	112,982	71.97%	34,144	21.75%	9,852	6.28%
DC	3,581	78.70%	879	19.32%	90	1.98%
FL	128,340	48.32%	135,851	51.15%	1,425	0.54%
GA	56,357	66.84%	27,147	32.19%	818	0.97%
HI	7,553	73.70%	2,603	25.40%	92	0.90%
ID	11,836	79.47%	2,856	19.18%	202	1.36%
IL	25,960	38.41%	41,045	60.73%	586	0.87%
IN	20,172	67.76%	9,345	31.39%	254	0.85%

46. *Id.*

47. *Id.*

48. E-mail from Nicole Church, Administrative Clerk, Corporations Section, State of Alaska, to David M. Graham, Research Assistant to Rodney Chrisman (Mar. 10, 2009) (on file with author) [hereinafter Church E-mail] (indicating that Alaska suffered a data loss and therefore does not have figures for 2007).

State	2007 New LLCs		2007 New Corps		2007 New LPs	
	Total	%	Total	%	Total	%
IA	8,395	71.22%	3,321	28.18%	71	0.60%
KS	8,471	70.12%	3,531	29.23%	79	0.65%
KY	14,552	77.86%	3,972	21.25%	166	0.89%
LA	28,629	81.21%	6,453	18.31%	169	0.48%
ME	4,026	65.87%	2,058	33.67%	28	0.46%
MD	29,671	67.75%	13,968	31.89%	158	0.36%
MA	13,675	54.51%	11,159	44.48%	253	1.01%
MI	46,715	73.64%	16,489	25.99%	235	0.37%
MN	19,739	65.96%	9,852	32.92%	335	1.12%
MS	13,349	70.34%	5,375	28.32%	255	1.34%
MO	30,551	85.99%	4,619	13.00%	358	1.01%
MT	9,436	66.27%	4,686	32.91%	116	0.81%
NE	4,452	63.82%	2,450	35.12%	74	1.06%
NV	42,850	61.14%	25,191	35.94%	2,044	2.92%
NH	7,763	85.04%	1,319	14.45%	47	0.51%
NJ	55,270	77.01%	16,224	22.61%	274	0.38%
NM	9,333	81.91%	1,932	16.96%	129	1.13%
NY	49,797	40.04%	73,971	59.47%	609	0.49%
NC	33,320	63.37%	18,981	36.10%	283	0.54%
ND	2,044	49.05%	1,832	43.96%	291	6.98%
OH	41,196	80.74%	9,425	18.47%	400	0.78%
OK	15,560	71.85%	5,850	27.01%	247	1.14%
OR	24,291	75.89%	7,524	23.51%	192	0.60%
PA	30,259	63.37%	14,598	30.57%	2,893	6.06%
RI	3,692	69.77%	1,556	29.40%	44	0.83%
SC	23,888	83.89%	4,278	15.02%	310	1.09%
SD	2,539	65.91%	1,240	32.19%	73	1.90%
TN	12,175	66.05%	6,001	32.55%	258	1.40%
TX	69,056	60.45%	34,463	30.17%	10,718	9.38%
UT	26,645	74.73%	8,452	23.71%	556	1.56%
VT	3,527	79.28%	922	20.72%	⁴⁹	⁵⁰
VA	35,820	66.54%	17,721	32.92%	295	0.55%
WA	32,474	72.88%	11,810	26.50%	275	0.62%
WV	4,475	73.59%	1,558	25.62%	48	0.79%

49. Poulin E-mail, *supra* note 39.

50. *Id.*

State	2007 New LLCs		2007 New Corps		2007 New LPs	
	Total	%	Total	%	Total	%
WI	26,818	85.99%	4,191	13.44%	179	0.57%
WY	6,899	65.82%	3,493	33.32%	90	0.86%
Tot.	1,375,148	63.58%	747,533	34.56%	40,229	1.86%

Table I-E: Total Number of New LLCs, Corporations, and LPs Formed in 2004-2007

State	Total 2004-2007 New LLCs		Total 2004-2007 New Corps		Total 2004-2007 New LPs	
	Total	%	Total	%	Total	%
AL	57,427	71.55%	22,337	27.83%	495	0.62%
AK	7,753	70.35%	2,956	26.82%	312	2.83%
AZ	179,554	76.85%	49,571	21.22%	4,516	1.93%
AR	31,413	58.06%	22,052	40.76%	638	1.18%
CA	239,362	37.58%	381,253	59.86%	16,340	2.57%
CO	184,094	71.84%	69,919	27.29%	2,237	0.87%
CT	96,834	91.31%	8,884	8.38%	328	0.31%
DE	366,657	68.16%	135,017	25.10%	36,231	6.74%
DC	13,472	75.27%	4,032	22.53%	395	2.21%
FL	469,174	42.34%	631,550	56.99%	7,372	0.67%
GA	160,679	53.06%	138,462	45.72%	3,683	1.22%
HI	27,679	70.29%	11,279	28.64%	419	1.06%
ID	36,457	72.44%	13,210	26.25%	662	1.32%
IL	94,733	35.09%	172,348	63.84%	2,906	1.08%
IN	70,932	62.61%	41,150	36.32%	1,209	1.07%
IA	30,521	64.65%	16,375	34.68%	316	0.67%
KS	30,270	64.53%	16,174	34.48%	461	0.98%
KY	56,571	73.94%	19,166	25.05%	775	1.01%
LA	105,530	82.65%	21,371	16.74%	777	0.61%
ME	15,707	61.31%	9,758	38.09%	155	0.60%
MD	111,324	66.48%	55,423	33.10%	699	0.42%
MA	49,587	52.64%	43,427	46.10%	1,188	1.26%
MI	186,480	71.00%	75,136	28.61%	1,028	0.39%
MN	75,223	60.74%	46,811	37.80%	1,813	1.46%
MS	41,189	68.78%	17,824	29.76%	872	1.46%
MO	113,881	80.50%	25,877	18.29%	1,713	1.21%
MT	33,079	71.50%	12,958	28.01%	230	0.50%

State	Total 2004-2007 New LLCs		Total 2004-2007 New Corps		Total 2004-2007 New LPs	
	Total	%	Total	%	Total	%
NE	16,301	54.35%	13,383	44.62%	311	1.04%
NV	150,148	51.98%	128,921	44.63%	9,813	3.40%
NH	30,449	82.17%	6,428	17.35%	180	0.49%
NJ	206,800	72.75%	76,223	26.81%	1,253	0.44%
NM	32,330	77.55%	8,740	20.96%	619	1.48%
NY	189,610	38.02%	306,675	61.49%	2,427	0.49%
NC	117,222	58.21%	82,900	41.17%	1,257	0.62%
ND	4,895	46.55%	5,014	47.68%	607	5.77%
OH	163,060	77.19%	45,899	21.73%	2,277	1.08%
OK	56,700	68.96%	24,382	29.65%	1,143	1.39%
OR	85,045	71.67%	32,845	27.68%	775	0.65%
PA	103,840	44.51%	115,130	49.35%	14,320	6.14%
RI	14,334	64.90%	7,570	34.28%	182	0.82%
SC	84,698	79.63%	20,507	19.28%	1,163	1.09%
SD	8,174	58.59%	5,429	38.91%	348	2.49%
TN	44,838	60.98%	27,246	37.05%	1,447	1.97%
TX	225,613	51.65%	143,884	32.94%	67,331	15.41%
UT	84,800	70.38%	33,684	27.96%	2,001	1.66%
VT	12,715	74.01%	4,465	25.99%	⁵¹	⁵²
VA	131,702	62.29%	78,237	37.00%	1,504	0.71%
WA	113,621	68.64%	50,694	30.63%	1,208	0.73%
WV	17,496	72.72%	6,379	26.52%	183	0.76%
WI	105,581	83.92%	19,420	15.44%	807	0.64%
WY	21,381	61.50%	12,918	37.16%	467	1.34%
Tot.	4,906,935	58.22%	3,321,293	39.41%	199,393	2.37%

ST	Ratios of New LLCs to New Corps					Ratios of New LLCs to LPs				
	2004	2005	2006	2007	Total	2004	2005	2006	2007	Total
AL	1.861	2.414	3.070	3.120	2.571	70.232	105.946	169.860	154.404	116.014
AK	2.378	2.573	2.863	⁵³	2.623	20.778	20.919	34.700	⁵⁴	24.849
AZ	2.743	3.434	3.910	4.531	3.622	14.293	53.535	69.163	86.570	39.760

51. *Id.*52. *Id.*53. Church E-mail, *supra* note 48.54. *Id.*

ST	Ratios of New LLCs to New Corps					Ratios of New LLCs to LPs				
	2004	2005	2006	2007	Total	2004	2005	2006	2007	Total
AR	1.243	1.361	1.424	1.714	1.424	42.924	50.855	50.703	53.025	49.237
CA	0.537	0.610	0.643	0.720	0.628	10.661	13.033	15.351	22.209	14.649
CO	2.138	2.381	2.797	3.332	2.633	66.926	69.375	80.393	127.029	82.295
CT	10.596	10.114	11.394	11.826	10.900	242.788	206.669	442.118	495.413	295.226
DE	2.082	2.541	2.915	3.309	2.716	8.842	10.046	9.848	11.468	10.120
DC	2.782	3.140	3.539	4.074	3.341	24.952	29.973	49.855	39.789	34.106
FL	0.554	0.734	0.782	0.945	0.743	44.606	53.926	79.750	90.063	63.643
GA	1.154	1.444	0.541	2.076	1.160	34.092	44.682	30.776	68.896	43.627
HI	1.953	2.260	2.768	2.902	2.454	53.565	63.689	67.078	82.098	66.060
ID	2.141	2.926	2.055	4.144	2.760	51.607	86.412	35.782	58.594	55.071
IL	0.480	0.531	0.563	0.632	0.550	25.530	26.820	39.476	44.300	32.599
IN	1.365	1.620	1.825	2.159	1.724	46.743	50.325	63.763	79.417	58.670
IA	1.432	1.712	1.969	2.528	1.864	69.484	91.167	117.735	118.239	96.585
KS	1.512	1.704	1.979	2.399	1.872	48.741	48.248	83.372	107.228	65.662
KY	2.717	2.759	2.830	3.664	2.952	67.664	66.170	74.040	87.663	72.995
LA	4.090	5.181	6.378	4.437	4.938	148.711	153.473	100.068	169.402	135.817
ME	1.285	1.555	1.762	1.956	1.610	61.424	101.400	142.893	143.786	101.335
MD	1.868	2.207	1.863	2.124	2.009	174.609	157.876	131.031	187.791	159.262
MA	0.957	1.121	1.286	1.225	1.142	30.613	47.980	39.497	54.051	41.740
MI	2.197	2.427	2.546	2.833	2.482	180.968	183.716	165.303	198.787	181.401
MN	1.357	1.490	1.682	2.004	1.607	22.834	53.997	53.597	58.922	41.491
MI	1.960	2.239	2.494	2.484	2.311	42.284	57.189	39.385	52.349	47.235
MO	2.712	4.300	5.424	6.614	4.401	49.275	58.639	81.589	85.338	66.480
MT	2.456	2.816	3.295	2.014	2.553	⁵⁵	⁵⁶	79.561	81.345	143.822
NE	0.695	1.312	1.557	1.817	1.218	36.313	66.466	54.988	60.162	52.415
NV	0.930	1.045	1.119	1.701	1.165	11.694	13.522	16.384	20.964	15.301
NH	4.053	4.065	5.338	5.886	4.737	156.913	124.288	290.536	165.170	169.161
NJ	2.240	2.588	2.781	3.407	2.713	140.171	152.413	173.900	201.715	165.044
NM	2.662	3.493	4.045	4.831	3.699	53.496	30.444	77.254	72.349	52.229
NY	0.540	0.631	0.634	0.673	0.618	65.440	80.404	86.520	81.768	78.125
NC	1.122	1.369	1.479	1.755	1.414	66.339	90.140	110.955	117.739	93.255
ND	0.781	0.810	1.121	1.116	0.976	10.181	9.859	7.794	7.024	8.064
OH	2.707	3.286	4.208	4.371	3.553	64.487	70.739	60.799	102.990	71.612
OK	1.795	2.208	2.751	2.660	2.325	37.442	49.476	51.959	62.996	49.606

55. Gormely E-mail, *supra* note 37.

56. *Id.*

ST	Ratios of New LLCs to New Corps					Ratios of New LLCs to LPs				
	2004	2005	2006	2007	Total	2004	2005	2006	2007	Total
OR	2.089	2.378	2.745	3.228	2.589	89.855	119.254	105.743	126.516	109.735
PA	0.326	1.307	1.687	2.073	0.902	5.220	6.036	8.457	10.459	7.251
RI	1.725	1.650	1.956	2.373	1.894	78.848	71.604	81.318	83.909	78.758
SC	2.855	3.807	4.767	5.584	4.130	64.011	111.651	57.429	77.058	72.827
SD	1.099	1.337	1.610	2.048	1.506	16.021	19.928	26.390	34.781	23.489
TN	1.272	1.556	1.802	2.029	1.646	20.089	28.144	36.892	47.190	30.987
TX	1.218	1.480	1.598	2.004	1.568	2.326	2.548	3.564	6.443	3.351
UT	1.960	2.232	2.707	3.153	2.518	31.978	43.710	45.178	47.923	42.379
VT	1.821	2.984	3.406	3.825	2.848	⁵⁷	⁵⁸	⁵⁹	⁶⁰	⁶¹
VA	1.427	1.611	1.720	2.021	1.683	65.058	76.331	102.514	121.424	87.568
WA	1.688	2.161	2.432	2.750	2.241	65.439	97.285	101.523	118.087	94.057
WV	2.827	2.740	2.595	2.872	2.743	99.308	83.182	105.538	93.229	95.607
WI	4.536	5.222	5.894	6.399	5.437	124.473	131.296	120.910	149.821	130.831
WY	1.254	1.579	1.750	1.975	1.655	26.681	39.084	52.593	76.656	45.784
Total	1.159	1.450	1.524	1.840	1.477	18.988	22.147	25.813	34.183	24.609

Even a cursory look at the above data clearly demonstrates that the number of new LLCs formed in America surpasses the number of other new business entities formed by every conceivable measure. In the most recent year, nearly two new domestic LLCs were formed for every one new domestic corporation. Over 34 new domestic LLCs were formed for every one new domestic LP. Those numbers are truly astounding considering that, just five years earlier, Professor Friedman's research showed that more corporations were still being formed nationwide than LLCs.⁶²

Further, when Professor Friedman reported his data, there were eleven jurisdictions where the LLC was not widely accepted.⁶³ In discussing this, Professor Friedman went on to note that "[i]n six states, this was overwhelmingly so; in California, Florida, Illinois, New York,

57. Poulin E-mail, *supra* note 39.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. Friedman, *supra* note 1, at 37 ("[n]ationally, 45.44% of business filing in 2003 were for LLCs").

63. *Id.*

North Dakota, and South Dakota, over twice as many corporations as LLCs were formed in 2003.”⁶⁴ By 2007, the number of non-adopting states had fallen from eleven to only four: California, Florida, Illinois, and New York. A large change, to be certain, and it appears that even in these four states where the number of corporations formed still exceeds the number of LLCs formed, that LLCs have made great gains. For example, in FL the number of new domestic LLCs and corporations formed is in nearly a dead heat with the 0.945 new LLCs formed for every one new corporation. In none of the four states do the number of new domestic corporations formed double the number of new domestic LLCs. Further, the data seems to indicate that LLCs are gaining ground in these states every year as well.

Later in his article, Professor Friedman suggested explanations for these nonconforming states.⁶⁵ While it is beyond this Article’s scope to do the same, one would assume that many of the same issues still exist given that the four remaining non-adopting states were also among the non-adopting jurisdictions from Professor Friedman’s research. This would be an interesting topic for additional research into what discourages the use of LLCs in these states and why. Further, certain states during the years included in this Article experienced significant drops in the number of new domestic LLCs formed only to see a complete rebound in the following year. It would be very interesting and useful for legislators and others to know what caused these fluctuations.

The long-term impact of the data presented herein is also astonishing. Between 2004 and 2007, over 1.5 million more domestic LLCs were formed than domestic corporations. Thus, as this number continues to increase in the future, attorneys, courts, legislators, and the general public⁶⁶ are going to be dealing more and more with LLCs and less and less with corporations. Regarding LPs, the number is even more striking. Between 2004 and 2007, over 4.7 million more domestic LLCs were formed than domestic LPs. Thus, the conclusion stated elsewhere herein is inescapable: we should expect to soon see the LP relegated to certain specialized transactions where it may retain some usefulness and otherwise to the dustbin of history.⁶⁷

64. *Id.*

65. *Id.* at 55-58.

66. *See, e.g.,* Miller, *supra* note 1, at 125 (noting the public’s vested interest in the effectiveness of the legal framework of publically traded LLCs).

67. There may be instances, such as in certain industries or in estate planning,

As the data makes clear, the LLC is now unquestionably the new king of the hill for business organizations. Law students are now much likelier to form and litigate around LLCs than corporations; judges are likelier to see LLCs in their courtrooms; Entrepreneurs are likelier to organize their companies as LLCs; and the general public is much likelier to acquire goods and services from LLCs than corporations. Accordingly, the LLC can no longer be ignored. It demands to be discussed and considered in law school classrooms, exhaustively addressed in business organization casebooks, and researched and analyzed in law review articles and other scholarly publications.

II. ANOTHER REVOLUTION BREWING?

HOW LLCs ARE BEING TAXED FOR FEDERAL INCOME TAX PURPOSES

When there were just two options for state-law business organizations, there were two symmetrical options for federal income taxation of those business organizations. Corporations were taxed under Subchapter C of the Internal Revenue Code as corporations, and partnerships were taxed under Subchapter K of the IRC as partnerships. Limited partnerships were essentially a special form of partnership and as such were taxed much as general partnerships again under subchapter K.⁶⁸ Similarly, the S-Corporation tax regime was a special way to tax a state-law corporation and, as such, did not especially strain the link between state-law business entity form and federal income tax regime. A corporation was still a state-law corporation, and it was still taxed as a corporation albeit a special type of corporate taxation under subchapter S.

Once again, then came the LLC. The LLC was neither a form of a corporation or a partnership. In fact, it bore characteristics of both and also many characteristics that are all its own. Therefore, there arose a very difficult question: what tax regime should be applied to such an entity? Should it be taxed as a partnership or as a corporation? The IRS frequently wanted to tax LLCs and other such hybrid entities as

where the LP has favorably authority or other reasons that cause practitioners to be reluctant to switch to the LLC in these transactions. I cannot help but speculate, however, that the LLC will eventually move into and replace the LP in these areas as well.

68. Some changes were needed for instance in handling how limited partners might be treated differently than general partners for tax purposes. However, LPs were essentially partnerships and were therefore taxed as such.

corporations, and business owners frequently hoped for their LLCs to be taxed as partnerships. Regardless of who won those early battles, when it became clear that the LLC would not automatically be lumped in with corporations or partnerships and taxed accordingly the connection between state-law business organization form and federal tax regime was effectively decoupled. Furthermore, since Congress has not enacted some new subchapter covering LLC taxation, the decoupling has been confirmed.

For a period of time, this decoupling led to significant uncertainties due to the four-part test of the Kintner Regulations.⁶⁹ With the repeal of the Kintner Regulations, however, and the promulgation of the “check-the-box” regulations,⁷⁰ the new decoupling accepted by the service was effectively embodied in federal income tax law. Thus, what was formerly automatic, i.e., corporations are taxed like corporations and partnerships are taxed like partnerships, in reality, even if not fully grasped or thought of this way at the time, became a two-part analysis. First, what state-law business entity form should be used? Second, which federal income tax regime will apply to this entity?⁷¹ This decoupling has led to much confusion in regard to the analysis of the common planning challenge: which business organization form should be used for a new enterprise?

As the following diagram⁷² indicates, for corporations there was really no significant change. A corporation is an “association” for tax purposes and as such may not elect, even under check-the-box, to be taxed as a partnership under subchapter K.⁷³ Therefore, if the state law business form chosen is a corporation, then there are only two tax options: the default C-corporation taxation or elective S-Corporation taxation.⁷⁴

69. I.R.C. §§ 301.7701-1 *et seq.*, before being amended in 1997.

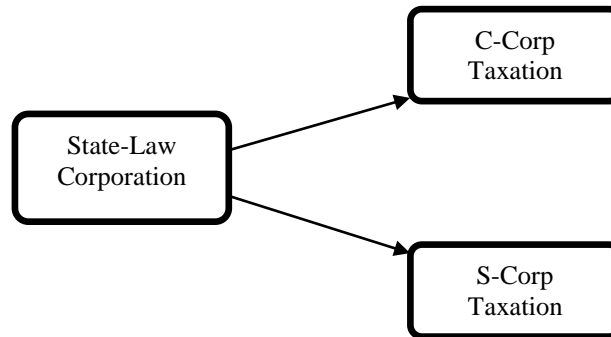
70. I.R.C. §§ 301.7701-1 to -4 (1997).

71. From a planning standpoint, it is helpful to note that the order of these questions may often be reversed or even considered together. Regardless, the questions are separated here to make the point that they are separate analytical considerations and the answer to one does not necessarily nor completely follow from the answer to the other.

72. The diagrams used herein are based upon those used by the author in teaching these concepts to students at Liberty University School of Law. These seem to have been helpful to the students, and the author hopes they will be helpful to others as well.

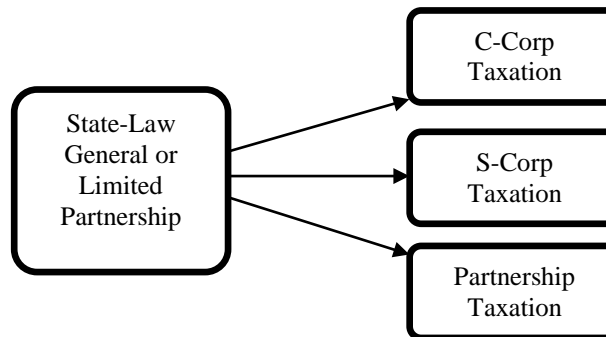
73. I.R.C. §§ 301.7701-2(b), 301.7701-3(a) (2007); IRS Form 8832 (Mar. 2007), available at <http://www.irs.gov/pub/irs-pdf/f8832.pdf>.

74. I.R.C. § 1361 (2007); IRS Form 2553 (Dec. 2007), available at



Most state-law corporations continue to elect to be taxed under the S-Corporation tax regime. This is primarily because the benefits of the C-Corporation tax regime are often far outweighed by the burdens of double-taxation. For example, in 2006, there were 3,909,707 S-Corporation returns filed as compared to only 2,009,500 C-corporation returns filed—a margin of nearly 2 to 1.⁷⁵

For partnerships and LLCs, however, the decoupling brought drastic changes. If the state-law business form chosen is a partnership or limited partnership, then there are three tax options: (1) the default partnership tax regime under subchapter K, (2) C-Corporation taxation, or (3) S-Corporation taxation.⁷⁶ The following diagram illustrates the options available to a state-law GP or LP. Despite these options, it should be noted that the uses for general partnerships (and indeed limited partnerships as the data herein demonstrates) are very limited, and most GPs and LPs should probably be organized as LLCs.



As stated above and noted elsewhere herein, one would assume that

<http://www.irs.gov/pub/irs-pdf/f2553/pdf>.

75. RIBSTEIN & KEATINGE, *supra* note 19, at § 2:1.

76. I.R.C. § 301.7701-1 (2007).

the vast majority of state-law partnerships and limited partnerships are taxed as partnerships. Further, as also noted elsewhere herein, a lawyer should mostly likely never form a general partnership. Any general partnerships are probably formed as the default organization and, therefore, not with the benefit of tax analysis and planning. Accordingly, it is likely that such entities would not make any tax elections. Additionally, LPs are becoming rarer and rarer, as demonstrated by the data herein, and the specialized circumstances in which they are still being used are likely well suited to partnership taxation. The IRS does not specifically track how many partnerships are being taxed as C-Corporations and S-Corporations, and the author of this Article did not request that data given the low-level of its significance for this article.

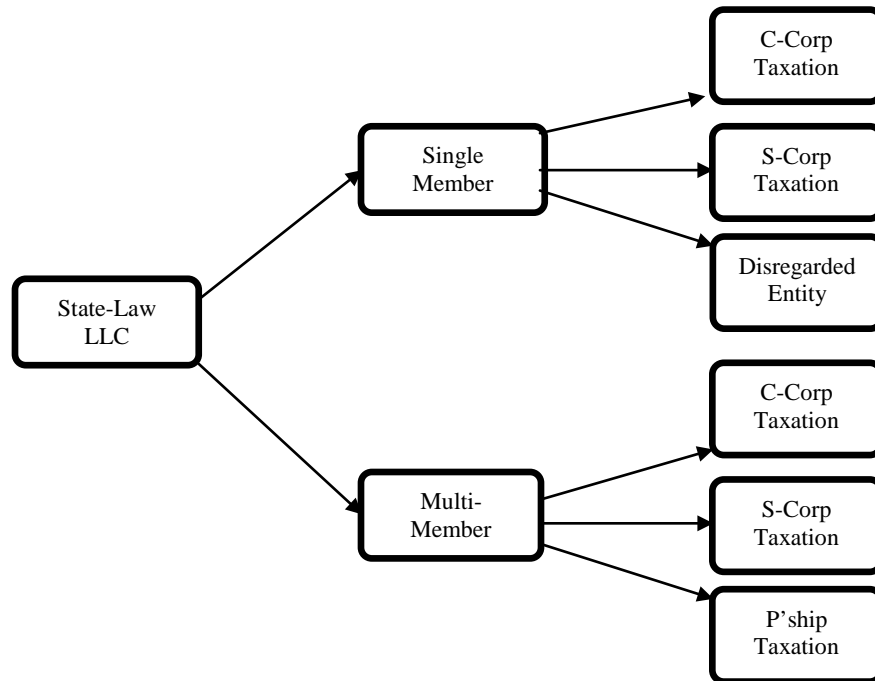
This decoupling's true effects are most dramatically displayed with regard to the LLC. If the state-law business entity form chosen is an LLC, then there are four options for taxation. First, the options available depend upon whether the LLC is a single-member LLC or a multi-member LLC.⁷⁷ An SMLLC has three options: (1) default taxation as a disregarded entity (sole proprietorship on Schedule C to the Form 1040 for an individual), (2) C-corporation taxation, and (3) S-Corporation taxation.⁷⁸ An MMLLC has three options as well: (1) default taxation as a partnership, (2) C-corporation taxation, and (3) S-Corporation taxation.⁷⁹ The following diagram illustrates the options available to the

77. I.R.C. § 301.7701-2(a) (2007) (“[An] entity with two or more members is classified for federal tax purposes as either a corporation or a partnership . . . [an] entity with only one owner is classified as a corporation or is disregarded; if . . . disregarded, its activities are treated . . . as a sole proprietorship, branch, or division of the owner.”). There is no such thing as a single-member partnership by definition. Therefore, this additional layer of complication does not exist with regard to general partnerships or limited partnerships. *See* REV. UNIFORM PARTNERSHIP ACT §§ 101, 201 (1997); REV. UNIFORM LIMITED PARTNERSHIP ACT §§ 102, 201 (2001).

78. REV. UNIFORM PARTNERSHIP ACT §§ 101, 201 (1997); REV. UNIFORM LIMITED PARTNERSHIP ACT §§ 102, 201 (2001). While there is no such thing as a single partner general partnership or limited partnership, every state now provides for a single-member LLC. *See* RIBSTEIN & KEATINGE, *supra* note 19, at app. 4-4. Form 8832 is required for the election to be taxed as a C-corporation. Formerly, Form 8832 and then Form 2553 were required for the election to be taxed as an S-corporation. However, the IRS has since amended the instructions to Form 2553 to provide that “[a]n entity eligible to elect to be taxed as a corporation [and also eligible to elect to be taxed as an s-corporation and filing Form 2553] will be treated as a corporation as of the effective date of the S corporation election and does not need to file Form 8832.” IRS Form 2553, *supra* note 74, at 1.

79. IRS Form 2553, *supra* note 74, at 1.

LLC.



Following decoupling, most commentators and practitioners have assumed that little has changed with regard to federal income taxation of business entities other than the certainty brought by the “check-the-box” regulations. As the preceding notes, this is likely true for corporations, general partnerships, and LPs. Further, commentators also assumed that there would be little changes regarding LLCs as well. The assumption was that LLCs would likely follow suit and just be taxed as partnerships since that is what everyone wanted—partnership taxation with limited liability.⁸⁰ The data set forth in the following, however, demonstrates

80. See, e.g., BISHOP & KLEINBERGER, *supra* note 19 (noting in Chapter 2 that LLCs can elect to be taxed as S-Corporations but then spending the entirety of Chapter 4 comparing the LLC and the S-Corporation as if the two are mutually exclusive); DRAKE, *supra* note 19, at 41-45 (assuming that an LLC and an S-Corporation are mutually exclusive); FRIEDLAND, *supra* note 19 (the title indicates that partnership and LLC taxation are essentially synonymous); MILLER & JACOBSON, *supra* note 19 (apparently assuming that no LLC would be taxed as an S-Corporation); Schwidetzky, *supra* note 19 (noting that LLCs “are usually taxed as partnerships” and opining that this “in most contexts make[s] S-Corporations obsolete”). *But see, e.g.*, RIBSTEIN & KEATINGE, *supra* note 19 (indicating that other election options are available to the LLC); Looney & Levitt, *supra* note 19 (noting that LLCs can elect to be taxed as S-

that this assumption, while largely true, seems to be falling subject to somewhat of a revolutionary trend of its own – namely, as the effects and implications of decoupling become more widely known among tax practitioners it appears that more and more prospective business owners are being advised to use an LLC and elect to have it taxed as something other than a partnership. Generally, this something else is an S-Corporation.

Speculation about the reasons behind this potential revolution are beyond this Article's scope.⁸¹ It appears, however, that practitioners are beginning to see benefits to the LLC state-law form beyond merely limited liability and partnership taxation that would make them want to use an LLC even when S-Corporation or perhaps C-Corporation taxation is preferable. For instance, the enormous flexibility and contractual nature of the LLC may provide advantages such as clearly negotiated and defined fiduciary duties and only the desired formalities. Further, in many states, the LLC may provide asset protection that goes beyond even that provided by the corporation.

Regardless of the reasons, the following tables clearly demonstrate that the trend is toward greater numbers of LLCs being taxed as something other than a partnership. Table II-A was compiled from data requested from the Internal Revenue Service ("IRS") in an open records request.⁸² All of the figures provided by the IRS are estimates based upon a sample taken by the IRS.⁸³ In particular, the number of LLCs taxed as S-Corporations and C-corporations is not tracked by the IRS and was determined "based on the number of corporations with 'LLC' or 'PLLC' in the corporate name."⁸⁴ The data is obviously not perfect or complete, but it does provide very helpful and enlightening information as to how LLCs are electing to be taxed.⁸⁵ As far as this author can

Corporations and even providing a form operating agreement for an LLC so electing).

81. For a discussion of the relative advantages and disadvantages of Subchapter K and Subchapter S taxation see Schwidetzky, *supra* note 19, at 759-801.

82. Letter from Gary T. Prutsman, Chief of Disclosure for the Small Business/Self-Employed Division of the Internal Revenue Service, Department of the Treasury, to David M. Graham, Research Assistant to Rodney Chrisman (Mar. 23, 2009) (on file with author).

83. *Id.*

84. *Id.*

85. The tables do not cover every type of taxation regime available to LLCs, nor do the tables account for LLCs ignored as disregarded entities for federal income tax purposes that are owned by other entities, among other shortcomings. Further, the data only goes through the 2006 tax year, because, as of the date of this article, the IRS data

determine, similar data has not been gathered or reported in any other law review or treatise.⁸⁶ Table II-B was calculated and compiled by the author from the information provided by the IRS.

Table II-A: How LLCs Were Taxed for Federal Income Tax Purposes
In Tax Years 2002-2006

Tax Year	Sole Proprietorships		Partnerships		S-Corporations		C- Corporations		Total
	Total	%	Total	%	Total	%	Total	%	
2002	144,078	12.77%	946,130	83.87%	23,834	2.11%	14,114	1.25%	1,128,156
2003	220,944	16.11%	1,091,502	79.58%	37,690	2.75%	21,393	1.56%	1,371,529
2004	313,404	18.75%	1,270,236	75.99%	63,132	3.78%	24,896	1.49%	1,671,668
2005	459,465	22.30%	1,465,223	71.10%	104,734	5.08%	31,351	1.52%	2,060,773
2006	612,334	25.18%	1,630,161	67.03%	148,649	6.11%	40,933	1.68%	2,432,077

Table II-B: Year-to-Year Increase by Tax Regime for How LLCs Were
Taxed for Federal Income Tax Purposes in Tax Years 2002-2006

Tax Years	Sole Proprietorships		Partnerships		S-Corporations		C-Corporations	
	Total	%	Total	%	Total	%	Total	%
2002- 2003	76,866	53.35%	145,372	15.36%	13,856	58.14%	7,279	51.57%
2003- 2004	92,460	41.85%	178,734	16.38%	25,442	67.50%	3,503	16.37%
2004- 2005	146,061	46.60%	194,987	15.35%	41,602	65.90%	6,455	25.93%
2005- 2006	152,869	33.27%	164,938	11.26%	43,915	41.93%	9,582	30.56%
Tot.	468,256	325.00%	684,031	72.30%	124,815	523.68%	26,819	190.02%

The above tables show much what one would expect. The majority of LLCs are taxed as the defaults under the “check-the-box” regulations—sole proprietorships for single-member LLCs owned by an

is not yet available for tax year 2007 or 2008.

86. See RIBSTEIN & KEATINGE, *supra* note 19, at § 2:1; Schwidetzky, *supra* note 19, at 801-07 (presenting information on the number of business entity tax returns filed including partnerships, LLCs, S-corporations, and C-corporations).

individual and partnerships for multi-member LLCs. Further, the number of LLCs taxed as S-Corporations and C-Corporations is relatively small compared to the number of LLCs taxed as partnerships and sole proprietorships. If this were all the data showed, it would hardly be worthy of reporting.

However, the data shows much more than that. It shows that the number of LLCs being taxed as S-Corporations or C-Corporations is growing at a rate that has far surpassed any of the other categories over the past five years. Further, the number of LLCs being taxed as S-Corporations surpasses all of the other groups handily, including those taxed as C-Corporations. For instance, in each of the years covered above, the number of LLCs taxed as S-Corporations increase each year by at least 41%. The nearest competing tax regime was sole proprietorships which increased each year by at least 33%. In contrast, C-Corporation taxed LLCs had one year of only a 16% increase and partnership taxed LLCs never increased by more than 16% and increased by as little as 11%.

Further, the number of LLCs taxed as S-Corporations grew by an average of 58.37% per year over the period of 2002 to 2006, while the number of LLCs taxed as partnerships grew by only an average of 14.59% per year. Sole proprietorship and C-Corporation taxed LLCs grew at average yearly rates higher than that of the partnership taxed LLCs (43.77% and 31.11% respectively,) but both grew at an average rate that is approximately 15% per year less than the growth in the number of S-Corporation taxed LLCs.

Perhaps the most staggering figure of all comes when viewing the totals for the years 2002-2006. Over that period of time, the total percentage increase in the number of LLCs taxed as partnerships was an impressive 72.30%. Despite that seemingly large number, however, it is literally dwarfed by the growth in the other tax regimes. For instance, the total percentage increase in the number of C-Corporation taxed LLCs was 190.02%. For sole proprietorship taxed LLCs, it was even higher coming in at an amazing 325%. All of these numbers, however, pale in comparison to the percentage increase over the period in the number of LLCs taxed as S-Corporations, which is a staggering 523.68%. In other words, for tax year 2006 over five times as many LLCs were taxed as S-Corporations than in 2002. Should that rate continue for another five years, there would be over three-quarters of a million LLCs taxed as S-Corporations by 2010!

While it seems likely that some flattening in the rates of increase

for sole proprietorship, S-Corporation, and C-corporation taxed LLCs is possible in the coming years as the total number of LLCs taxed under these regimes increases, the sheer numbers of LLCs taxed under these varying regimes demands that commentators and practitioners begin to think differently about LLC taxation. No longer should it be assumed that LLCs are primarily and nearly exclusively taxed as sole proprietorships or partnerships. Rather, just as the time for considering the LLC as the new king of the hill in the business organization world has long since arrive, the day is beginning to dawn when the breadth and variety of LLC taxation must be recognized. LLCs are now taxed in a variety of ways, and commentators and practitioners should recognize this and begin to consider its implications.

Just as the reasons for choosing an LLC beyond just partnership taxation are beyond this Article's scope, so too are the relative benefits of S-Corporation taxation as opposed to partnership taxation. S-Corporation taxation is certainly less complex for most businesses than partnership taxation, which this author often tells students is the most complicated system of taxation ever devised by man. Further, S-Corporation taxation provides the opportunity for tax-free reorganization, a benefit not available to entities taxed as a partnership. Perhaps most importantly, S-Corporation taxation allows the opportunity to avoid significant self-employment taxes as opposed to entities taxed as sole proprietorships or partnerships. Regardless of the reasons, the data reported herein makes clear that the number of LLCs taxed S-Corporations is growing at an astounding rate that demands the attention of commentators.

Commentators should explore the relative risks and benefits of structuring an LLC to be taxed as an S-Corporation as opposed to simply using a state-law corporation. Commentators should be considering the types of situations where it makes sense to choose S-Corporation taxation over partnership taxation and then to structure the S-Corporation taxed entity as an LLC. Commentators should be working to draft forms that provide for the making and protection of the S-election in an LLC context. These and many other issues are ripe for consideration by commentators and deserve our attention.

CONCLUSION

Much additional research needs to be done regarding the data presented in this Article. One thing is abundantly clear, however: a

great revolution has occurred in business organizations law. The LLC has replaced the corporation as the most commonly formed new business entity in the United States. The revolution has occurred quickly and appears to be continuing as LLCs become increasingly popular every year.

It further appears that there may well be another practitioner-driven revolution in the making with regard to LLCs – the LLC taxed as an S-Corporation. As the research presented in this Article demonstrates, the number of LLCs taxed as S-Corporations is currently small but growing at an amazing rate. If the trends discussed herein regarding LLC taxation continue, in only a very few years LLCs may be just as likely to be taxed as an S-Corporation as a partnership or sole proprietorship. Presumably, this will only add to the attractiveness of the LLC as an entity choice and lead to the LLC being further solidified in its current position as the new business entity king of the hill.