

**Again, For the Want of a Theory:
The Challenge of the “Series” to Business Organization Law**

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Following is the working draft of an article that will appear in the AMERICAN BUSINESS LAW JOURNAL. My position is that the “series” is as of yet an undefined concept. The various states that have series in their LLC/LP/statutory trust acts have afforded the structures different attributes, and within Delaware, the only state to have series in all of the LLC/LP/statutory trust acts, the capabilities of a series are different under the statutory trust act than they are under the LLC/LP acts. These divergent treatments of the series are consequent to a failure to on a normative basis define what are (should be) the characteristics of a series. Rather, the series is evolving, not necessarily in an appropriate manner, to satisfy different perceived needs. That evolution has, however, deprived the series of a consistent structure. As a consequence, in only the broadest sense, namely the ability to segregate assets and liabilities within individual series, is it possible to know what are the capabilities and characteristics of a series only by reviewing the statute at issue. Furthermore, the failure to clearly define what a series is (and is not) makes it difficult to analyze the structure in other areas of law such as bankruptcy, taxation and conflicts.

Again, For the Want of a Theory: The Challenge of the “Series” to Business Organization Law

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I. INTRODUCTION

The notion of a “series,” essentially an internal compartment of a limited liability company, limited partnership or business trust that affords both an affirmative and a negative liability shield and has some of the attributes of a legal entity,¹ has of late caused significant confusion. Some of that confusion has arisen from concerns about how the series will be treated in the areas of federal and state taxation, in the bankruptcy system. Other questions, they being the primary focus of this presentation, have arisen from the effort to conceptualize the individual series and to place them in the context of the primary business organization of which they are, in some manner, components.

As is briefly touched upon herein, many of the issues arising in the taxation of a series business organization can be resolved through the informed application of existing tax principles, the distinctions between a series and other forms of business organization such as a partnership with scheduled allocations being more of degree than of kind.² In contrast, other issues,

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¹ As such, the “series” as discussed herein is entirely distinct from the notion of a “series” of, for example, preferred stock. *See, e.g.*, Revised Model Business Corporation Act § 6.02; KY. REV. STAT. ANN. § 271B.6-020(1); and DEL. CODE ANN. tit. 8, § 151(a).

² *See, e.g.*, Thomas M. Stephens & Marc Schultz, *Segregating Assets Within a Single Partnership: Delaware Series Partnerships and LLCs*, 78 TAXES

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including the inconsistent treatment between the various statutes of the entity-like characteristics of an individual series and questions as to the vibrancy the liability shield between the various series and that between the series and the primary business organization remain and likely will remain unresolved because the fundamental understanding of what is a series, including how it relates to both the primary business organization of which it is a part and to third-parties, has not been resolved. There being and having been no unified understanding of what is a series, these questions have not been addressed in a unified manner. As a consequence, the series has developed on different ways in different states and under different forms of business organization, resulting in confusion and lessening the opportunity for a timely adoption of the series across the range of business organizations and the states.³

This essay begins by reviewing the adoptions to date of series provisions, identifying both common themes and points of departure. From there the review turns to a brief recitation of some of the unresolved issues and challenges that are presented by the series. Coming then to the thesis, it is argued that the failure to define what is the series has resulted in inconsistent expressions of the concept, a failure that will for the foreseeable future hinder the development and acceptance of the concept and as well present significant problems that will arise under choice

231 (March 2000); Mark A. Gershon, *Taxing Series LLCs*, BNA March 8, 2004; Michael W. McLaughlin & Bruce P. Ely, *The Series LLC Raises Serious State Tax Questions; But Few Answers Are Yet Available*, 16 J. MULTISTATE TAX'N 6 (Jan. 2007); H. Karl Zeswitz, Jr. & William R. Pauls, *Classification of Series Entities*, 49 TAX MGMT. MEMO. 531 (Dec. 22, 2008); Terence F. Cuff, *Series LLCs and the Abolition of the Tax System*, 2 BUSINESS ENTITIES 26 (Jan.-Feb. 2000).

³ As is addressed in detail below, the series has been adopted in the limited liability company (LLC) in only seven states, and has as well been adopted in the Delaware limited partnership and in the business/statutory trust acts of Delaware, Connecticut and Virginia. *See infra* notes 13, 14 and 17. Further, the Uniform Statutory Trust Act (USTA), currently being drafted, incorporates series provisions. While the author, as a representative from the Section of Business Law, American Bar Association, is a member of the USTA drafting committee, the views expressed herein are my own and do not necessarily reflect views of other participants in the USTA drafting effort.

of laws when a series transacts business in a state that does not provide for series at all or in that form of organization.⁴

II. THE HISTORY & FEATURES OF THE SERIES

The series arose in Delaware in the context of business (now statutory) trusts⁵ utilized for asset securitization and the organization of investment companies.⁶ In the most traditional application, a series is an administrative sub-unit of an investment company. Assuming that the investment company is organized as a statutory trust, only it, on behalf of the “fund family,” will register with the SEC on, for example, Form N-1. Thereafter, the trust organizes a series for each of the various sponsored funds.⁷ The business trust has a single trustee, typically embodied in a board, overseeing all of the series even as, on behalf of each

⁴ A statement made notwithstanding the admonition of Samuel Meyer “I never make predictions, especially about the future.”

⁵ Delaware adopted a Business Trust Act in 1988, referring to the organizations created thereunder under the name of a “business trust.” In 2001 the name of the act was changed to the Delaware Statutory Trust Act and the name of organizations created thereunder was changed to a Statutory Trust. *See* DEL. CODE ANN. tit. 12, § 3801(g) (2007). Herein “statutory” and “business” trust are used interchangeably.

⁶ *See, e.g.*, GORDON ALTMAN ET AL., A PRACTICAL GUIDE TO THE INVESTMENT COMPANY ACT, p. 2-3 (1996) (“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.”); THOMAS A. HUMPHREYS, LIMITED LIABILITY COMPANIES § 1.04 (2006) (“The series fund concept is useful because it permits the formation of only one legal entity. For example, a series mutual fund formed as a corporation under state law has only one board of directors, one set of officers, etc. It files a single registration under the Investment Company Act of 1940. The use of the series is thus designed to save expenses for the fund’s shareholders.”) (citation omitted). *See also* Section 18(f)(2) of the Investment Company Act; SEC Rule 18f-2(a) (“For purposes of this rule a series company is a registered open-end investment company which, in accordance with the provisions of Section 18(f)(2) of the Act, issues two or more classes or series of preferred or special stock each of which is preferred over all other classes or series in respect of assets specifically allocated to that class or series.”)

⁷ *See* HUMPHREYS, *supra* note 6.

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series organized fund, distinct fund managers are retained.⁸ 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. Today, however, while the series remains actively utilized in the mutual fund and asset securitization applications, the use of the series in other applications is being seen. For example, it has been suggested that it might be used as a mechanism by which an integrated oil company could organize liability shields between different oil fields and other assets⁹ and in real estate,¹⁰ and we know of at least one instance in which a series LLC was utilized to own a personal speedboat.¹¹

It must be recognized that a series of a statutory trust is itself not a distinct legal organization. In one of the few cases to consider the matter, *Betra v. Investors Research Corp.*,¹² the court held that an individual series is not an independent legal entity. In that case, the owner of one series of an investment company, which was itself organized with twelve distinct series, filed suit with respect to one series, then transferred his investment to a different series; as such, as the lawsuit proceeded, the plaintiff no longer owned shares in the particular series with respect to which he

⁸ 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.

⁹ Cuff, *supra* note 2, at 816. It has been suggested as well that an organic farm that raises livestock, grows the grain fed to the livestock and owns the real property on which the operations are conducted might distribute its various business segments among separate series. See Dominick T. Gattuso, *Series LLCs – Let's Give the Frog a Little Love*, 17 BUS. L. TODAY 33, 36 (July/Aug. 2008).

¹⁰ See, e.g., John C. Murray, *A Real Estate Practitioner's Guide to Delaware Series LLCs (with Form)*, available at <http://www.firstam.com/listReference.cfm?id=5574>; Nick Marsico, *Current Status of the Series LLC: Illinois Series LLC Improves Upon Delaware Series LLC but Many Open Issues Remain*, 9 J PASSTHROUGH ENTITIES 35, 38-39 (Nov.-Dec. 2006).

¹¹ See *GxG Management LLC v. Young Brothers and Co., Inc.*, 2007 WL 551761 (D. Me. 2007).

¹² 1192 WL 278688 *1 (W.D. Mo. 1991).

brought the action. The defendants asserted that each series constituted a distinct investment company and that, as the plaintiff did not own shares in the series with respect to which the action was brought, he lacked standing. The court rejected this contention, noting that under the Investment Company Act of 1940, the individual series is not the issuer of securities. Ultimately, a person owning shares in any one series was effectively granted standing to bring an action with respect to the shares in any series.

In addition to Delaware, Connecticut¹³ and Virginia¹⁴ include the series concept in their respective business trust acts.

In Delaware, from the statutory trust realm, the series concept was adopted, albeit in modified form, and incorporated into the limited liability company¹⁵ and the limited partnership acts.¹⁶ Several other states have incorporated the series into their respective LLC acts.¹⁷ Most recently, although as of this writing still in the developmental stage, are the series provisions being incorporated in the Uniform Statutory Trust Act.¹⁸ Under the

¹³ CONN. CODE § 34-5167(b)(2); § 34-502(b).

¹⁴ VA. CODE ANN. § 13.1-1219, § 13.1-1231 and § 13.1-1240.

¹⁵ DEL. CODE ANN. tit. 6, § 18-215.

¹⁶ DEL. CODE ANN. tit. 6, § 17-218(b). Other than Delaware, no state has yet provided for the series in its limited partnership act.

¹⁷ Those states are Illinois (805 ILCS 180/37-40), Iowa (IOWA CODE § 490A.305 (until Jan. 1, 2009); IOWA CODE §§ 489.1201 thru 489.1206 (after Jan. 1, 2009)), Nevada (NEV. REV. STAT. § 86.296.3) (2008), Oklahoma (18 OKLA. STAT. § 2054.4B) (2008), Tennessee (TENN. CODE ANN. § 48-249-309) (2008), and Utah (UTAH CODE ANN. § 48-2c-606) (2008). The Revised Uniform Limited Liability Company Act (2001) (RULLCA) does not contain series provisions. While the drafting committee (of which the author was a member as an advisor from the American Bar Association, Section of Business Law, see also *supra* note 3) did consider including series provisions in RULLCA, and the reporters had prepared an initial draft/were on the cusp of preparing an initial draft, the determination was made to not proceed with that aspect of the project. As to that determination, see Revised Uniform Limited Liability Company Act (2006) Prefatory Note, 6B U.L.A. 412 (2008).

¹⁸ The formal name of this Act is, as of the time of this writing, the Uniform Statutory Trust Entity Act, with the "Entity" added to the title in order to (purportedly) greater differentiate this Act from the Uniform Trust Code. However, the organization created under this proposed legislation is a Statutory

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formulation being there utilized, a series is expressly not a distinct legal entity¹⁹ and lacks the power to hold property in its own name and as well lacks the power to sue or be sued in its own name.

While there are distinctions between the various acts,²⁰ common elements include a reference to at least the limited liability that exists between series in the organic organizational filing,²¹

Trust, and not a Statutory Entity Trust; to that extent, the title of the Act is somewhat misleading in that it does not accurately refer to the form of organization created thereby. For that reason, as utilized in this article, the Act will be referred to as the Uniform Statutory Trust Act and the under the acronym "USTA."

¹⁹ See USTA (draft for February 29, 2008 meeting, *available at* nccusl.org) § 301(A)(b). All references herein to the USTA and its substantive provisions are based upon a non-final draft of that uniform act, and there exists the possibility of significant changes in the provisions here cited by the finalization of the act, now scheduled for the summer of 2009. It should be recognized that many of the determinations as to the characteristics of a series in the USTA have been driven not by a normative assessment of the series but rather by a determination that the language employed must conform with and not conflict with established protocols and expectations of the mutual fund and securitized finance industries which are utilizing the existing Delaware statutory trust act and its series provisions.

²⁰ Notwithstanding that many of the series provisions of the various LLC acts are substantially based upon the language employed in Delaware, at least as of the time adopted, the series provisions of the various acts are best understood and appreciated as individual one-off structures. Put another way, an assumption of uniformity is erroneous. The fact that the series provisions in the three Delaware acts at issue, namely the statutory trust, the limited liability company, and the limited partnership, vary widely from one another is indicative of a lack of agreement on a standard model.

²¹ See, e.g., NEV. REV. STAT. § 86.161(1)(e) (requiring that the articles of organization of a series LLC set forth that it is a series LLC and either the "relative rights, powers and duties of the series" or that such are set forth in or established by the operating agreement); DEL. CODE ANN. tit. 6, § 18-215 (certificate of formation must set forth that the LLC is a series LLC as a pre-condition to series limited liability); UTAH CODE § 48-2c-606(3)(d) (articles of organization must set forth notice of series limited liability as a pre-condition thereto); DEL. CODE ANN. tit. 6, § 17-218(b) (certificate of limited partnership must set forth that limited partnership is a series limited partnership as a pre-condition to series limited liability); DEL. CODE ANN. tit. 12, § 3804(a) (in order for series to enjoy limited liability, notice of the limited liability of the series must be set forth in the certificate of trust); VA. CODE ANN. § 13.1-1231.D (2007) (in order for series to enjoy limited liability, notice of limited liability of

internal association of assets to the series,²² the application of

the series must be set forth in the articles of trust); CONN. STAT. § 34-502(b) (providing that, in order for series to enjoy limited liability, “notice of the limitation on liabilities of series as referenced in this sentence is set forth in the certificate of trust of the statutory trust.”); and IOWA CODE ANN. § 489.1201(2)(d) (2006) (requiring as a condition to inter-series limited liability that “[n]otice of establishment of the series and the limitation on liabilities of the series is set forth in the certificate of organization. . . .”).

²² See, e.g., DEL. CODE ANN. tit. 6, § 17-218(b) (requiring as a pre-condition of series limited liability that there be maintained records accounting for the assets associated with each series as distinct from those held otherwise by the limited partnership or any other series thereof); VA. CODE ANN. § 13.1-1231.D. (requiring as a pre-condition of series limited liability that there be maintained records accounting for the assets associated with each series as distinct from those held otherwise by the trust or any other series thereof); TENN. CODE ANN. § 48-249-309(b)(1)(B) (requiring that, in order for series limited liability to be available, that separate and distinct records be maintained for each series reflecting the assets associated with each series, accounting for in separate and distinct records the other assets of the LLC and the assets of any other series of the LLC); UTAH CODE ANN. § 48-2c-606(3)(b), (c) (limited liability being conditioned upon the maintenance on behalf of the series of separate and distinct records and that the assets associated with each series be held and accounted for separately from the other assets of the LLC or of any other series thereof); 18 OKLA. STAT. ANN. § 2054.4.B. (providing as a pre-condition to series limited liability that “separate and distinct records are maintained for any such series and that the assets associated with any such series are held, directly or indirectly, including through a nominee or otherwise, and accounted for separately from the other assets of the [LLC], or any other series thereof”); 805 ILCS 180/37-40(b) (providing as a pre-condition to series limited liability that “separate and distinct records are maintained for any such series and that the assets associated with any such series are held, directly or indirectly, including through a nominee or otherwise, and accounted for separately from the other assets of the [LLC], or any other series thereof”); NEV. REV. STAT. § 86.296(3)(a) (providing as a pre-condition to series limited liability that “separate and distinct records are maintained for any such series and that the assets associated with any such series are held, directly or indirectly, including through a nominee or otherwise, and accounted for separately from the other assets of the [LLC], or any other series thereof”); DEL. CODE ANN. tit. 6, § 18-215(b) (providing as a pre-condition to series limited liability that “separate and distinct records are maintained for any such series and that the assets associated with any such series are held, directly or indirectly, including through a nominee or otherwise, and accounted for separately from the other assets of the [LLC], or any other series thereof”); and IOWA CODE ANN. § 489.1201(2)(b) (“Separate and distinct records are maintained for the series and separate and distinct records account for the assets associated with that series. The assets associated with a series must be accounted for separately from the other assets of the limited liability company, including another series.”)

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certain otherwise entity-applicable rules at the series level,²³ and the enumeration of the powers of a series as distinct from those of the organization of which it is a component.²⁴ The various acts differ, however, with respect to numerous factors including

²³ See, e.g., DEL. CODE ANN. tit. 6, § 18-215(i) (statutory limitations on distributions are applied at the series level); NEV. REV. STAT. § 86.296(5) (addressing the termination of a manager to a particular series as such would impact upon management of any other series or of the LLC as a whole); 805 ILCS 180/37-40(h) (providing that a series may be managed by either the members associated with the series or by a manager); TENN. CODE ANN. § 48-249-309(e) (limitations on distributions applied at the series level); VA. CODE ANN. § 13.1-1240.A. (dissolution of a series of a statutory trust does not dissolve the statutory trust); DEL. CODE ANN. tit. 6, § 17-218(g) (limited partner ceasing to be associated with a particular series with the limited partnership does not necessarily cease to be associated with other series); DEL. CODE ANN. tit. 6, § 17-218(j) (distribution limits applied at the level of an individual series); UTAH CODE ANN. § 48-21-606(6)(a) (providing that property and assets of a series may not be transferred to the LLC or to another series if that transfer impairs the ability of the transferor series to pay its debts unless fair value is given therefor); 805 ILCS § 37/40(j) (“except as 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.”); IOWA CODE ANN. § 489.1201(7) (“Except to the extent modified by this Article, the provision of this chapter which are generally applicable to a [LLC], and its manager, members and transferees, shall be applicable to each series with respect to the operations of such series”); *id.* § 489.1202(1) (a series is either member-managed or manager-managed); and *id.* § 489.1203(5) (limits on distributions applied at the series level).

²⁴ See, e.g., DEL. CODE ANN. tit. 6, § 18-215(c) (providing that a series “shall have the power and capacity to, in its own name, contract, hold title to assets (including real, personal and intangible property), grant liens and security interests, and sue and be sued.”); NEV. REV. STAT. § 86.296(2) (providing that an individual series may have a separate business purpose or investment objective from that of the LLC from which it was formed); 805 ILCS § 180/37-40(b) (“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 conduct the powers of a limited liability company under this Act.”); UTAH CODE ANN. § 48-2c-606(5) (“a series may contract on its own behalf and in its own name, including through a manager”); DEL. CODE ANN. tit. 6, § 17-218(c) (“unless otherwise provided in a partnership agreement, a series established in accordance with subsection (b) of this section shall have the power and capacity to, in its own name, contract, hold title to assets (including real, personal and intangible property), grant liens and security interests, and sue and be sued.”); and IOWA CODE ANN. § 489.1201(7), incorporating *id.* § 489.105(1) (power to sue and be sued in own name).

whether or not a particular series may be treated as an entity,²⁵ the degree to which the statute specifically recognizes the ability of a foreign series LLC to qualify to transact business, and the consequences of a failure to do so²⁶ and the degree to which additional state filings (and fees) must be paid to the state with respect to each series as formed. The Illinois series provision, as well the series provisions added to the 2008 adoption of RULLCA in Iowa, provide that a series may be treated as a distinct legal entity.²⁷ The other series provisions are silent regarding entity treatment (or not) while the series provisions in the draft USTA provide expressly that a series is not a distinct legal entity.²⁸ Illinois²⁹ requires a filing fee with respect to the creation of each series and, thereafter, an annual filing fee. Conversely, Delaware imposes no filing requirements or fees with respect to the organization and maintenance of a series.

III. THE SERIES LIABILITY SHIELD

Across all of the entities that utilize the series concept, there is provided limited liability for each series.³⁰ These liability shields

²⁵ See *infra* notes 40 through 42 and accompanying text.

²⁶ For example, Tennessee and Iowa, while allowing a foreign series LLC to qualify to transact business, imply that the consequence of failing to so qualify is the loss of the liability shield between the various series. See TENN. CODE ANN. § 48-249-309(i); IOWA CODE ANN. § 489.1206.

²⁷ 805 ILCS § 180/37-40(b); IOWA CODE ANN. § 489.1201(3).

²⁸ USTA (Dec. 10, 2008 Draft) § 401(b) (copy on file with author).

²⁹ Illinois imposes a \$500 filing fee for a non-series LLC and a \$750 filing fee for a series LLC. In addition, there is a \$50 filing fee for each certificate of designation that is filed. Each Illinois LLC must file an annual report with a \$250 filing fee, and an additional \$50 must be paid for each series in place as of 60 days before the due date of the annual report.

³⁰ DEL. CODE ANN. tit. 6, § 18-215(b) (contingent upon the satisfaction of a series of conditions, “then the debts, liabilities, obligations, and expenses incurred, contracted for, or otherwise existing with respect to a particular series shall be enforceable against the assets of such series only, and not against the assets of the limited liability company or any other series thereof.”); NEV. REV. STAT. § 86.296(3); 805 ILCS § 180/37-40(b); 18 OKLA. STAT. ANN. § 2054.4(B); UTAH CODE ANN. § 48-2c-606(4); TENN. CODE ANN. § 48-249-309(b)(1); IOWA CODE § 490A.305(2) (until January 1, 2009); IOWA CODE § 489.1201(2) (after January 1, 2009); DEL. CODE ANN. tit. 12, § 3804(a); CONN. STAT. § 34-502(b); VA. CODE ANN. § 13.1-1231(D); and DEL. CODE ANN. tit. 6, § 17-218(b).

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have a number of implications. First, neither the assets of the parent entity (i.e., those assets, if any, that are not associated with a series) nor those of any other series of the entity, are subject to the debts and obligations of any individual series.³¹ Second, the owners of the series are not personally liable for the debts and obligations of the series which they own.³² Third, the assets of a particular series are not available to satisfy the debts and obligations of another series, of the parent organization, or of the members of that series.³³ It is important to appreciate, however, that the application of these rules in the series context is different from facially equivalent rules when series are not present. While, historically, limited liability has not been an indispensable characteristic of the corporate form,³⁴ it is now treated as such and indeed lauded as the central component of corporate form.³⁵ Limited liability is not, however, necessarily the consequence of incorporation, but rather a consequence of the appreciation that

³¹ This statement is made with respect to the default statutory rule. Cross-collateralization of assets between series or guarantees of obligations would, by private ordering, alter this rule in a particular circumstance.

³² DEL. CODE ANN. tit. 6, § 18-215(b); NEV. REV. STAT. § 86.296(3); 805 ILCS § 180/37-40(b); 18 OKLA. STAT. ANN. § 2054.4(B); UTAH CODE ANN. § 48-2c-606(4); TENN. CODE ANN. § 48-249-309(b)(1); IOWA CODE § 490A.305(2) (until Jan. 1, 2009); IOWA CODE § 489.1201(2) (after Jan. 1, 2009); DEL. CODE ANN. tit. 12, § 3804(a); CONN. STAT. § 34-502(b); VA. CODE ANN. § 13.1-1231(D); and DEL. CODE ANN. tit. 6, § 17-218(b).

³³ This aspect of the rule of limited liability has been labeled “capital lock-in.” See Lynn Stout, *On the Nature of Corporations*, 2005 U. ILL. L. REV. 253.

³⁴ See, BAYLESS MANNING, A CONCISE TEXTBOOK ON LEGAL CAPITAL 5-6 (2^d ed. 1981) (“As a matter of history, it is at least worth noting that the feature of limited liability . . . played little or no part in the development of modern corporation law.”). Blackstone did not identify limited liability as a characteristic of a corporation. See WILLIAM BLACKSTONE, 1 COMMENTARIES *475. See also WILLIAM L. CLARK, JR., HANDBOOK OF THE LAW OF PRIVATE CORPORATIONS 16 (2d ed. West 1907) (limited liability is “not an essential attribute” of the private corporation); Wesley Newcomb Hohfeld, *Nature of Stockholders’ Individual Liability for Corporation Debts*, 9 COLUM. L. REV. 285 (1909).

³⁵ See, e.g., MAURICE WORMSER, DISREGARD OF THE CORPORATE FICTION AND ALLIED CORPORATION PROBLEMS 14 (1927) (“The attribute of limited liability is regarded by most persons as the greatest advantage of incorporation. Indeed many immigrants doubtless possess full knowledge of this fact before coming within hailing distance of the Statue of Liberty.”).

the corporation is a legal entity³⁶ and the recognition that it is the corporation, and not its constituent owners, who is the debtor.³⁷ As limited liability has become more and more available across the various forms of business organization,³⁸ such is typically been coincident with the definition of the organization as a

³⁶ The at best ambiguous consequences of “entity treatment” are addressed *infra* notes 60 through 67 and accompanying text. *See also* Thomas E. Rutledge, *External Entities and Internal Aggregates: A Deconstructionist Conundrum*, 43 SUFFOLK U.L. REV. (forthcoming 2009).

³⁷ *See, e.g.*, MANNING, *supra* note 34, at 6.

History aside, it is important to understand that modern corporation law does not “provide for” limited liability; what it does is provide that in the case of creditor claims against an enterprise in corporate form, *the corporation is the debtor* rather than those who hold claim to the proprietorship capital in the enterprise. Once that step is taken, the creditor law of the corporation exactly parallels the law of individual indebtedness and of creditors of individuals.

See also 1 FLETCHER CYCLOPEDIA § 14 (2006) (“Unless the corporation and the individuals are the same in entity, it is logical that its rights and liabilities are not primarily and essentially theirs. When it is an owner or a debtor, they are not, and vice versa.”) It needs to be recognized as well that in addition to protecting the shareholders from exposure in excess of the amounts invested in the venture, the corollary of limited liability, namely that the assets of the venture will not be available to satisfy claims against the owners in their individual capacities assures a defined pool of assets available to satisfy creditor claims. *Id.* at § 38. This aspect of limited liability has been labeled “defensive asset partitioning.” *See* Henry Hansmann & Reinier Krackman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 394-95 (2000). *See generally* Margaret M. Blair, *Locking In Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387 (2003).

³⁸ Today, limited liability is available in the limited liability company (*see, e.g.*, RULLCA § 304, 68 U.L.A. 475 (2008); ULLCA § 303(a), 6B U.L.A. 587 (2008); DEL. CODE ANN. tit. 6, § 18-303(a); KY. REV. STAT. ANN. § 275.150(1)), the statutory trust (*see, e.g.*, Uniform Statutory Trust Entity Act (2008 Annual Meeting Draft) § 303 (defining “beneficial owner”)); DEL. CODE ANN. tit. 12, § 3803; CONNECTICUT § 34-523; KY. REV. STAT. ANN. § 386.400.), the limited liability partnership (*see, e.g.*, RUPA § 306(c), 6 U.L.A. 117 (2001); DEL. CODE ANN. tit. 6, § 18-306(c), KY. REV. STAT. ANN. § 362.1-306(3)) and the limited liability limited partnership. *See, e.g.*, ULPA (2001) § 404(c), 6A U.L.A. 432 (2008); DEL. CODE ANN. tit. 6, § 17-214(c); KY. REV. STAT. ANN. § 362.2-404(3).

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distinct legal entity.³⁹ With the exceptions of elective entity classification that exists in the series provisions of the Illinois and Iowa limited liability company acts,⁴⁰ the statutes lack declarations as to whether or not a series is an “entity.” While a series may have some of the characteristics of a legal entity, it is open to dispute whether a series does or does not itself rise to that level. Adding not clarity but rather further confusion, the Delaware LLC Act has defined a “person” as including a series,⁴¹ and has further in the legislative history of the LLC Act stated that a series of an LLC may be treated as a separate LLC.⁴² The series is a chimera, having some of the characteristics of an independent legal organization while lacking others. As such, it fails to fall into our traditional analytic categories, thereby giving rise to significant confusion and challenges.

IV. THE CHALLENGES PRESENTED BY THE SERIES

The series concept has given rise to a significant number of questions, some of which are internal to the application of the series rules and others of which arise from the need to assess the series from the perspective of and to integrate it into other areas of law. Many of these points have received significant attention elsewhere, and as the objective of this essay is not to resolve them, they are here only cataloged. From the standpoint of

³⁹ See, e.g., RULLCA § 104(a), 6B U.L.A. 437 (2008); KY. REV. STAT. ANN. § 275.010(2); RUPA § 201(a), 6 U.L.A. 91; KY. REV. STAT. ANN. § 362.201(1); Uniform Statutory Trust Act § 301 (2008 Annual Meeting Draft); DEL. CODE ANN. tit. 12, § 3801(a).

⁴⁰ See 805 ILCS § 180/37-40(b) (“A series is treated as a separate entity to the extent set forth in the articles of organization; 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 an LLC.”); IOWA CODE § 489.1201(3) (“A series meeting all of the conditions of Subsection II shall be treated as a separate entity to the extent set forth in the certificate of organization.”).

⁴¹ “Person” means, among others enumerated, “any other . . . entity (or series thereof) . . .” DEL. CODE ANN. tit. 6, § 18-101(12).

⁴² According to the synopsis that accompanied the Delaware legislation authorizing the LLC series, “. . . a limited liability company may provide that such series shall be treated in many important respects as if the series were a separate limited liability company . . .” H.R. 528, § 9, 70 DEL. LAW ch. 360 (1996).

federal income taxation, there exist questions involving whether a series is an “eligible entity” able to elect its tax classification,⁴³ whether an entity with series will be treated as a single taxpayer⁴⁴ or rather, whether each individual series, as well as primary series will be treated as distinct taxpayers⁴⁵ with possible opportunities for abusive transactions.⁴⁶ There are significant state tax issues including characterization similar to those faced under federal law, as well as questions of nexus and apportionment.⁴⁷ While, in

⁴³ See Treas. Reg. § 301.7701-3(a); see also Charles T. Terry & Derek D. Samz, *An Initial Inquiry into the Federal Tax Classification of Series Limited Liability Companies*, 110 TAX NOTES 1093 (Mar. 6, 2006); Michael E. Mooney, *Series LLCs: The Loaves and Fishes of Subchapter K*, 116 TAX NOTES 663 (Aug. 20, 2007).

⁴⁴ Or, in the context of an entity that is taxed as a partnership, a single partnership under Code Section 701.

⁴⁵ For example, in *National Securities Series – Industrial Stock Series*, 13 T.C. 884 (Dec. 17, 1949), the Tax Court determined that several series within a single investment trust would each be treated as separate taxable entities, although this ruling is in conflict with the earlier ruling rendered in *Union Trusted Fund, Inc. v. Comm’r*, 8 T.C. 1133 (1947), *acq.* 1947-2 C.B. 4. Treatment of each series as a distinct partnership is addressed as well in Rev. Rul. 55-416, 1955-1 C.B. 416, and Private Letter Ruling 200803004 (Oct. 15, 2007) (concluding that each series of an LLC should for purposes of federal tax classification be treated as a separate eligible entity). See also Steven E. Grob & Norman J. Hannawa, *Federal Tax Status of a Series Limited Liability Company*, 10 BUS. ENTITIES 24 (Mar./Apr. 2008); Zeswitz & Pauls, *supra* note 1, at 534. In a comment letter issued by the American Bar Association Section of Taxation to Douglas Shulman, Commissioner, The Internal Revenue Service (Jan. 5, 2009) addressing “Notice 2008-19 and Segregating Arrangements That Do Not Involve Insurance,” it was stated that “As indicated above, there is no meaningful authority that addresses whether a series of a [LLC] constitutes an entity for federal tax purposes that is separate and apart from the [LLC] itself or any other series of that [LLC].” This letter goes on to recommend to the IRS that it adopt guidance to the effect that each individual series be treated as a “eligible entity” and that the parent LLC, assuming it has assets, which may include an interest in an individual series thereof, it as well be an eligible entity or, where it has no such assets, that it be disregarded.

⁴⁶ See, e.g., Cuff, *supra* note 2, at 26 (“The series LLC has the potential of a tax planning H bomb... It may also turn out provide the whimper of cold fusion rather than the big bang of real fusion.”).

⁴⁷ See, e.g., McLaughlin & Ely, *supra* note 2, at 6. See also ROBERT R. KEATINGE AND ANN E. CONAWAY, KEATINGE AND CONAWAY ON CHOICE OF BUSINESS ENTITY § 16:51 (2007). Individual states have moved forward with respect to their views as to the classification of an individual series. For example, Massachusetts has determined that each individual series will be

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most instances, an individual series is not itself an entity,⁴⁸ and as such is not a registered entity,⁴⁹ there are significant tracing issues in the granting of a security interest in assets that are associated with a particular series.⁵⁰ If a series is not itself considered a

treated, for purposes of Massachusetts state taxation as a separate entity. *See* Mass. Ltr. Rul. 08-2: Separate Entity Status in Federal Classification for Each Series of an LLC (Feb. 15, 2008). A similar conclusion has been reached in California. *See* California 2007 Limited Liability Company Tax Booklet, Section F, at 5; *see also* Sheldon I. Banoff & Richard M. Lipton, *California Refines Its Tax Treatment of Series LLCs*, 106 J. TAX'N 316 (2007).

⁴⁸ Of course, this statement will not be true in those instances in which under the law of either Illinois or Iowa, the individual series has elected to be a legal entity. *See supra* note 40.

⁴⁹ *See* UCC 9-102(70) (defining a “registered organization” as “an organization organized solely under the law of a single State or the United States and as to which the State or the United States must maintain a public record showing the organization to have been organized.”) With the exceptions of Illinois and Iowa, there exists no requirement that there be a public filing with the state of organization as to the creation of any individual series. Consequently, while the 2007 amendments to the series provisions of the Delaware LLC Act specifically provide that a series has the power to “grant liens and security interests” (DEL. CODE ANN. tit. 6, § 18-215(c)), the Delaware UCC was not amended to likewise characterize a series granting a security interest as a “registered organization.”

⁵⁰ The records by which particular assets are associated with a particular series are not of public record and as such, absent voluntary disclosure by the organizer of the individual series, it is not possible to ascertain which assets are or are not associated therewith. Consequently, a security interest issued with respect to the assets associated with only an individual series, or indeed any security interest issued with respect to other than all assets of every series and of the organizing statutory trust/LLC/LP would presumably apply as well in many circumstances to all assets that may be subsequently allocated to that series. The series provisions of the Delaware LLC and Limited Partnership Act, (*see* DEL. CODE ANN. tit. 6, § 18-215(c), DEL. CODE ANN. tit. 6, § 17-218(c), as well as the series LLC provisions in Illinois and in the Iowa adoption of RULLCA (805 ILCS § 180/37-40(b); IOWA CODE § 489.1201(7), incorporating *id.* § 489.105(1)) expressly authorize the titling of assets in the name of the series. To the extent this option is utilized, issues with respect to the identification of the collateral may be reduced, but they are not eliminated as, having titled certain assets in the name of the individual series, there exists no obligation that this approach be utilized with respect to all assets. As such, an individual series may simultaneously hold title to assets in its own name while being the owner of other assets pursuant to an allocation from the parent LLC/limited partnership. None of the statutory trust acts that, as of this writing, contain series provisions authorize the titling of assets in the name of an individual series.

distinct legal entity, may it contract in its own name,⁵¹ sue and be sued in its own name,⁵² or hold title to property, real, intangible or personal, in its own name?⁵³ Where an agent seeks to legally bind only a particular series and those assets associated with it, thus making the obligation non-recourse as to the entity as a whole and as to the other series, what steps must be taken by the agent to insure that the other party is fully aware of the limitations?⁵⁴ Still on the question of agency, as a series is not an

⁵¹ Delaware has afforded the series of a LLC or of a limited partnership the capacity to contract in the name of the series (see DEL. CODE ANN. tit. 6, § 18-215(c) (LLC); tit. 6, § 17-218(c) (LP)); no similar provision has been added to the Delaware Statutory Trust Act. The series provisions of the Illinois and Iowa LLC acts permit an individual series to contract in its own name; the series language employed in the other series acts does not provide that an individual series may contract in its own name.

⁵² Delaware has afforded the series of a LLC or of a limited partnership the capacity to sue and be sued in the name of the series (see DEL. CODE ANN. tit. 6, § 18-215(c) (LLC); tit. 6, § 17-218(c) (LP)); no similar provision has been added to the Delaware Statutory Trust Act. The series provisions of the Illinois and Iowa LLC acts and the Virginia statutory trust act permit an individual series to sue or be sued in the name of the series (805 ILCS § 180/37-40(b); IOWA CODE § 1201(7); VA. CODE ANN. § 13.1-1231.A); the series language employed in the other series acts does not provide that an individual series may sue or be sued in the name of of the series.

⁵³ Delaware has afforded the series of a LLC or of a limited partnership the power to hold title to property in its own name (*see* DEL. CODE ANN. tit. 6, § 18-215(c) (LLC); tit. 6, § 17-218(c) (LP)); no similar provision has been added to the Delaware Statutory Trust Act. The series of an LLC organized under the laws of Illinois similarly has the capacity to hold title to property in the name of the series (805 ILCS § 180/37-40(b)); the other series provisions are silent as to the capacity to hold property titled in the name of an individual series.

⁵⁴ Numerous decisions have held that, absent the agent's appropriate designation of their principal, the agent is personally liable on the obligation where the principal is not properly disclosed. *See, e.g.,* Perry v. Ernest R. Hamilton Assocs., Inc., 485 S.W.2d 505 (Ky. 1972); Water, Waste & Land, Inc. v. Lanham, 955 P.2d 997 (Colo. 1998); Hopkins Adver. & Pub. Relations, Inc. v. Morris, 1997 WL 306653 (Conn. Super. Ct. May 29, 1997); Josale v. Warren, 1999 WL 588538 (Tenn. App. July 29, 1999); and Baumstein v. Mykleburst, 635 N.W.2d 28 (Wis. Ct. App. 2001). *See also* RESTATEMENT (THIRD) OF AGENCY §§ 6.01, 6.02 and 6.03 (2006). As noted by one pair of commentators:

[T]here is some uncertainty as to whether creditors of the LLC whose claims relate to the assets of a particular series, but who did not specifically contract with the LLC as to the series only, will be prohibited from looking to the LLC's general assets to satisfy their

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entity able to contract, on what basis may it retain agents, and would any agent so retained identify its principal as being the individual series or the primary organization?⁵⁵ May an individual series, as contrasted with the primary organization, file for bankruptcy, and if so how, or must the bankruptcy of an individual series be addressed through a bankruptcy of the primary organization?⁵⁶

claims. As noted, § 18-215(b) of the Delaware LLC Act provides that debts and liabilities “incurred, contracted for or otherwise existing” with respect to a particular series will be enforceable solely against the assets of such series, and not against the assets of the LLC generally. In many instances, the relationship between the third-party claimant and the LLC will not arise out of a contract or undertaking specifying whether the LLC is acting without limitation or solely with respect to a single series - for example, tort claimants or general trade creditors. In such situations it may be extremely difficult, as a practical matter, to establish whether the debt or liability was “incurred, contracted for or otherwise existing” with respect to a particular series within the LLC.

Kenneth L. Harris & Andrea M. Despontes, *Limited Liability Within the LLC: Another Reason to Choose Delaware?*, 5 J. OF LLCs 132, 133 (1998).

⁵⁵ Of course, this is not a question with respect to a series organized under the Delaware LLC or Limited Partnership Act or the series provisions of the Illinois and Iowa LLC Acts as, in those instances, an individual series is authorized to contract in its own name.

⁵⁶ A petition for bankruptcy may be filed by or with respect to a “person” (11 U.S.C. § 109(a)), which is defined as including an individual, a partnership or a corporation (11 U.S.C. § 101(41)), but does not include an estate or a trust (other than a business trust) (11 U.S.C. § 101(15) (“‘Entity’ includes person, estate, trust, governmental unit, and United States Trustee.”)). Organizations other than those expressly enumerated may as well fall within the definition of a “person.” *See, e.g., In re ICLNDS Notes Acquisition, LLC*, 259 B.R. 289, 292 (Bankr. N.D. Ohio 2001) (holding that an LLC is eligible to file petition in bankruptcy as it shares characteristics of the corporation and the partnership and therefore “is similar enough to those entities to be eligible.”). Further, the definition of a “corporation” may include an unincorporated organization organized under a law that makes only the capital subscribed to responsible for the debts and obligations of the association. 11 U.S.C. § 101(9) (A)(ii); *see also* Senate Report No. 95-989. Conversely, however, a limited partnership is expressly excluded from the definition of a corporation (11 U.S.C. § 101(9)(B)), thereby precluding even a limited liability limited partnership from

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Is, or is not, a series an entity distinct from the business organization out of which it was organized? Two possible paths of analysis exist pursuant to which this relatively straightforward appearing question may be addressed - the positive and the operational. If it is determined that the series is an entity then there is a body of analytic tools that can be applied assessing the series and placing it in the context of both other types of business organizations as well as the broader legal environment. The determination that a series is a legal entity may be based upon either the organizational act or by an assessment and weighting of its characteristics. Unfortunately, as a consequence of the failure to assess and answer that question at the time the series was conceived, neither path of analysis yields, across the states and across the business organizations in which the series is utilized, a consistent answer.

For lack of a better term, “entityness”⁵⁷ is the question before us. Unfortunately, however, determining whether an organization is itself a legal entity is something of a dead end that the term does not, in and of itself, definitively convey information with respect to the characteristics of that so labeled. An “entity” is something that “has an existence only as an object of reason.”⁵⁸ For these purposes, an “entity” is such as evidenced by (i) the ability to sue

being classified as a corporation, rather than as a partnership, under the Bankruptcy Code. Still, it is not clear that a series may fall within the definition of a “person,” presumably as being akin to a “corporation,” able to file a petition in bankruptcy. As observed by a noted commentator in the law of unincorporated business organizations:

Unless and until bankruptcy law recognizes series as separate legal entities, bankruptcy of a single series might well jeopardize assets of the LLC and other series as well if a bankruptcy court consolidates the assets and liabilities of the series, the anticipated benefits of limited liability between the series would disappear.

Carol R. Goforth, *The Series LLC, and A Series of Difficult Questions*, 60 ARK. L. REV. 385, 398 (2007). See also Harris & Despontes, *supra* note 54 at 137-38; Marsico, *supra* note 10, at 42-43.

⁵⁷ Admittedly not a word.

⁵⁸ THE OXFORD ENGLISH DICTIONARY (2d ed. 1989).

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and be sued in its own name, (ii) the ability to hold and convey property in its own name, (iii) the organization being afforded a legal personality distinct from the collective identity of its owners (sometimes referred to as continuity of life or perpetuity of succession), and (iv) limited liability to the owners qua owners.⁵⁹

V. THE SERIES – A POSITIVE VIEW

As a matter of positive law, where a series is designated, in the enabling legislation as an “entity,” it will be treated as such and, in parallel, where it is not so designated as an entity, it will not be afforded the benefits of entity characterization.⁶⁰ Or so it might seem. Ultimately, such a positive reference to a label employed by a legislature is unsatisfactory. Assume a particular legislature were to indicate that a series either is or may be, by private ordering, an “entity,” but is either silent or expressly abnegates characteristics that we would typically expect to see in a business organization that is itself an entity, examples being the power to sue and be sued in its own name, the power to take title to property in its own name, and to enjoy perpetual succession. “What’s in a name?” rapidly becomes our challenge. In Shakespeare’s formulation of the deconstructionist problem we can touch the rose, smell its fragrance, and feel its thorns

⁵⁹ See Thomas E. Rutledge, *To Boldly Go Where You Have Not Been Told You May Go: LLCs, LLPs, and LLLPs in Interstate Transactions*, 58 BAYLOR L. REV. 205 at 235 (2006) (reciting the various characteristics used to distinguish a “corporation” under principles set forth in Section 279, the Kintner tax classification regulations, and under Blackstone’s Commentaries). For these purposes weight is not afforded a legislative declaration that a particular form of business organization is an “entity.” See, e.g., RUPA § 201(a) (“A partnership is an entity distinct from its partners.”). Focusing here on normative characteristics, it is appropriate to ignore such a declaration as it would be entirely possible for there to be such a declaration notwithstanding the absence of those characteristics that are understood to be embodied within being an entity. For example, the Kentucky partnership act was amended in 1994 to provide that “[a] partnership may sue or be sued in its common name.” See KY. REV. STAT. ANN. § 362.605. However, at the same time the act was not amended to provide that the partnership was not to undergo at least a technical dissolution upon the disassociation of a partner. See KY. REV. STAT. ANN. § 362.290.

⁶⁰ This statement is made notwithstanding the admonition of Ralph Waldo Emerson, namely that “a foolish consistency is the hobgoblin of little minds.” Ralph Waldo Emerson, *Self Reliance*, ESSAYS: FIRST SERIES 35 (1841) (1990).

irrespective of the label granted to it.⁶¹ Conversely, an “entity” is something that exists only as a construct, and we can understand what is an entity only with respect to the understanding of what are the characteristics that have been associated therewith. In the absence of the association of the characteristics, the use of the “entity” label is at minimum unhelpful, having conveyed no information, and in many instances will actually be detrimental as it may imply information when the implication is unwarranted.

As noted above, a corporation is understood to be a legal entity, as are an LLC,⁶² a partnership,⁶³ and a statutory trust.⁶⁴ There is, however, no further information conveyed by this categorization. For example, does the designation of a business organization as an entity indicate that it may sue and be sued in its own name? Generally speaking, we presume that result, but do we presume it because of an understanding of the entity label, or because of express statutory authorization to sue or be sued?⁶⁵ If the entity characterization is intended to convey the rule of limited liability, why then has it as well been substantively recited in the body of the law? Admittedly, in the case of RUPA, with its movement to an entity theory of the partnership as contrasted with the predominant aggregate theory utilized in the UPA,⁶⁶ the

⁶¹ WILLIAM SHAKESPEARE, THE SECOND ACT OF ROMEO AND JULIET, SC. 2.

⁶² *See, e.g.*, RULLCA § 104(a), 6B U.L.A. 437 (2008); KY. REV. STAT. ANN. § 275.010(2). The original LLC Act, adopted in Wyoming in 1997, did not describe an LLC as an entity or even utilize that term in the Act.

⁶³ *See, e.g.*, RUPA § 201(a), 6 U.L.A. 91; KY. REV. STAT. ANN. § 362.201(1).

⁶⁴ *See, e.g.*, Uniform Statutory Trust Act § 301 (2008 Annual Meeting Draft); DEL. CODE ANN. tit. 12, § 3801(a). Prior to the statutory declarations of entity status, there existed a difference of opinion as to whether a business trust itself constituted a legal entity. *See* 13 AM. JUR. 2D *Business Trust* § 4 (2000).

⁶⁵ *See, e.g.*, Model Business Corporation Act § 3.02(1) (a corporation may sue and be sued in its own name); RUPA § 307(a), 6 U.L.A. 124 (a partnership may sue and be sued in its own name); RULLCA § 105, 6B U.L.A. 438 (2008) (a partnership may sue and be sued in its own name); Uniform Statutory Trust Act § 307(a) (2008 Annual Meeting Draft) (a statutory trust may sue and be sued in its own name).

⁶⁶ *See* ROBERT W. HILMAN, ALLAN W. VESTAL & DONALD J. WEIDNER, THE REVISED UNIFORM PARTNERSHIP ACT § 201, Author’s Comments 1 through 8, 78-88 (2008-2009).

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designation of a partnership as an “entity” serves the salutary purpose of cutting RUPA adrift from prior partnership law that was itself dependent upon the aggregate concept.⁶⁷ However, no similar benefit follows in the corporate, LLC, or other organizational forms that are not tied to a historical aggregate (i.e., non-entity) treatment. Rather, designation of these organizations as an “entity” serves only to ascribe a label that conveys no substantive information. For these reasons, ultimately the legislative designation of a series as being an entity does not resolve its challenges.

VI. THE SERIES – AN OPERATIONAL VIEW

Whether, on a normative basis, a series should be treated as a distinct legal entity is a matter of crucial importance to the further development of the concept. In the formula “if A then B,” where A is “entity,” and B designates the consequences, there is no conclusive determination as to what constitutes B.

One of the most troubling questions is whether a state, not providing for a series in its own organizational laws, will, with respect to a claim arising in connection with a series organized in another jurisdiction, respect the internal liability shields between the various series and between any series and the statutory trust/LLC/limited partnership of which it is a component. Only the Illinois and Iowa LLC acts, in addressing the series, speak to the question of “entityness,” there indicating that a series may be a separate entity, indicating by the negative implication that without such an affirmative election⁶⁸ a series is not a distinct legal entity. Only a flawed picture may be taken away from such a negative implication. Unfortunately, there is no broadly accepted list of characteristics that necessarily result from the declaration of entity status. The analysis is not necessarily

⁶⁷ See RUPA § 201, Official Comment, 6 U.L.A. 91.

⁶⁸ Curiously, this is a situation, perhaps unique, in which “entityness,” a status that has significant implications regarding the organization’s dealings with third-parties, may be determined by private ordering of which the third-party may be entirely unaware. While the election of entity treatment for a series must be set forth in the Certificate of Organization that is of public record with the Secretary of State (see 805 ILCS § 180/37-40(b); IOWA CODE § 489.1201(2)(d)), that is no assurance that a third-party will be aware of that determination.

symmetrical where the series is not itself characterized as an entity. In those instances, little comfort may be taken with respect to either an affirmative or a negative statement regarding the aspects of the series as no conclusively consequent determinations may be drawn from that characterization.

VII. RECOGNITION OF THE SERIES LEVEL LIABILITY SHIELD IN NON-SERIES JURISDICTIONS?

A. The Statutory Internal Affairs Doctrine

An especially troubling, and oft-mentioned, question with respect to the series is whether in a jurisdiction that does not provide for series the liability protections between the series and between any series and the LLC/limited partnership/statutory trust of which it is a component will be respected or, on the contrary, whether in such a non-series jurisdiction the series and the primary organization will be conflated and treated as one. This question illustrates the chimerical nature of the series and its failure to fall squarely within an existing category.

Although the question at one time had currency,⁶⁹ today we do not question that an LLC doing business in a foreign jurisdiction does so carrying with it the limited liability afforded it by the jurisdiction of organization. This determination follows from the fact that all states now permit the formation of LLCs,⁷⁰ provide for the qualification of foreign LLCs to transact business,⁷¹ and state that the law of the jurisdiction of formation will govern the

⁶⁹ See, e.g., Michael A. Bamberger, *Specific Uses of an LLC*, in LIMITED LIABILITY COMPANIES AND LIMITED LIABILITY PARTNERSHIPS 156-57 (1993):

Because of the uncertainty that currently exists as to whether states which have not enacted LLC statutes will recognize the limited liability characteristics of LLCs, it is probably prudent not to operate an LLC in a state which has not yet enacted LLC legislation.

⁷⁰ See LARRY E. RIBSTEIN AND ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES § 1:2 (2004).

⁷¹ See *id.* at § 13:3.

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“internal affairs” of the foreign LLC,⁷² a term understood to include the rule of limited liability.⁷³ Somewhat different rules apply in the case of limited partnerships. A foreign limited partnership that has qualified to transact business in a jurisdiction that has enacted the Revised Uniform Limited Partnership Act (1985)⁷⁴ will find that the limited liability of the limited partners will be determined in accordance with the laws of the jurisdiction of organization;⁷⁵ the act is however silent as to and therefore leaves open to question what law will determine the liability of the general partners.⁷⁶ A different rule applies when a foreign limited partnership qualifies to transact business in a jurisdiction that has adopted the Uniform Limited Partnership Act (2001),⁷⁷ which provides that the law of the jurisdiction of formation will determine the liability of the partners, there being no distinction drawn between general and limited partners.⁷⁸ The case of the business trust is rather more muddled as not all states have business trust statutes and not all of the statutes address the treatment of foreign business trusts acting in that jurisdiction.⁷⁹

Focusing on the clearest case, at least from the completeness of the statutory recognition of limited liability granted in a foreign

⁷² *Id.*

⁷³ See RESTATEMENT (SECOND) OF CONFLICTS § 307. As to the internal affairs doctrine generally, see, e.g., Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine* (Emory Law and Economics Research Paper No. 06-04), available at <http://ssrn.com/abstract=686592>.

⁷⁴ 6B U.L.A. 1 (2008).

⁷⁵ RULPA § 901, 6B U.L.A. 341 (2008) (“The laws of the state under which a foreign limited partnership is organized govern . . . the liability of its limited partners.”).

⁷⁶ See Rutledge, *supra* note 59, at 241.

⁷⁷ 6A U.L.A. 325 (2008).

⁷⁸ ULPA (2001) § 901(a), 6A U.L.A. 488 (2001) (“The laws of the State or other jurisdiction under which a foreign limited partnership is organized govern . . . the liability of partners as partners for an obligation of the foreign limited partnership.”).

⁷⁹ For example, it was not until 2007 that Kentucky adopted legislation stating that a foreign business trust transacting business in Kentucky would, as to its organization and internal affairs, be governed by the laws of the jurisdiction of organization. See KY. REV. STAT. ANN. § 386.4420.

state and “imported” into another state, of the limited liability company, there may be the reaction that the issue has already been addressed, and that there is already statutory recognition of the series liability shield. Such a first reaction would be, however, erroneous; in fact, the various statutes addressing the recognition of limited liability by foreign LLCs do not extend to the series.

Here a parsing of the language employed in the statutes at issue is necessary. For example, the Kentucky LLC Act provides that, “[t]he laws of the State or other jurisdiction under which a foreign limited liability company is organized shall govern . . . the liability of its members,”⁸⁰ while that of Virginia provides “The laws of the State or other jurisdiction under which a foreign limited liability company is formed govern . . . the liability of its members and managers.”⁸¹ Each addresses the derivative liability of the members for the debts and obligations of the LLC. Neither addresses the liability of the LLC for its own debts and obligations, and while it has been suggested that a series is viewed as being similar to a distinct LLC,⁸² there is no suggestion that a series is in fact or should be assessed as a distinct legal organization. Such is evident from the distinct manners in which they are formed. Using Delaware as our model, an LLC is organized by filing a certificate of formation with the Delaware Secretary of State.⁸³ In contrast, while the capacity to organize series must be recited in the certificate of formation as a condition precedent to the series and the LLC enjoying limited liability from the debts of one another, no public filing is necessary for an individual series to be brought into existence.⁸⁴ While the

⁸⁰ KY. REV. STAT. ANN. § 275.380(1)(a).

⁸¹ VA. CODE ANN. § 13.1-1051.

⁸² *See supra* notes 40-42 and accompanying text.

⁸³ *See* DEL. CODE ANN. tit. 6, § 18-201(a) (“In order to form a limited liability company, 1 or more authorized persons must execute a certificate of formation. The certificate of formation shall be filed in the office of the Secretary of State.”). *See also* KY. REV. STAT. ANN. 275.020(1) (“One (1) or more persons may . . . form a limited liability company by delivering articles of organization to the Secretary of State for filing.”).

⁸⁴ Admittedly this description fails in the case of Illinois, which requires a public filing for the organization of each series and as well the continued maintenance of each. *See* 805 ILCS § 180/37-40(d).

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statutes addressing the limited liability of the members in a foreign LLC doing business in a jurisdiction are clear as to liability for the debts and obligations of the LLC, they do not address the LLC's liability for its own debts and obligations and do not provide, *inter alia*, that by private ordering a foreign LLC may *ab initio* and unilaterally determine that it is not wholly liable for the debts and obligations of its constituent components.⁸⁵ Ultimately, the statutory "internal affairs" doctrine does not dictate that the foreign series liability shield be respected.

B. The Restatement (Second) of Conflicts

Conflating, at least for a moment, the terms "entity" and "corporation," we can consider the words of Chief Justice Marshall from *Trustees of Dartmouth College v. Woodward*⁸⁶ when he observed that a corporation is:

[A]n article being, invisible, intangible, and existing only in contemplation of law. Being the mere creation of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.⁸⁷

Assuming the corporation to be the prototypical entity, what are the characteristics of the entity which are determined subsequent to formation?⁸⁸ This lack of independent meaning of what

⁸⁵ See also 2 CARTER G. BISHOP AND DANIEL S. KLEINBERGER, LIMITED LIABILITY COMPANIES-TAX AND BUSINESS LAW ¶ 14.06, 14-109 (2003 & Supp. 2005) ("Many (perhaps most) LLC statutes make foreign law controlling where the question is the liability of a member for the obligations of a foreign LLC. However, Delaware's internal shields do not implicate that question. Instead, they raise an entirely different question – namely, whether a forum state should defer to a foreign state's rules on an entity's ability to segregate its assets and its creditors' access to those assets.") (footnote omitted).

⁸⁶ 17 U.S. 518 (1819).

⁸⁷ *Trustees of Dartmouth College*, 17 U.S. at 636.

⁸⁸ Further indicating the lack of independent meaning of "entity," the term was not even defined in the first addition of BLACK'S LAW DICTIONARY. See R. CAMPBELL BLACK, A DICTIONARY OF LAW CONTAINED IN DEFINITIONS OF THE TERMS AND PHRASES OF AMERICAN AND ENGLISH JURISPRUDENCE,

constitutes an “entity” is further evidenced by the determination over many years that detailed powers provisions are appropriate in business corporation acts in order to define the powers and capabilities of a corporation,⁸⁹ an exercise that would be not be necessary if and to the extent that the characterization of a business corporation as an entity (“if A”) yielded in and of itself a defined series of characteristics (“then B”). For example, “if entity, then owner limited liability.” This fails, however, when we consider the general partnership, now avowedly an “entity”⁹⁰ in which the owners do not by reason of the entity treatment enjoy limited liability.⁹¹

Under the *Restatement (Second) of Conflicts*, released in 1971, the geographically based “vested rights” principles of the *Restatement (First) of Conflicts* was abandoned,⁹² and there was substituted in place thereof a multi-factor test that in application should apply the law of the state that has the “most significant relationship to the case.”⁹³

Section 307 of the *Restatement (Shareholders’ Liability)* directs that the laws of the jurisdiction of organization of a “corporation” shall govern a shareholder’s personal liability.⁹⁴ But what is a

ANCIENT AND MODERN (1891 West). Similarly, the term is not defined in JOHN BOUBIER, A LAW DICTIONARY ADOPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA AND THE SEVERAL STATES OF THE AMERICAN UNION (1857 Philadelphia Childs & Peterson).

⁸⁹ Revised Model Business Corporation Act § 1.30 (reciting the powers of a business corporation); *id.* § 6.22 (reciting the rule of limited liability enjoyed by the shareholders of a business corporation).

⁹⁰ RUPA § 201(a), 6 U.L.A. 91 (2001).

⁹¹ RUPA § 306(a), 6 U.L.A. 117 (2001).

⁹² Under the RESTATEMENT (FIRST) OF CONFLICTS, §§ 377-390 (1934), the rule for choice of law for claims in tort was “lex loci delicti,” the law of the jurisdiction where the injury occurred.

⁹³ See RESTATEMENT (SECOND) OF CONFLICTS § 6 & cmt. c § 6 (1971) [hereinafter RESTATEMENT].

⁹⁴ RESTATEMENT Section 307 provides:

The local law of the state of incorporation will be applied to determine the existence and extent of a shareholder’s liability to the corporation for assessments or contributions and to its creditors for corporate debt.

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“corporation,” and can an LLC or other unincorporated business organization fall within this provision?⁹⁵ Put another way, is a series of an LLC/LP/Statutory trust so like a corporation that, for *Restatement* purposes, it should be treated as equivalent?⁹⁶ For that we look to Section 298, “Treatment of an Organization as Corporation,” to determine whether Section 307 is applicable. *Restatement* Section 298 provides that an entity will be considered a “corporation” if it enjoys various attributes of a corporation:

RESTATEMENT Section 289, titled “Directors’ or Officers’ Liability,” meshes with Section 307 and provides:

The local law of the state of incorporation will be applied to determine the existence and extent of a director’s or officer’s liability to the corporation, its creditors and shareholders, except where, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the parties and the transaction, in which event the local law of the other state will be applied.

See also RESTATEMENT Section 297, “Recognition of Foreign Incorporation,” which provides:

Incorporation by one state will be recognized by other states.

Comment c to RESTATEMENT Section 297 states:

Limitation of shareholders’ liability. Insofar as this protection is accorded them in the state of incorporation, a state will usually recognize the immunity of the shareholders of a foreign corporation from being sued as individuals on matters arising out of the act or omissions of the corporation and from having their individual property made responsible for obligations of the corporation.

⁹⁵ A foreign court is not bound by the label given by the jurisdiction of organization. *See, e.g., American Railway Express Co. v. Commonwealth*, 228 S.W. 433 (Ky. 1921). *See also Hemphill v. Orloff*, 277 U.S. 537 (1928) (“The real nature of the organization must be considered. If clothed with the ordinary functions and attributes of a corporation, it is subject to similar treatment.”).

⁹⁶ Practitioners who welcomed the Check-the-Box classification regulations (Treas. Reg. § 301.7701-2; T.D. 8679, 61 Fed. Reg. 66584 (Dec. 18, 1996) (effective Jan. 1, 1997)) and the abandonment of the multi-factor *Kintner* classification regulations will doubtless have an unwelcome feeling of déjà vu as they engage in this analysis.

An organization formed in one state will be considered a corporation within the meaning of a statute or rule of another state if the attributes the organization possesses under the local law of the state of its formation are sufficient to make it a corporation for the purposes of the statute or rule.

Comment a to *Restatement* Section 298 provides:

A court will sometimes be faced with the task of determining whether an organization formed in another state should be considered a corporation within the meaning of a local statute or rule. In deciding this question, the court will first determine what attributes an organization must possess to be a corporation for purposes of the statute or rule. If the organization possesses such attributes under local law of the state of its formation, it will be considered a corporation within the meaning of the statute or rule. This will be so even though the organization goes by some other name in the state of its formation, or even though there have been omissions or other defects in the process of incorporation which give the state of incorporation the power, through quo warrantor or other action, to deprive the organization of its corporate status. Contrariwise, even though the organization is considered to be a corporation in the state of its formation, it will not be considered a corporation within the meaning of a statute or rule of another state if the attributes given it by the former state do not suffice to make it a corporation for the purposes of the statute or rule. In any event, the organization will be recognized in other states as possessing such attributes as are accorded it by the state of its formation. The rule of this Section is an application of the rule of § 7.

Illustration 1 to Section 298 notes that a foreign joint stock association will be viewed as a corporation as it:

- has limited liability;

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- can sue in its own name; and
- is governed by duly elected representatives.

The use of a “similarity” test to determine whether a particular business association will be treated as a corporation or a partnership, the two categories addressed by the *Restatement (Second) of Conflicts*, has application in both tax and non-tax environments. For example, in *Hill-Davis Co. v. Atwell*,⁹⁷ the California court considered a Michigan limited partnership association and explained:

It is elementary that, when the question arises in one state to whether a particular association organized under the laws of a sister state is a corporation or merely an unincorporated association, the question will be determined by considering the nature of the association as indicated by the powers and faculties conferred on it by the state of its creation. If the powers and faculties conferred on it are such as to make it essentially a corporation, it will be held to be such, regardless of what or how the state of its creation calls or treats it.⁹⁸

⁹⁷ 10 P.2d 463 (Ca. 1932).

⁹⁸ *Id.* at 447-48. In making its assessment, the *Hill-Davis* court noted:

An examination of the act under which respondent was organized indicates that while associations such as respondent are called “partnership associations, limited,” they possess, in fact, all of the powers and attributes of a corporation. Such an association has a separate and distinct entity entirely distinct from its members, it is organized under a general law by the filing of articles of association with the secretary of state and county clerk; it pays to the state for the privilege of organizing and continuing to exist exactly the same fees and taxes as are exacted from corporations in that state; it is permitted to sue and be sued in the firm name; it may contract in the firm name; it may make and enforce by-laws; it has a common seal; it has stockholders as does a corporation, and the interest of these stockholders is by statute declared to be personal

More recently, in *Ashenden v. Lloyd's of London*,⁹⁹ the court applied a multi-factor similarity test to determine the characterization of Lloyd's for diversity purposes, noting:

Based on the above features of Lloyd's, it is certainly an unusual corporation, if indeed it should be considered one at all. We agree with the plaintiff's contention that it does not resemble a typical U.S. stock corporation. Nevertheless, Lloyd's does have many of the traditional earmarks of a corporation.

A corporation has been defined as "an entity separate from its owners . . . an association of persons to whom the sovereign has offered a franchise to become an artificial, judicial person, with a name of its own." Lloyd's obviously has the grant of a separate identity by a sovereign and a name of its own. Other common attributes of a corporation include "the capacity of perpetual succession, the power to sue or be sued in the corporate name; to acquire or transfer property and do other acts in the corporate name; to purchase and hold real estate; to have a common seal; and to make bylaws for internal government." Lloyd's

property; the stock may be sold or transferred, and the transferee becomes entitled to the same rights as existing members possess; stockholders, except under certain circumstances, are not personally liable for the debts of the association; the association has perpetual succession; the death of a member does not dissolve the association; the association is governed by managers with powers similar to directors of corporations, and these managers are elected in precisely the same fashion as are directors of corporations. Section 10 of the act (Comp. Laws Mich. 1929, § 9918) under which respondent is organized provides that "all real estate owned or purchased by any association, created under and by virtue of this act, shall be held and owned and conveyance thereof shall be made in the association name."

Id. at 446-447.

⁹⁹ 934 F. Supp. 992 (N.D. Ill. 1996).

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has all of these attributes. It has the ability to contract, as evidenced by the fact that U.S. courts have enforced the forum selection provisions of Lloyd's General Undertaking contracts, thus implicitly recognizing Lloyd's capacity to enter into such contracts. United States courts have similarly recognized Lloyd's ability to be sued and to bring suit in its own name. The Lloyd's Act grants Lloyd's perpetual succession and a common seal, the power to transfer property, and to purchase and hold real estate. And, as noted above, the Council of Lloyd's has the power to make by-laws for Lloyd's.

Lloyd's thus has many of the common attributes of a corporation.¹⁰⁰

Relying upon direction provided in the *Restatement*¹⁰¹ as well as the decisions rendered in *Ashenden, Morrissey v. Commissioner*,¹⁰² and *United States v. Kintner*,¹⁰³ the attributes to be applied in assessing whether a series is subject to characterization as a "corporation" benefiting from the rule of *lex incorporantis* might include:

- interests that may be represented by a certificate;
- perpetual succession (i.e., continuity of life);
- the ability to hold and transfer property in its own name;
- the right to sue or be sued in a common name;

¹⁰⁰ *Id.* at 997-98 (citations omitted).

¹⁰¹ The introductory note to chapter 13 of the RESTATEMENT, in addition to limited liability, lists the following "important attributes" of a corporation: (a) to sue and be sued in the corporate name; (b) election of managers; (c) to acquire, hold and sell property in the corporate name; (d) to have succession for years or in perpetuity.

¹⁰² 296 U.S. 344 (1935).

¹⁰³ 216 F.2d 418 (9th Cir. 1954).

- the right to contract in the name of the series;
- the recognition by the state of organization that the series is a legal entity distinct from its members;
- governed by elected representatives;
- formation by a filing with the state;
- limited liability; and
- a requirement of annual filings with the state to maintain the series in good standing status.¹⁰⁴

Appendix A contains an analysis of these characteristics and the degree to which they are or are not extant in the various series provisions.

Is a particular series, based upon the alignment of characteristics that may be applied in a *Restatement (Second) of Conflicts* Section 298 analysis to be treated as if it is itself a “corporation?” There is no clear answer to this inquiry. The first issue is with the multi-factor analysis. Initially, unlike a straightforward “majority” analysis of a defined set of equal weighted factors,¹⁰⁵ the *Restatement* does not provide guidance with respect to either a comprehensive listing of the factors that should be considered, the relative weighting of those factors, and the minimum threshold (e.g., majority, super-majority, preponderance, etc.” of the factors that will result in a particular organization being classified, for purposes of Section 298, as a corporation). Even

¹⁰⁴ Blackstone described the characteristics of a corporation as being: (i) the capacity of perpetual succession; (ii) the power to sue or be sued in the corporate name; (iii) to acquire and/or transfer property and otherwise act in the corporate name; (iv) to purchase and hold real estate; (v) to have a seal; and (vi) to make bylaws for its internal government. WILLIAM BLACKSTONE, 1 COMMENTARIES *475.

¹⁰⁵ For example, the Kintner tax classification regulations in effect through December 31, 2006 defined four factors that were then used in distinguishing an organization classified as an association from an organization classified as a corporation, provided equal weight to each of the four factors and provided that classification as an association would result if the organization in question had three or more of those characteristics.

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were the application of Section 298 significantly more clear, the disparate treatment of the series between the various enabling statutes would preclude a generic answer as to whether the series is susceptible to classification as a *Restatement* Section 298 corporation. This disparate treatment is highlighted in Delaware wherein, and as already noted, a series of an LLC or of a limited partnership has the power to hold and convey property and to contract in its name and to sue and be sued in its own name,¹⁰⁶ all affirmative grants of powers that have not been affirmatively afforded the series of a statutory trust organized in Delaware. If some or all of these characteristics are deemed necessary for a particular series to fall within the ambit of a *Restatement* Section 298 corporation, then it may be possible that the series organized under the Delaware LLC or limited partnership acts should, as to the limited liability afforded the members of the series, the limited liability as to the other series in the limited partnership or LLC and the LLC or limited partnership itself, benefit from the rule of *lex incorporantis*, while at the same time a series of a Delaware statutory trust would not receive the same treatment.

Having failed, on a normative basis, to define what are the characteristics of a series, the structure has been left in limbo. Consequently, the broader utilization of the structure, where dependent upon the availability of series limited liability, has been severely constrained as to those jurisdictions in which series legislation is not in place.¹⁰⁷

VIII. FOR WANT OF A THEORY

To date, the series has developed across various business organizational acts without an agreed upon determination of what

¹⁰⁶ DEL. CODE ANN. tit. 6, §§ 18-215(b), (c) (LLC); DEL. CODE ANN. tit. 6, §§ 17-218(b), (c) (LP).

¹⁰⁷ It bears noting that, of the jurisdictions that provide for series in their various business entity acts, only Delaware provides for the series in all of its limited liability company, limited partnership and statutory trust acts. By way of contrast, Virginia provides for the series only in its statutory trust act (VA. CODE ANN. § 13.1-1219 et seq.), not addressing the concept in its limited partnership or LLC acts. It is worth wondering, in those jurisdictions, whether the inclusion of serious provisions in only one form of organization constitutes an affirmative determination that the series should not, in that jurisdiction, be respected when in a different form of organization.

should (and what should not) constitute a series. Growing out of an organizational construct designed for the organization of investment companies, to the series there have been added “patches”¹⁰⁸ such as the inter-series limited liability shield and various powers such as that to contract, to hold and convey property, and to sue and be sued. These non-systematic developments in the statute have deprived the series of the ability to, on an organic, evolutionary basis¹⁰⁹ develop into a structure with a defined set of characteristics and limitations. Alternatively, there having been no pre-defined determination as to what does and does not constitute a series or a theory of the series, the statutes have developed without a defined background from which to operate.¹¹⁰ Consequently they have developed in different manners and as such there now exists no “model,” no “prototype” of what is a series beyond the provision of limited liability to each.

IX. CONCLUSION

Various business organization forms exist vis-à-vis not only business organization law but other bodies of law such as tax, regulatory, bankruptcy, securities, contract, agency and conflicts.

¹⁰⁸ See Robert A. Kessler, *With Limited Liability for All: Why Not a Partnership Corporation?*, 36 FORDHAM L. REV. 235 at 252 (1968):

[A]ll forms of business organization are essentially the same, mere variations on the same theme Entity is found with and without limited liability; there is limited liability without entity; and there are quasi-entities with and without limited liability. The constructs of business law are not immutable verities, ideal forms, but rather a rough patchwork partly the result of historical accident, partly the result of invention and . . . partly the result of eclectic combination of forms. And each of the fifty states has its own patches on the patches.

¹⁰⁹ Thomas Earl Geu, *A Single Theory of Limited Liability Companies: An Evolutionary Analysis*, 43 SUFFOLK U. L. REV. (forthcoming 2009).

¹¹⁰ In contrast, there was never any effort to develop a limited liability company act that did not, ab initio, provide the members of the LLC with limited liability. Conversely, a strong case may be made that the development of the single-member LLC in the predominantly contractual realm of unincorporated business organization was a departure from the theory of that form of organization.

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The concept of a “series” of a statutory trust, limited liability company or limited partnership similarly exists in that sea of other law. Unfortunately, as has been identified above, the relationship of the individual series as to the organic law from which it is created and the broader body of law has not been, it would seem, examined, much less resolved, even as the concept of this series has been promoted by Delaware and adopted in a number of other jurisdictions. There has been a failure to determine a theoretical underpinning of what is a series: is it a distinct legal entity within the ambit of the organization of which it is a component part, is it a mere administrative function within another business organization, or is it something else? This normative question has not been resolved, and on a piecemeal basis it has been inconsistently answered, likely inadvertently, in conflicting ways across the various business organization acts that to date incorporate series. This failure to clarify what the series is and should be consigns it to chimera status, a classification that makes it difficult if not impossible to ascertain where an individual series should, particularly with respect to non-business organization law, fit. Until these issues are resolved in greater (if not absolute) certainty, confusion will continue to reign as to the further use and expansion of the series concept.

APPENDIX A

	Del LLC/LP	Del Stat Trust	USTA	Ill – Iowa LLC	Other LLC
interests that may be represented by a certificate	Yes ¹¹¹	Yes ¹¹²	No ¹¹³	Yes ¹¹⁴	Yes ¹¹⁵
perpetual succession	Yes ¹¹⁶	Yes ¹¹⁷	Yes ¹¹⁸	Yes ¹¹⁹	Yes ¹²⁰
the ability to hold and transfer property in its own name	Yes ¹²¹	No	No	Yes ¹²²	No

¹¹¹ See, e.g., DEL. CODE ANN. tit. 6, § 18-702(c); § 17-702(b).

¹¹² DEL. CODE ANN. tit. 12, § 3801(2)(b).

¹¹³ While the USTA (Summer 2008 Draft) provides for the filing of a “certificate of trust,” by means of which the statutory trust is formed, it is silent as to the capacity to represent a beneficial interest in either the statutory trust or a series thereof by a physical certificate.

¹¹⁴ See, e.g., 805 ILCS § 180/37-40(j), § 180/30-1(c); IOWA CODE ANN. § 489.1201(7), § 489.502(4).

¹¹⁵ Under the Tennessee LLC Act, although not specifically referenced in the provision setting forth the rules as to Series LLCs (TENN. CODE ANN. § 48-249-309), presumably the owner of a series would be entitled to receive a statement of the interest owned that is otherwise available to the member of an LLC. See TENN. CODE ANN. § 48-249-502(b).

¹¹⁶ See, e.g., DEL. CODE ANN. tit. 6, § 18-201(b); § 17-218(k).

¹¹⁷ See, e.g., DEL. CODE ANN. tit. 12, § 3808(a); CONN. STAT. § 34.518.

¹¹⁸ USTA (Dec. 10, 2008 Draft) § 406(b).

¹¹⁹ See, e.g., 805 ILCS § 180/37-40(j), § 180/35-1; IOWA CODE ANN. § 489.1201(7), § 489.104(3).

¹²⁰ See, e.g., NEV. REV. STAT. § 86.155.

¹²¹ See, e.g., DEL. CODE ANN. tit. 6, §§ 18-215(b), (c); §§ 17-218(b), (c).

¹²² See, e.g., 805 ILCS § 180/37-40(b); IOWA CODE ANN. § 489.1201(7), § 489.105(1). See also *id.* § 489.302(1)(b)(1).

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	Del LLC/LP	Del Stat Trust	USTA	Ill – Iowa LLC	Other LLC
Sue and be sued in common name	Yes ¹²³	No	No	Yes ¹²⁴	No ¹²⁵
Hold title in the name of the series	Yes ¹²⁶	No	No	Yes ¹²⁷	No ¹²⁸
State definition as an “entity”	No ¹²⁹	No	No	Yes ¹³⁰	No
Governed by elected representatives	Yes ¹³¹	Yes ¹³²	Yes ¹³³	Yes ¹³⁴	Yes ¹³⁵
Formed by state filing	No	No	No	Yes ¹³⁶	No

¹²³ See, e.g., DEL. CODE ANN. tit. 6, § 18-215(c); § 17-218(c).

¹²⁴ See 805 ILCS § 180/37-40(b); IOWA CODE ANN. § 489.1201(7), § 489.105(1). See also 805 ILCS § 180/37-40(j), § 180/1-30(i).

¹²⁵ Aside from the Delaware, Illinois and Iowa provisions addressing series, the other states having series LLCs are silent with respect to the capacity of a series to sue or be sued in its own name.

¹²⁶ See, e.g., DEL. CODE ANN. tit. 6, § 18-215(c); § 17-218(c).

¹²⁷ See 805 ILCS § 180/37-40(j); IOWA CODE ANN. § 489.105(1).

¹²⁸ Aside from the Delaware, Illinois and Iowa provisions addressing series, the other states having series LLCs are silent with respect to the capacity of a series to hold title in the name of an individual series.

¹²⁹ While Delaware does define a limited liability company as a distinct legal entity (DEL. CODE ANN. tit. 6, § 18-201(b)), no similar reference is made with respect to any series thereof.

¹³⁰ See 805 ILCS § 180/37-40(b); IOWA CODE ANN. § 489.1201(3).

¹³¹ See, e.g. DEL. CODE ANN. tit. 6, § 18-215(e); § 17-218(e).

¹³² DEL. CODE ANN. tit. 12, § 3806(a).

¹³³ USTA (Dec. 10, 2008 Draft) § 401(a), 403.

¹³⁴ See 805 ILCS § 180/37-40(g); IOWA CODE ANN. § 489.1202.

¹³⁵ See, e.g., OKLA. STAT. § 18-2054.4(G).

¹³⁶ See 805 ILCS § 180/37-40(d) (requiring the filing of a “certificate of designation” with the Secretary of State with respect to the organization of each series and requiring that the certificate of designation set forth information with respect to the management of the series and requiring as well that the name of the series be distinguishable upon the records of the Secretary of State and that it contain as well the full name of the organizing

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	Del LLC/LP	Del Stat Trust	USTA	Ill – Iowa LLC	Other LLC
Limited liability	Yes ¹³⁷	Yes ¹³⁸	Yes ¹³⁹	Yes ¹⁴⁰	Yes ¹⁴¹
Annual filing required	No	No	No	Yes ¹⁴²	No

LLC). While the Iowa LLC Act does require that the Certificate of Formation recite that the LLC has or may have series (IOWA CODE ANN. § 489.1201(1)(d)), no separate filing is required with the state vis a vis the formation of each individual series.

¹³⁷ See, e.g., DEL. CODE ANN. tit. 6, § 18-215(b); § 17-218(b).

¹³⁸ DEL. CODE ANN. tit. 12, § 3804(a).

¹³⁹ USTA (Dec. 10, 2008 Draft) § 303.

¹⁴⁰ See, e.g., 805 ILCS § 180/37-40(b); IOWA CODE ANN. § 489.1201(2).

¹⁴¹ See, e.g., TENN. CODE ANN. § 48-249-309(b)(1).

¹⁴² See, e.g., 805 ILCS § 180/50-1. While Iowa does require each LLC, on a biannual basis, to file a report with the Secretary of State (IOWA CODE ANN. § 489.209), there is no distinct requirement with respect to either a filing by each series or a requirement that the annual report recite any information with respect to any series then in existence.