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Through the Looking Glass: Series LLCs in 2015

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Introduction

This Article examines series LLCs in an effort to explain how the series concept developed, what potential uses for the series concept exist, the relevance of the treatment of a series as a separate state law entity or not, what potential problems the series concept raises, and what improvements should be considered. This Article first looks at the history of the series concept as it developed in the use of business trusts in the fund area and then reviews the series provisions of the Delaware LLC Act and the series provisions of the laws of other states. In connection with that review, this Article addresses the question whether a series is treated as a separate state law entity and, if so, what the meaning and significance of that treatment may be. Certain actual and potential uses of series LLC are examined, and this Article then addresses certain legal uncertainties with respect to series LLCs. Following a look at the few cases that have been decided involving series LLCs, this Article concludes with some recommendations and cautions.

The author serves as an ABA Advisor to the Drafting Committee considering a Series of Unincorporated Business Entities Act for the National Conference of Commissioners on Uniform State Laws (the “NCCUSL Committee”). Despite the reservations raised in this Article, the author believes that innovation in the law is a positive development. When a new legal concept is introduced, the author believes it is incumbent on the profession to do all it

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1 The author is also co-chair of the task force on model series LLC operating agreement of the LLCs, Partnerships, and Unincorporated Entities Committee of the Business Law Section of the American Bar Association.
reasonably can to improve the concept, to develop improvements, and to provide guidance on how the new concept can best be employed to assist clients in reaching their goals.

**Origin of Series Concept.**

The series concept arose in Delaware. Delaware in 1988 adopted its Business Trust Act (changed to Statutory Trust Act in 2001).\(^2\) Series provisions were added to the Delaware Business Trust Act in 1990 at the urging of the mutual fund/investment company industry; these series provisions afforded internal liability shields only to registered investment companies.\(^3\) The 1990 amendments added the following language to Section 3806(b) of what was then the Delaware Business Trust Act:

> (b) A governing instrument may contain any provision relating to the management of the business and affairs of the business trust, and the rights, duties and obligations of the trustees, beneficial owners and other persons, which is not contrary to any provision or requirement of this chapter and, without limitation:

> **(2)** may establish or provide for the establishment of designated series of trustees, beneficial owners or beneficial interests having separate rights, powers or duties with respect to specified property or obligations of the business trust or profits and losses associated with specified property or obligations, and, to the extent provided in the governing instrument, any such series may have a separate business purpose or investment objective.


In addition, the amendment added the following to the end of section 3804 of the Delaware Business Trust Act (with some ancillary language that was deleted in 1991 omitted):

> Notwithstanding the foregoing provisions of this §3804, in the event that the governing instrument of a business trust which is a registered investment company under the Investment Company Act of 1940, as amended (15 U.S.C. §§80a-l et seq.) creates one or more series as provided in §3806(b)(2), and if separate and distinct records are maintained for any such series and the assets

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\(^2\) Del. Code Ann tit. 12 § 3801(g).

\(^3\) Memo from Marla Norton, a director and shareholder of Bayard, P.A. in Wilmington, Delaware, to the NCCULSA Committee. (copy on file with author).
associated with any such series are held and accounted for separately from the
other assets of the business trust, or any other series thereof, and if the governing
instrument so provides, and notice of the limitation on liabilities of a series as
referenced in this sentence is set forth in the certificate of trust of the business
trust, then the debts, liabilities, obligations and expenses incurred, contracted for
or otherwise existing with respect to a particular series shall be enforceable
against the assets of such series only, and not against the assets of the business
trust generally . . . .

In 1994, Delaware amended section 3804 of its Business Trust Act to insert the words “,
including a business trust” between “business trust” and “which is” and to add a comma before
“creates.” The 1994 amendments removed the limitation on internal liability shields so that the
concept of segregated protected series applied to securitization and structured finance
transactions as well as mutual funds and investment companies.4 Delaware’s Statutory Trust Act
now provides a framework for trusts utilized for asset securitization and the organization of
investment companies. In the traditional application, a series is an administrative sub-unit of an
investment company.

A series company or fund is an investment company composed of separate
portfolios of investments organized under the umbrella of a single corporate or
trust entity... Each portfolio of a series company has distinct objectives and
policies, and interests in each portfolio are represented by a separate class or
series of shares. Shareholders of each series participate solely in the investment
results of that series. In effect, each series operates as a separate investment
company.5

Section 18(f)(2) of the Investment Company Act and SEC Rule 18f-2(a) apply
substantially the same analysis. Assuming that an investment company is organized as a
statutory trust, only the investment comapny, on behalf of the “fund family,” will register with
the SEC on, for example, Form N-1. Thereafter, the trust will organize a series for each of the
various sponsored funds. The business trust has a single trustee, typically embodied in a board,
overseeing all of the series even as, on behalf of each series, distinct fund managers are retained.

4 Id.
Further, typically all of the series organized by a single investment company operate under a single set of service documents executed with various service providers such as transfer agents, custodians, principal underwriter(s), numerous broker-dealer firms, etc. In the securitized finance realm, under an individual business trust, distinct series are organized with respect to particular classes of securitized assets, and then securities are issued with respect to each series. The series structure makes sense for the mutual fund and asset securitization applications. Mutual funds, for example, employ the series structure so that new funds can be created to exploit market opportunities with minimal regulatory delay and expense. As this Article discusses below, however, practitioners are now seeing the use of the series concept in situations that are not necessarily as well suited as the mutual fund and asset securitization situations.

**Dawn of Series LLCs.**

A few years after it enacted its Business Trust Act, Delaware in 1996 enacted the first statutory provisions for series LLCs at the same time that it added series provisions to its limited partnership act. The Delaware legislature added series provisions to its limited partnership act because “sophisticated, highly funded deals were commonplace for use by Delaware limited partnerships.” Series provisions became part of the Delaware LLC Act the same year, presumably to maintain the Delaware LLC Act’s stature as a modern, forward-looking statute. Although arguably not responding to any perceived need, lawyers quickly began seeing potential uses for series LLCs after Delaware and a few other states enacted series provisions.

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8 *Id.* at 5.

9 Conaway, *supra*, note 7, does not discuss why Delaware thought it good policy to add series provisions to its LLC statute. Conaway’s article provides a good discussion of statutory trusts for anyone desiring more information about those entities, but the example of a series LLC that she discusses at pages 50-51 does not make it apparent why the persons in her example would not have been just as well-served, if not better served, by forming separate LLCs. In a later paper, Conaway asserts that “the Delaware series … is a prime example of a legislative response to market demands of the business community.” Ann E. Conaway and Peter I. Tsoslias, “The Delaware Series LLC: Sophisticated and Flexible Business Planning,” 2 *Mich. J. of Private Equity & Venture Capital L.*, 97, electronic copy available at http://ssrn.com/abstract=207945. The quoted statement appears to be correct with respect to the Delaware Statutory Trust and possibly the Delaware limited partnership act, but Conaway and Tsoslias present no evidence of any market demand for series LLCs.
Under Delaware law and the laws of the majority of other states with series LLC legislation, the organizer forms a juridical LLC (the “series LLC”) and provides in its company agreement the power to form individual series. The individual series can be viewed as administrative accounting entities distinct from each other and the series LLC and, if properly formed and maintained, with individual liability protection between and among the individual series and the series LLC. Thus there may be only a single series LLC and an infinite number of individual series formed under the series LLC.

A minority of the series LLC jurisdictions permit, but do not require, an individual series of a series LLC to be treated as a separate entity. Where a series is treated as a separate entity, the statutes nevertheless require common reporting and registered agents. This Article

10 As of January, 2015, the jurisdictions that have enacted series legislation are Alabama ALA. CODE § 10A-5A-11.01 (2015); Delaware (DEL. CODE ANN. tit. 6, § 18-215); the District of Columbia (D.C. CODE § 29-802.06); Illinois (805 ILL. COMP. STAT. § 180/37-40); Iowa (IOWA CODE ANN. §489.1201) (Iowa also provides for protected insurance cell companies—IOWA CODE ANN § 521G.7); Kansas (KAN. STAT. ANN. § 17-76, 143); Missouri (MO. REV. STAT. § 347.186); Montana (MONT. CODE. ANN. § 35-8-202) (Montana requires that the articles of organization for a series LLC attach a list naming each series member and including their individual operating agreements and requires a filing fee of $70.00 plus $50.00 for each series member.); Nevada (NEV. REV. STAT. 86.296); Oklahoma (OKLA. STAT. tit. 18, § 2054.4); Puerto Rico (14 P.R. LAWS ANN. tit.14, § 3967); Tennessee (TENN. CODE ANN. § 48-249-309); Texas (TEx. BUS. ORGS. CODE § 101.601); and Utah (UTAH CODE ANN. § 48-3-1201). In addition, two states have legislation providing for entities known as series LLCs, but the statutes in these states do not provide for internal liability shields: North Dakota (N.D. CENT. CODE § 10-32-02.57); Wisconsin (WIS. STAT. § 183.0504). Delaware law also provides for series limited partnerships. DEL. CODE ANN. tit. 6, § 17-218 (2007). The District of Columbia, Kansas, Illinois, Iowa, Missouri, and Utah series LLC statutes permit the Series LLC to elect to treat individual series as separate entities. D.C. Code § 29-802.6; KAN. STAT. ANN. § 17-76,143; 805 ILL. COMP. STAT. § 180/37-40(b); IOWA CODE ANN. § 489.1201; MO. REV STAT § 347.186; and UTAH CODE ANN. § 48-3-1201(a). The District of Columbia, Illinois, and Kansas require the filing of a certificate for each series. Missouri requires the limited liability company to file “articles of organization that separately identify each series which is to have limited liability.” MO. REV. STAT. § 347.186.2(1)(f).

11 These jurisdictions are the District of Columbia, Kansas, Illinois, Iowa, Missouri, and Utah. Supra, note 10.

12 D.C. CODE § 29-802.06(p); KAN. STAT. ANN. § 17-76,143(f); ILL. COMP. STAT. § 180/37-40(f); IOWA CODE ANN. §§ 489.113, 489.1201.7. The Iowa series provisions do not contain a registered agent provision. § 489.113 provides for the naming of a registered agent by a “limited liability company.” § 489.1201.7 provides that except as otherwise modified by the series provisions, the provisions generally applicable to a limited liability company apply to a series; MO. REV. STAT. § 347.186.4(e)(4) (registered agent for limited liability company will be registered agent for each series); the Utah series provisions also do not contain a registered agent provision. UTAH CODE ANN § 48-3a-111 provides for the naming of a registered agent by a “limited liability company.” UTAH CODE ANN § 48-3a-1201(6), states. “Except to the extent modified by this part, the provisions of this chapter which are generally applicable to a limited liability company, its managers, members, and transferees, shall be applicable to each series with respect to the operations of such a series.”
discusses later what it may mean that a series is a separate entity and some of the uncertainties raised by such treatment.

The Delaware LLC Act states:

A limited liability company agreement may establish or provide for the establishment of 1 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.14

If notice and record-keeping requirements in the statute are satisfied, the Delaware statute provides for an internal liability shield between the various individual series and the series LLC itself as follows:

[T]he debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to a particular series shall be enforceable against the assets of such series only, and not against the assets of the limited liability company generally or any other series thereof; and, unless otherwise provided in the limited liability company agreement, none of the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to the limited liability company generally or any other series thereof shall be enforceable against the assets of such series.15

13 Infra, notes 53-80 and accompanying text.
14 DEL. CODE ANN. tit. 6, § 18-215(a).
15 Id. at (b). Note the similarity between the series provisions of the Delaware LLC Act quoted in the text accompanying this note and supra, note 14 with the provisions of the Delaware Statutory Trust Act quoted at supra, notes 3-4 and accompanying text. A precondition to the organization of one or more series is the reservation of that power in the certificate of formation/articles of organization. ALA. CODE § 10A-5A-11.02(b)(3) (certificate of formation must contain a statement that the LLC may have one or more series of assets subject to the limits provided in § 11.02(a)); DEL. CODE ANN. tit. 6, § 18-215 (certificate of formation must set forth that the LLC may have separate series as a pre-condition to inter-series limited liability); D. C CODE § 29-802.6(b)(3) (certificate of organization must state that the debts, obligations, and other liabilities of a series are limited as provided in that subsection and a certificate of series designation must be filed for each series); 805 ILL. COMP. STAT. § 180/37-40(b) (articles of organization must contain a notice of the statutory limit on the liability of a series, and a certificate of designation must be filed for each series that is to have limited liability); IOWA CODE ANN. § 489.1201.2.d (notice of the establishment of the series and of the limitation on liability of the series must be set forth in the certificate of organization; “The filing of the certificate of organization containing a notice of the limitations on liabilities of a series in the office of the secretary of state constitutes notice of the limitations on liabilities of such series); KAN. Stat. Ann. § 17-76, 143(b) (articles of organization must contain a notice of the statutory limit on the liability of a series, and a certificate of designation must be filed for each series that is to have limited liability); Mo.
The notice required by the Delaware series provisions is only a statement in the LLC’s certificate of formation as to the limitation on liability of series. Notice is sufficient even if no series has been created and there is no requirement that any specific series be referenced. There is also no requirement in the Delaware statute that the name of a series include the word “series’ or any other indication that it is a series of a series LLC. A trade creditor (much less a tort creditor) dealing with “Able Company Ltd.” who checks the web site of the Delaware Secretary of State has no way of learning that Able Company Ltd. is a series of Baker LLC. The situation is different in other series states. In Texas, for example, if the name of any series established by a series LLC differs from the name of the series LLC stated in its certificate of formation, the articles of organization must state that the LLC has separate series.

16 DEL. CODE ANN. tit. 6, § 18-215(b). “The fact that a certificate of formation that contains the foregoing notice of the limitation of liabilities of a series is on file in the office of the Secretary of State shall constitute notice of such limitation of liabilities of a series. Id. Conaway and Tsolias supra, note 9 at 131 state that it is “probably” sufficient to state in the certificate of formation that the LLC “is a series LLC with all the limitations provided by law” but that it would be safer to track the language of the statute.

17 This assumes that the stationary, invoices, emails, or other documents of Able Company Ltd. do not contain any references to its being a series of Baker LLC. Whether this fact pattern or any variations thereof may create other issues, such as liability for acting for an undisclosed principal or for a deceptive trade practice, is beyond the scope of this Article.
formation, the LLC must file an assumed name certificate for that series.\textsuperscript{18} Although other series states may require greater notice, the lack of any required particularized notice by the Delaware statute is serious because most series LLCs will probably be formed in Delaware or another state that does not require any more notice than Delaware.\textsuperscript{19}

Although series LLCs did not gain much attention for several years, more and more states began adopting series LLC provisions.\textsuperscript{20} In 2009, without any policy discussion to speak of, Texas adopted provisions permitting the creation and operation of series LLCs.\textsuperscript{21} The Texas series provisions follow the Delaware model but provide much more detail. Also, differences exist because Texas, unlike Delaware,\textsuperscript{22} requires that the certificate of formation of an LLC state

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\item \textsuperscript{18}TEX. BUS. & COMM. CODE § 71.002(2)(H). In Missouri, the form Articles of Organization (LLC-1) requires the identification of each series and that each separate series file an Attachment Form LLCIA. The Missouri statute requires that the limited liability company file articles of organization “that separately identify each series which is to have limited liability.” MO. REV. STAT. § 347.186.2(f). Further, Missouri requires the name of each series to include the entire name of the limited liability company and be distinguishable from the name of any other series. MO. REV. STAT. § 347.186.3. Montana requires that the operating agreement of each series be in writing and filed with the Articles of Organization. MONT. CODE ANN. § 35-8-202(h). The District of Columbia, Illinois, and Kansas require the filing of a certificate for each series. D.C. CODE § 29-802.06(d)(1) requires that a certificate of series designation state a different name for each series that contains the entire name of the limited liability company. 805 ILL. COMP. STAT. requires that a series with limited liability to have a name that “commences with the entire name of the limited liability company, as set forth in its articles of organization and be distinguishable from the names of the other series as set forth in the articles of organization.” IOWA CODE ANN. § 489.1201.1 provides that “the name of each series must contain the name of the limited liability company and be distinguishable from the name of any other series as set forth in the certificate of organization.” KAN. STAT. ANN. § 17-76, 143(c) provides that “the name of the series with limited liability must contain the entire name of the limited liability company and be distinguishable from the names of the other series as set forth in the articles of organization.” Utah requires that the name of each series include the name of the limited liability company and be distinguishable from the name of any other series. UTAH CODE ANN. § 48-3a-1201(1). The Utah notice provision, however, is like Delaware’s in that the notice required in the certificate of organization is sufficient even if no series has been established—and the notice is not required to reference a specific series. UTAH CODE ANN. § 48-3a-1202.

\item Griffith and Ling, supra, note 6 at 89 report that of the approximately 37,000 series LLCs that had been formed as of 2013, almost 26,000 had been formed either in Delaware or in Nevada. Nevada does not appear to require any more meaningful notice than Delaware. However, Griffith and Lang at 90 state that the large number for Nevada may be misleading because “the Nevada Secretary of State’s form for the formation of LLCs has a box to check if the LLC is a Series LLC. It may well be that a significant percentage of the Nevada LLCs are Series LLCs due to businessmen forming their own LLCs, using the Secretary of State’s form, and checking a box for which they have no understanding and in fact have no intention of forming protected series.” The number of series LLCs formed in Delaware also may overstate the number actually functioning as series LLCs. See, the statement of Marla Norton, infra, text accompanying note 68.

\item See supra, note 10 for a list of the jurisdictions that have enacted series legislation.

\item TEX. BUS. ORGS. CODE § 101.601, et. seq.

\item DEL. CODE ANN., tit. 6, § 18-201(a).
\end{itemize}
who its governing persons are and whether they are managers or managing members. Notably, in a Texas series LLC, an individual series may be managed by the members of the series even if the LLC itself is manager-managed. Likewise, an individual series may be manager-managed even if the LLC itself is member-managed, and an individual series may have different managers than the LLC. The same result obtains under Delaware law as the certificate of formation of a Delaware LLC does not state whether the LLC is member-managed or manager-managed and, unless varied in the LLC agreement, members of a Delaware LLC arguably have agency authority even if a manager is named. In the case of a Delaware series LLC, management of an individual series is vested in the members associated with that series unless the LLC agreement provides for a manager for that series.

**Status (or Not) as a Separate State Law Entity.**

**Individual Series Generally not a Separate State Law Entity.** Under the majority of state series LLC acts including Delaware and Texas, the entity for state law purposes is the juridical LLC (that is, the LLC actually formed by a filing with the state filing office) and not an individual series within the LLC. Stated differently, an individual series within a series LLC is not a separate entity under the laws of the state of Delaware or Texas. Indeed, Texas, alone among the series jurisdictions, makes this crystal clear:

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25 *Id.*

26 Del. Code Ann., tit. 6, § 18-201(a).


29 *See supra,* note 10.

30 It is unclear that the term “separate entity” or even the term “juridical entity” has an accepted meaning. Humpty Dumpty would feel right at home—“When I use a word, it means just what I choose it to mean—neither more nor less.” Lewis Carroll, *Through the Looking Glass*, Chapter 6.
For purposes of this chapter and Title 1, a series has the rights, powers, and duties provided by this subchapter to the series but is not a separate domestic entity or organization.\(^{31}\)

Although an individual series of a Delaware or Texas series LLC has “the power and capacity to, in its own name, contract, hold title to assets (including real, personal and intangible property), grant liens and security interests, and sue and be sued,”\(^{32}\) an individual series may not enter into a merger or conversion because the individual series is not a separate entity.\(^{33}\)

Delaware permits a “domestic limited liability company” to enter into a merger or conversion.\(^{34}\) Further, Delaware defines a “limited liability company” and a “domestic limited liability company” as “a limited liability company formed under the laws of the State of Delaware and having 1 or more members.”\(^{35}\) An individual series within a series LLC is not “formed” under either Delaware or Texas law but rather exists only pursuant to the limited liability company agreement of the series LLC. Members are not admitted as members of an individual series but are members of the series LLC “associated” with one or more series.\(^{36}\) A member may or may not have any economic interest in the series LLC itself; the member’s economic interest may be tied only to one or more series.\(^{37}\) Accordingly, when dealing with a series of a Texas or Delaware series LLC, an attorney must examine the company agreement and


\(^{33}\) Tex. Bus. Orgs. Code § 101.605; see infra, notes 34-37 and accompanying text. This is also the case with a series of a District of Columbia series LLC even though the District of Columbia allows separate entity treatment for a series. D.C. Code § 29-802-061(o) (“A series of a limited liability company shall not engage in a transaction under subchapter IX of this chapter or Chapter 2 of this title independently of the limited liability company.”).

\(^{34}\) Del. Code Ann. tit. 6, § 18-209(a).


\(^{37}\) Tex. Bus. Orgs. Code §§ 101.606-607, 610(b), 611; Del. Code Ann. tit. 6, § 18-215(e)-(k). Taken together, the provisions of the Delaware statute discussed above in the text accompanying notes 32 to 37 clearly provide that an individual series of a Delaware series LLC is not a separate legal entity. Accord, Conaway and Tsoflias, supra, note 9 at 126-27, noting that the existence of a series under Delaware law is entirely derivative of the series LLC. This analysis would also apply to individual series of series LLCs formed under the series LLC statutes of the other jurisdictions listed in note 10 other than the District of Columbia, Kansas, Illinois, Iowa, Missouri, and Utah. For the Texas provision that expressly states this result, see supra, note 31 and accompanying text.
any applicable series supplements to determine who has economic rights in the LLC or any series and who has power and authority to bind the series. Moreover, the lack of state law entity status is one of the many features of series LLCs that makes opining with respect to a Series LLC different from opining with respect to a non-series LLC.\textsuperscript{38}

**Absence of Separate Entity Status Consistent with Statutory Trusts.** Treatment of an individual series of a series LLC as not being a separate legal entity is consistent with the treatment of statutory trusts. The different funds of a statutory trust are not themselves distinct legal organizations.\textsuperscript{39}

In one of the few cases\textsuperscript{40} to consider the matter, the court in *Batra v. Investors Research Corp.* held that the plaintiff, who had filed suit with respect to one fund of an investment company, then transferred his investment to a different fund, still had standing to bring legal action against the investment company and all of its funds. In the court’s view, since an individual fund is not an independent legal entity, only the registered investment company was the “issuer” for the purposes of Investment Company Act jurisdiction, and the plaintiff had standing with respect to the investment company and each of its funds even though he owned an interest in only one fund and that was not the same fund in which he owned an interest at the time he brought suit.

More recently, Federal courts in Massachusetts, Illinois, and Maryland have taken the opposite position – that the funds themselves are separate entities for standing purposes whether or not they are separate legal entities under the organizational statute.\textsuperscript{41} This judicial controversy


\textsuperscript{39} UNIF. STAT. TR. ACT § 401(B), 6B U.L.A. 110 (Supp. 2012).


\textsuperscript{41} Wicks v. Putnam Inv. Mgmt., LLC, No. Civ. A. 04-10988, 2005 WL 705360, at *3 (D.Mass. Mar. 28, 2005) (when each fund is a separate corporate entity, “a shareholder plaintiff has a § 36(b) cause of action with respect to each registered investment company in which he owns an interest.”); Williams v. Bank One Corp., No. 03 C 8561, 2003 WL 22964376, at *1 (N.D.Ill.Dec. 15, 2003). In re Mutual Funds Investment Litigation, 519 F.Supp.2d 580 at n. 12 (D.Md. 2012) (criticizing *Batra* because the court “did not, however, consider that by suing on behalf of the fund
over standing in the investment company area and whether it matters to that question whether a fund is treated as a separate legal entity may foreshadow controversies and uncertainties to come in the series LLC area. This Article discusses several of these uncertainties later.42 Other uncertainties, which this Article does not discuss, include how a series LLC and its individual series will be treated in bankruptcy,43 how one files an effective financing statement against the assets of an individual series of a series LLC,44 what one should consider if asked to render a legal opinion with respect to a series,45 and whether a “transfer” of an asset from the series LLC to an individual series or from one individual series to another individual series, which need be only a notation in the records of the series LLC,46 will be treated as a transfer for purposes of the Uniform Fraudulent Transfers Act.47

Significance of Non-Separate Entity Status. This feature of series LLCs raises questions under the UCC and federal and state tax law and also creates issues when determining how to satisfy foreign entity qualification requirements when an individual series does business outside the state of formation of the series LLC and, more importantly, whether the internal

family, plaintiff (who can only feasibly own shares in an individual series) thus failed to satisfy the requirement that he sue on behalf of an entity in which he is a ‘security holder’.

42 Infra, notes 129-174 and accompanying text.


45 Powell, supra, note 38 at 20.

46 TEX. BUS. ORGS. CODE §101-603(a); DEL. CODE ANN. tit. 6, § 18-215(b).

47 The National Conference of Commissioners on Uniform State Laws in 2014 proposed amendments to the Uniform Fraudulent Transfers Act (including changing the name to the Uniform Voidable Transactions Act) that would treat each individual series of a series LLC as a separate person for purposes of the Act whether or not the individual series was otherwise treated as a person separate from the series LLC. The Utah series statute prohibits a series from transferring assets to the limited liability company or another series if the transfer impairs the ability of the series to pay its debts existing at the time of the transfer unless fair value is given to the series for the assets transferred. UTAH CODE ANN. § 48-3-1201(4)(a).
liability shields of a series LLC will be respected outside its state of formation. It also appears
that the concept of separate series within a single entity confuses many.48 Confusion may arise
because, despite the lack of separate entity status, a series of a Delaware or Texas series LLC
may “in its own name, contract, hold title to assets (including real, personal and intangible
property), grant liens and security interests, and sue and be sued.”49 Such an individual series
may not, however, enter into a merger or conversion.50 In all but one series jurisdiction, there is
no statutory provision allowing persons may not be admitted as members of a series—they must
be admitted as members of the series LLC and “associated” with one or more series.51
Tennessee stands alone in permitting members to be admitted at the series level.52 Other
uncertainties may be answered by the company agreement. For example, although the applicable
statutes are silent on this, presumably a member could be permitted to transfer not just the
member’s interest in the series LLC but also the member’s status as being associated with one or
more series. Likewise, because the powers of an individual series include the power to contract
and hold title to assets, presumably an individual series might be admitted as a member of
another LLC (whether or not the other LLC is a series LLC) and presumably could acquire other
equity interests, such as corporate stock. These powers would also appear to permit an
individual series to become a member of the series LLC that created it and then be associated
with one or more other series. Admittedly, this possibility may bring to mind the image of a
snake swallowing itself, but the fact that this possibility appears to exist adds to the potential
confusion that may result from statements that individual series are not separate legal entities.

48 See generally Griffith and Ling, supra, note 6.

49 TEX. BUS. ORGS. CODE § 101.605; DEL. CODE ANN. tit. 6, § 18-215(c). See, Conaway and Tsoflias, supra, note 9
at 126.

50 Supra, notes 33-37.

51 Supra, note 37. It is also the case in Illinois, Iowa, Kansas, Missouri, and Utah, five of the six series jurisdictions
that permit a series to be treated as a separate entity, that the statutory language speaks of “members associated
with a series.” 805 ILL. COMP. STAT. § 180/37-40(g), (h), and (i); IOWA CODE ANN. § 480.1201.5 and 6; KAN. STAT. ANN.
§ 17-76, 143 (g), (h), (i), and (l); MO. REV. STAT. § 347.186.5 and 6; UTAH CODE ANN. § 48-3a-1204. Utah, also,
however, refers to “members of the series” and “the series members.” UTAH CODE ANN. § 48-3a-1202. The District
of Columbia series LLC provisions do not contain the “members associated with” language and in fact refer to
members of a series. D.C. CODE § 29-802.06(c), (k)(2), and (m). However, the District of Columbia statute defines
“member” as “a person that has become a member of a limited liability company under § 29-804.01.”

52 TENN. CODE ANN. § 48-249-309(f), stating “Parts 4 and 5 if this chapter shall apply to a series of an LLC, as if the
series were a separate LLC.” § 48-49-501 provides for admission of members.
Significance of Separate Entity Status  It is unclear what it means in practice that that the governing law of a series jurisdiction treats a series as a separate entity or allows such treatment.\(^{53}\) For example, it is the case in Illinois, Iowa, Kansas, Missouri, and Utah, five of the six series jurisdictions that permit a series to be treated as a separate entity, that the applicable statutory language speaks of “members associated with a series.”\(^{54}\) Utah, also, however, refers to members of the series” and “the series members.”\(^{55}\) The District of Columbia series LLC provisions do not contain the “members associated with” language and in fact refers to members of a series.\(^{56}\) However, the District of Columbia statute defines “member” as “a person that has become a member of a limited liability company under § 29-804.01.”\(^{57}\) None of these series provisions provide a mechanism for a person to be admitted as a member of a series without being admitted as a member of the series LLC. Arguably, statutory authority for such admission might be found in the language providing, for example, as Illinois does, that each series with limited liability may “otherwise conduct business and exercise the powers of a limited liability company under this Act.”\(^{58}\) Iowa, Kansas, Missouri, and Utah have similar provisions.

\(^{53}\) Supra, note 30.

\(^{54}\) 805 ILL. COMP. STAT. § 180/37-40(g), (h), and (i); IOWA CODE ANN. § 480.1201.5 and 6; KAN. STAT. ANN. § 17-76, 143 (g), (h), (i), and (l); MO. REV. STAT. § 347.186.5 and 6; UTAH CODE ANN. § 48-3a-1204.

\(^{55}\) UTAH CODE ANN. § 48-3a-1202, § 48-3a-1204, series related provisions in the operating agreement, speaks exclusively of “members associated.” § 48-3a-401, admission of members, speaks only of members being admitted to a limited liability company. § 48-3a-1201(1), however, is unusual in that unlike Delaware and other series jurisdictions, it provides that a limited liability company may establish one or more “series of transferable interests.” Delaware provides that a limited liability company may establish one or more “designated series of members, managers, limited liability company interests or assets.” DEL. CODE ANN. tit. 6, § 18-215(b).

\(^{56}\) D.C. CODE § 29-802.06(c), (k)(2), and (m).

\(^{57}\) D.C. CODE § 29-802.02(8).

\(^{58}\) 805 ILL. COMP. STAT. §180/37-40(b).

\(^{59}\) IOWA CODE ANN. § 489.1201.7, stating “Except to the extent modified by this article, the provisions of this chapter which are generally applicable to a limited liability company, and its managers, members and transferees, shall be applicable to each series with respect to the operations of such series.”.

\(^{60}\) KAN. STAT. ANN. § 17-76, 143 (b), stating. “Except to the extent modified in this section, the provisions of this act which are generally applicable to limited liability companies, their managers, members and transferees, shall be applicable to each particular series with respect to the operation of such series.”
The District of Columbia provision is worded differently but appears similar in result.\[^{63}\] There is simply no guidance available, and admission as a member of a series does seem to be inconsistent with the “members associated with a series” language of all of the separate entity series LLC statutes other than that of the District of Columbia. Interestingly, only Tennessee, which is not a state that permits separate entity treatment for a series, appears clearly to allow members to be admitted at the series level.\[^{64}\]

Similarly to the member language, the statutes of all of the series jurisdictions that permit a series to be a separate entity refer to “the assets associated with any such series.”\[^{65}\] That is, although most series jurisdictions provide that a series may take title to property in the name of the series,\[^{66}\] no series LLC statute speaks of assets being owned by a series but, rather, associated with a series. Some statutory language, however, does suggest actual ownership.\[^{67}\]

Even though the District of Columbia series LLC statute allows separate entity treatment for a series, it provides that a series may not engage in a merger, conversion, or interest exchange

\[^{61}\] Mo. Rev. Stat. tit. 12, § 347.186.2(4), stating “Except as modified in this section, the provisions of this chapter which are generally applicable to limited liability companies and their managers, members and transferees, shall be applicable to each particular series with respect to the operation of such series.”

\[^{62}\] Utah Code Ann § 48-3a-1201(6), stating. “Except to the extent modified by this part, the provisions of this chapter which are generally applicable to a limited liability company, its managers, members, and transferees, shall be applicable to each series with respect to the operations of such a series.”

\[^{63}\] D.C. Code § 29-802-06(r) (in all matters not otherwise specifically addressed in this section, this chapter shall govern a series as if the series of the limited liability company were a separate limited liability company formed under this chapter.)


\[^{65}\] Ill. Comp. Stat. § 180/37-40(b); D.C. Code § 29-802.06(b)(2), (g), (h), and (i); Iowa Code Ann. § 480.1201.2; Kan. Stat. Ann. § 17-76, 143(b); Mo. Rev. Stat. § 347.186.2(1)(c); Utah Code Ann. § 48-3a-1201(2)(c).


\[^{67}\] Ala. Code § 10A-5A-1.04(d)(3) provides that a series has the power and capacity to hold and convey title to assets of the series; Iowa Code Ann. § 480.1203(d)(1) refers to “the series’ properties” and § 1201-2 states that debts of a series are enforceable “against the assets of that series only.”
apart from the series LLC. On the other hand, Illinois provides that each series with limited liability may “otherwise conduct business and exercise the powers of a limited liability company under this Act.” Iowa, Kansas, Missouri, and Utah have similar provisions. The scope and effect of these provisions is uncertain. For example, do they mean that an individual series of an Illinois series LLC could merge with another entity? If so, what would that look like in practice? Could a series of Illinois series LLC A merge with a series created by another Illinois series LLC—series LLC B? If so, what relationship would the survivor have with either series LLC? What happens if the merging series of series LLC A is the survivor? Must the company agreement of series LLC A provide for the consequences of such a merger? If the merging series of series LLC A is not the survivor, does it then follow that the series of series LLC B that was a party to the merger has no relationship with series LLC A? In either case, will the surviving series remain as a series of the series LLC that created it? Will all this depend on the provisions of the company agreements of the series LLCs and the merger agreement? What additional

68 D.C. CODE § 29-802-06 (o).

69 805 ILL. COMP. STAT. §180/37-40(b).

70 IOWA CODE ANN. § 489.1201.7, stating “Except to the extent modified by this article, the provisions of this chapter which are generally applicable to a limited liability company, and its managers, members and transferees, shall be applicable to each series with respect to the operations of such series.”

71 KAN. STAT. ANN. § 17-76, 143 (j), stating. “Except to the extent modified in this section, the provisions of this act which are generally applicable to limited liability companies, their managers, members and transferees, shall be applicable to each particular series with respect to the operation of such series.”

72 MO. REV. STAT. tit. 12, § 347.186.5(4), stating “Except as modified in this section, the provisions of this chapter which are generally applicable to limited liability companies, their managers, members and transferees, shall be applicable to each particular series with respect to the operation of such series.”

73 UTAH CODE ANN § 48-3a-1201(6), stating. “Except to the extent modified by this part, the provisions of this chapter which are generally applicable to a limited liability company, its managers, members, and transferees, shall be applicable to each series with respect to the operation of such a series.”

74 The separate existence of the non-surviving series presumably would cease pursuant to 805 ILL. COMP. STAT. § 180/37(a)(1), and “all property owned by” the non-surviving series would become the property of the surviving series. Id. at (2). The merger of a series could raise issues about what property was “owned by” the series. The Illinois series provisions, like all(?) others, refer to “the assets associated with any such series.” 805 ILL. COMP. STAT. § 180/37-40(b). The statutes of the other series jurisdictions that permit a series to be a separate entity contain similar language referring to assets being associated with a series rather than being owned by a series or just being assets of a series. D.C. CODE § 29-802.06(b)(2), (g), (h), and (i); IOWA CODE ANN. § 480.1201.2; KAN. STAT. ANN. § 17-76, 143(b); MO. REV. STAT. § 347.186.2(1)(c); UTAH CODE ANN. § 48-3a-1201(2)(c). Query if the plan of merger could provide that the merging series of series LLC A would be the survivor but would become a series of series LLC B?
questions might arise if a series of series LLC A is a party to a merger with a non-series LLC or a corporation?

All of the series LLC statutes providing for separate entity treatment also provide, like the Delaware statute and other non-separate entity states, that if the notice and record-keeping requirements are satisfied, then the debts and obligations of a series are not enforceable against the assets of the series LLC or any other series. This is confusing because debts of a non-series entity ordinarily would not be considered those of the entity’s owners because the entity is a separate legal entity. Accordingly, the question arises, if individual series are truly separate entities under the District of Columbia, Illinois, Iowa, Kansas, Missouri, and Utah LLC statutes, why is the series rule regarding internal liability shields needed? Is it just cautious drafting? Additionally, if a series of a District of Columbia, Illinois, Iowa, Kansas, Missouri or Utah limited liability company is truly a separate entity, why do all of these jurisdictions require that a series have the same registered agent as the series LLC? Moreover, all of these jurisdictions provide that a series is in good standing only if the series LLC is in good standing. Finally, if a series in one of these states can truly do anything any LLC can do, is there any reason to use a series LLC in these states other than to save on filing fees?

75 D.C. CODE § 29-802-06 (g); 805 ILL. COMP. STAT. §180/37-40(e); IOWA CODE ANN. § 489.1201.2; KAN. STAT. ANN. § 17-76, 143 (e); MO. REV. STAT. tit. 12, § 347.186.2; UTAH CODE ANN. § 48-3a-1202.

76 See, Bayless Manning, A CONCISE TEXTBOOK ON LEGAL CAPITAL 6 (2nd Ed. 1981).

77 Supra, note 12.

78 D.C. CODE § 29-802-06 (b)(a series of a limited liability company shall be in good standing as long as the limited liability company is in good standing); 805 ILL. COMP. STAT. §180/37-40(e) (a series of a limited liability company will be deemed to be in good standing as long as the limited liability company is in good standing); IOWA CODE ANN. § 489.208 (providing for issuance of a certificate of existence for a limited liability company; no separate provision for a series); KAN. STAT. ANN. § 17-76, 143 (e) (same as Illinois); MO. REV. STAT. tit. 12, § 347.186.4(e)(3) (same as Illinois); UTAH CODE ANN. § 48-3a-211 (same as Iowa).

79 Other than the District of Columbia; a series of a District of Columbia series LLC cannot engage in a merger, conversion, or interest exchange apart from the series LLC. D.C. CODE § 29-802-06 (o).

80 The filing fee in Illinois to form an LLC is $500; to form a series LLC, the Illinois fee is $750. Filing fees in other series jurisdictions are as follows:
   Alabama: Certificate of formation of LLC $100.
   Delaware: Certificate of formation for LLC $90; Delaware offers expedited service for fees ranging up to $1,000 for one-hour service.
   District of Columbia: Certificate of organization for LLC $220; certificate of designation for a series $220.
Several Actual and Potential Reasons to Use a Series LLC. Although filing fees in a few states (notably, for example, Illinois)\textsuperscript{81} made a series LLC attractive on that basis alone since only a single juridical LLC filing need be made, most lawyers saw more promise in the internal liability shields of series LLCs. Thus, for example, some commentators have suggested that a series LLC might be used as a mechanism by which an integrated oil company could organize liability shields between different oil fields and other assets and in real estate by isolating liabilities of one parcel from the value of other parcels.\textsuperscript{82} Other commentators have suggested that a series LLC could be a cost-saving mechanism for holding and transferring real estate.\textsuperscript{83} Norman M. Powell has reported recently that “in recent years a small but growing number of Series have been utilized as borrowers in real estate and other financing transactions.”\textsuperscript{84}

In emails to the NCCULSA Drafting Committee,\textsuperscript{85} several Delaware lawyers reported on their experience and that of their colleagues in using Delaware series LLCs. Marla Norton, a director and shareholder of Bayard, P.A. in Wilmington, Delaware, observed that once a client who has asked about using a series LLC is advised as to the uncertainties of judicial scrutiny, bankruptcy, tax treatment, UCC perfection, etc.,\textsuperscript{86} the cost to properly set up a series entity, recommended best practices and alternatives, the client often decides to go another way. Ms.

\begin{itemize}
  \item Kansas: Articles of organization for LLC $250; Certificate of designation for a series $100.
  \item Iowa: Certificate of organization for LLC $50; Any other document $5.
  \item Missouri: Certificate of formation for LLC $50 (online) $105 (paper).
  \item Montana: Certificate of formation for series LLC $70 plus $50 for each series member.
  \item Nevada: Articles of organization for LLC $75; expedited service $125.
  \item Oklahoma: Articles of organization for LLC $100.
  \item Puerto Rico: Certificate of formation for LLC $50 plus $50 for designation of registered agent.
  \item Tennessee: Articles of organization for LLC $50 per member; minimum $300, maximum $3,000.
  \item Texas: Certificate of formation for LLC $300; expedited service $25.
  \item Utah: Certificate of organization for LLC $70.
\end{itemize}

\textsuperscript{81} Supra, note 80.

\textsuperscript{82} Bond and Sparkman, supra, note 44 at 85-86.

\textsuperscript{83} See Bradley V. Borden and Matthews Vattamala, Series LLCs in Real Estate Transactions, 46 REAL PROP. TR. AND EST. LJ 255, 257-258 (2011).

\textsuperscript{84} Powell, supra, note 38.

\textsuperscript{85} On file with author.

\textsuperscript{86} Infra, notes 129-174, and accompanying text.
Norton also reports that the statistics on the number of series entities formed in Delaware may be skewed somewhat because she is aware of a few tax practitioners who routinely include series language in their certificates of formation of LLCs and certificates of limited partnerships to afford their clients the flexibility to set up series later. Ms. Norton states that she is aware of the following examples of the use of series entities:

- In a family limited partnership or LLC, some practitioners are using series entities for family wealth transfers. Different assets are placed in different series and interests in the series can be gifted to different family members in varying proportions. One series may be managed by members of the younger generation, while other series are managed by professionals of the older generation. Although it appears that these goals could be accomplished through subsidiary entities, the series structure allows accomplishment of these goals in a single entity. Management of the series LLC could set overall goals for the family’s planning, while the individual series could pursue goals tailored to the assets of a particular series as well as the expectations of the senior generation for the younger-generation managers of a particular series.

- Equity Participation Planning. A company may place each of its business units in a separate series and award equity participation units as an incentive to the employees managing a particular division or location. The series structure helps to avoid having to give away too much of the business and allows for a direct relationship between the success of the particular division or location and the value of the employee’s interest. Ms. Norton reports that she is aware of a multi-unit franchise owner who used the series structure to award the manager of each store a less than 10% equity interest in the store managed by the manager without triggering the transfer restrictions in the franchise agreement.

- Licensing Issues. Multiple establishments are sometimes operated under a single regulatory or business license. Rather than assigning different locations to separate subsidiaries and face relicensing, the owner may isolate each location in a separate series to obtain some measure of asset protection without risking licensing status.

- Real Estate Holdings. Some clients are using series LLCs solely to avoid the cost and administrative burden of establishing separate entities. Others are trying to move assets around without incurring transfer taxes, reassessment, or other consequences of
a transfer of real estate to a third party. Also, in one instance, an existing LLC was converted to a series LLC to allow allocation of several projects, some of which were profitable and some of which were less so, into separate series to allow for the dilution of the interests of the members who did not fund their capital contribution commitment with respect to a particular project while maintaining their relative interest in the projects held by other series. In the conversion, so as not to disadvantage existing creditors, all of the series remained liable for the obligations of the LLC existing at the date of conversion.

In another email to the NCCULSA Drafting Committee,87 Gregory W. Ladner, a director of Richards, Layton & Finger, P.A., in Wilmington, Delaware, reports that, in his experience, it is rare that a series LLC is used for a real estate operating company and that series LLCs are never used where non-consolidation or other unique or bankruptcy-related opinions will be required. Rather, series LLCs generally are used “in investment businesses or transactions with affiliates where a group of parties wants to establish some sort of overall business arrangement and then allow subsets of the parties to participate in specified aspects of the business under the pre-agreed overall framework.” Mr. Ladner offers examples of a private equity fund in this way and also a private equity fund that used a series LLC to facilitate allocations of profit among the principals—if a subset of the principals is managing a particular fund, those principals will be the members associated with the series of the LLC that receives the carried interest or other payments from that fund to the principals.

In another email to the NCCULSA Drafting Committee, Ellisa Opstbaum Habbart, principal of the Delaware Counsel Group in Wilmington, Delaware reports that clients have used series LLCs for separate operations in lieu of separate subsidiaries. In each case the client selected this structure because they wanted to have a basic set of rules that would apply to all operations, and each operating series would have a set of supplemental rules that addressed its particular needs. In another case, the client liked the idea of being to appoint a number of people as either the CEO or president of a series. Interestingly, Ms. Habbart states that none of these companies expected to gain any advantage in limiting any potential liability.

87 On file with author.
Although their article generally approves the series structure as a planning alternative, Conaway and Tsoflias state that the benefits of the series structure “are particularly noticeable in investment vehicles” but that the series structure is “is not, however, for general practitioners who have the occasional client wishing for the latest benefit Delaware has to offer.”

As with any new, not well-understood statute, some early adopters have pushed the envelope beyond breaking by utilizing a series LLC to own a personal speedboat and to own a diamond ring and, in separate series, an automobile, and a personal residence.

As this Article discusses below, however, using a series LLC in states that do not have statutes recognizing series LLCs runs the risk that a court in a non-series state will not recognize the internal liability shields and thus collapse all series into a single entity. Even in a series LLC state, using individual series to protect assets without any business purpose other than to avoid creditors and not following the appropriate formalities will likely give courts a basis for ignoring the internal limited liability shields intended to be provided by a series LLC. As the Delaware practitioners cited above noted, in most of the situations in which their clients used series LLCs, the internal liability shields of the series LLC was not a major factor.

**Duties and Information Rights in Series LLCs**

A problem for the negotiation and drafting of any company agreement is the application of duties, including fiduciary duties. In the case of a series LLC, this requires determining how the duties will be applied among and between the officers, managers, and members of a series LLC and its individual series. The management structure desired by the parties will dictate the precise analysis of the problem, and the flexibility permitted to management structures in LLCs

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88 Conaway and Tsoflias, *supra*, note 9 at 99-100.

89 *GxG Mgmt. LLC v. Young Bros. & Co.*, 2007 WL 551761 (D. Me. 2007) (series of a Delaware series LLC owning a speedboat); *In re Mastro*, 2011 WL 4498834 (Bankr. W.D. Wash. 2011) (Delaware series LLC with a Home Series, a Jewelry Series, and an Automobile Series). For one commentator’s take on the dangers that Series LLCs present to inexperienced practitioners, see Adkisson, *infra*, note 181.

90 *Infra*, notes 162-173 and accompanying text.

91 *Supra*, text accompanying notes 85-87.
will require that analysis be made on a case-by-case basis. The following generalizations, however, may be helpful. Because the company agreement may reduce or increase the duties applicable to the officers, members, or managers, the company agreement should address this issue overtly, and not rely entirely on the applicable statute. Additionally, whether or not the parties intend the series LLC to function as a liability-limiting vehicle, the company agreement should address the liabilities for the management team (whatever its structure or format) across the series LLC and its individual series. If there is more than one series, and there is “management” specifically assigned to a series, then it likely makes sense to limit their liability to the members associated with the other series. Conversely, if there is “management” that is common among all of the series, then it would make sense that the common management is liable to all of the series that they can affect (or relieved of liability with respect to all such series if that is the deal).

Conaway notes an additional potential problem—whether liability for breach of duty might penetrate the internal shields in the absence of an applicable provision in the company agreement—for example, when the actions of the governing persons of one series damages an asset (a liquor license) that is crucial to the business of all of the series, each of which operates a retail liquor store. Conaway and Tsolfias also discuss this hypothetical and make a confusing statement:

If a member or members are associated with each store for purposes of management, profits, and day-to-day decision-making, should these members owe fiduciary duties across series boundaries without question? Here, the answer should again be “no” since the reckless operation of one site could result in the loss of license for all the remaining properties. (emphasis supplied)

Here, Conaway and Tsolfias note the same problem that Conaway noted but suggest that liability for imperiling the liquor license should not cross the internal shields.

Perhaps Conaway and Tsolfias misspoke here, but that is not clear. They go on to state: In the above circumstance, one could conclude that reasonable parties would have considered negotiating this subject. If the agreement is silent on fiduciary duties,

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92 Conaway, supra, note 7 at 56-57.

93 Conaway and Tsolfias supra, note 9
the parties should not be bound to a court drafting terms into their agreement based upon a “hypothetical bargain” – terms upon which neither party (likely on purpose) agree. In other words, the agreement is precisely what the parties’ desire, without the imposition of common law care or loyalty obligations. Many investors gravitate to Delaware for the very purpose that they may draft their contracts in a sophisticated manner. Is it efficient and useful in the predictable development of Delaware’s LLC law to return to judicial paternalism in the enforcement of LLC agreements? The authors say not. The authors posit that Delaware benefits from its courts enforcing what the General Assembly adopted so concisely in 1992.

Conaway and Tsolfias argue that an agreement’s silence on fiduciary duties means that the parties did not desire to have fiduciary duties apply. Arguments based on silence are always suspect; as Gary Wills noted in another context, one may make “a silence mean anything.”

This Article posits that it is just as likely that business people who do not include duty provisions in their company agreements were not properly advised and that, had they been, they likely would have wanted some standard to apply to their conduct. As has been noted in another context, “it is one thing to have a clear understanding that people may elect to have a low standard of care among themselves. It’s quite a different thing to have that be the general rule for relatively unsophisticated people.”

It appears that Conaway and Tsolfias intended to contrast the customary day-to-day operations of the various liquor stores in their example with an extraordinary act of recklessness that would imperil the license on which all the stores depended. Perhaps, for example, the manager of one store (and of the series that owns and operates that store) knowingly sells alcohol to minors on several occasions. If the legal advisor to the series LLC had raised such a possibility, the likely response of the principals would be, “None of us would ever do that.” But if the advisor forced the principals to consider what they would want in such a situation, it seems highly unlikely that the principals would have said we don’t think there should be liability to the rest of us if one of us screws up like that. In this instance, it appears highly unlikely that the

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correct result would be for the internal shields of the series LLC to protect the reckless manager from liability to the other series.

Whether or not Delaware (or any other state) has enacted appropriate duty standards, the advisor must make sure that clients understand the choices that are available and the implications of the possible choices. This caution applies, of course, in drafting any entity agreement—it perhaps applies more forcefully in drafting a series LLC company agreement. Another caution that applies to drafting any LLC company agreement, and thus to series LLC company agreements, is the application of agency law. A series LLC and its individual series may have more persons who are agents that a typical non-series LLC. In one of the examples of the use of a Delaware series LLC, Ellisa Opstbaum Habbart reported that the client liked the idea of being able to appoint a number of people as either the CEO or president of a series. Each of the appointees would be an agent of the particular series.

When acting as an agent of an LLC or a series, the member, manager, or other person so acting owes duties of care and loyalty pursuant to basic agency principles. Cases in other jurisdictions are beginning to recognize agency law as a basis for imposing fiduciary duties in the LLC context. An LLC agreement that intends to modify applicable statutory duties should

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96 Restatement (Third) of Agency § 8.08; see also Restatement (Second) of Agency § 379. See Restatement (Third) of Agency §§ 8.01-8.06. These sections provide:

• 8.01 — general duty of loyalty in “all matters connected with the agency relationship;”
• 8.02 — duty not to acquire a material benefit from a third party in connection with the agency relationship;
• 8.03 — duty not to act as or on behalf of a party adverse to the principal;
• 8.04 — duty not to compete throughout the duration of the agency relationship;
• 8.05 — duty not to use property of the principal or confidential information of the principal for the agent’s own purposes or those of a third party; and
• 8.06 — as discussed supra, notes 68-69 and accompanying text, § 8.06 permits modification of the duties in §§ 8.01-8.05 if certain requirements are satisfied.

See also Restatement (Second) of Agency §§ 387-398.

97 See In re Hardee, 2013 Bankr. LEXIS 949, 2013 WL 1084494 (Bankr. E.D. Tex. March 14, 2013) (concluding managing member owed LLC formal fiduciary duties based on agency law; managing member owed formal fiduciary duties to LLC based on implication of Texas LLC law that managers and managing members owe fiduciary duties of care, loyalty, and obedience similar to corporate directors; managing member owed no fiduciary duties to other members); In re TSC Sieber Servs., LC, 2012 Bankr. LEXIS 4904, 2012 WL 5046820 (Bankr. E.D. Tex. Oct. 2012) (finding individual who took over managerial control of LLC but had no formal office or ownership interest owed LLC a formal fiduciary duty based on agency law and an informal fiduciary duty based on circumstances giving rise to control).
also provide for corresponding modifications of the duties under agency law. The *Restatement (Third) of Agency* (the “*Restatement of Agency*”) permits conduct that would otherwise be prohibited by §§ 8.01 through 8.05 if the principal consents, provided that, in obtaining the principal’s consent, the agent:

- Acts in good faith;
- Discloses all material facts that the agent knows, has reason to know, or should know would reasonably affect the principal’s judgment, unless the principal has manifested that such facts are already known by the principal or that the principal does not wish to know them; and
- Otherwise deals fairly with the principal.

The principal’s consent must “concern either a specific act or transaction, or acts or transactions of a specified type that could reasonably be expected to occur in the ordinary course of the agency relationship.”

The *Restatement of Agency* sets out more duties of an agent in the following sections:

- § 8.07 (agent’s duty to act in accordance with any contract with the principal);
- § 8.08 (agent’s duties of care, competence, and diligence; may be varied by contract);
- § 8.09 (agent’s duty to act only within scope of actual authority and to comply with principal’s lawful instructions);
- § 8.10 (agent’s duty of good conduct);
- § 8.11 (agent’s duty to provide information to principal); and
- § 8.12 (agent’s duty, subject to any agreement with the principal, not to deal with the principal’s property so that it appears to be the agent’s; not to commingle; and to keep and render accounts to the principal of money or other property received or paid out on the principal’s account; may be varied by agreement).

The *Restatement of Agency* also provides that the principal has certain duties to the agent under:

- § 8.13 (principal’s duty to comply with the contract);

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98 As explained in the text accompanying *infra*, notes 99-101, *Restatement (Third) of Agency* § 8.06 permits waiver of the duty of loyalty if certain requirements are satisfied. *Restatement (Third) of Agency* § 8.08 provides that the duty of care may be waived by agreement.

99 *Restatement (Third) of Agency* § 8.06.
• § 8.14 (principal’s duty to indemnify the agent, subject to variation by agreement; principal’s duty to indemnify does not extend to losses that result from the agent’s own negligence, illegal acts, or other wrongful conduct\(^{100}\)); and
• § 8.15 (principal’s duty to deal fairly and in good faith with the agent, including the obligation to provide the agent with information about physical or pecuniary risks to the agent).

What this Article’s recitation of agency law duties should tell advisors is that consideration should be given to who will be agents of a series LLC and its individual series and insure that intended waivers or modifications of the duties of those persons will be effective under agency law as well as the applicable statute.\(^{101}\) This will probably follow as a matter of course in the case of a Delaware LLC if the company agreement provides that duties will be waived to the maximum extent permitted by law or that the only duties the managing persons will have are duties (a) and (b) and no other duties. This should follow from the language of the Delaware LLC statute, which permits a company agreement, to the extent a member or manager has any duties at law or in equity (including any that might be termed “fiduciary duties”) to restrict or eliminate any and all duties;\(^{102}\) but a Delaware company agreement cannot eliminate the implied contractual covenant of good faith and fair dealing.\(^{103}\) The Alabama\(^{104}\) and Nevada\(^{105}\) LLC statutes contain duty provisions that are substantially the same as Delaware. Whether and in what circumstances and to what extent courts might find that the managing persons of a Delaware, Alabama, or Nevada LLC have duties to the LLC or members of the LLC is as yet unknown. Texas statutory law provides:

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\(^{100}\) Restatement (Third) of Agency § 8.14, cmt. b.

\(^{101}\) Agency law has different standards for waivers of duties than does the typical LLC statute. Also, to the author’s knowledge, there is no guidance as to how waivers under agency law should be handled if the agent or agents are in control of the principal. This Article posits that a company agreement should state explanations for its waivers of duties—to buttress the position that there has been an effective waiver under agency law as well as generally to ensure that all potential owners understand the lay of the land.

\(^{102}\) DEL. CODE ANN. tit. 6 § 18-1101(c).

\(^{103}\) Id. at (e).

\(^{104}\) ALA. CODE § 10A-5A-1.08.

\(^{105}\) NEV. REV. STAT. § 86.286.5.
The company agreement of a limited liability company may expand or restrict any duties, including fiduciary duties, and related liabilities that a member, manager, officer, or other person has to the company or to a member or manager of the company.\textsuperscript{106}

Note that the Texas statute, unlike the Delaware statute, does not mention the contractual duty of good faith and fair dealing. Perhaps the reason for this omission lies in the fact that the Texas statute allows only restriction of duties, not elimination of duties as does Delaware. A more likely reason appears to be that there is no general duty of contractual good faith and fair dealing in Texas. Rather, the duty arises in Texas only when there is a special relationship between the contracting parties.\textsuperscript{107} Texas courts have recognized a special relationship when there is unequal bargaining power between the parties and there is a risk that one of the parties will take advantage of the other based on the imbalance of power, e.g., insurer/insured.\textsuperscript{108} It seems doubtful that a Texas court would hold that the relationship of the governing persons of a Texas LLC to each other and to the LLC is the type of special relationship that warrants application of the duty of contractual good faith and fair dealing in all LLC situations. However, that does not mean that a Texas court would not find a special relationship causing the duty of good faith and fair dealing to arise in a particular case. Moreover, the governing persons of Texas LLCs likely do have duties—the duty of care, the duty of loyalty, and the duty of obedience—unless limited by the company agreement. Certain provisions of the Texas Business Organizations Code and the LLC chapter of that Code imply that duties exist. For example, the statute implicitly recognizes that a governing person\textsuperscript{109} has a duty of care by its provision that, in discharging a duty, a governing person may in good faith and with ordinary care rely on certain reports and other information.\textsuperscript{110} Further, the Texas statute implicitly recognizes the duty of

\textsuperscript{106} TEX. BUS. ORGS. CODE § 101.401.

\textsuperscript{107} Subaru of America v. David McDavid Nissan, 84 S.W.3d 212, 225 (Tex. 2002).


\textsuperscript{109} A manager of a manager-managed LLC is a “governing person,” as is a member of a member-managed LLC. TEX. BUS. ORGS. CODE §1.002(35), (37).

\textsuperscript{110} TEX. BUS. ORGS. CODE § 3.102.
loyalty by providing a mechanism for the approval of conflicting-interest transactions.\(^{111}\) Finally, the LLC chapter explicitly states that each governing person of an LLC and each officer and agent invested with actual or apparent authority by the governing authority of the LLC is an agent of the LLC. As this Article discussed above, agency law applies duties of care and loyalty unless modified by agreement.\(^{112}\)

In a state whose LLC statute sets out specific duties, the drafter should avoid crafting a waiver that narrowly refers only to “any duty imposed by section so and so” if the intent is also to waive corresponding duties under agency law. For example, the Montana LLC Act imposes duties of loyalty and care.\(^{113}\) The operating agreement of a Montana LLC may not eliminate the duty of loyalty or unreasonably reduce the duty of care, but the agreement could “identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable.”\(^{114}\) Accordingly, the drafter of an operating agreement for a Montana LLC should not draft a provision modifying the duty of loyalty or duty of care in such a way that it is a modification only of the duties set forth in the Montana LLC Act. A provision stating that certain types of activities would not violate the duty of loyalty should comply with the Montana LLC Act if not manifestly unreasonable whether or not the provision refers to the statute authorizing such a provision. And, if the provision is not limited by its terms to being only a modification of the Montana statutory duty, it should also be an effective modification of the duty of loyalty under agency law. The Illinois LLC Act contains duty and waiver provisions similar to those in the Montana statute.\(^{115}\) A drafter of an operating agreement for an Illinois series LLC must be mindful that Illinois law permits the individual series to be treated as separate entities, but it does not appear that this should materially affect how modifications of duties should be properly crafted. In other words, the drafting considerations discussed generally


\(^{112}\) Supra, notes 96-101 and accompanying text.

\(^{113}\) MONT. CODE ANN. § 35-8-310.

\(^{114}\) MONT. CODE ANN. § 35-8-109(2)(b), (c). The operating agreement may also “specify the number or percentage of members or disinterested managers that may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty.”

\(^{115}\) 805 ILL. COMP. STAT. §§ 180/15-3, 15-5.
for series LLC company agreements\textsuperscript{116} are applicable whether or not the series is treated as a separate entity, particularly if there is common management among the series.

Information rights present another issue that is complicated by a series structure. In Delaware, each “member of a limited liability company” is entitled to inspect certain records of the limited liability company. Unless limited by agreement, each member associated with a series of a series LLC would have the right to examine all of the records of the limited liability company. Although at first blush one might think that a member’s information rights should be limited to the series that the member is associated with, there are some records that will always be relevant to all members. Moreover, in some cases members may need access to information about other series to understand fully the information about the particular series a member is associated with. Texas law may limit the information rights of members associated with a series to information about the series LLC or other series. The Texas LLC Act provides that the information rights section of the Texas LLC Act\textsuperscript{117} will be applied to a series LLC by substituting “series” for “limited liability company” or “company” and by substituting “member associated with a series” for “member.”\textsuperscript{118} This appears to limit a member’s information rights\textsuperscript{119} to the series with which the member is associated; however, another provision of Texas law, in the Texas Business Organizations Code but not in the LLC Act, states that “each owner and member of a filing entity” may examine certain records of the entity.\textsuperscript{120} The Missouri statute also contains a provision of uncertain scope regarding the books and records of a series LLC:

\begin{quote}
Notwithstanding any other provisions of law to the contrary, the debts, liabilities, and obligations incurred, contracted for, or otherwise existing with respect to a particular series shall be enforceable against the assets of such series only, and not against the assets of the limited liability company generally or any other series thereof. Such particular series shall be deemed to have possession, custody, and
\end{quote}

\textsuperscript{116} Supra, notes 93-96 and accompanying text.

\textsuperscript{117} TEX. BUS. ORG. CODE § 101.501.

\textsuperscript{118} Id. at §101.609.

\textsuperscript{119} Texas is an outlier in that it also statutorily extends information rights to an assignee of a member. TBOC § 101.502(a).

\textsuperscript{120} Id. at §3.153.
control only of the books, records, information, and documentation related to such series and not of the books, records, information, and documentation related to the limited liability company as a whole or any other series thereof [if notice and record-keeping requirements are satisfied].

The intended effect of the quoted Missouri statute is unclear. The general information rights provision of the Missouri LLC Act permits members to inspect and copy a wide range of information and contains no mention of series. Tennessee also provides that the required records provision of its LLC Act applies to a series “as if the series were a separate LLC” but the Tennessee provision allowing members access to information is not one of the provisions that is applied separately to a series. The breadth and ambiguity of the Delaware, Missouri, Texas, Tennessee, and other series provisions relating to information rights makes it important that the parties think about what they want and for the company agreement to be drafted accordingly. Indeed, in all cases, no matter the state of formation or whether the LLC is a series LLC, the company agreement should clearly spell out what information rights the members have and what restrictions apply instead of relying on a court to apply the statutory provisions in a way that is acceptable to the parties.

Another often overlooked issue with regard to information rights is what modifications, if any, should be imposed on non-managing members. In those states that retain the manager-managed versus member-managed dichotomy, members of a manager-managed LLC arguably may have no duties to the LLC or the other members (except possibly some form of the obligation of good faith and fair dealing). If a non-manager member is permitted to access important business information of the LLC, the LLC may not have recourse if the member uses

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121 MO. REV. STAT. § 347.186.2(1). (emphasis added).
122 MO. REV. STAT. § 347.091.
123 TENN. CODE ANN. § 48-249-309(f). § 48-249-406 (required records.)
124 TENN. CODE ANN. § 48-249-308.
125 All state LLC statutes permit some restrictions on members’ information rights, such as restrictions necessary to protect trade secrets. Delaware allows “reasonable restrictions,” DEL. CODE ANN. tit. 6 §18-305(a), and specifically allows restricting access to protect trade secrets and other protected information. DEL. CODE ANN. § 18-305(c). Texas prohibits a company agreement from “unreasonably” restricting a member’s or assignee’s rights to information. TEX. BUS. ORGS.CODE § 101.054(e).
that information for personal benefit, even if in competition with the LLC.\textsuperscript{126} This issue could also arise in a state that has adopted the Revised Uniform Limited Liability Company Act (“ULLCA”).\textsuperscript{127} ULLCA does not retain the manager-managed versus member-managed dichotomy in its required formation document, but the company agreement may provide for either type of management. ULLCA provides some protection to the company by stating that a member of a manager-managed LLC may examine information of the company only if:

(A) the member seeks the information for a purpose material to the member’s interest as a member;
(B) the member makes a demand in a record received by the company, describing with reasonable particularity the information sought and the purpose for seeking the information; and
(C) the information sought is directly connected to the member’s purpose.\textsuperscript{128}

Although this issue applies to all LLCs, it further highlights the advisability of carefully considering what information rights should be available to the members of a series LLC.

\textbf{Series LLCs and the UCC and Federal and State Tax Law.\textsuperscript{129}}

\textbf{UCC.} If an attorney will be filing a financing statement with respect to the assets of a series LLC or one of its individual series, the filing should be made in the series LLC’s state of formation.\textsuperscript{130} If the attorney’s task is to file a financing statement with respect to the interest of a member of the series LLC, that filing should be made in the state of the member’s residence.\textsuperscript{131} If the member’s interest is certificated and the series LLC has made an election under Article 8 of the UCC to treat the membership interest as a security for Article 8 purposes, perfection of a

\begin{footnotes}
\item[128] RULLCA § 401(b)(2).
\item[129] For a more complete discussion of the issues discussed in this paper with respect to the UCC and tax law, see Bond and Sparkman, \textit{supra}, note 44 at 20-33.
\item[130] See, \textit{e.g.}, 6 Del. Code §§ 9-301(1), 9-307(e); TEX. BUS. & COMM. CODE §§ 4-9-301(1), 4-9-307(e).
\item[131] See, \textit{e.g.}, 6 Del. Code §§ 9-301(1), 9-307(b)(2); TEX. BUS. & COMM. CODE §§ 4-9-301(1), 4-9-307(b)(1).
\end{footnotes}
security interest may be had by taking possession of the certificate. Taking a security interest in the membership interest of any LLC can be dicey and usually will require a control agreement to protect the creditor.\textsuperscript{132} Filing a financing statement with respect to a membership interest in a series LLC should include an accurate description of the interest. In states such as Delaware and Texas, where an individual series is not treated as a separate legal entity,\textsuperscript{133} a person does not have a membership interest in an individual series. Admission to membership is accomplished at the series LLC level, and a member who has an interest in one or more series will be “associated with” that or those series. The member may or may not have an economic interest in the series LLC itself.

**Federal and State Taxation.** Proposed federal tax regulations (“Proposed Regulations”) would treat each individual series within a series LLC as a separate entity for federal income tax purposes whether or not the individual series is treated as a separate entity under state law.\textsuperscript{134} Each individual series would be classified as a partnership, disregarded, or as an association taxable as a corporation.\textsuperscript{135} The Proposed Regulations state a beneficial rule in that they will allow the same income tax classification that would apply if separate juridical LLCs were

\textsuperscript{132} For a discussion of issues arising when taking a security interest in an LLC interest, see § 9.1 of Herrick K. Lidstone, Jr. and Allen Sparkman, LIMITED LIABILITY COMPANIES AND PARTNERSHIPS IN COLORADO (Continuing Legal Education in Colorado, Inc., 2015) (discussion applicable to state laws other than Colorado as well as to Colorado law).

\textsuperscript{133} See supra, note 10 and discussion supra in text accompanying notes 31 to 37.


\textsuperscript{135} Under the so-called “check-the-box” regulations promulgated in December, 1996, with certain limited exceptions, absent election to the contrary, any domestic unincorporated entity (such as an LLC) with more than one owner will be classified as a partnership for federal tax purposes, and a single owner unincorporated entity (such as an LLC) will be disregarded for federal tax purposes. Treas. Reg. § 301.7701-2 (1996). The exceptions to the check-the-box classification are a business entity that is organized under a state statute that describes or refers to the entity as a joint-stock company or joint-stock association, an insurance company, a state-chartered bank if any of its deposits are insured under the Federal Deposit Insurance Act, a business entity that is wholly owned by a state or political subdivision of a state, and a business entity that is taxable as a corporation under another provision of the Internal Revenue Code. Treas. Reg. § 301.7701-2(b) (1996). Moreover, a single member unincorporated entity that is disregarded for income tax purposes is not disregarded for employment tax purposes and certain excise tax purposes. Treas. Reg. §§ 301.7701-2(c)(2)(iv) (1996) (employment taxes) & 303.7701-2(c)(2)(v) (1996) (certain excise taxes). Also, for purposes of the regulations applying to the issuance of non-compensatory options by partnerships, a disregarded entity that has not elected to be classified as a corporation is treated as a partnership. Treas. Reg. § 1.761-3(b)(2) (2013).
established. In other words, if, instead of using a series structure, a client established a non-series LLC with one or more wholly-owned LLC subsidiaries, each of the parent LLC and its subsidiary LLCs would be entitled to make their own tax classification election. If the parent LLC was taxed as a partnership or disregarded and each of its subsidiary LLCs were disregarded, however, the tax reporting requirements might actually be less than if a series structure were used. As disregarded entities, the results of each subsidiary’s operations would be reported on the parent’s 1065. The Proposed Regulations would require that a series LLC and each of its series file a statement for each taxable year containing the identifying information with respect to the series LLC or the series as prescribed by the Internal Revenue Service for this purpose and include the information required by the statement and its instructions.\textsuperscript{136} Without knowing what information in what format would be required, one cannot judge whether the series reporting requirements would be more or less onerous, or the same as, the reporting requirements that would apply in a non-series structure.

The Proposed Regulations leave many questions unanswered, including how employment tax obligations should be handled and whether and how an individual series or a series LLC could establish a qualified employee benefit plan.\textsuperscript{137}

The Proposed Regulations are only proposed; a series LLC therefore could report now as a single entity but would have to switch to separate reporting if the Proposed Regulations are finalized as written unless the transition rule in the Proposed Regulations applies.\textsuperscript{138} This switch

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{136}] Prop. Treas. Reg. § 6011-6(a), 75 Fed. Reg. 55699 (Sept. 14, 2010).
\item[\textsuperscript{137}] For a detailed discussion of the failure of the Proposed Regulations to address employment tax issue or employee benefit issues, see Bond and Sparkman \textit{supra}, note 44 at 79-82.
\item[\textsuperscript{138}] (ii) Transition rule—(A) In general. Except as provided in paragraph (f)(3)(ii)(B) of this section, a taxpayer’s treatment of a series in a manner inconsistent with the final regulations will be respected on and after the date final regulations are published in the Federal Register, provided that—

\begin{enumerate}
\item The series was established prior to [September 14, 2010];
\item The series (independent of the series organization or other series of the series organization) conducted business or investment activity, or, in the case of a series established pursuant to a foreign statute, more than half the business of the series was the issuing of insurance or annuity contracts or the reinsuring of risks underwritten by insurance companies, on and prior to [September 14, 2010];
\end{enumerate}
\end{enumerate}
\end{footnotesize}
would be considered a conversion from a single entity to multiple entities for federal tax purposes. For a taxpayer who reports in accordance with the Proposed Regulations, however, the Proposed Regulations are “substantial authority.” However, as noted, the Proposed Regulations do not apply for purposes of employment taxes or employee benefits and, therefore, would not be substantial authority for a taxpayer’s treatment of those matters in a series LLC.

State tax issues are evolving.

- The Texas Comptroller of Public Accounts collects a statutory tax for the privilege of doing business in Texas – formally known as the Texas Franchise Tax but commonly referred to as the “margin tax.” Before amendment effective January 1, 2008, the margin tax applied to corporations and LLCs. After its amendment effective January 1, 2008, the margin tax became generally applicable to all entities except general partnerships that are not

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140 For further discussion of the Proposed Regulations, see Allen Sparkman, “Tax Aspects of Series LLCs,” Business Law Today (February 2013). The Proposed Regulations would not be “substantial authority” with respect to employment taxes in any event. The Treasury Regulation cited supra, note 139, provides that proposed regulations are substantial authority for purposes of avoiding the accuracy-related penalty with respect to understatements of income tax only.
LLPs and that are comprised solely of natural persons.\textsuperscript{141} When series LLCs were added to the Texas LLC Act, the Tax Section of the State Bar of Texas recommended that each individual series be treated as a separate entity for margin tax purposes. The Comptroller took a different approach to maximize tax collection. In Rule 3.581, as explained by FAQ #19, “a series LLC is treated as a single legal entity. . . . If one of the series has nexus in Texas, the entire series LLC has nexus in Texas.”\textsuperscript{142}

- The California Franchise Tax Board has announced it will treat each individual series of a series LLC as a separate LLC, thus subjecting each series to a minimum $800 annual franchise tax.\textsuperscript{143}

- Massachusetts has determined that it will treat each individual series as a separate entity for purposes of Massachusetts state taxation.\textsuperscript{144}

- The Tennessee Department of Revenue has informally announced that each individual series of a series LLC will be treated as a separate entity for purposes of Tennessee’s franchise and excise tax.\textsuperscript{145}

\textbf{Securities Law Issues.} Securities law issues associated with series LLCs have not yet reached the courts and are at best speculative. Whether an investment opportunity constitutes the offer and sale of a security subject to securities registration or exemption requirements is a facts and

\textsuperscript{141} Prior to its amendment effective January 1, 2008, the margin tax’s application to LLCs made LLCs much less attractive as an entity choice in Texas than in other states.


\textsuperscript{144} Massachusetts Dept. of Rev., Mass. Ltr. Rul. 08-2 (February 15, 2008).

\textsuperscript{145} Tennessee Dept. of Rev. Letter Ruling 11-42 (Sept. 6, 2011).
circumstances determination. In considering securities regulation as applicable to series LLCs and the individual series, an advisor must review two issues unique to series LLCs and the individual series.

**Who is the Issuer?** In a state such as Delaware or Texas,\(^{146}\) where a person becomes a member at the series LLC level and then may be associated with one or more series, it appears clear that the series LLC is the issuer. That may not be the end of the story, though. Where the economic rights associated with the investment derive from an individual series, the individual series may be considered a “co-issuer” and subject to similar obligations and liabilities.

If the series LLC is formed in a state such as Illinois, which permits, but does not require, an individual series to be treated as a separate legal entity, the answer to who is the issuer may depend on whether an individual series has elected to be treated as a separate entity and, if so, whether applicable state law permits such an individual series to admit members.\(^{147}\) Except in Tennessee,\(^{148}\) a state that does not permit separate entity treatment for a series, the applicable series provisions do not clearly permit an individual series to admit a person as a member. Illinois, Iowa, Kansas, Missouri, and Utah all use the same “members associated with a series” language as do the series jurisdictions that do not permit a series to be treated as a separate entity.\(^{149}\) If the issue is interpreted by the SEC or securities regulators or courts in non-series states, there is no certainty how it will be resolved.

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\(^{146}\) See discussion *supra*, notes 31-37 and accompanying text.

\(^{147}\) For an individual series of an Illinois series LLC to have limited liability, the series LLC must file a certificate of designation with respect to the individual series with the Illinois Secretary of State. 805 ILL. COMP. STAT. § 180/37-40(b). “A series with limited liability will be treated as a separate entity to the extent set forth in the articles of organization.” *Id.*; Apparently whether or not the series is treated as a separate entity, “each series with limited liability may, in its own name, contract, hold title to assets, grant security interests, sue and be sued, *and otherwise conduct business and exercise the powers of a limited liability company under this Act.*” (emphasis supplied). Notwithstanding the foregoing, however, an individual series is in good standing only if the Series LLC is in good standing. 805 ILL. COMP. STAT. § 180/37-40(e). See *supra*, note 10 for other states that allow separate entity status for an individual series.

\(^{148}\) TENN. CODE ANN. §§ 48-249-309(f), -501.

\(^{149}\) 805 ILL. COMP. STAT. § 180/37-40(g), (h), and (i); IOWA CODE ANN. § 480.1201.5 and 6; KAN. STAT. ANN. § 17-76, 143 (g), (h), (l), and (i); MO. REV. STAT. § 347.186.5 and 6; UTAH CODE ANN. § 48-3a-1204. Utah also, however, refers to “members of the series” and “the series members.” UTAH CODE ANN. § 48-3a-1202. The District of
**Determining Accredited Investor and Purchaser Status.** The definition of “accredited investor” provides that an entity is an accredited investor if all of the equity owners of the entity are accredited. In addition, such an entity will be treated as one purchaser for purposes of Regulation D.\(^{150}\) In the case of a series LLC, both of these questions depend on whether the individual series is considered to be an “entity” for this purpose or the “entity” for determination of accredited investor or purchaser status is the series LLC. The author is unaware of any guidance on this issue.

In the case of a Delaware or other series LLC formed in a state that does not treat an individual series as a separate legal entity, the SEC or a court may look at all of the members of the series LLC and the underlying individual series to test whether the entity (the series LLC) is an accredited investor. On the other hand, since it will be an individual series that is the potential investor and most likely only its members will stand to gain from the investment, arguments can be made that the individual series should be the measuring point. Since there is no guidance, where individual series plan to make investments as accredited investors, a cautious advisor should examine the accredited investor status of all of the members of the series LLC, not just the members associated with the individual series.

If the series LLC is formed in Illinois or another state that permits an individual series to be treated as a separate entity, an advisor may determine that only the members associated with the purchasing series need be considered.\(^{151}\) Once again, though, there is no specific guidance, and an advisor should proceed with caution.

**Foreign Qualification Issues.**

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Columbia statute does not contain the “members associated with” language and in fact refers to members of a series. D.C. CODE § 29-802.06(c), (k)(2), and (m). However, the District of Columbia statute defines “member” as “a person that has become a member of a limited liability company under § 29-804.01.”

\(^{150}\) 17 C.F.R. §§ 230.500-508. The provisions defining accredited investor and number of purchasers as discussed in the text may be found at 17 C.F.R. §§ 230.501(a)(8), (e)(1)(iv), (2).

\(^{151}\) Supra, note 10.
The Problem. Partnership tax treatment, limitation of liabilities, and the ability to accomplish special allocation of profits and losses and payment of distributions, as well as the flexibility of LLCs, have caused the LLC format to gain wide acceptance as an appropriate vehicle for holding real estate or other assets for investment and for operating businesses. Because of their flexibility, some LLC practitioners are finding series LLCs, especially those formed under Delaware law, attractive. A problem develops when a series LLC, for example, forms individual series to own and operate real estate or conduct oil and gas drilling operations in other states. States that have series LLC legislation may look at individual series from a different jurisdiction similar to their statute; states without series LLC legislation may look at individual series in several different ways – perhaps not to the benefit of the owners of an individual series or of the series LLC which spawned the individual series.

All states require foreign entities to qualify to do business in certain circumstances. For example, Colorado law requires “foreign limited liability companies” to file a statement of foreign entity authority “for the transaction of business or the conduct of activities” in Colorado.152

As this Article discusses above,153 under the majority of the Series LLC statutes, an individual series is not a separate entity – the series LLC is the separate entity. Consequently, as this Article discusses below, in many cases, an individual series cannot properly qualify as a “foreign entity” in a non-series state such as Colorado.

Foreign Qualification – Non-Series State. If an individual series wishes to carry on activities in a non-series State that will constitute “doing business” in that State for purposes of the registration of foreign entities, it is likely to be unclear precisely how the individual series, or the juridical series LLC, should comply. That is, should the filing be in the name of the individual series or of the juridical series LLC?

152 COLO. REV. STAT. §§ 7-80-901, 7-90-801.

153 Supra, note 10.
In Colorado, a non-series LLC state, the statute provides that “a foreign entity shall not transact business or conduct activities in this state … until its statement of foreign entity authority is filed in the records of the secretary of state.” The Colorado statute defines “foreign entity as “a foreign corporation, …a foreign limited liability company, or any other organization or association that is formed under a statute or common law of a jurisdiction other than this state or as to which the law of a jurisdiction other than this state governs relations among the owners and between the owners and the organization or association and is recognized under the law of such jurisdiction as a separate legal entity.”

Because an individual series of a Delaware series LLC is not treated as a separate legal entity, if such an individual series began doing business in Colorado, the juridical series LLC would be required to file a statement of foreign entity authority. Notwithstanding this statutory requirement, the records of the Colorado Secretary of State disclose that in many cases an individual series has filed a statement of foreign authority in the name of the individual series. Assuming such a filing could not be characterized as a filing by the juridical series LLC, there does not appear to have been compliance with the Colorado statute and the validity of the filing is in doubt.

On the other hand, if an individual series derives from a juridical series LLC formed under a statute such as that of Illinois that permits an individual series to be treated as a separate legal entity, and if such individual series in fact has separate legal entity status, it could likely qualify in its name under Colorado law.

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156 This analysis also applies to series LLC (and their individual series) formed under the statutes cited in supra, note 10 other than the District of Columbia, Kansas, Illinois, Iowa, Missouri, and Utah.
157 See supra, note 10. Interestingly, even if an individual series of an Illinois series LLC is not treated as a separate entity by the articles of organization of the series LLC, the Illinois statute provides that if an LLC with the ability to establish series does not register to do business in a foreign jurisdiction for itself and certain of its series, “a series of a limited liability company may itself register to do business as a limited liability company in the foreign jurisdiction in accordance with the laws of the foreign jurisdiction.” 805 Ill. Comp. Stat. § 180/37-40(n). The Illinois statute would not appear to make such an individual series of an Illinois series LLC, i.e., one that is not treated under
**Foreign Qualification Issues—Series State.** How to qualify an individual series of a foreign series LLC may also be unclear in a state with series LLC legislation. The effect of qualifying – whether, for example, the individual series maintains its limited liability shield may also be unclear even in a series state.\(^{158}\)

Delaware provides that if a foreign series LLC registering to do business in Delaware is governed by an operating agreement that establishes designated series of members, managers, LLC interests, or assets having separate rights, powers, or duties with respect to specified property or obligations of the foreign limited liability company or profits and losses associated with specified property or obligations of the LLC, that fact must be stated on the application for registration as a foreign LLC. In addition, the foreign LLC will state on the application whether the debts, liabilities, and obligations incurred, contracted for, or otherwise existing with respect to a particular series is enforceable only against the assets of that series and not against the assets of the foreign series LLC generally or any other series thereof and whether any of the obligations, debts, expenses, and liabilities of the series LLC generally or another series thereof are enforceable against that series.\(^{159}\) Delaware lawyers believe § 18-215(n) to be a notice statute that does not provide a substantive rule that Delaware will recognize the internal liability shield of a foreign series LLC.\(^{160}\) However, the author is unaware of any suggestion that Delaware would not recognize the internal liability shields of a foreign series LLC that provided notice as set forth above in its application for registration as a foreign LLC that it was a series LLC and that it had internal liability shields.\(^{161}\)

\(^{158}\) Several series jurisdictions do now recognize foreign series and their internal liability shields if required notice is given in the registration to do business. 805 ILL. COMP. STAT. § 180/37-40(o); KAN. STAT. AN. § 17-76, 143(n); Mo. Rev. Stat. § 47.186.6(2); OKLA. STAT. tit. 18, § 2054.4M; 14 L.P.R. § 3967(m); TENN. CODE ANN. § 48-249-309(i); UTAH CODE ANN. § 48-3-1209.

\(^{159}\) Del. Code Ann. tit. 6, § 18-215(n).

\(^{160}\) Conaway, *supra*, note 7 at 30.

\(^{161}\) See *supra*, note 158 for a list of those series jurisdictions that do recognize the internal liability shields of foreign series LLCs.
The Texas Business Organizations Code contains a special rule for the qualification of foreign series LLCs in Texas:

Sec. 9.005. SUPPLEMENTAL INFORMATION REQUIRED IN APPLICATION FOR REGISTRATION OF FOREIGN LIMITED LIABILITY COMPANY. (a) This section applies only to a foreign limited liability company governed by a company agreement that establishes or provides for the establishment of a designated series of members, managers, membership interests, or assets that has any of the characteristics described by Subsection (b).

(b) A foreign limited liability company must state in its application for registration as a foreign limited liability company whether:

(1) the series has:

(A) separate rights, powers, or duties with respect to specified property or obligations of the foreign limited liability company; or

(B) separate profits and losses associated with specified property or obligations of the foreign limited liability company;

(2) any debts, liabilities, obligations, and expenses incurred, contracted for, or otherwise existing with respect to a particular series shall be enforceable against the assets of that series only, and not against the assets of the company generally or the assets of any other series; and

(3) any debts, liabilities, obligations, and expenses incurred, contracted for, or otherwise existing with respect to the company generally or any other series shall be enforceable against the assets of that series.

Note that the form the Texas Secretary of State has promulgated for filing by a foreign series LLC requires that the filing will be in the name of the juridical series LLC in certain cases. The instructions to Form 313 state: “A series limited liability company that is treated as a single legal entity under the laws of its jurisdiction of organization is treated as a single legal entity for purposes of registration. The limited liability company rather than the individual series should register as the legal entity that is transacting business in Texas.” Does the language of the instructions to Form 313 mean by implication that an individual foreign series that is treated as a
separate legal entity by its jurisdiction of formation should file in the name of the individual series? If you are called on to help with such a filing, the author suggests calling the friendly folks at the Texas Secretary of State’s office. In all cases where the answer is not clear from the applicable statute or form, the best practice surely must be to call the particular State filing office for guidance.

**Internal Liability Shields in a Non-Series State.**

A more important question in most cases is whether a court in a non-series State (such as Colorado) will respect the internal liability shields of a series LLC established by series LLC legislation. This concern arises most directly in tort cases since persons who contract with an individual series in a non-series state may protect themselves through appropriate contractual provisions.

The general rule is that the law of the state of formation should govern the regulation of the internal affairs of an entity, including the liability of an owner of the entity for obligations of the entity. ¹⁶² Courts in a non-series LLC state may not be willing to apply the internal affairs doctrine to a case involving third party creditors—especially where the creditors did not knowingly choose to deal with a series LLC—as in the case of a tort creditor. Some commentators have taken an optimistic view of this problem:

Will jurisdictions that have not adopted Series LLC statutes recognize the existence of the series and the statutory limited liability granted by other states? Courts have not considered that specific question (perhaps because of the newness of Series LLCs or the question’s lack of novelty), but have held that states must respect the limited liability rules of other types of foreign entities, such as LLCs and limited partnerships. Nothing indicates that courts would reverse course with respect to Series LLCs. Furthermore, attorneys have the benefit of resolving certain issues by referring to the statute itself. Practitioners can ensure courts will respect the internal liability shields of a Series LLC and its series by exercising the same due diligence and care demanded by any business form that provides limited liability. Owners can help shield the assets of an individual series from

¹⁶² This discussion assumes that there are no “piercing the veil” claims as a result of which a court would disregard the internal liability shield.
the debts, liabilities, obligations, and expenses of the other series or the Series LLC by complying with [the statutory formalities].

The cases cited by the authors of the quoted paragraph involved situations in which a plaintiff in one state sought a judgment against the owners of an entity formed in another state. The cases involved foreign entities formed under statutes substantially similar to statutes of the forum state. It is not apparent that a different choice of law would have produced a different result. These cases are by no means authority for the proposition that the forum state must always follow the liability rules of the state of the formation. Moreover, the cases discussed below establish that one state is not required to apply the statutes of another state. If the internal affairs doctrine does not apply—and this Article submits that the internal affairs doctrine should have no application to possible liability of a series LLC or one of its series to a third-party creditor—the next question is whether a non-series state would be required to recognize the internal liability shields of a series LLC because of the Full Faith and Credit Clause of the United States Constitution:

Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

In other words, if an individual series of a Delaware series LLC is doing business in a non-series state, say Colorado, does the Full Faith and Credit Clause require a Colorado court to respect the internal liability shield of the Delaware series LLC legislation in a suit brought by a Colorado resident seeking to hold the juridical series LLC and all its series liable for an accident caused by the activities of one of the series in Colorado? The short answer is no. Although it is well-established that a state’s statutes are “public acts” for purposes of the Full Faith and Credit

163 Borden and Vattamala, supra, note 83 at 263-264.

164 At the same time that it added series provisions to its LLC statute, Alabama added a provision of doubtful effectiveness stating the law of Alabama governs “the availability of the assets of a series or the limited liability company for the obligations of another series or the limited liability company,” ALA. CODE § 10A-5A-105(d).

165 U.S. CONST. art. IV, § 1.
Clause, a state is not required “to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.” In 1998, the Supreme Court cited a 1939 case holding that “[a]lthough a court may be guided by the forum state’s public policy in determining the law applicable to a controversy, the Court’s decisions support no roving ‘public policy exception’ to the full faith and credit due judgments.” Further, “a rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, whenever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.”

Accordingly, a court in a non-series state could, without running afoul of the Full Faith and Credit Clause, refuse to uphold the internal liability shields of a series LLC on the ground that the forum state’s legislature, by not enacting series legislation, had expressed a public policy that internal liability shields within a single entity should not be recognized. By contrast, the Full Faith and Credit Clause applies quite differently to judgments of a sister State:

A valid judgment in one State of the United States will be recognized and enforced in a sister State even though the strong public policy of the latter State would have precluded recovery in its courts on the original claim.

Indeed, if a Colorado court were to render a money judgment against a Delaware series LLC (the juridical LLC) because of an act of one of its series in Colorado, the Full Faith and Credit Clause would require a Delaware court to recognize and enforce that judgment. In Fauntleroy v. Lum, the Court required a Mississippi court to enforce a judgment of a Missouri

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168 Id.
171 RESTATEMENT (SECOND) OF CONFLICTS § 117 (1971); Baker, 522 U.S. at 233.
court that, in a case brought in Missouri, enforced a contract entered into in Mississippi that was illegal under Mississippi law.

Even if you have a transaction that could go across state boundaries but remain in jurisdictions that have series LLC legislation (a real estate developer that works in Texas and Illinois), the applicable legislation is not uniform. This Article suggests that until there is wider adoption of series LLC legislation or favorable clarification of the issues discussed above, the prudent course for an attorney advising a series LLC that wants to do business in a non-series state would be to advise that the series LLC form a single-member LLC subsidiary (“LLC Sub”) to carry out business activity in the non-series state. The membership interest of LLC Sub LLC could be allocated in the records of the series LLC as necessary to reflect the agreed-on economic interest of each series in the planned business activity in the non-series state. Note, however, that if the membership interest of LLC Sub is allocated to more than one series, LLC Sub may be a partnership for tax purposes.

Cases Involving Series LLCs.

The author is aware of four published decisions in cases involving series LLCs, but none of these opinions shed light on any of the issues discussed above. In a Delaware series case decided by a non-Delaware court, *G x G Management LLC v. Young Brothers and Co., Inc.*

174 However, several series jurisdictions statutorily provide for recognition of the internal liability shields of a foreign series if requisite notice is given in the filing to qualify to do business. See *supra*, note 158.

175 2007 WL 1702872 (D. Me. 2007). Conaway, *supra*, note 7 at 19 appears to want to make more out of this case: “[The court] did not hesitate to interpret Delaware law governing the series despite the fact that Maine has no enabling series legislation.” Conaway and Tsolias, *supra*, note 9 at 116 states: “As to the contrary question—whether a non-Delaware court would recognize the Delaware series where the foreign jurisdiction has no enabling series legislation—one case has answered in the affirmative”, characterizing *G x G Management* (in note 130) as “recognizing a Delaware series in a contract dispute.” As noted in the text accompanying this note, actually, the court in *G x G Management* recognized the series LLC, G x G Management LLC, not its Series B, as the proper party to bring a breach of contract action against Young Brothers—noting that the dispute related to a contract entered into before Series B existed. In response to Young Brothers’ motion to amend its judgment, the court further noted that it was not determining whether G x G Management could sue on behalf of Series B or the legal question whether G x G Management and Series B were distinct legal entities “both of which questions would most certainly be governed by Delaware law.” It appears that the federal district court was simply doing what courts are often called on to do—interpret a statute other than one of the forum state to determine the powers and rights of an entity formed under or pursuant to such statute. This case has nothing to say about whether the internal liability shields of a Delaware series LLC would be respected by a court in a non-series state.
the court looked to the Delaware act to determine what capacity an LLC has to pursue litigation on behalf of a series or, in the alternative, what capacity a series has to pursue litigation on its own behalf or whether the series could be regarded as an entity distinct from the LLC. In that case, the court found that the LLC had an interest sufficient in the series so as to permit the LLC to maintain an action as a real party in interest. In a subsequent ruling, the court made clear that it had not decided that the series was a separate entity and that even if the series could otherwise maintain an action in its own name, it could not in this case because the action would arise out of the same facts being litigated by the LLC. In a bankruptcy case arising in Montana, an individual series of a series LLC filed for bankruptcy, but the opinion does not contain any discussion of the propriety of filing on that basis.  

A second bankruptcy case involved a fantastical series LLC that included an automobile series, a jewelry series, and a personal residence series. The series structure again was not in issue—the fraudulent transfer issues were so blatant that the court simply did not need to consider the series structure. Finally, in another case in which the series structure was not at issue, the series structure may have clouded the court’s consideration regarding whether an arbitration clause in an LLC Agreement bound a non-party to the agreement. 

As series LLC legislation has become more widespread the last several years, practitioners and others who are interested in series LLCs have been looking forward to a day when court decisions or administrative rulings will have answered some of the outstanding questions about series LLCs. Thus, it was disappointing when the Fifth Circuit Court of Appeals in an unpublished opinion passed up an opportunity to bring clarity to certain questions and may also have given incorrect guidance for the district court to follow on remand. Alphonse v. Arch Bay Holdings, L.L.C. involved a Louisiana resident, Mr. Alphonse, who lost his home to

foreclosure. According to the district court opinion, the foreclosure action was brought in Louisiana state court by a petition filed by “Arch Bay Holdings, LLC – Series 2010B, a corporation [sic] authorized to do business in St. Tammany Parish, Louisiana.” Alphonse did not challenge the foreclosure proceeding itself or appeal the foreclosure in Louisiana state court. Instead, he sued in federal court under the Louisiana Unfair Trade Practices Act (“LUTPA”). The federal district court for the Eastern District of Louisiana dismissed the action for lack of subject matter jurisdiction on grounds that all parties on appeal to the Fifth Circuit acknowledged were erroneous.

Alphonse obtained his mortgage from WMC Mortgage Corporation, which later assigned the mortgage note to Arch Bay Holdings, LLC—Series 2010B. Arch Bay Holdings, LLC is a Delaware LLC that, pursuant to Delaware’s LLC statute, had created Series 2010B as a separate series. Neither the district court opinion nor the Fifth Circuit opinion tells us anything about the basis of the separateness of Series 2010B—whether it was separate assets, separate associated members, separated management, or some other basis or combination of bases. Confusion about just how to characterize a series LLC and one of its individual series begins with the district court opinion, helped along by the arguments made by Alphonse.

In his action in federal court, Alphonse did not sue Series 2010B but sued Arch Bay Holdings, LLC and the mortgage servicer, Specialized Loan Servicing, LLC. At the district court level, Alphonse asserted “that AB-Series 2010 is a financial instrument and not a separate juridical entity.” Plaintiff also alleged “that Arch Bay Holdings, LLC controls and owns a number of trusts, including Series 2010B.” In its response to this argument, the district court observed that “a series of trusts is distinct from a series corporation [sic].” In concluding that Series 2010B was the correct party defendant, not Arch Bay Holdings, the district court noted that “Arch Bay Holdings never seized or possessed the plaintiff’s property” and that in the state court proceeding to foreclose on Alphonse’s mortgage, the petition was filed by “Arch Bay Holdings, LLC – Series 2010B, a corporation [sic] authorized to do business in St. Tammany Parish, Louisiana.” The district court then analyzes the series provisions of the Delaware LLC Act and concludes that Series 2010B was “a separate juridical entity from Arch Bay Holdings, LLC, itself.”
The Fifth Circuit opinion adds to the confusion by describing Arch Bay Holdings, LLC as “the parent company of Series 2010B.” The defendants asserted issue preclusion and *res judicata* based on the state court action involving the mortgage. One ground cited by the federal district court in ruling for defendants was that “the LUTPA claims against Arch Bay should be dismissed for the additional reason that Delaware law determines Arch Bay’s liability, and under Delaware law, Series 2010B is the real party in interest and is a separate juridical entity.” In the federal appeal, defendants argued that the district court’s decision dismissing Alphonse’s claims with prejudice should be affirmed because of, inter alia, Series 2010B’s separate juridical status.

In support of its position that Alphonse’ claims should be dismissed because of issue preclusion or *res judicata*, Arch Bay argued that it had “identical interests to and [was] the ‘virtual representative’ of Series 2010B in the foreclosure suit as the alter ego of Series 2010B and thus it possesses an identity of interest.” Although the court distinguished a case in which a federal district court held a parent and subsidiary to be “legally identical,” the Fifth Circuit said “we must determine whether there exists sufficient ‘identity of the parties’ between Arch Bay (the parent company) and Series 2010B (the judgment creditor) as well as between SLS (the mortgage servicer) and Series 2010B.” Moving on from its disturbing references to Arch Bay as the “parent company”\(^{180}\) of Series 2010B, the Fifth Circuit states: “Series 2010B is a Series LLC, and *Series LLCs only exist to represent the interest of the parent LLC*, which in this case is Arch Bay” (emphasis supplied). However, the court then observed that the legal separation of Series 2010B and “its parent, Arch Bay” is a fact-bound question and must be decided on remand. The court also stated that “the separate juridical status of a Series LLC with respect to third party plaintiffs remains an open question. We remand because there are insufficient facts in the record to determine whether the Series LLC in this case is truly separate. The important point is that the *res judicata* identity of parties in question—whether Series 2010B and its parent Arch Bay have

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\(^{180}\) These references are disturbing because the relationship between a juridical LLC and the series is not that of a parent-subsidiary in a corporate (or other) context. A parent and subsidiary are each separate entities. As discussed *supra*, notes 31-36 and accompanying text, a series of a Delaware series LLC is not a separate state law entity. See Conaway and Tsaflias, *supra*, note 9 at 126-27, noting that the existence of a series LLC under Delaware law is entirely derivative of the series LLC. Unfortunately our courts, usually judged by former criminal and civil litigators, generally do not have the sophistication to appreciate these subtle differences.
identical interests—ought in fairness be considered together with the question of whether Series 2010B is in fact a distinct juridical entity.”

The author was not present at the hearing before the Fifth Circuit and has not read the pleadings in the case. The decisions in many cases turn on the strength and clarity of the arguments made by the attorneys involved, and second-guessing courts can be a fool’s errand. It does appear that the Fifth Circuit muddles the question whether Series 2010B was a separate legal entity with the question whether its interests and the interests of Arch Bay were identical. It is clear that an individual series, such as Series 2010B, of a Delaware series LLC is not a separate juridical entity, but that point is, or should be, irrelevant when determining whether the juridical series LLC should be held responsible for the actions of a series it established.

In this case, whether there exists an identity of interest between Series 2010B and Arch Bay is irrelevant. Using erroneous terms like “parent” and “subsidiary” (even though facially helpful in explaining the relationship between a series and the juridical series LLC) are wrong, even in a non-series LLC state. Ignoring the Delaware series LLC statutory provisions when saying that “Series LLCs only exist to represent the interest of the parent LLC” is bad jurisprudence. Series LLCs and the relationship between an individual series and its juridical LLC is a new concept that deserves more time and attention by our courts and the litigators who appear before them than simply trying to force them into pre-existing analytical frameworks.

181 One commentator who discusses Alphonse observes:

Even the very bright attorneys who deal with Series LLCs and similar entities have trouble understanding them and articulating how they work. Series LLCs are a form of entity that require half a bottle of aspirin and a full bottle of Scotch to comprehensively understand, if that human endeavor is achievable at all. Those of you living in states with liberal compassionate use laws, or who have access to mescaline, may be able to understand Series LLCs more easily.

If the typical LLC is a hang glider that pretty much any idiot can manage—sometimes not needing even an Operating Agreement since the LLC laws provide for the most common situations (although you’re a fool not to have one)—then the Series LLC is a 747 jetliner, which is full of complex systems and a suicide mission for a novice to attempt to fly. Even worse, this particular 747 is a test airplane where nobody knows whether critical systems will even work.

This Article submits that factual analysis is required to determine if identity of interests between an individual series and the juridical series LLC exists. This Article also posits that the better legal view is that an individual series of a Delaware series LLC is not a separate juridical entity, but that is not a relevant consideration to the question whether the series LLC should be held liable for the debts of the series itself.

In this case Series 2010B was not formed by any filing with the Secretary of State of Delaware; Series 2010B was formed by Arch Bay Holdings’ action pursuant to its company agreement as contemplated by Delaware law.

- Series 2010B, as an individual series of Arch Bay Holdings (a Delaware series LLC) has “the power and capacity to, in its own name, contract, hold title to assets (including real, personal and intangible property), grant liens and security interests, and sue and be sued,” 182

- On the other hand, Series 2010B is not authorized to enter into a merger or conversion in its name and capacity. Only Arch Bay Holdings, as an LLC formed by a filing with the Delaware Secretary of State, meets the Delaware definition of a “limited liability company” and a “domestic limited liability company.” 183 Only “limited liability companies” may enter into mergers or conversion.

- Members are not admitted as members of an individual series but, rather, as members of the series LLC and are “associated” with one or more series and may or may not have any economic interest in the series LLC itself other than an interest in one or more series. 184

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184 Del. Code Ann. tit. 6, § 18-215(e)-(k).
Although no definitive legal definition of “juridical entity” exists, the better view appears to be that an individual series of a Delaware series LLC is not a separate juridical entity; the series is not created by a filing with the state; the series cannot enter into fundamental transactions such as mergers and conversions, and termination of the series does not occur simply because there are no members associated with the series.\footnote{\textsc{Del. Code Ann. tit. 6, § 18-215(i)}. Also see Conaway and Tsoflias, \textit{supra}, note 9 at 126-27, noting that the existence of a series under Delaware law is entirely derivative of the series LLC.} In \textit{Alphonse}, Series 2010B should not be considered a separate juridical entity, but that does not answer whether the owners of the economic interest in Series 2010B were identical, or to what degree, with the owners of the economic interest in Arch Bay Holdings. And even this identity of interest, if it exists as the Fifth Circuit stated (but without analysis), does not answer the question whether the juridical series LLC should be liable for the debts of the individual series.

The Fifth Circuit also remanded for the district court to decide, “perhaps with … factual development,” whether Delaware law applied because of the internal affairs doctrine or whether liability to a third party was an external affair. The author is not aware of the nature of the “factual development” that would be helpful to the question whether the internal affairs doctrine would be applicable as a matter of law. It would have been better had the Fifth Circuit addressed the legal issue directly and had determined that, as a matter of law, the internal affairs doctrine does not apply to a third party liability claim. Failing that, the Fifth Circuit could have provided clearer guidance to the district court.

Indeed, if a Louisiana court were to render a money judgment against a Delaware juridical series LLC because of an act of one of its series in Louisiana, the Full Faith and Credit Clause would require a Delaware court to recognize and enforce that judgment even though the judgment (or at least the reasoning for the judgment) was erroneous under Delaware series LLC legislation.\footnote{\textit{Baker}, 522 U.S. at 235; \textit{Fauntleroy v. Lum}, 210 U.S. 237 (1908).} In \textit{Fauntleroy v. Lum},\footnote{210 U.S. 237 (1908).} the Court required a Mississippi court to enforce a
judgment of a Missouri court that, in a case brought in Missouri, enforced a contract entered into in Mississippi that would have been illegal under Mississippi law.

It would have been far preferable, and more useful to practitioners, if the Fifth Circuit had:

- Held that the internal affairs doctrine does not apply to third party liability claims;
- Avoided inaccurate terms in describing a series and the series LLC of which it is a part; and
- Recognized the flexibility possible under Delaware law and remanded for specific fact findings on ownership of Arch Bay Holdings and of its Series 2010B, piercing the veil issues, and the potential liability of the juridical series LLC for the actions of its series and determining whether, under Louisiana law, the internal liability shields of a Delaware series LLC should be recognized.

These issues remain for a future court in a case where the litigators, experts, and judges have the necessary sophistication to reach these conclusions. On remand, in a decision characterized by Jay Adkisson as “It’s fourth and long and the District Court will punt,” 188 the Federal District Court dismissed *Alphonse* for lack of subject matter jurisdiction under 28 U.S.C. § 1367. 189 Although arguably what the court should have done in the first place, the end result of *Alphonse* leaves practitioners with no effective guidance from the Fifth Circuit with respect to several important issues relating to series LLCs.

**Concluding Considerations**

This Article submits that the following are important factors that should be considered in the future development and use of series LLCs.

188 Email to Inet-llc list serve November 29, 2014.

What Issues Should be Analyzed by a State When Considering Whether to Adopt or Modify Series Provisions?

This Article submits that at least the following should be considered by a state before adopting series LLC legislation and should be considered by existing series LLC jurisdictions for possible statutory amendments:

What is the Policy Basis for Adopting Series Provisions?

Is it good policy to provide for a single entity that has internal liability shields? Conaway and Tsolias assert that “the Delaware series … is a prime example of a legislative response to market demands of the business community.” What evidence do we have for a market demand for series LLCs? Should a legislature automatically respond favorably to “market demands” of the business community? What factors should a legislature consider to determine if a market demand of the business or other community for statutory change is appropriate?

If a preliminary decision is made that series provisions are desirable, then other questions arise:

What powers should be granted to an individual series?

If a series is to be permitted (or required) to be treated as a separate entity, how will that be structured? If a series is a separate entity, may it enter into mergers or conversions apart from the series LLC? If a series may enter into a merger or conversion on its own, how will that work? If a series is not the surviving entity in a merger, does the series automatically terminate as to the series LLC? If a series is the surviving entity in a merger, do the equity owners of the non-surviving entity become members of the series LLC associated with the merging series? In either case, does the series LLC need to be a party to the merger agreement? If a series enters into a conversion, may it convert to any other entity, including a series of another series LLC? Does the conversion of a series automatically terminate the series as to the series LLC? If a series is not permitted to be a party to a merger, to enter into a conversion, to have its own registered agent, or to obtain a certificate of good standing in its own name, what then is intended by saying that it is, or can elect to be, a separate entity?

What notice should be required for the establishment of a series and its name?

What name requirements should there be? Should a series LLC statute require that each series have a name including the name of the series LLC? If not, why not? If a series may use a name that offers no indication that it is the name of a series of a series LLC, should not the state
require at least an assumed name filing as Texas does? It does not appear appropriate from a policy standpoint to permit the formation of series with no more notice than is required by Delaware, Nevada, and several other states. Practically every entity that affords limited liability must be formed or registered with a state filing office by the filing of a document that provides notice at least of the entity’s existence, its name, and its registered agent. Why should an individual series (whether or not treated as a separate entity) be different?

*What filing fees should be charged?*

What fees should be charged for filing the formation document for the series LLC and any required designation documents for the series? This Article submits that it is inappropriate public policy to set entity filing fees such that they affect a decision as to what is the best choice of entity.

*Are there other statutes that should be reviewed?*

Are there other statutes that should be reviewed, for example licensing statutes?

**When Should a Series LLC be Used?**

It does not appear that there has been any policy discussion as to whether it is good public policy for there to be a state law entity like the series LLC. The series structure makes sense in the mutual fund industry and regulated investment company industry. It is understandable that a provider, such as Vanguard, would want to have a single board of directors overseeing all of its funds. Different funds of course would often have different investment managers, depending on the investment strategy of each fund. Moreover, mutual fund providers want to be able to establish new funds quickly to respond to market changes.

As this Article discussed earlier, several Delaware practitioners report several different uses for series LLCs that their clients have adopted. These Delaware practitioners are highly experienced and competent lawyers, and they also report that even more clients inquire about series LLCs but then decide against them once the uncertainties and actual and potential costs are explained to them. In the situations in which the Delaware practitioners reported that a series

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Supra, note 18, and accompanying text.

Exceptions that readily come to mind are trusts and unincorporated nonprofit associations.

Supra, text accompanying notes 85-87.
LLC was used, in only one or two situations could the client not have accomplished the stated goals by using several wholly-owned subsidiaries. Granted, using subsidiaries would result in greater filing fees. However, if one considers the record-keeping requirements of the series provisions of the Delaware LLC Act, it seems unlikely that using the series structure avoids a meaningful amount of administrative hassle. Moreover, the increased filing fees follow from the problematic decision by Delaware and several other series states to charge only a single filing fee for the formation of a series LLC no matter how any series are formed. Only the District of Columbia has made a different choice.

This Article submits that the mutual fund/regulated investment company rationale does not apply in many other situations. The Delaware practitioners discussed situations in which the series structure could be said to be helpful, but, in most of those situations, the client could have achieved its goals by using subsidiary entities. As noted above, in some states, such as Illinois, filing fees make a series LLC attractive. One wonders, however, how long it will be before states recognize that they are losing revenue by, in effect, permitting the formation of many LLCs for only one filing fee. As noted above, some states with series LLC legislation have already responded to this. In those states where filing fees might make a series LLC attractive, a policy question that should be addressed is whether filing fees should be structured such that they drive a choice of entity decision. A related policy question is whether business filing fees should be set at a level sufficient just to cover the costs of the filing agency in administering the filing program or whether it is appropriate that business filing fees be used to fund other state programs.

**What Public Notice of the Formation of a Series is Appropriate?**

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193 See the tax reporting requirements for series and series LLCs discussed *supra*, note 136 and accompanying text.

194 *Supra*, note 80.

195 *Supra*, notes 81-82.

196 See the discussion of Montana’s filing requirements and fees at *supra*, note 9. Also, the District of Columbia’s fee structure provides no savings to a series LLC. *Supra*, note 80.
As discussed above,197 in many series LLC states, there may be no public notice whether a series LLC has formed one or more series. Some states are requiring notice of one kind or another,198 and Griffith and Ling suggest that this is a developing trend,199 which would be welcome. The series jurisdictions that permit a series to be treated as a separate entity in general require more notice than other series jurisdictions. In the District of Columbia, the existence of a series does not begin until a certificate of series designation is filed.200 The certificate of series designation for a District of Columbia series must state a “different name for each series that contains the entire name of the limited liability company.”201 Kansas requires the filing of a certificate of designation for a series that is to have limited liability and the existence of the series begins when the certificate of designation is filed.202 The name of each Kansas series that is to have limited liability “must contain the entire name of the limited liability company and be distinct from the names of the other series set forth in the articles of organization.”203 In addition, if different than the limited liability company the certificate of designation required in Kansas must list the members of the series if it is member-managed or the managers of the series if it is manager-managed.204 The requirements of Illinois law are the same as those of Kansas except that in Illinois the name of a series set forth in the certificate of designation must “commence with” the entire name of the limited liability company and be distinguishable from the name of each other series.205 Iowa requires that notice of the establishment of a series be

197 Supra, notes 14-18 and accompanying text.

198 Supra, notes 18-19 and accompanying text.

199 Griffith and Ling, supra, note 6 at 7.

200 D.C. CODE § 29-802.1(e).

201 Id. at (d)(1). Somewhat confusingly, D.C. CODE § 29-802.1(d)(2) requires that the certificate of designation also state a street and mailing address for the principal office and name and mailing address of a registered agent “if either is different from that specified for the limited liability company.” D.C. CODE § 29-802.1(p), however, states that the registered agent for the limited liability company shall be the registered agent for each series.

202 KAN. STAT. ANN. § 17-76, 143(b), (d).

203 Id. at (c).

204 Id. at (d).

205 805 ILL. COMP. STAT § 180/37-40(c).
given in the certificate of organization of the limited liability company and that the name of each series “must contain the name of the limited liability company and be distinguishable from the name of any other series set forth in the certificate of organization.”

Missouri’s and Utah’s requirements are basically the same as Iowa’s. With the exception of the Texas requirement for filing an assumed name certificate, all of the series jurisdictions that do not treat a series as a separate entity follow the Delaware model of minimal notice.

**Areas of Potential Confusion and Uncertainty**

As this Article discussed earlier, several aspects of series LLCs may be confusing to practitioners as well as clients. The Delaware practitioners cited in this paper, to use Jay Adkisson’s colorful analogy, are experienced 747 test pilots. Other practitioners who are called on to advise clients with respect to the potential use of series LLCs should ensure that they have the requisite knowledge, either directly or by association with an experienced and knowledgeable practitioner.

The NCCULSA Committee has prepared a discussion draft of a Series of Unincorporated Business Entities Act (the “Discussion Draft”). Unlike the existing series LLC statutes, which use the term “series,” the Discussion Draft proposes to use the term “protected series.” Although this would be a welcome change if applied to series LLC statutes generally, because

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206 **Iowa Code Ann.** § 489.1201.1, 1201.2.

207 **Mo. Rev. Stat.** § 347.186.3 (specifying that the name of a series must “include the entire name of the limited liability company.”)

208 **Utah Code Ann.** § 48-3a-1201(1),

209 *Supra*, notes 48-52 and accompanying text.

210 *Supra*, text accompanying notes 85-87.

211 *Supra*, note 181.

212 Model Rules Prof. Cond. 1.1, cmt. 1.

213 The latest iteration of the Discussion Draft (November 7-8, 2014 NCCULSA Series Drafting Committee meeting) also uses the term “series organization” to refer to what in this paper is referred to as a series LLC. The Discussion Draft’s use of this term is consistent with the Proposed Regulations discussed *supra*, notes 134-140 and accompanying text.

214 *Supra*, note 10.
any LLC may create series of members, it is questionable how quickly such a change could be made or if it would be welcomed by the series LLC jurisdictions. The Discussion Draft also has as a premise that it “will scrupulously avoid stating that a protected series is an entity or person in its own right, even though a series will have many of the most important powers of a legal entity/person.” Although this would be consistent with the approach of the majority of the series LLC jurisdictions,215 as this Article has discussed, several series LLC jurisdictions allow a series to be treated as a separate entity. This creates its own confusions. For example, Illinois provides that each series with limited liability may “otherwise conduct business and exercise the powers of a limited liability company under this Act.”216 Kansas217 and Missouri218 have similar provisions. The Iowa series provisions state that except as modified by the series provisions, the provisions of the Iowa LLC Act “which are generally applicable to a limited liability company and its managers, members and transferees, shall be applicable to each series with respect to the operations of such series.”219 Utah’s series provisions state a rule substantially the same as Iowa.220 As noted, the scope and effect of these provisions is uncertain.221 The Revised Prototype Limited Liability Company Act222 also contains series provisions modeled on the Delaware Limited Liability Company Act.223 The Prototype Act also contains a problematic provision like that in the Alabama Limited Liability Company Act stating that the law of the

215 Id.

216 805 ILL. COMP. STAT. § 180/37-40(b).

217 KAN. STAT. ANN. § 17-76, 143 (b).


219 IOWA CODE ANN. § 489.1201.7.

220 UTAH CODE ANN. § 48-3a-1201(6).

221 Supra, notes 52-78 and accompanying text.

222 The Revised Prototype Limited Liability Company Act is an ongoing project of the LLCs, Partnerships and Unincorporated Entities Committee of the Business Law Section of the American Bar Association. The most recent version was published in THE BUSINESS LAWYER (Nov., 2011).

223 Id. § 105(d) and Article 11.
state of formation shall govern “the availability of the assets of a series or the limited liability company for the obligations of another series or the limited liability company.”\textsuperscript{224}

As this Article discussed above,\textsuperscript{225} many uncertainties exist with respect to series LLCs. These include how to file an effective financing statement, how a series LLC and its series will be treated in bankruptcy, how federal and state taxation will apply, how a series will qualify to do business in a non-series state, and whether the courts in a non-series state will respect the internal liability shields of a series LLC. Moreover, the series LLC statutes are far from uniform, and many contain provisions of uncertain scope and effect. In addition, considerable uncertainty exists with respect to whether treating a series as a separate entity makes any practical difference.\textsuperscript{226} Norman Powell has noted the difficulties of opining with respect to a series LLC.\textsuperscript{227} Some states have rejected series LLC legislation on grounds of uncertainty and other potential problems. In California, Senate Bill 323 was introduced in 2011 to adopt the Revised Uniform Limited Liability Company Act and included series provisions. The series 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.’”\textsuperscript{228} Maine adopted a new LLC Act in 2011 and decided against including series provisions because:

The uncertainties surrounding the series, 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.\textsuperscript{229}

\textsuperscript{224} Id. § 106(d). For the Alabama provision, see \textit{supra}, note 164.

\textsuperscript{225} \textit{Supra}, notes 43-47 and 129-173 and accompanying text.

\textsuperscript{226} \textit{Supra} notes 53-81 and accompanying text.

\textsuperscript{227} \textit{Supra}, note 38.

\textsuperscript{228} Griffith and Ling, \textit{supra}, note 6 at 5, citing Senate Judiciary Committee, CA 2012 legislative case history re series 01981859, p. 7 (1/4/12).

\textsuperscript{229} Deckelman, McLoon, and Pratt, “Maine’s New Limited Liability Company Act,” Maine Bar J. 181, 185-86 (Fall 2010).
How Can Clients be Protected?

Perhaps unfortunately, the legal profession is not one that requires specialization or that restricts the use of certain procedures to those who have demonstrated competence with the procedures. Use of sharp or otherwise dangerous tools in a tool box should not be denied to qualified, experienced practitioners just because some may lack the skill to safely use those tools. On the other hand, it would seem that the providers of dangerous tools should have some responsibility to educate potential users on the proper and safe use of such tools and the alternative, safer, tools that will accomplish the same tasks.

Conclusion

The many uncertainties surrounding series LLCs may mean that the adoption of series LLC provisions will slow. Furthermore, where, as in many states, an LLC can be formed and maintained for a nominal cost and given the uncertainty whether a non-series state will recognize the internal liability shields of individual series, many practitioners will likely prefer to form individual LLCs rather than to take the risk of series LLCs.

States that do not have series provisions should be wary of adopting proposals like that of the National Conference of Commissioners on Uniform State Laws to amend the Uniform Fraudulent Transfers Act to provide that each individual series of a series LLC would be treated as a separate person for purposes of that Act whether or not the individual series was otherwise treated as a person separate from the series LLC. Adding such a provision to the law of a non-series state would be problematic in that it could be found to be a backdoor approval of the series concept. If a state does decide to add series provisions to its LLC statute, this Article submits that the District of Columbia statute has much to recommend it. Apart from the uncertain consequences of providing that a series is a separate entity, the District of Columbia does require valuable notice of the existence and name of each series and has adopted a fee structure that does not differentiate between forming a series LLC with multiple series and forming the same number of separate LLCs. If, on the other hand, additional states adopt series provisions with the minimal notice required by Delaware, Nevada, and other states, then many practitioners and their clients may be seeking solace in the words of the great American poet Bob Dylan, who wrote in

\[230^{230}\ Supra, note 46.\]
“All Along the Watchtower”: “There must be some way out of here,” said the joker to the thief, “There’s too much confusion, I can’t get no relief.”