

State Law & State Taxation Corner

By *Thomas E. Rutledge*

The Man Who Tells You He Understands Series Will Lie to You About Other Things As Well



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My good friend Scott Ludwig,¹ a font of southern aphorisms, is known to have observed “A man who tells you he is in charge of his household will lie to you about other things as well.” While it is beyond my skill set to assess the universality of this obvious generalization, I am confident that anyone representing that they truly understand the “series” as utilized in certain LLC, limited partnership and business/statutory trust acts is at a minimum overestimating their capabilities. Simply put, consequent to the disparate elements of series between the various acts and the many unresolved questions, understanding is simply at this time not possible.

The Series Generally

Depending upon the law at issue, series may exist within a limited liability company (LLC), statutory trust or limited partnership. In any of those instances, that state law organization, by means of a state filing, makes of record the fact that it has the capacity to create “series.” Thereafter, certain assets are either titled in the name of or, on the records of the business organization, assigned to a series. In addition, liabilities may be assigned to a series. When the various state law requirements are satisfied, each of the series enjoys limited liability versus the debts and obligations of each other series or from the parent state law organization. Ergo, a debt enforceable against Series A, where there is a deficiency after the collection of all assets titled in the name of or allocated to Series A, cannot be satisfied by the creditors against assets titled or assigned to Series B, Series C, *etc.* or against the assets of the parent state law entity.



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Distinguishing a Series from a Division or Subsidiary

For purposes of analogy, the series is sometimes compared to either a division, but one which affords limited liability, or a subsidiary, but without requiring the creation of a separate state law entity. While at times helpful, both of the analogies are in the end incomplete, with the risk that they can be misleading.

As regards the division analogy, a division is not a distinct jural person with the capacity to either contract or take title to property. Further, a division does not afford the parent organization with limited liability from debts and obligations incurred in the name of the division, and assets utilized by the division are available to satisfy debts and obligations of the parent organization.

With respect to the analogy to a distinct legal subsidiary, the most obvious distinction is that a subsidiary is a distinct legal entity whose relationship to the parent is defined by the rules of ownership of corporate shares or LLC interests; the parent has the rights of a sole shareholder or sole member as defined by the applicable corporate or LLC laws. Being a legal entity, and unlike some series, a subsidiary is able to contract and own property in its own name. There is limited liability and asset partitioning between the parent and the subsidiary, and those protections generally will be respected absent the typically high and exacting requirements for piercing.² However, in the series, the limited liability and asset segregation may be set aside upon a failure to properly memorialize the allocation of assets (and liabilities) to a series.³

Why the Series?

The series arose in Delaware in the context of business (now statutory) trusts⁴ utilized for asset securitization and the organization of investment companies.⁵ In the 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.⁶ The business trust has a single trustee, typically embodied in a board, overseeing all of the series even as, on behalf of each series organized by the trust, distinct fund managers are retained.⁷ 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 assets,⁸ and in real estate,⁹ and we know of at least one instance in which a series LLC was utilized to own a personal speedboat.¹⁰

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It must be recognized that the distinct series of a statutory trust is itself not a distinct legal organization.¹¹ In one of the few cases to consider the matter, namely *Batra 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 12 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 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, owning shares in any one series effectively granted standing to bring an action with respect to any series.

In addition to Delaware,¹³ Connecticut,¹⁴ the District of Columbia,¹⁵ Kentucky,¹⁶ Virginia¹⁷ and Wyoming¹⁸ include the series concept in their respective business trust acts. Series provisions were also set forth in the Uniform Statutory Trust Entity Act.¹⁹

In Delaware, from the statutory trust realm, the

series concept was adopted, albeit in modified form, and incorporated into the limited liability company²⁰ and the limited partnership acts.²¹ Several other states have incorporated the series into their respective LLC acts, and they appear as well in the Revised Prototype Limited Liability Company Act.²²

Existing Series Legislation and the Uniform Laws Project

The series, in one form or another, has been adopted in 12 states, which adoptions include eight series LLCs,²³ five statutory/business trust acts²⁴ and one limited partnership act.²⁵ In addition, series are provided for in the Uniform Statutory Trust Entity Act²⁶ and in the Revised Prototype Limited Liability Company Act.²⁷ It is important to understand, however, that these series provisions provide different rules.

Ergo, the assumption that the series in State A's LLC Act is similar to the series in State B's Statutory Trust Act is likely to go to be incorrect. By way of example, in none of the Delaware Acts is there any public filing made in connection with the creation of an individual series. In contrast, under

the series provisions of the Illinois and Kansas LLC Acts, a "certificate of designation" must be filed with the Secretary of State each time a series is created.²⁸ The Uniform Statutory Trust Act provides expressly that a series is not a distinct legal entity.²⁹ In contrast, the series provisions in the LLC Acts of Iowa, Illinois and Kansas allow the series to affirmatively elect entity status.³⁰ Under the series provisions of the Kentucky Uniform Statutory Trust Act, a series may take title to property in its own name.³¹ In contrast, a series of a statutory trust organized in either of Delaware or Virginia is not enabled to take title to property in its own name.³²

In 2011, the National Conference of Commissioners of Uniform State Laws ("NCCUSL") approved a study project as to whether the various unincorporated business organization statutes (*i.e.*, the Revised Uniform Limited Liability Company Act, the Uniform Limited Partnership Act, the Uniform Statutory Trust Act) should be reconsidered for either inclusion or modification of series provisions. The work of that

committee, accomplished under Chair Steve Frost with Allan Donn serving as reporter, was completed in the summer of 2012, the committee determining to recommend to NCCUSL that the project should proceed.³³ The recommendation to proceed with the project was approved by NCCUSL in 2012, and the drafting committee will have its first meetings in 2013.

Things We Know, Things We Don't Know and Things We Don't Know That We Don't Know³⁴

It would be possible to suggest that one understands series only if the various series statutes were sufficiently similar to one another that a statement as to one would be generally applicable to another. That is not, how-

ever, the case. The most that can be said is that one has an appreciation of all of the various series acts, which understanding incorporates as well an appreciation for the distinctions amongst them.

Stepping beyond the narrow confines of the various series statutes, there must be considered

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as well the numerous unresolved issues of how the series relates to numerous other aspects of business law. These relationships between areas of law are of crucial importance as it is only by means of their resolution that the series can be properly placed in perspective; the series provisions do not exist in what is other than the organizational law a vacuum any more than do the various business entity forms themselves. For example, it is possible to provide a conclusive answer as to the mechanism by which a security interest is taken in personal property owned by an LLC, but that understanding is premised upon an appreciation of the law as to the LLC's ability to own personal property³⁵ and an understanding of the LLC as being, for purposes of the UCC, a registered organization.³⁶ The duties, responsibilities and obligations of corporate officers are largely defined not by the law of corporations, but rather by the law of agency; an assessment of an officer's capacity to discharge a particular function is dependent upon the understanding of both corporate and agency

law. Unfortunately for our purposes, many of the relationships of the series to these other areas of law are as of yet unresolved, and doubtless there are interrelationships that have not yet been identified as requiring scrutiny.

Federal and State Tax Classification

Under regulations proposed on September 14, 2010, each series will for federal tax purposes be classified as a distinct eligible entity that may under the so-called “check-the-box” regulations determine its classification.³⁷ Ergo, assuming there is only one owner associated with the series, it will have a default classification as a disregarded entity while, if there are two or more owners associated with the series, it will have a default classification as a partnership.³⁸ At this time, however, those regulations are only proposed, and there exist no indications that their final issuance is imminent.

State classification is as well an issue. While a few states have issued regulations or policy statements as to how series will be classified for state tax purposes,³⁹ most have not.⁴⁰ A series entity transacting business in any of those jurisdictions faces an obvious uncertainty as to its treatment in that jurisdiction.

Diversity Jurisdiction

Under the federal diversity jurisdiction statute,⁴¹ there must be complete diversity between all plaintiffs and all defendants.⁴² When the organization is unincorporated, the organization has the citizenship of each of its partners or members.⁴³ These rules can be confusing when applied outside of series⁴⁴; how they would work in a series environment is entirely unresolved. Consider an LLC with two series, A and B. The LLC has four members, Julia, Hannah, Laura and Lilly. Julia and Lilly are both associated with Series A, while Hannah and Laura are associated with Series B. Creditor initiates suit alleging a claim against Series B. Is the citizenship of only Hannah and Laura at issue in determining diversity, or is that of Julia and Laura also at issue? At this time, there is simply no guidance on the issue. Reference might be made to whether the series has the capacity to sue or be sued in its own name⁴⁵ and from there arguing that diversity should be based upon only the members associated with the series that is a party to the suit. Conversely, that path of analysis would make assessing diversity jurisdiction dependent upon a state law characteristic and therefore precluding a single nationwide rule. Alternatively, applying by

analogy the *Batra* ruling⁴⁶ on standing to the issue of citizenship, it could be held that, as there is only one distinct legal entity, the citizenship of all of its constituents, irrespective of series allocation, should be the issue.

Bankruptcy

Under Bankruptcy Code section 109(a), a “person” is authorized to file for bankruptcy protection.⁴⁷ In turn, a person is defined as including a person, a partnership or a corporation,⁴⁸ and a “corporation” is defined as including “(i) association having a power or privilege that a private corporation, but not an individual or a partnership, possesses; (ii) partnership association organized under a law that makes only the capital subscribed responsible for the debts of such association; (iii) joint-stock company; (iv) unincorporated company or association; or (v) business trust; but (B) does not include limited partnership.”⁴⁹ Cutting to the chase, is a series, in and of itself, a “person” such that it may file for bankruptcy protection? At this juncture, there is no guidance on the point, as it does not appear that a series (as distinct from a series organization) has sought bankruptcy protection.⁵⁰

Furthermore, the designation of the “statutory trust,” in contrast to the more traditional “business trust,”⁵¹ followed from the decision rendered in *In re Secured Equipment Trust of Eastern Airlines, Inc.*,⁵² which held that certain trusts utilized for securitizations were not “business trusts” as contemplated by the Bankruptcy Code.⁵³ Given that business/statutory trusts are often utilized for financing structures where bankruptcy remoteness is desired,⁵⁴ this relabeling, it may be argued, further removed a “statutory trust” from the ambit of organizations that may file for protection under the bankruptcy code. While this “a rose by any other name”⁵⁵ issue has not been to date addressed in a published opinion, there must be considered the conflict between renaming the parent organization as a “statutory trust” in order to limit its capacity to file for bankruptcy protection while arguing that a series thereof should be permitted to file on its own account for that protection.

Security Interests

There exists a disconnect between the various series statutes and the UCC, including as to how a security interest in series property is to be granted and recorded. For purposes of illustration, let’s assume that Bank is to take security interests in tangible personal

property of a series of a Delaware statutory trust and a series of a Kentucky statutory trust.

Initially, can a series of a Delaware statutory trust grant a security interest in property? Under its organizational act, a series of a Delaware statutory trust does not have the capacity to hold property in its own name.⁵⁶ If the series cannot hold title in its own name, how can it, on its own behalf, give a security interest; of what does it have ownership in which it can make a pledge? Further, as a series of a Delaware statutory trust lacks the capacity, in its own name, to contract, on what basis can the series enter into the security agreement that is itself a condition precedent to the filing of a UCC-1 against the series' property? Ultimately, under the UCC, can a series of a Delaware statutory trust ever be a debtor? It would appear that, in this circumstance, it must be the statutory trust itself, rather than the individual series, that grants the security interest to the third party with the UCC-1 being filed against the statutory trust, it being a registered organization.⁵⁷ In that it is the series statu-

tory trust, rather than the individual series, that holds title to assets associated with a series, does it then not follow that it is the statutory trust, rather than the series, that must grant the security interest and consent to the filing of the form UCC-1?

In contrast, a series of a Kentucky statutory trust is expressly authorized to hold title to property in its own name.⁵⁸ In addition, property may be associated with a series upon the books and records of the statutory trust.⁵⁹ Holding title to property in its own name, and with the capacity to enter into contracts in its own name,⁶⁰ it would appear that the series is empowered to enter into a security agreement and grant a security interest in the assets titled to it. There remains the question of granting a security interest in property that is titled in the name of the statutory trust and then associated with the series. There still remains the problem that a series is not itself a registered organization recognizable under the UCC.

Choice of Law

A particularly troubling problem with series is whether, outside the jurisdiction of organization, the inter-series liability shield will be respected. An oft-mentioned question with respect to the series is

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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 nonseries 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.⁶¹

Although the question at one time had currency,⁶² 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,⁶³ provide for

the qualification of foreign LLCs to transact business,⁶⁴ and state that the law of the jurisdiction of formation will govern the "internal affairs" of the foreign LLC,⁶⁵ a term understood to include the rule of limited liability.⁶⁶ 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)⁶⁷ will find that the limited liability of the limited partners will be determined in accordance with the laws of the jurisdiction of organization⁶⁸; the act is however silent as to, and therefore leaves open to question, what law will determine the liability of the general partners.⁶⁹ 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),⁷⁰ 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.⁷¹ 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.⁷²

Focusing on the clearest case of the LLC and the nationwide statutory recognition of limited liability granted by a foreign state,⁷³ 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 “The laws of the state or other jurisdiction under which a foreign limited liability company is organized shall govern ... the liability of its members,”⁷⁴ 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.”⁷⁵ Each statute addresses the liability of the members for the debts and obligations of the foreign LLC; neither addresses the liability of the LLC for its own debts and obligations. While it has been suggested that a series is viewed as being similar to a distinct LLC, 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.⁷⁶ 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,⁷⁷ no public filing is necessary for an individual series to be brought into existence.⁷⁸ While the 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 liable for the debts and obligations of its constituent components.⁷⁹ Ultimately, the statutory “internal affairs” doctrine does not dictate that the foreign series liability shield be respected.

Under the *Restatement (2nd) of Conflicts*, the geographically based “vested rights” principles of the *Restatement (1st) of Conflicts* were abandoned,⁸⁰ 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.”⁸¹ 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.⁸²

Is a particular series, based upon the alignment of characteristics that may be applied in a *Restatement (2nd) of Conflicts* §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,⁸³ 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 §298, as a corporation. Even were the application of §298 significantly 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 §298 corporation. This disparate treatment is highlighted in Delaware where, 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,⁸⁴ 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 §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.⁸⁵

Conclusion

Sometimes it is more important to be able to ask the right question than it is to know all of the answers. At this juncture in their development, the great level of uncertainty as to the series would indicate that it is more important to keep considering and asking those questions versus being comfortable in what we at least perceive to be the answers.⁸⁶

ENDNOTES

- ¹ It should be noted that between the two of us, I am by far the greater beneficiary of this friendship.
- ² See, e.g., *Inter-Tel Technologies, Inc. v. Linn Station Properties, LLC*, 360 SW3d 152 (Ky. 2012).
- ³ The various series statutes require, as a condition to the inter-series liability shield, that adequate books and records be maintained as to the allocation of assets to the various series. See, e.g., Del. Code Ann. tit. 6, §18-215(b); Rev. Prototype LLC Act §1102(b)(1), 67 BUS. LAW. 117 at 211 (Nov. 2011); and Ky. Rev. Stat. Ann. §386A.4-020(2)(a).
- ⁴ 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); 73 Del. Acts ch. 328 §1. Herein “statutory” and “business” trust are used interchangeably.
- ⁵ See, e.g., GORDON ALTMAN ET AL., A PRACTICAL GUIDE TO THE INVESTMENT COMPANY ACT, pp. 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.”); HUMPHREYS, LIMITED LIABILITY COMPANIES §1.04 (Revised 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.”).
- ⁶ See also HUMPHREYS, *supra* note 5.
- ⁷ 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.
- ⁸ Terence F. Cuff, *Series LLCs and the Abolition of the Tax System*, 2 BUSINESS ENTITIES 26 (Jan.–Feb. 2000). 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).
- ⁹ See, e.g., John C. Murray, *A Real Estate Practitioner’s Guide to Delaware Series LLCs (with Form)*, available at 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*, J. PASSTHROUGH ENTITIES, Nov.–Dec. 2006, at 38.
- ¹⁰ See *GxG Management LLC v. Young Brothers and Co., Inc.*, 2007 U.S. Dist. LEXIS 12337 (D. Me. 2007).
- ¹¹ See also UNIF. STAT. TR. ACT, §401(B), 6B U.L.A. (2012 supp.) 110; see also *id.* Prefatory Note, 6B U.L.A. (2012 supp.) 81 (“However, a series is not an entity separate from the statutory trust.”).
- ¹² *Batra v. Investors Research Corp.*, 1990 U.S. Dist. LEXIS 5500, *1, FED. SEC. L. REP. (CCH) ¶95,496 (W.D. Mo. 1991). *Contrast In re Mutual Funds Inv. Litigation*, 519 FSupp2d 580 (D. Md. 2007).
- ¹³ DEL. CODE ANN. tit. 12, §§3804(a), 3805(h) and 3806(b).
- ¹⁴ CONN. CODE §§34-5167(b)(2), 34-502(b).
- ¹⁵ D.C. CODE §§29-1204.01 through 29-1204.04.
- ¹⁶ KY. REV. STAT. ANN. §§386A.4-010 through 386A.4-110.
- ¹⁷ VA. CODE ANN. §§13.1-1219, 13.1-1231 and 13.1-1240.
- ¹⁸ WY. STAT. §§17-23-106, 17-23-108.
- ¹⁹ See Unif. Stat. Tr. Act §§401-401, 6B U.L.A. (2012 supp.) 110-13; see also Thomas E. Rutledge and Elisa O. Habbart, *The Uniform Statutory Trust Entity Act: A Review*, 65 BUS. LAW. 1055 (Aug. 2010). To date USTA has been adopted only in D.C. (D.C. Code §29-1201 to 29-1209.01) and Kentucky. Ky. Rev. Stat. Ann. §386A.1-010 et seq.
- ²⁰ DEL. CODE ANN. tit. 6, §18-215.
- ²¹ DEL. CODE ANN. tit. 6, §17-218(b). Other than Delaware, no state has yet provided for the series in its limited partnership act.
- ²² 67 BUS. LAW 117, 210-221 (Nov. 2011). 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) did consider including series provisions in RULLCA, and the reporters were on the cusp of preparing an initial draft, the determination was made to not proceed with that aspect of the project. That determination is explained in Revised Uniform Limited Liability Company Act (2006) Prefatory Note, 6B U.L.A. 412 (2008).
- ²³ Those states are the District of Columbia (D.C. CODE §29-802.06), Illinois (805 ILCS 180/37-40), Iowa (IOWA CODE §490A.305 (until January 1, 2009); IOWA CODE §§489.1201 thru 489.1206 (after January 1, 2009)), Kansas (KANSAS §17-76,143); Nevada (NEV. REV. STAT. §86.296.3), Oklahoma (18 OKLA. STAT. §2054.4B), Tennessee (TENN. CODE ANN. §48-249-309), Texas (TEX. CODE ANN. §101.601 through 101.621), and Utah (UTAH CODE ANN. §§48-3-1201 through 1210).
- ²⁴ DEL. CODE ANN. tit. 12, §§3804(a), 3805(h), 3806(b); D.C. CODE §29-1204.01 et seq.; CONN. STAT. §34-5167(b)(2), *id.* §34-502(b); KY. REV. STAT. ANN. §§386A.4-010 through 386A.4-110; VA. CODE ANN. §§13-1-1219, 13.1-1231, and 13.1-1240; and WYOM. STAT. §§17-23-106, 17-23-108.
- ²⁵ DEL. CODE ANN. tit. 6 §17-218.
- ²⁶ See UNIF. STAT. TR. ACT, 6B U.L.A. (2012 supp.) 78.
- ²⁷ See Revised Prototype Limited Liability Company Act Editorial Board, LLCs, Partnerships and Unincorporated Entities Committee, ABA Section of Business Law, *Revised Prototype Limited Liability Company Act*, 67 BUS. LAW. 117 (Nov. 2011) (hereinafter “Rev. Prototype LLC Act”).
- ²⁸ 805 ILCS 180/37-40(b); KANSAS §17-76,143(1)(b) and if the [LLC] has filed a certificate of designation for each series which is to have limited liability under this section”).
- ²⁹ UNIF. STAT. TR. ACT §401(b), 6B U.L.A. (2012 supp.) 110.
- ³⁰ See 805 ILCS 180/37-40(b); IOWA CODE §489.1201(3); and Kansas 2207 §1(b) (“A series with limited liability shall be treated as a separate entity to the extent set forth in the articles of organization.”). What are the consequences of election of “entity” status is unclear. See Rutledge, *External Entities and Internal Aggregates: A Deconstructionist Conundrum*, 43 SUFFOLK U. L. REV. 655 (2008-09); J. William Callison, *Indeterminacy, Irony and Partnership Law*, 2 STANFORD AGORA; and David Millon, *The Ambiguous Significance of Corporate Personhood*, 2 STANFORD AGORA.
- ³¹ KY. REV. STAT. ANN. §386A.4-010(4); *id.* §386A.4-030. *Accord* Rev. Prototype LLC Act §105(d)(3), 67 BUS. LAW. at 133.
- ³² See DEL. CODE ANN. tit. 12, §3806(b); VA. CODE §13.1-1231.D.
- ³³ This report is reproduced in Vol. XXXIX, No. 2 of THE LLC & PARTNERSHIP REPORTER (Aug. 2012), the newsletter of the Committee on LLCs, Partnerships and Unincorporated Entities, Section of Business Law, ABA.

ENDNOTES

- ³⁴ See Donald Rumsfeld, Press Conference at NATO Headquarters, Brussels, Belgium, June 6, 2002, http://en.wikiquote.org/wiki/Donald_Rumsfeld.
Now what is the message there? The message is that there are no “knowns.” There are things we know that we know. There are known unknowns. That is to say there are things that we now know we don’t know. But there are also unknown unknowns. There are things we do not know we don’t know. So when we do the best we can and we pull all this information together, and we then say well that’s basically what we see as the situation, that is really only the known knowns and the known unknowns. And each year, we discover a few more of those unknown unknowns.
- ³⁵ See, e.g., KY. REV. STAT. ANN. §275.240(2) (“Property may be acquired, held and conveyed in the name of the limited liability company.”); *id.* §275.240(1) (“Property transferred to or otherwise acquired by a limited liability company shall be the property of the limited liability company and not of the members individually.”); VA. CODE §13.1-1009.2. (“Every LLC has the power [t]o purchase, receive, lease or otherwise acquire, and own, hold, improve, use and otherwise deal with, real or personal property, or any legal or equitable interest in property, wherever located.”); *id.* §13.1-1021 (“Any estate or interest in property may be acquired in the name of the limited liability company and title to any estate or interest so acquired vest in the limited liability company.”).
- ³⁶ 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 D.C., Illinois and Kansas, there exists no requirement that there be a public filing with the state of organization as to the creation of any individual series. Under the laws of the District of Columbia, which provide for series statutory trusts and series LLCs, while no public filing is required to create a series of a statutory trust, a public filing is required to create a series of an LLC. See D.C. CODE §29-802.06(b)(4). Kansas and Illinois likewise require the filing of a certificate of designation with the Secretary of State for each series. See Kansas 2207 §1(b); 805 ILCS 180/37-40(b), (d). 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.”
- ³⁷ Proposed Regulations, §301.7701-1(a)(5), *Series LLCs and Cell Companies*, 75 FR 55699. See also 2 LARRY E. RIBSTEIN AND ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES §17.23 (2nd ed. December 2012).
- ³⁸ REG. §301.7701-3(a).
- ³⁹ See, e.g., California 2011 Limited Liability Tax Booklet, Section F, page 8; Florida Department of Revenue Technical Assistance Advertisement No. 02(M)-009 (Nov. 27, 2002); Massachusetts Letter Ruling 08-2 (Feb. 15, 2008). See also Sheldon Banoff and Richard Lipton, Shoptalk, *California Refines Its Tax Treatment of Series LLCs*, 106 J. TAX’N 316 (May, 2007); Jacob Stein, *Tilting at Windmills: Examining FTB’s Treatment of Series LLCs*, 10 BUSINESS ENTITIES 16, 19-21 (May-June 2008); Michael McLoughlin and Bruce Ely, *The Series LLC Raises Serious State Tax Questions but Few Answers are Yet Available*, 16 J. MULTISTATE TAX’N 6 (Jan. 2007); Michael McLoughlin and Bruce Ely, *IRS Issues Long-Awaited Guidance on Series LLCs; Will the States Soon Follow?*, 20 J. MULTISTATE TAX’N 9 (Jan. 2011); ROBERT R. KEATINGE AND ANN CONAWAY, KEATINGE AND CONAWAY ON CHOICE OF BUSINESS ENTITIES, §16:23 (2011); and Bruce P. Ely, James E. Long, Jr. and J. Leigh Griffith, *Survey of States Regarding Their Intent to Conform to the Classification of Series LLCs for Federal Income Tax Purposes* (Sept. 2012).
- ⁴⁰ Recall that the states are not bound to follow the federal classification system. For example, Kentucky imposes an entity-level tax upon organizations that are for federal purposes pass-through. See, e.g., KY. REV. STAT. ANN. §§141.010(24)(a), 141.040(1) and 141.040(2)(a). See generally Carolyn Joy Lee, Bruce P. Ely and Dennis Rimkunas, *State Taxation of Partnerships and LLCs and Their Members*, 19 J. OF MULTISTATE TAXATION AND INCENTIVES 8 (Feb. 2010); Bruce P. Ely, *State Taxation of Subchapter S and Subchapter K Entities and Their Owners—An Overview*, CHOICE OF ENTITY-2007 (ALI-ABA, Feb. 8, 2007), Appendix B, Appendix C; KEATINGE & CONAWAY at CH. 15; BISHOP AND KLEINBERGER CH. 3. Many states that follow the federal classification for income tax purposes diverge from the federal classification for purposes of other taxes, such as sales and use tax. The Georgia LLC Act, for example, follows the federal classification rules only for “income” tax purposes. GA. CODE ANN. §14-11-1104 (2001 amendment inserted the word “income” in four places).
- ⁴¹ 28 USC §1332.
- ⁴² *Caterpillar, Inc. v. Lewis*, SCt, 519 US 61, 68 (1996); *Strawbridge v. Curtiss*, SCt, 7 US (3 Cranch) 267 (1806); *Caudill v. North Am. Media Corp.*, CA-6, 200 F3d 914, 916 (2000) (“Section 1332’s congressionally conferred diversity jurisdiction has been interpreted to demand complete diversity, that is, that no party share citizenship with any opposing party.”); *Wisconsin Dep’t of Corrections v. Schacht*, SCt, 524 US 381, 288 (1988) (“A case falls within the federal district court’s original diversity jurisdiction only if diversity of citizenship among the parties is complete, *i.e.*, only if there is no plaintiff and no defendant who are citizens of the same State.”) (internal quotation marks omitted). For individuals, a person is considered a citizen of a state if that person is domiciled within that state and has intent to stay there indefinitely. See, e.g., *Krasnov v. Dinan*, CA-3, 465 F2d 1298 (1972). Where one lives is *prima facie* evidence of domicile, but mere residency in a state is insufficient for purposes of diversity. The fact of residency must be coupled with a finding of intent to remain indefinitely. *Id.*
- ⁴³ See, e.g., *Carden v. Arkoma Associates*, SCt, 494 US 185 (1990) (limited partnership has the citizenship of each general and each limited partner); *Cosgrove v. Batolotta*, CA-7 150 F3d 729 (1998) (LLC has citizenship of each member); *Delay v. Rosenthal Collins Group, LLC*, CA-6, 585 F3d 1003, 1005 (2009) (same); and *Riley v. Merrill Lynch Pierce Fenner & Smith, Inc.*, CA-11, 292 F3d 1334 (2002), *cert. denied*, SCt, 537 US 950 (citizenship of business trust is that of each of the beneficial owners).
- ⁴⁴ For example, is the citizenship of a “non-equity” partner attributed to a partnership? See, e.g., *Morson v. Kreindler & Kreindler, LLP*, 2009 U.S. Dist. LEXIS 58823 (D. Mass. 2009) (citizenship of a contract partner who received a Form W-2 and not a Form K-1 who had no voting rights in the firm and did not share in its profits or losses was not a “partner” whose citizenship would be attributed to that of the partnership); *Passavant Memorial Area Hospital Ass’n v. Lancaster Pollard & Co.*, No. 11-CV-3116 (C.D. Ill. (Springfield Div.) April 2, 2012) (holding that the citizenship of “contract partners” who had no equity in the partnership or authority to participate in its management and who received a fixed compensation from the partnership were not partners whose citizenship would be attributed to the partnership).
- ⁴⁵ See, e.g., KY. REV. STAT. ANN. §386A.4-010(4) (“Unless otherwise provided in the governing instrument, a series ... shall have the power and capacity to ... sue and be sued.”).
- ⁴⁶ *Batra v. Investors Research Corp.*, 1991 U.S. Dist. LEXIS 14773, FED. SEC. L. REP. (CCH) ¶96,982 (W.D. Mo. 1991).
- ⁴⁷ 11 USC §109(a).
- ⁴⁸ 11 USC §101(41).
- ⁴⁹ 11 USC §101(9).
- ⁵⁰ For an excellent review of this issue, see Michelle Harner, Jennifer Ivey-

ENDNOTES

- Crickenberger and Tae Kim, *Series LLCs: What Happens When One Series Fails? Key Considerations and Issues*, 2003 BUS. LAW TODAY (Feb. 22, 2013).
- ⁵¹ Delaware adopted a Business Trust Act in 1988, referring to an organization created thereunder as a “business trust.” In 2001, the name of the act was changed to the Delaware Statutory Trust Act and the name of an organization created thereunder was changed to a “statutory trust.” See DEL. CODE ANN. tit. 12, §3801(g) (2007). The amendment was not intended as a substantive change in Delaware law, but rather was made to address the concern of those who used trusts in structured finance transactions that a “business trust” might be deemed a “person” and therefore a “debtor” under the Federal Bankruptcy Code. If so, the entity could be the subject of an involuntary bankruptcy, which would defeat the expectations of the parties in asset securitization transactions who rely upon a bankruptcy remote entity. See Rutledge and Habbart, *supra* note 18 at 1060-61. The Connecticut act, which was enacted in 1997, used the term “statutory trust” from the outset. See CONN. GEN. STAT. §34-500. The label “statutory trust” is utilized as well in Wyoming. See WYO. STAT. §17-23-202(g). Herein “statutory” and “business” trust are used interchangeably.
- ⁵² *In re Secured Equipment Trust of Eastern Airlines, Inc.*, CA-2, 38 F3d 86 (1994).
- ⁵³ A “debtor” eligible to file bankruptcy includes a “person” (11 USC §101(13)), which is defined to include a “corporation” (11 USC §101(41)) which is, in turn, defined to include a “business trust.” 11 USC §101(9). See also *In re Gurney’s Inn Corp. Liquidating Trust*, 215 BR 659 (Bankr. E.D. N.Y. 1997); *In re the Estate of the Assignment for the Benefit of Creditors of Edward Paul May*, 405 B.R. 443 (Bankr. E.D. Mich. 2008); Kenneth N. Klee and Brandt C. Butler, *Asset-Backed Securitization, Special Purpose Vehicles and Other Securitization Issues*, 35 U.C.C.L.J. 23, 46-48 (2002).
- ⁵⁴ See, e.g., Steven L. Schwarcz, *Commercial Trusts as Business Organizations: Unveiling the Mystery*, 58 BUS. LAW. 559, 564 (Feb. 2003).
- ⁵⁵ Shakespeare, *Romeo and Juliet*, 11, ii, 1-2.
- ⁵⁶ Contrast DEL. CODE ANN. tit. 6, §18-215(c) (permitting a series of a Delaware LLC to hold property in its own name); *id.* §17-218(c) (permitting a series of a Delaware limited partnership to hold property in its own name).
- ⁵⁷ See UCC §9-102(70); see also *id.* §9-503(a)(1).
- ⁵⁸ KY. REV. STAT. ANN. §386A.4-010(4); *id.* §386A.4-030.
- ⁵⁹ See *id.* §386A.4-030.
- ⁶⁰ KY. REV. STAT. ANN. §386A.4-010(4).
- ⁶¹ See also Rutledge, *Again, For the Want of a Theory: The Challenge of the “Series” to Business Organization Law*, 46 AMERICAN BUSINESS LAW JOURNAL 311 (2009).
- ⁶² 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.”)
- ⁶³ See RIBSTEIN AND KEATINGE, *supra* note 37 at §1:2.
- ⁶⁴ See RIBSTEIN AND KEATINGE, *supra* note 37 at §13:3.
- ⁶⁵ *Id.*
- ⁶⁶ See RESTATEMENT (SECOND) OF CONFLICTS §307.
- ⁶⁷ 6B U.L.A. 1 (2008).
- ⁶⁸ Rev. Unif. Ltd. Part. Act §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.”)
- ⁶⁹ See also 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, 241 (2006).
- ⁷⁰ 6A U.L.A. 325 (2008).
- ⁷¹ Unif. Ltd. Part. Act (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.”)
- ⁷² 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.
- ⁷³ See 2 RIBSTEIN AND KEATINGE, *supra* note 37, Table 13-5.
- ⁷⁴ KY. REV. STAT. ANN. §275.380(1)(a).
- ⁷⁵ VA. CODE. §13.1-1051.
- ⁷⁶ 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.”)
- ⁷⁷ DEL. CODE ANN. tit. 6, §18-215(b). *Accord* KY. REV. STAT. ANN. §386A.4-020(2)(c); VA. CODE §13.1-1231.D; and KANSAS §17-76,143(1)(b).
- ⁷⁸ Admittedly this description fails in the cases of Iowa and Kansas, each of 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); KANSAS §17-76,143(1)(b).
- ⁷⁹ 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).
- ⁸⁰ Under the Restatement (1st) of Conflicts, §§377-390, the rule for choice of law for claims in tort was “*lex loci delicti*,” the law of the jurisdiction where the injury occurred.
- ⁸¹ See RESTATEMENT (2ND) OF CONFLICTS §6; see also *id.*, cmt. c §6.
- ⁸² Restatement §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.
See also Restatement §297, “Recognition of Foreign Incorporation,” which provides:
Incorporation by one state will be recognized by other states.
Comment c to Restatement §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.
- ⁸³ 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.
- ⁸⁴ DEL. CODE ANN. tit. 6, §§18-215(b), (c) (LLC); DEL. CODE ANN. tit. 6, §§17-218(b), (c) (LP).
- ⁸⁵ 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, Kentucky and Virginia provide for the series only in their respective statutory trust acts, not addressing the concept in its limited partnership or LLC acts.

ENDNOTES

Illinois and Iowa have series LLCs without having series statutory/business trusts. It is worth wondering, in those jurisdictions, whether the inclusion of series 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? Alternatively, it could be argued, these states have no policy objection to the series, and have only, for themselves, proceeded to employ them in certain organizational forms.

⁸⁶ I am indebted to Allan Donn (Willcox & Savage, P.C., Norfolk, Virginia) and Sarah J. Sloan (Stoll Keenon Ogden PLLC, Lexington, Kentucky) for their observations and assistance with this article.

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