Series Limited Liability Companies: A Possible Solution to Multiple LLCs

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INTRODUCTION

Series Limited Liability Companies (LLC) are now over a decade old. This idealistic concept has seemingly transformed organizational law, touting opportunities and flexibility far surpassing existing entity options. However, this eleven-year period has passed leaving corporate and tax lawyers clueless on important topics such as tax guidance from the Internal Revenue Service (IRS), legislative history, state treatment of foreign series LLCs, and case law. While heralded in theoretical circles, many practicing attorneys fail to recommend series LLCs to their clients due to the plethora of unanswered questions. In fact, business owners can achieve analogous results with multiple LLCs while maintaining relative certainty in their choice. Further, only seven states to date have enacted statutes authorizing series LLCs, and the drafters of the recent Revised Uniform Limited Liability Company Act (RULLCA) considered and rejected provisions to the RULLCA creating series LLCs. These facts beg the question: Why should we care about series LLCs?

This Note compares and contrasts aspects of multiple LLCs with those of series LLCs. It focuses primarily on Delaware and Illinois, as these states present leading ideas on series LLC laws even as they draw material

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2. Since the state law of the jurisdiction of formation governs business entities such as LLCs, the term “foreign” refers to entities formed outside of the state.
3. See infra, Part IV.2.
5. This Note will refer to the former only as “multiple LLCs,” while referring to the latter throughout as “series LLCs.” It will distinguish between the LLC which formed the series as “umbrella LLC” or “Parent LLC,” while referring separately to the individual series.
distinctions about series LLCs. Since series LLC legislation is likely to develop and spread throughout state law, this Note will contrast the purely theoretical information available publicly today with a realistic perspective.

Part I will examine generally the characteristics of series LLCs, in addition to the tax implications, benefits, and limitations of using them. Part II will present an in-depth look at series LLCs by surveying state legislation adopting series LLC statutes. Part III will discuss the history and development of series LLC laws, including why the drafters of the RULLCA considered and rejected series LLC provisions. Finally, Part IV will unveil the uncertain state of series LLC law, challenging the theoretical approach taken by drafters and proponents. The Note will recommend that attorneys refrain from using this entity type due to the current state of uncertainty surrounding series LLCs. Further, this note will call for the enactment of enhanced series LLC legislation nationwide to provide unity and foundation for the new entity type, which will allow attorneys and business owners to reap the benefits of series LLCs.

As discussed below, proponents of series LLCs advertise benefits such as increased asset protection, flexibility of management and ownership, and most importantly, monumental cost savings. Reality, however, tells a different story. An attorney may find that series LLCs are inferior to multiple LLCs. Asset protection in a series LLC is equal or inferior to multiple LLCs because each series runs additional risks that a foreign court will not recognize the internal liability shield between each series or may pierce between series rather than pierce between distinct LLCs. The flexibility of management and ownership may be achieved with multiple LLCs, without the confusion of trying to map out the connections in multiple series. Although reduced filing fees and administrative costs may benefit owners of a series, these cost savings are usually insignificant when compared to the entirety of the LLC. Further, since the potential for loss of limited liability between series is greater than with multiple LLCs, choosing a series LLC structure may lead to the death of the whole entity.

I. THE SERIES LLC: CHARACTERISTICS, TAX IMPLICATIONS, AND BENEFITS & LIMITATIONS

A. Limited Liability Company

The limited liability company is now an established national treasure in all fifty states.6 Born out of the idea that members of a company should

be able to contract freely,\textsuperscript{7} the LLC has pushed the limits on how a company may be owned, operated, and taxed while retaining limited liability.

Like a corporation, an LLC is an entity separate and distinct from its owners, allowing limited liability for its members.\textsuperscript{8} Like a partnership, most LLCs may generally choose to be taxed as a corporation or as a partnership with flow-through taxation.\textsuperscript{9} This means that the members may avoid an extra layer of tax imposed on subchapter C corporations.\textsuperscript{10} If an LLC has only one member, the LLC is disregarded as a separate entity from its owner for federal tax purposes, although the owner retains the limited liability unattainable by a sole proprietorship.\textsuperscript{11}

By the mid-1990s, most states had LLC legislation in place.\textsuperscript{12} Thus, LLCs were positioned to become America’s hot ticket to tax savings for domestic businesses.

\textbf{B. Fundamental Characteristics of a Series LLC}

In 1996, Delaware passed the first legislation authorizing series LLCs.\textsuperscript{13} The statute allows an LLC to designate one or more series of members, managers, LLC interests, or assets.\textsuperscript{14} This creative idea soon blossomed into an asset protection strategy for LLCs organized in at least seven states.\textsuperscript{15} On its face, the series concept seems beneficial, though its complexity scares away potential users. Proponents and drafters of legislation tend to see only the big picture.

Although the laws differ from state to state, creating a series LLC begins with forming an umbrella or “Parent” LLC.\textsuperscript{16} The term “Parent,” as

\begin{itemize}
\item \textsuperscript{8} \textsc{Revised Unif. Ltd. Liab. Co. Act} § 104 (2006), 6A U.L.A. 225 (West Supp. 2007).
\item \textsuperscript{9} An LLC or partnership does not pay tax on its income. Instead, the income, loss, deductions, and credits of the entity pass through to the shareholder(s). I.R.C. § 704 (West Supp. 2008); \textsc{Susan Kalinka & Harriet S. Daggett, 9 Mertens Law of Federal Income Taxation} § 35A:29, (2007).
\item \textsuperscript{10} I.R.C. § 11 (2006).
\item \textsuperscript{11} Treas. Reg. § 301.7701-2(a) (as amended in 2006).
\item \textsuperscript{12} See \textsc{Ribstein & Keatinge, supra note 6}.
\item \textsuperscript{14} \textit{Id.}
\end{itemize}
used herein, differs from the traditional corporate paradigm of parent and subsidiary corporations. In the corporate paradigm, Parent implies that it owns the subsidiary entity. Do not be misled, as that is not necessarily the case for series LLCs. Instead, the Parent refers to the LLC which files its articles of organization with a state creating one or more series. Unlike the corporate paradigm, the Parent LLC may own part, all, or none of each of its series. However, the Parent and series may continue to be connected through the Parent’s articles of organization. They may also be taxed as one entity. This distinction is key to understanding how a series LLC may be formed and operated.

Once a series is formed, state law outlines the rights, powers, and duties of each series. In some states, each series acts as its own entity and relies on its own Operating Agreement. Each series enjoys limited liability and shields its own assets from those of each other series and the Parent. Thus, the concept has been described as internal shields, compartments, and cells. A series may have a different business purpose from the other series and the Parent. It may have separate members, managers, or voting rights. Each series may dictate a separate structure with respect to profits and losses associated with specific property or obligations. One series is not dissolved by the dissolution of another, although all series are dissolved by the dissolution of the Parent LLC. Thus, if members of a series LLC wish to terminate the LLC, members of one of its series will be unable to halt the dissolution of the series without a contractual provision protecting its interests.

However, the limited liability of each series may only be enjoyed if certain guidelines fundamental to the series LLC concept are followed, such as maintaining separate entity records, accounting records, and bank

17. Brian R. Fons, Serious About Series LLCs, CBA REC., Apr. 2007, at 46, 49.
19. This is debatable, although Illinois law suggests a consolidated tax scheme for series LLCs. Id.
20. E.g., id. Although no state requires each series to have its own operating agreement, one commentator mused that “each series should have its own operating agreement that expressly states how the internal affairs shall be governed.” NICHOLAS KARAMBELAS, LIMITED LIABILITY COMPANIES: LAW, PRACTICE AND FORMS § 7:4 (2007).
21. E.g., DEL. CODE ANN. tit. 6, § 18-215(b) (West Supp. 2008).
accounts. Also, some states require each series to separate assets (i) from the Parent LLC and (ii) among the other series. Additionally, most states require the articles of organization or operating agreement to state that liability is limited to the assets owned by each series, effectively providing notice to creditors. As a result, the debts, liabilities, obligations, and expenses incurred are only enforceable against the assets of that series. Thus, any series LLC which fails to meet these requirements risks losing the benefits of the series LLC.

1. Mapping the Structure

The primary question for an attorney forming a series LLC is: What does it look like? The first structure that comes to mind is the Parent-Series structure discussed above. In its simplest form, the Parent LLC would own a majority share of each series, and the individual owners would have an interest in the Parent LLC. Thus, this structure would be mapped as in Diagram 1.

In this first example, each series holds an asset, and the Parent LLC may itself be an operating company or a holding company.

The second possible structure resembles more of a Brother-Sister relationship. Here, the LLC must exist to form the several series, but does not have any further relationship to them. The individual owners would have an interest in the LLC and each series, as mapped in Diagram 2.1.

![Diagram 2.1](image.png)

27. E.g., DEL. CODE ANN. tit. 6, § 18-215(b) (West Supp. 2008).
29. E.g., OKLA. STAT. tit. 18, § 2054.4(B) (West Supp. 2008).
30. Id.
With this structure, it is unclear what the LLC is, how it functions, and whether it even exists at all. The LLC itself may hold an asset, as shown in Diagram 2.2.

Finally, the statutes provide virtually limitless possibilities for flexible approaches to these structures. Since each series may have different owners or ownership interests, potential structures may mirror Diagrams 3.1 or 3.2. Each series LLC could be tailored to the industry and the needs of each owner. Further, each series LLC may have a different management structure.

However, it is unclear whether the drafters of the series LLC statutes intended these results. Attorneys choosing one structure over the other may later need to unwind the transaction. Further, the distinction between these two basic structures may make a huge difference once the series LLC is formed. The relationship may affect a court’s standards to pierce the veil or to consolidate in bankruptcy.\footnote{See infra, Part IV.}

From another perspective, both structures above and the wording of the state statutes create a very questionable connection. A single series formed in Delaware or Illinois may exercise certain powers on its own, apart from the Parent LLC, such as the power to contract or hold title to assets. The Parent LLC may, instead, perform these acts on behalf of its series. The Parent LLC controls the articles of organization, and each series does not require its own operating agreement. A series “is not a legal entity,”\footnote{KARAMBELAS, supra note 20. The separate issue of whether a series LLC is a separate legal entity for tax purposes is debatable, and is discussed in-depth in Part I(3)(C).} so it needs the Parent LLC. Yet, the Parent LLC does not have to
actually be related in any other way. Thus, the link this situation presents may be deemed a quasi-relationship.

C. **Tax Implications of a Series LLC**

1. **Introduction**

Generally, taxation is an important characteristic to business owners, heavily influencing entity choice. Primarily, owners of an entity would prefer to minimize taxes, by removing the second layer of tax imposed on corporate entities, netting losses against gains incurred when the entity has large gains, or otherwise taking advantage of the various tax eccentricities.33

"Tax law is based on statutory authority."34 Legislators must grant such authority for tax agencies to regulate tax and for taxpayers to know what, when, and how to pay the taxes they owe. When this information is lacking, many taxpayers are reluctant to engage in transactions where the tax treatment is unresolved, the possibility exists that the IRS will recharacterize the transaction, and the interest and penalties are so high.35 Series LLCs currently face this problem. These owners lack guidance on how to apply existing state corporate laws and state and federal tax laws to their entities. Series LLC owners and attorneys must start from the beginning to evaluate where series LLCs fit into this web. For example, since series LLCs are a fusion of ideas from partnership law, business organization law, trust law, and something new, it is not entirely clear whether the series LLC should be taxed as a partnership or a corporation. A more complex question might be whether a series LLC may file a unified return for all series or whether it must file separate returns for each.

2. **The First Question: Should a Series LLC be Taxed as a Partnership, a Corporation, or a Disregarded Entity?**

The Internal Revenue Code (IRC) applies only two classifications for all types of business entities with two or more owners: a corporation or a partnership.36 An entity taxed as a subchapter C corporation pays a corporate-level tax on income and a shareholder tax on dividends and distributions, resulting in two levels of taxes.37 An entity taxed as a partnership

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passes through all income, losses, deductions, and credits to its members (known as “pass-through taxation”), thus paying only a single layer of tax on member allocations. However, before the inception of LLCs, the primary way to obtain limited liability for all the owners also came with a double tax: a subchapter C corporation. Although the subchapter S corporation has also been available since the 1950s, providing limited liability with pass-through taxation, its restrictions are too limiting for many business owners. When the LLC structure became available, its semi-corporate nature presented characteristics which jeopardized the benefit of being taxed like a partnership.

However, in December 1996, the Treasury Department issued regulations under Internal Revenue Code § 7701, which allows most entities to check a box to choose how they wish to be taxed. By default, an LLC which fails to check a box is treated as a partnership. In fact, LLCs were created to serve the purpose of avoiding the entity-level taxation.

Further, a single-member LLC must choose to be taxed as either a disregarded entity or a corporation. A disregarded entity is treated like a sole proprietorship; the single owner reports the LLC’s income on Schedule C of his personal income tax return. Thus, a single-member umbrella LLC owning 100% of five series LLCs will be likely treated as a disregarded entity, and the sole member will report the income of all five series LLCs on his tax return.

Business ventures basically come in two varieties: those expecting to incur losses in their first few years, and those expecting to earn a profit. Ventures which foresee early losses will seek to use those losses right away, passing them through to the owners. This is not available in an entity taxed as a subchapter C corporation, since corporate losses can only be netted against corporate gains. However, a partnership allows these early losses to be passed through to the partners’ tax returns, reducing the part-

38. Id. § 704.
39. For example, an S corporation may have only a limited number of shareholders and only one class of stock. Id. § 1361(b).
41. Treas. Reg. §§ 301.7701-1–301.7701-3 (as amended in 2006). This does not include corporations and publicly-traded partnerships or LLCs, which must be taxed as corporations. I.R.C. §§ 7701, 7704 (West Supp. 2009).
42. See Treas. Reg. § 301.7701-2(c) (2006).
45. Id. An LLC owned by a single corporation is treated as a division of that corporation.
nners’ other sources of income and reducing the amount of taxes.\textsuperscript{47} Ventures which foresee immediate gains have a variety of needs, none of which involve passing through tax losses. Further, a corporation may reduce the overall tax if the fluctuating tax rates for individuals exceed that of the entity-level tax and tax on dividends.\textsuperscript{48} Thus, if the corporate tax rate is 35\% of net income while dividends are taxed at 15\%, a shareholder whose individual income is taxed at 50\% will benefit from passing income through a corporation.\textsuperscript{49} However, current tax rates discourage most businesses from operating as a C corporation.\textsuperscript{50} Yet, the future may renew tax structures which may either encourage the corporate tax structure or make it irrelevant.

Under the current Treasury Regulations, a business entity must first prove it is eligible to use the check-the-box system.\textsuperscript{51} First, it must constitute a “separate entity” under the Treasury Regulations.\textsuperscript{52} Second, it must constitute a “business entity” under the Treasury Regulations, which is basically any entity that is not a trust or is not subject to special federal tax treatment.\textsuperscript{53} Third, it must not be a “per se corporation.”\textsuperscript{54} If these factors are met, the entity may generally choose whether to be taxed as a partnership under subchapter K of the Internal Revenue Code or as a corporation under subchapter C.\textsuperscript{55}

The first factor is difficult to apply. Series LLC legislation is not definitive on this question, despite the assumptions of numerous commentators.\textsuperscript{56} This issue is discussed further in the next section. Assuming the series LLC or each of its series constitutes a separate entity, it likely constitutes a business entity, since the entity presumably seeks a profit and,

\begin{itemize}
\item \textsuperscript{47} I.R.C. § 704.
\item \textsuperscript{49} For example, $100 income in a pass-through entity will be taxed at the owner’s tax rate of 50\%. Thus, after a $50 tax liability, the owner is left with $50. However, this $100 income in a subchapter C corporation would be taxed at 35\% and would net $65 to be distributed to the shareholder. If the shareholder pays 15\% tax of $9.75, the shareholder is left with $55.25. Thus, the shareholder would benefit from passing income through a corporation under such a tax regime.
\item \textsuperscript{51} Treas. Reg. § 301.7701-1 (as amended in 2006).
\item \textsuperscript{52} \textit{Id.} § 301.7701-1(a).
\item \textsuperscript{53} \textit{Id.} § 301.7701-2(a) (as amended in 2007).
\item \textsuperscript{54} \textit{Id.} § 301.7701-2(b).
\item \textsuperscript{55} \textit{Id.} § 301.7701-3 (as amended in 2005).
\item \textsuperscript{56} For example, “the default treatment of the series and parent LLC under the Illinois statute is that they are separate entities and will remain so until the series and parent LLCs choose to be treated as one taxing entity.” Charles T. Terry & Derek D. Samz, \textit{An Initial Inquiry into the Federal Tax Classification of Series Limited Liability Companies}, 110 TAX NOTES 1093, 1097 (2006).
\end{itemize}
unlike a trust, does not merely shelter property. Finally, the series LLC will probably not constitute a per se corporation, since it filed articles of organization (or the equivalent) and not articles of incorporation. Thus, the series LLC should qualify to choose whether to be taxed as a partnership or as a corporation.

3. The Second Question: Should a Series LLC File Separate Returns for Each Series or One Return with Several Allocations?

This topic has been widely debated over the past few years, since the IRS has issued no tax guidance on the tax implications of using series LLCs. With the exception of Illinois, state law has also failed to provide guidance. The issue is whether the Parent LLC and its series should be taxed as a single unified entity or as many single LLCs, or whether they may choose their method of reporting. The answer to this question affects many aspects of tax law, such as the netting of passive income and losses. Passive income and losses occur generally from passive activities such as rental property. If the Parent LLC and its series are treated as a single unified entity, it may net passive income and losses between the many series. This would be very beneficial to an LLC that places one piece of property in each series, so that the losses of several series net with the gains from other series to reduce overall tax. That LLC may be able to retain limited liability while utilizing the breadth of partnership tax benefits.

In an attempt to answer this question, one author considered a presumption that the LLC, as a whole, would be taxed as one entity, and then argued that, where two members own one LLC with two separate series, the single LLC should be treated as two single-member LLCs for tax purposes. Another author assumed that practitioners could choose whether to file a separate tax return for each series or a single return for all. This

58. See Treas. Reg. § 301.7701-2(b) (listing entities which are considered corporations under the Treasury Regulations).
59. For an ingeniously in-depth but somewhat outdated discussion, see Terry & Samz, supra note 56, at 1093–98.
60. Illinois law states that "[t]he limited liability company and any of its series may elect to consolidate their operations as a single taxpayer to the extent permitted under applicable law . . . ." 805 ILL. COMP. STAT. ANN. 180/37-40(b) (West Supp. 2008).
62. See id. § 469(j)(11).
64. Jacob Stein, Advanced Asset Protection and Tax Planning with LLCs, 29 L.A. LAW. 17, 20
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author also stated that most series LLCs file a single return.65

To analyze this question, a quick survey of the sparse current agency advice is highly relevant. First, the Illinois statute states that the series may consolidate its operations as a single taxpayer to the extent permitted under applicable law.66 However, the only guidance Illinois has given as to the state tax treatment of series LLCs was in a 1998 General Information Letter.67 This guidance described a foreign series LLC with at least three series, all owned 99% by “A” LLC.68 The taxpayer sought advice to determine whether its series may file a composite return on behalf of the non-resident owners of “A,” noting that such composite returns could result in 25% fewer returns processed by the Illinois Department of Revenue (IDOR) and substantial tax compliance cost savings to “A.”69 Further, the taxpayer argued that this more efficient system would still procure the proper amount of tax to IDOR.70 However, IDOR determined that it had no authority to accept composite returns under the wording of the Illinois Income Tax Act.71 Although this decision was prior to the series LLC legislation in Illinois, the applicable tax statutes and regulations have not changed.

On the other hand, the Branch Chief for one IRS National Office stated in a private telephone interview the current federal position on the subject.72 Although the IRS has not published and will not soon publish any written guidance on the tax treatment of series LLCs, it advises business owners that the series LLC is flexible enough to structure the entity as a single or several taxpayer(s).73 The state statutes seem to allow this, and the series LLC agreement may dictate the structure and separateness of the entity.74 Once the IRS has seen real history, transactions, and case law on series LLCs, then the IRS may begin to publish guidance on this topic.75

Another indication of how the series LLC should be taxed is found in statutory trust law. As discussed below in Part III, Delaware series statutory trusts have existed for almost eighteen years and are structured similarly to


65. Id.
67. Ill. Dep’t of Revenue Gen. Info. Ltr, supra note 34.
68. Id.
69. Id.
70. Id.
71. Id. (referring to 35 ILL. COMP. STAT. ANN. 5/502(f) (West Supp. 2008)).
73. Id.
74. Id.
75. Id.
series LLCs.\textsuperscript{76} Thus, tax treatments of series trusts may dictate the tax guidance on series LLCs. The IRS has ruled several times that the series of a Delaware statutory trust may be distinct taxable entities for federal tax purposes.\textsuperscript{77} Since this is now an established rule, the IRS may eventually follow suit with series LLCs, declaring them similarly separate entities and separate taxpayers.

Commentators argue that the IRS will adapt statutory trust ideas to the series LLC.\textsuperscript{78} Ideas behind the IRS's declarations of separateness date back over fifty years.\textsuperscript{79} These ideas, it is argued, are based on the owners' rights to payment on liquidation from only the assets of a particular series and on the limited liability for the debts and expenses of each series.\textsuperscript{80}

Further, commentators believe that "where a relationship is not a separate legal entity under state law, federal tax law nonetheless tends to elevate the relationship to that of separate entity status when a certain quantum of business activity and purpose exists for the relationship."\textsuperscript{81} The series LLC statutes do not determine whether each of many series functions as a separate state law entity. Some commentators assume that the wording of the Illinois statute indicates a degree of separateness between the series and its Parent,\textsuperscript{82} but Illinois law merely states that a series is separate to the extent provided in the articles of organization.\textsuperscript{83} This suggests that a series may or may not be separate, at least for state law purposes, depending on the facts and circumstances. One author has argued that, since the Illinois series LLC may elect to consolidate its operations as a single taxpayer, a series LLC is, by default, a separate entity until it chooses otherwise.\textsuperscript{84} Delaware law does not suggest whether a series is a separate entity from its Parent LLC, except that a series may contract, hold title to assets, and sue and be sued. In an Informal Ruling, the Delaware Department of Finance ruled that it would treat all series as branches or divisions of their owner. This assumes the Parent LLC owns each series and fails to account for series LLCs with complex structures and owners.

\textsuperscript{76} See infra, Part III.2.
\textsuperscript{78} BISHOP & KLEINBERGER, supra note 77, at *4–6.
\textsuperscript{79} Id. at *6.
\textsuperscript{80} Id.
\textsuperscript{81} Id. at *4.
\textsuperscript{82} TERRY & SAMZ, supra note 56, at 1097.
\textsuperscript{83} 805 ILL. COMP. STAT. ANN. 180/37-40(b) (West Supp. 2008). "A series with limited liability shall be treated as a separate entity to the extent set forth in the articles of organization." Id.
\textsuperscript{84} TERRY & SAMZ, supra note 56, at 1097.
The debate continues. In fact, this uncertainty as to fundamental matters of tax classification may be the most uncertain question surrounding series LLC law, and certainly may constitute a deal-breaker for those deciding between a series LLC and multiple LLCs. Until state agencies or the IRS issue written guidance on the topic, business owners can never be entirely certain that they will not be penalized by the IRS for combining or failing to combine the LLC and its series for federal tax purposes. Further, state taxation presents yet another question which no commentators have yet found the courage to attempt to answer. However, New York stated that it would treat each series as a separate partnership, and California stated that it would consider a series as a separate business entity if it met certain stated considerations. Massachusetts recently decided that each LLC series will be classified as a separate entity for Massachusetts income and corporate excise tax purposes, and be taxed according to the federal classification.

4. The Third Question: Does the Series LLC Violate the Anti-Abuse Regulations within Subchapter K?

The intent of subchapter K of the IRC, under which partnerships (and LLCs, by definition) are taxed, is to allow taxpayers a flexible vehicle through which they may conduct business. However, subchapter K has several requirements. First, the entity must be bona fide, and its transactions must have a substantial business purpose. The series LLC presents a new twist, since each series may be formed solely to limit liability. Second, the substance-over-form principle requires that all transactions comply with tax law both in form and in substance. Series LLCs threaten to violate this rule, since segregating assets between series may produce a variety of tax consequences while maintaining the limited liability of a corporation.

85. However, a few authors have objectively discussed state tax consequences. See generally Michael W. McLoughlin & Bruce P. Ely, Series LLCs: Many State Tax Questions Are Raised but Few Answers Are Yet Available, 9 BUS. ENTITIES 36 (2007), available at 2007 WL 602935.
89. Treas. Reg. § 1.701-2(a) (as amended in 1995).
90. Id.
91. Although the mutual fund industry may utilize the series concept for its organizational flexibility and reduced compliance burdens under the Investment Company Act of 1940, many proponents today suggest series LLCs for estate planning and the real estate industry. See, e.g., Jeffrey Lerman, Surge of New Real Estate Investors Unwittingly Risk Personal Assets, BUS. WIRE, Feb. 3, 2006.
For example, the substantial economic effect test\textsuperscript{93} will unwind any transaction that allocates gains and losses in a way which improperly shifts tax consequences.\textsuperscript{94} Series LLCs present a way for owners to subvert the economic effect test. For example, an LLC may put an income-producing asset into Series X, in which Individual A owns a 20% share, and put a loss asset into Series Y, in which Individual A owns an 80% share. Thus, Individual A is effectively getting a tax shelter and violating the anti-abuse rules by using the cellular structure to shift income and loss disproportionately. While this type of tax-shifting may be done with multiple LLCs, the quasi-relationship between the many series may warrant action by the IRS.

Taxation is a relevant motivator when choosing an entity. Current tax rates motivate business owners to form entities which will be taxed as a partnership with income and losses flowing through to the owners. Further, a business entity that allows owners to net losses against gains from other business activities will entice both corporate giants and mom-and-pop businesses. Overall, the uncertainty that permeates taxation of series LLCs only hurts the concept. Many attorneys who fear negative tax consequences for their clients fail to recommend it to clients who may benefit notwithstanding the tax uncertainty.

\textbf{D. Benefits}

Before the inception of the series LLC, attorneys recommended that clients desiring similar asset protection form multiple LLCs. For example, a client with four properties can place each property in its own LLC, which separates the liability of each property but nearly quadruples the costs. To larger companies, like the offshore mutual fund industry, these additional costs are worth the extra liability protections they provide. Now, series LLCs attempt to offer the same protections as multiple LLCs with several additional benefits.

\textbf{1. Cost Savings}

When comparing series LLCs to multiple LLCs, common sense suggests that a single entity should be cheaper to form and operate. In fact, proponents typically state that the main advantage of using series LLCs over multiple LLCs is cost savings. However, a closer look shadows doubt upon this theory.

First, formation of either series LLCs or multiple LLCs incurs filing

\textsuperscript{93} I.R.C. § 704(b)(2) (2006).
fees. In Delaware, an entity must pay a $90 fee to file a Certificate of Formation for each LLC, regardless of whether it has series. The same situation is present in Nevada, where each LLC pays $75 to file its Articles of Organization. In Iowa, each LLC pays $50. In contrast, Illinois, currently the most expensive state in which to form a series LLC, requires a series LLC to pay a $750 fee, which exceeds the regular $500 fee for each new LLC. Further, each series pays a $50 fee to file a Certificate of Designation. Thus, an Illinois investor with ten properties in ten LLCs will pay $5000 to form ten LLCs, but only $1250 to form one LLC with ten series, each holding a different property. However, the same investor will pay only $75 to form one LLC with ten series in Nevada. For an entity with many sub-parts, cost savings may be achieved using a series LLC with many series, but only if the owners value cost savings over other issues. However, Illinois also has ongoing reporting requirements for each series in the state, requiring an additional fee. Again, a series LLC would still be cheaper than multiple LLCs.

Thus, a series LLC formed in its home state may be the least expensive option for a business owner seeking to segregate the liabilities of assets. However, to qualify to transact business in another state, the LLC and each of its series may be required to register and pay additional filing fees. This suggests that the formation costs would still equal those incurred in forming multiple LLCs instead of a series LLC. However, Illinois law exempts from the foreign registration requirement certain foreign LLCs that qualify as holding companies. Thus, an Illinois business owner who merely holds assets will benefit from forming multiple LLCs in a state with lower formation fees, with no additional registration costs in Illinois. However, other issues may arise, such as choice of law or the LLC’s ability to file suit in Illinois regarding in-state claims. Further, any growth of the

96. For a current fee schedule, see Nevada Secretary of State, Limited-Liability Company Fee Schedule, http://sos.state.nv.us/business/forms/pdf/FeeScheduleLLC.pdf (last visited Apr. 1, 2009).
97. For a current fee schedule, see Iowa Secretary of State, Fee Schedule, http://www.sos.state.ia.us/business/corpfee.html#DLLC490A (last visited Apr. 10, 2009).
99. 805 ILL. COMP. STAT. ANN. 180/50-10(b)(18).
100. id.
101. id. § 45-47. This statute states that a foreign entity is not transacting business in Illinois for entities which, among other things, merely maintain bank accounts or hold real estate. id.
foreign LLC may remove it from the exemption and require it to register as a foreign LLC. Another dilemma arises if the formation state’s LLC law is inferior to the laws of Illinois.

Second, the entity must pay accounting and attorney’s fees for advice and document preparation. Each LLC formed may prepare articles of organization (or similar formation documents), contracts, employment agreements, an operating agreement, membership agreements, annual reports, annual minutes, financial records, and more. At first glance, the series LLC seems like a miraculous solution to the endless paperwork. No state currently requires a series to have its own operating agreement or other documents. In fact, only Illinois102 and Delaware103 even give a series the optional power to contract and hold title to assets. Thus, it is possible, in theory, for a series to incur very limited professional costs. Further, Illinois allows, and perhaps encourages, sharing of expenses between series.104

On the other hand, series LLC law is so new that it is more likely that professional fees will be greater. Many attorneys are unfamiliar with the series concept, and must educate themselves and keep up with the ever-changing laws. Lack of any guidance will likely make attorneys more wary in preparing series LLC documents. It is unlikely many attorneys possess the infallible “default documents” for series LLCs as they do for corporations or LLCs. As guidance grows over the coming years, many attorneys may need to unwind or modify their documents. Since liability is a key issue in series LLCs, contracts and security agreements will need to adapt to the cellular concept. Further, owners of series LLCs will likely order documents for each series in order to fully “paper the transaction” and protect their business. These may simply mirror each other, or they may be more complex and tailored to the business or assets within each series. To protect the strings of limited liability, each series should demand documents tailored to that specific series.

As an ongoing business, a series LLC will incur costs equal to those in multiple LLCs, erasing the “unrealistic hope”105 which forms an all-too common argument in favor of the series LLC concept. Each series is required, by statute, to segregate assets and maintain separate records.106

102. Id. § 37-40(b).
103. DEL. CODE ANN. tit. 6, § 18-215(c) (West Supp. 2008).
104. ILL. COMP. STAT. ANN. 180/37-40(b).
106. See, e.g., 805 ILL. COMP. STAT. ANN. 180/37-40(b) (“[A]nd if separate and distinct records are maintained for any such series and the assets associated with any such series are held (directly or indi-
Discussing whether administrative costs would be lower with series LLCs, an ABA advisor to the RULLCA Drafting Committee responded that this is wrong because of the added burden of the legal and record-keeping of each series. Additionally, if the client is spending less on record-keeping than she would on maintaining single member LLCs, "‘the client is probably doing it wrong.’" Thus, one of the main purported benefits of series LLCs—cost savings—is really not a benefit at all. When coupled with other concerns, such as tax uncertainty, forming multiple LLCs instead of one series LLC begins to seem like the best idea.

2. Ease of Administration

Unlike cost-savings, series LLCs do provide other benefits that withstand practical application, such as an increased ease of administration and operation. Although each state requires separate books and records for each series, in most states the investor need file only one annual report and maintain one registered agent acting for the entire LLC. Illinois requires an annual report and fee for each series each year, which is significantly less than the fee associated with each LLC annual report. For example, the filing fee for an LLC’s annual report in Illinois is $250, and the cost for each series is only $50. Thus, an investor with ten LLCs will pay $2500 each year, but only $750 for one LLC with ten series. Further, operating expenses may be reduced where the several series act together and share expenses for services like legal and accounting. However, these savings may prove to be the same as using multiple LLCs.

108. Id.
110. See, e.g., 805 ILL. COMP. STAT. ANN. 180/1-35 (West Supp. 2008).
111. Id. § 180/50-1.
112. Id. § 180/50-10.
113. Id.
3. Flexibility

Third, series LLCs provide for a wide range of flexibility available to the members and managers of such an entity. Each state statute authorizing series LLCs gives broad deference to the drafter of the operating agreement, allowing hand-picking of the best provisions from partnership and corporate law. For example, series LLCs allow multiple classes of ownership interests, a feature not available to S corporations, which are limited to one class of stock. Series LLCs also may provide for different voting rights or no voting rights at all.

4. Asset Protection

Fourth, series LLCs are structured so as to provide maximum asset protection to investing members. By placing one asset in each series, an investor may properly shield that asset from the creditors of other assets held in other series or by the Parent LLC. It has been argued that a series LLC may provide asset protection benefits superior to multiple LLCs due to the ability to segregate liabilities within each series. This argument is discussed in Part IV below.

5. Naming the Entity

Finally, an often-overlooked benefit, available solely under Illinois law, is the ease of choosing a name for multiple businesses. Normally, each LLC would have to register with the Secretary of State under a different name. However, as any attorney would attest, registering a new name can be difficult as the client’s choice name may already be taken. This problem multiplies with a client attempting to form several LLCs. However, series LLCs need to select only one name for the Parent LLC. Each subsequent series may be consecutively named as “Series A” or “Series 1” for ease, or may be more complex, such as “Maple Street Series” or “Taxi 2938.” However, this benefit may be similarly utilized by multiple LLCs,

116. I.R.C. § 1361(b)(1)(D) (2006). An S corporation is a corporation which files an election to have its income taxed through its shareholders rather than through the corporation. Id. § 1361(a). There are many limitations on what businesses can elect S corporation status, such as the number of shareholders. Id. § 1361(b).
117. See, e.g., OKLA. STAT. tit. 18, § 2054.4(E) (West Supp. 2008) (“Voting by members or managers associated with a series may be on a per capita, number, financial interest, class, group or any other basis.”).
118. Gold, supra note 114, at 19.
119. See 805 ILL. COMP. STAT. ANN. 180/1-10 (West Supp. 2008).
120. See id.
although additional steps may be needed. Illinois law further requires the name of each series to include the Parent LLC’s name.\textsuperscript{121}

Thus, the birds-eye view of series LLCs reveals many advantages of this new entity choice. However, the benefits are only worthwhile when compared to similar opportunities available with multiple LLCs. Further limitations reduce the value which series LLCs supposedly provide to the business arena.

6. Limitations

Series LLCs come with a price. First and most crucial, very few states have adopted series provisions to their LLC legislation, although several states have adopted legislation governing foreign series LLCs operating within their respective states.\textsuperscript{122} However, there is relatively little case law or other information on which investors and attorneys can rely for guidance. Thus, forming a series LLC means taking a risk that other states will not recognize the limited liability of each series. This is quite unlike the origins of the LLC, where states that did not specifically authorize LLCs still recognized the entity as a limited liability company.\textsuperscript{123}

This also suggests that forming a series LLC may limit an investor’s ability to safely expand the business. If a series LLC wants to transact business in a non-recognition state, it may be required to register the entire LLC to do business in that state, potentially losing the protection of limited liability between each series. Thus, the assets of one series will no longer be protected from claims against another series.

The Illinois special name requirement discussed above may also actually limit a business owner’s use of the series LLC. Clients with multiple real estate properties generally name their business entities based on the particular name of the development.\textsuperscript{124} With Illinois series, the client is forced to include the entire name of the LLC while still distinguishing each series.\textsuperscript{125}

Finally, the connections between the Parent LLC and each series open the door to piercing issues, as discussed below.\textsuperscript{126} Each state statute authorizing series LLCs requires each series to keep separate records and bank

\textsuperscript{121} Id. § 180/37-40(c).
\textsuperscript{122} See Goforth, supra note 105, at 402.
\textsuperscript{124} Telephone Interview with Terry Anderson, Partner, WilliamsMcCarthy, LLP (Oct. 30, 2007).
\textsuperscript{125} 805 ILL. COMP. STAT. ANN. 180/37-40(c).
\textsuperscript{126} See infra, Part IV.1.
accounts, as well as hold separate assets. If a series or the Parent LLC fails to meet one element required for limited liability, it may forfeit the entire shield it has erected and allow creditors to pierce the veil of limited liability and reach the assets of the Parent LLC and each series. This, of course, effectively negates the very purpose of the series LLC.

Thus, the touted benefits may not be worth the costs associated with choosing a series LLC over multiple LLCs. Although certain entities may enjoy more advantages than disadvantages, others may not. Specific examples will illuminate these issues.

7. Examples

Many examples of good opportunities to use a series LLC come to mind, each differentiated only by the industry and ownership technique. Series LLCs have become a growing trend in the real estate industry, allowing real estate investors to hold one piece of property in each series. One author opines that a series LLC is an ideal structure for real estate investors. In these situations, attorneys have historically recommended the investor form multiple LLCs and transfer one parcel to each. This effectively shields each parcel from the debts, liabilities, obligations, and expenses incurred by each other parcel. However, this can also be costly, since each LLC must pay a filing fee, annual report fee, taxes, and accounting and legal expenses. By forming a series LLC, the investor may obtain the same result with a lower cost. This example will also apply to landlords owning and managing many rental units, placing each rental unit into a separate series. Similarly, taxicab companies owning multiple taxicabs may place one taxicab in each series. Thus, if one rental unit or taxicab becomes subject to a large liability, all other rental units and taxicabs will remain unaffected. Further, an investment bank that currently creates multiple LLCs for its various mutual funds may instead create one LLC with multiple series and reduced costs. It may segregate various hedge funds, capital funds, or funds by location through the internal shields available with a series LLC.

127. See, e.g., 805 ILL. COMP. STAT. ANN. 180/37-40(c).
128. See infra, Part IV.1.
130. Fons, supra note 17, at 47.
131. But see supra, Part I.D.1. Moreover, as stated above, a single-member LLC is disregarded for tax purposes. However, a single-member series LLC will still have the same result as multiple single-member LLCs, with potentially reduced costs.
Since each series is not limited by purpose, a company may benefit by storing each separate business line in a series LLC under an umbrella LLC owning a portion of each series. The company may place its manufacturing line in one series, its intellectual property in another series, and its shipping line in a third series. The umbrella LLC may own sixty membership units of each series, authorizing forty additional units for additional investors. Aside from securities law issues on marketing to potential investors, the LLC can efficiently and cheaply protect each line of business by placing it in a series, so long as it maintains separate books and records.

Similarly, one investor may create an umbrella LLC with a set of series holding separate businesses, such as a restaurant business, a rental home, and an apartment building, all held in separate series. The investor may hold 100% of the membership units of each, with the umbrella LLC holding no units of each series. By segregating the businesses, the investor can retain limited liability while reducing expenses.

Thus, series LLCs may be tailor-made for certain businesses and ill-suited for others. Business owners must consider the full spectrum of benefits, disadvantages, and tax and liability implications before adopting a series LLC structure. Further examination into the specific provisions of each state may reveal additional uses or limitations of this type of entity.

II. A COMPARISON AND ANALYSIS OF STATE SERIES LLC LAW

Introduction

In 1996, Delaware led the way to bring the first series LLC statute to the United States. Not until eight years later did Oklahoma approve legislation authorizing series LLCs. Soon after, others followed: Tennessee, Illinois, Nevada, Utah, and Iowa. Illinois finally approved its legislation in August 2005, after many months of study and
In fact, the Illinois statute differs from all others in ways that deserve special recognition. On the other hand, most other series LLC states followed Delaware law, historically in the forefront of innovative business law. Thus, this article focuses primarily on Delaware and Illinois law, the two extremes, while other series LLC states fall somewhere in between. Further, since the inception of its series LLC statute, Delaware legislators have updated its laws, incorporating some of Illinois’ ideas into the current statute.

A. Delaware

To maintain its national preeminence in the field of entity law, Delaware added a new section to its Limited Liability Company Act which authorizes an LLC to designate series of members, managers, or interests. With freedom of contract in mind, Delaware authorized the LLC to outline whether the series shall be treated as a separate LLC. As all other series LLC state statutes provide, each “series may have a separate business purpose or investment objective.” A Delaware series LLC is formed by filing a Certificate of Formation and drafting a limited liability company agreement which establishes one or more designated series of members, managers, limited liability company interests, or assets. By this agreement, each series may have separate rights, powers or duties with respect to specified assets. The Parent LLC must file a Certificate of Formation with the Secretary of State and pay a $90 fee. No further notice to creditors of the limited liability of each series is required. To retain limited liability in Delaware, a series LLC must keep separate records for each series and account for assets separately from each series. However, the assets associated with a series “may be held directly or indirectly, including in the name of such series, in the name of the limited liability company, through a nominee or otherwise.” Thus, the stat-

141. 805 ILL. COMP. STAT. ANN. 180/37-40.
143. “[U]pon compliance with the requirements of new § 18-215(b), 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 . . . .” Id.
144. E.g., DEL. CODE ANN. tit. 6, § 18-215(a).
145. Id.
146. Id.
147. See id. § 18-215(b).
148. Id.
149. Id.
150. Id.
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ute does not clearly state the actual purpose or operation of the series; a series must keep separate records, but the Parent may hold its assets. Since a series need not give notice to its creditors of its limited liability, the series concept immediately appears erratic and immaterial.

Unless otherwise provided in the limited liability company agreement, management is, by default, vested in the members in proportion to their current interest in the profits of the series. A series can be dissolved without dissolving any other series or the Parent LLC. However, all series are dissolved upon dissolution of the Parent LLC.

Unlike the Illinois statute, the Delaware legislation fails to outline the practical relationship between the series and its Parent. Until very recently, it also offered no guidance on the application of the statute to real-life issues, such whether a series may bring a lawsuit or even have standing to do so.

B. Illinois

Illinois amended its LLC legislation to allow series LLCs in August 2005. During the first five months after the series LLC legislation was enacted, eighty-two series LLCs were organized and eleven foreign series LLCs were admitted to transact business in Illinois. In addition, some number of established LLCs filed amendments to become authorized to establish series, though no count of such companies was kept by the Secretary of State’s Office. The series idea quickly caught on. By the end of July 2008, about three years after Illinois enacted the statute, Illinois had 2342 series LLCs, 109 foreign and 2166 domestic. In comparison, approximately 130,000 LLCs, foreign and domestic, have been registered

151. Id. § 18-215(g).
152. Id. § 18-215(k).
153. Id.
154. See infra, Part III.
156. Chart prepared by the Office of the Illinois Secretary of State, Series LLC’s by 5.5(S) or 45.5(S) (Aug. 26, 2008) (on file with the author). However, as of the publication of this Note, an unknown number of series LLCs have not established a single series, while several series LLCs have established over one hundred series. Telephone interview with Chuck Moles, Administrator of Liability Limitations Division, Department of Business Services, Illinois Secretary of State (Aug. 22, 2008).
157. Telephone interview with Chuck Moles, supra note 156.
158. Id. During 2005, 241 Certificates of Designation were filed; during 2006, 1,519 Certificates of Designation were filed; during 2007, over 2,291 Certificates of Designation were filed. E-mail from Chuck Moles, Administrator of Liability Limitations Division, Department of Business Services, Illinois Secretary of State to author (Nov. 29, 2007, 16:23 CST) (on file with author). However, one Series LLC may file potentially dozens of Certificates of Designation.
since Illinois authorized LLCs in its 1994 legislation.\textsuperscript{159} The overwhelming majority of LLCs registered in Illinois are small businesses.\textsuperscript{160}

Illinois law is similar to Delaware law, with several modifications that attempt to improve upon the model created by Delaware and to make Illinois "a good place to do business."\textsuperscript{161} In fact, Illinois attempts to go further to establish the separate existence of the series LLC: its legislation states that a series LLC may be treated as a separate entity able, in its own name, to contract, hold title to assets, grant security interests, and sue and be sued.\textsuperscript{162} Clearly, Illinois has outlined the relationship between the series and its Parent: separateness. At least, this is one interpretation. The language states that the series "shall be treated as a separate entity to the extent set forth in the articles of organization."\textsuperscript{163} Thus, the LLC may define the relationship, freeing or binding the series.

Like Delaware, Illinois allows each series to have a separate business purpose or investment objective.\textsuperscript{164} Unlike Delaware, Illinois requires that this be provided for in the series' operating agreement.\textsuperscript{165} Although the Illinois statute gives no reason for this additional requirement, the increased formalities prevalent throughout the statute are probably aimed to support the separate record-keeping requirements of each series. Such strict requirements should make it easier for a court to determine when it should pierce the series LLC's veil of limited liability.\textsuperscript{166}

Notably, Illinois allows the series LLC to consolidate its operations as a single taxpayer, work together cooperatively, or jointly contract.\textsuperscript{167} This suggests further ways that a series can elicit cost savings, since the multiple series as a group may enjoy the benefits of a larger company. Additionally, Illinois requires that the name of each series contain the entire name of the Parent LLC and be distinguishable from the names of each other series.\textsuperscript{168} Thus, a Parent called "ABC, LLC" would enact series named ABC, LLC (Series A), ABC, LLC (Series B), and so on. Furthermore, Illinois provides guidance on the issue of Illinois taxation, since a series LLC may choose

\textsuperscript{159} Telephone interview with Chuck Moles, Administrator of Liability Limitations Division, Department of Business Services, Illinois Secretary of State (Oct. 31, 2007).

\textsuperscript{160} Id.


\textsuperscript{162} 805 ILL. COMP. STAT. ANN. 180/37-40(b) (West Supp. 2008).

\textsuperscript{163} Id.

\textsuperscript{164} Id. § 37-40(a).

\textsuperscript{165} Id.

\textsuperscript{166} See infra, Part IV.1.

\textsuperscript{167} 805 ILL. COMP. STAT. ANN. 180/37-40(b).

\textsuperscript{168} Id. § 180/37-40(c).
whether to consolidate for Illinois tax purposes. If the LLC and each of its series have exactly the same ownership and management structure, it may unify the series LLC as a single taxpayer, saving time and money on tax preparation.

To form a series LLC in Illinois, the entity must first file articles of organization with the Secretary of State and pay a $750 fee. Then, the LLC must provide for the creation of series in its operating agreement. Finally, each individual series is formed through the filing of a certificate of designation and payment of a $50 filing fee. To dissolve a single series, the LLC must simply file a new certificate of designation identifying the particular series it wishes to dissolve. Each series will also be dissolved upon the dissolution of the Parent LLC.

At first glance, the Illinois law does seem to improve upon the Delaware series LLC statutes. By emphasizing the separate nature of each series, the Illinois statute removes some ambiguity from the judicial treatment of a series. However, the Illinois statute is currently the only state with this language; Delaware has not adopted it, although it has adopted other provisions of the Illinois law. Further, while Delaware laws required no additional documents for each new series formed, the Illinois Secretary of State’s office was concerned this freedom made it difficult for the public to figure out exactly who they are dealing with. Illinois attempted to solve this problem by mandating that each Parent file a certificate of designation to form a new series. While initially concerned over the administrative process for filing the certificates of designation, Chuck Moles, Administrator of the Secretary of State’s Liability Limitations Division, confirms that filing of the certificates has become routine and that 6417 have been filed through July 31, 2008.

While the Secretary of State’s Department of Business Services tendered the proposal, the main proponent and author of the legislation enact-
ing series LLCs in Illinois was the Secretary’s Business Acts Advisory Committee ("Advisory Committee").\footnote{180} The Advisory Committee studied the series LLC concept for two years prior to enacting the statute in Illinois.\footnote{181} At the time of the study, Illinois understood Delaware to be the only other state allowing for the organization of series LLCs.\footnote{182} Administrator Moles explained that, at the time of the proposal, the Secretary of State could not actually predict its financial impact, since the lack of series legislation might have caused an LLC with several series to register only one consolidated LLC, rather than multiple LLCs.\footnote{183} Furthermore, Moles was concerned that any mention of a positive or negative impact on Illinois revenue could possibly hurt the bill in the Illinois General Assembly.\footnote{184} Nonetheless, potential cost savings for filing many LLCs was the primary motive driving the attorneys and drafters of the Advisory Committee.\footnote{185}

Thus, Illinois has met its goals by improving series LLC legislation and allowing Illinois to compete in the business entity arena. Although the statute is far from perfect, Illinois’ weathered analysis and consideration has produced a new model of series LLC legislation which other states may enact.

C. Other States

As discussed above, several other states have adopted series LLC provisions, including Iowa,\footnote{186} Oklahoma,\footnote{187} Nevada,\footnote{188} Utah,\footnote{189} Tennessee,\footnote{190} and Puerto Rico.\footnote{191} Although these statutes generally follow Delaware law, a few present notable differences. The Tennessee law attempts to promote the separateness of an LLC by applying its laws to a series LLC “as if the series were a separate LLC.”\footnote{192} The Nevada series LLC provisions are woven throughout the LLC statute instead of concentrated in one or two sections.\footnote{193} Utah law protects creditors when it pro-

\footnote{180}{Id.}
\footnote{181}{Id.}
\footnote{182}{Id.}
\footnote{183}{Telephone interview with Chuck Moles, supra note 159.}
\footnote{184}{Id.}
\footnote{185}{Telephone interview with Terry Anderson, supra note 124.}
\footnote{186}{IOWA CODE ANN. § 490A.305 (West Supp. 2008) (effective April, 2006).}
\footnote{187}{OKLA. STAT. tit. 18, § 2054.4 (West Supp. 2008) (effective May, 2004).}
\footnote{188}{NEV. REV. STAT. ANN. §§ 86.296 (West Supp. 2008) (effective October, 2005).}
\footnote{189}{UTAH CODE ANN. § 48-2c-606 (West Supp. 2008) (effective March, 2006).}
\footnote{190}{TENN. CODE ANN. § 48-249-309 (West Supp. 2008) (effective 2005).}
\footnote{191}{P.R. LAWS ANN. tit. 14, § 3426p (2006) (effective August, 1995).}
\footnote{192}{TENN. CODE ANN. §§ 48-249-309(e)-(f).}
\footnote{193}{E.g., NEV. REV. STAT. ANN. §§ 86.291, 86.296.}
vides that the tax or other liability of a series may not be assigned to another series or the Parent LLC if the assignment impairs a creditor’s right to collect an amount due.\textsuperscript{194} Utah law also prohibits a series from transferring assets if the transfer impairs the ability of the transferring series to pay its debts, unless the transfer is made in exchange for fair value of the assets.\textsuperscript{195}

Thus, when forming a series LLC, an attorney must carefully review the statutes of the formation state and the foreign entity rules of any states in which the entity plans to transact business.

These differences in state statutes fail to address the question of how series LLCs will benefit each state. Although LLCs are designed for use by smaller entities, series LLCs were designed for complex financial transactions.\textsuperscript{196} States such as Iowa and Tennessee may not need such sophisticated legislation.\textsuperscript{197} Not surprisingly, the author’s search for the motivations and drive behind series LLC legislation in states other than Delaware and Illinois culminated in a dead end. Most state agencies fail to even realize that their state has series LLC legislation, and they generally do not track series LLCs in their states. The state agencies do not publish information on how to form a series LLC. Therefore, it seems that these states simply parroted Delaware’s supposedly renowned entity law. Since the states fail to track series LLCs, it is impossible to determine whether the states have existing domestic series LLCs. Thus, the question remains how series LLCs will serve residents of certain states.

III. THE HISTORY AND DEVELOPMENT OF SERIES LLCs

Series LLCs developed from the offshore mutual fund industry in places such as the territory of the Cayman Islands.\textsuperscript{198} Delaware first adopted the idea for series statutory trusts.\textsuperscript{199} Later, Delaware enacted legislation for series LLCs.\textsuperscript{200}

However, to analyze the series LLC concept, one must understand the development of unincorporated law, including partnerships and LLCs. Fur-
ther, 2007 saw the first published court decision interpreting Delaware series LLC law. Subsequently, Delaware amended its series LLC statute in an attempt to more clearly explain the rights of an individual series.

Finally, the drafting committee for the RULLCA recently considered and rejected series provisions to the uniform acts. Their reasons and ongoing considerations are highly relevant to determining the practical applications to the series LLC concept.

A. The Bridge from Partnerships to LLCs

“At America’s beginnings, only two business forms existed: the general partnership, which requires no formal sovereign recognition, and the corporation, which has always required formal recognition by a sovereign person or government.” Corporations in the U.S. have existed since the earliest colonial days, where the states began to declare their power over incorporation laws. By 1890, most states had enacted incorporation laws. Soon, corporation law improved as states competed to advance their place as the nation’s most business-friendly state. The Revenue Act of 1913 then created the first stepping stone for LLCs, placing an entity-level tax on all corporations and associations other than partnerships. Thus, businesses had to decide between limited liability, available with a corporation, and flow-through taxation, available with a partnership.

However, the oil and gas industry in the mid-1900s needed a business entity which combined these characteristics. To secure capital, independent oil producers sold partnership interests to investors. These investors sought the limited liability that a corporate investment would provide. The Partnership sought flow-through taxation in order to immediately pass business losses to the owners. Thus, in the 1970s, an oil producer called Hamilton Brothers Oil Company created an unincorporated entity similar to overseas LLCs which existed at the time. The Alaska legisla-

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201. See infra Part III.3.
204. Hamill, supra note 48, at 1484.
205. Id. at 1484–96.
206. Id. at 1496.
207. Id. at 1500.
208. Id. at 1502–03.
209. See id. at 1516.
210. Id.
211. Id. at 1463.
ture rejected the idea, although Wyoming enacted LLC legislation without much prodding in 1977.212

After a struggle with the IRS to secure partnership taxation for the LLC, states finally began to see the value in an unincorporated entity with limited liability but flow-through taxation. Thus, the LLC, taken from the concepts found abroad,213 was crafted and designed to fill a need. As of 2006, 45% of new businesses formed chose to be structured as LLCs.214 At the end of the first eleven years after Wyoming established the LLC, many of the haunting questions which prevented use of the LLC were answered, such as the tax uncertainties and state-law issues.215

B. The Path from Series Trusts to Series LLCs

Statutory business trusts are governed by statutes enacted in a majority of states as a response to the legal uncertainty of common law trusts.216 Generally, these trusts are valuable to industries such as mutual funds and asset securitization.217 A statutory trust must be created and operated similar to any other business entity, and similarly has rights, such as the right to sue or be sued.218

Delaware enacted legislation codifying series statutory business trusts in 1990.219 Differentiated from common law trusts, the current statute uses familiar wording to describe one or more series of a statutory trust, created by the governing instrument, which will limit liability between each series as to the debts, liabilities, obligations and expenses incurred.220 The series must maintain separate records, segregate assets, and provide notice of the limitation on liabilities in the certificate of trust.221 Thus, the movement from series statutory trusts to series LLCs was much more a hop than a jump.

212. Id. at 1465.
213. For example, the Panamanian limitada. See id. at 1463.
215. See, e.g., Rev. Rut. 88-76, 1988-2 C.B. 360 (deciding that an LLC under the Wyoming statutes may be classified as a partnership for federal tax purposes).
217. Id.
218. Id. at 1, 3.
219. DEL. CODE ANN. tit. 12, § 3804 (as amended 2006).
221. DEL. CODE ANN. tit. 12, § 3804(a).
In fact, series LLCs had existed for some time in the offshore mutual fund industry to segregate portfolio companies and protect cell companies. The term “cell companies” generally describes a legal entity which is divided into different “cells,” each holding different funds or assets. In an effort to update its legislation and to maintain its national prominence in business law, Delaware brought a new entity type into the already-diverse soup of corporate law: the series LLC.

Series LLCs have now existed for eleven years, yet many answers are nowhere to be found. The IRS or state revenue authorities have failed to provide sufficient tax guidance. Few states have adopted the series legislation. However, courts are beginning to decide cases involving series LLCs, finally providing some answers.

C. Case Law & Subsequent State Response

Until recently, attorneys and investors had no guidance from case law or governmental agencies on the operation of a series LLC. Since no guidance hinders attorneys from using series LLCs at all, the first case interpreting series LLC law should have laid the groundwork for further interpretation of the law. However, the first case on the topic, recently decided by the United States District Court for the District of Maine in GxG Management, LLC v. Young Brothers and Co., offered little insight to assist attorneys and judges. The relevant issue in this case, at least for purposes of this Note, involved whether the Parent LLC or its series may sue under a right arising from an asset. In GxG Mgmt., the plaintiff, GxG Management, LLC (“GxG”) operated a business in Maine that was organized in Delaware as a series LLC. GxG entered into a contract in January 2001 to purchase a boat from the defendant. Once the boat was delivered in September 2003, GxG formed two series under Delaware law, Series A and Series B. GxG gave Series B the boat and accompanying assets and liabilities, properly filing a new certificate of documentation. However, GxG continued to be the managing owner of Series B.

Between 2003 and 2005, GxG began having engine problems with the...
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boat. Thus, GxG brought suit alleging that the defendant breached the contract and certain warranties. After GxG commenced the suit, the parties disputed which company had privity of contract to bring the breach of warranty claim against the defendant, since GxG originally made the contract with the defendant, but Series B suffered economic damages by paying for the boat repair. In the Plaintiff’s Pre-Trial Brief, GxG argued that it had assigned Series B all rights, liabilities, and obligations under the boat contract. Since Series B was not a separate entity from GxG, it argued, GxG could also bring the suit either in the name of GxG or Series B.

The court noted that, at some point, GxG attempted to join Series B as a real party in interest, since the series had separate rights, powers or duties with respect to the boat under Delaware law. The plaintiff declined the option of merely substituting Series B for itself. On the issue of joining Series B as a party to the suit, the court first noted that the Delaware series LLC statute failed to indicate whether and how an LLC can pursue litigation on behalf of its series or on its own behalf. The court also found the Delaware statute unclear as to whether it authorized the series to be an entity distinct from the LLC.

GxG argued that Series B should be joined since the plaintiff assigned all of its rights under the boat contract to Series B when it granted the asset to the series. The court rejected this argument, stating that both the LLC and Series B had an interest in the boat, because the LLC managed all aspects of the boat and Series B was simply the legal owner of the boat. Since the case was about rights under a contract formed before Series B was created, the court held that the LLC had a sufficient interest in the boat to maintain the breach of contract action as the real party in interest.

Subsequent to the court’s decision, the defendant filed a motion to

230. Id. at *2.
231. Id. at *1.
234. Id. at 12.
236. Id.
237. Id.
238. Id.
239. Id.
240. Id. at *8.
241. Id. at *21.
The defendant argued that the court erred in allowing GxG to maintain the suit as the real party in interest. It stated, “[t]he problem is in melding the initial purchaser, who never suffered damages, with a subsequent transferee who did.” Since Series B suffered economic damages, and GxG relinquished ownership of the boat to Series B, Series B was the true owner and the only real party in interest. Series B, not GxG, maintained liability for all claims arising from the boat, and thus also maintained the rights associated with the boat, such as the right to sue.

In response, GxG argued that it followed the Delaware statute by keeping separate records and giving proper notice by filing a Certificate of Documentation. It further noted that the Delaware statute did not state whether the series could sue or be sued. GxG noted that Series B merely owned the boat but never used or operated it, calling Series B’s interest in the boat a “nominal interest.” This argument presumed that Delaware law intended to allow liability so limited that an owner may subdivide his interests small enough to prevent any liability at all.

GxG next described Series A, which “simply owns the office and its equipment, which is used to manage the businesses of GxG and the other Series.” Thus, the groundwork was laid for an unfortunate interpretation of Delaware law: separating assets to protect them from liability, while blurring the boundaries of the series to allow management of the assets from another series and to allow the Parent LLC to represent all series in lawsuits. The interaction between Series A, Series B, and the Parent LLC suggested that their owners envisioned a consolidated entity with infinite protection for each asset. As the defendant later stated, “What is abundantly clear is that GxG went to great lengths to insure it could not be held responsible for any obligations arising from the vessel.” The defendant then noted some very important defects in the Delaware statutes: the seem-

242. Young Bros. Motion to Amend Judgment, supra note 232, at 1.
243. Id.
244. Id. at 3.
245. Id. at 2–3.
246. Id. at 4.
248. Id. at 3.
249. Id. at 5. The boat was operated by an employee of “another entity” for the personal use of the sole shareholder of GxG and Series B. Id.
250. Id. at 6.
ing lack of singularity of rights and liabilities arising from ownership of an asset.\textsuperscript{252}

Ruling on the motion, the court concluded that Delaware law did not create a separate entity in the series, but that Series B was rather a “series of interest” of GxG.\textsuperscript{253} Since Series B’s interest in the boat was nominal, GxG retained all contract and tort rights in the boat and the contract with the defendant.\textsuperscript{254} Thus, GxG was the real party in interest.\textsuperscript{255}

This case displays faults in the Delaware legislation and the overall series concept. During the case, the Delaware statute failed to provide any guidance whatsoever to determine whether series LLCs may sue, be sued, or even have standing to sue. Perhaps more significantly, the legislation may allow GxG and similar businesses to manipulate the series structure so as to separate pieces of a business in such a way that creditors have absolutely no relief and no assets from which to recover. This was the basis for the defendant’s argument in \textit{GxG Mgmt.}, where the boat was owned by Series B but managed by Series A, which had limited assets.\textsuperscript{256} Had GxG been the defendant in a claim against the boat, this court may have protected Series B’s limited liability in the boat since it determined that GxG was the real party in interest. The lack of a notice requirement\textsuperscript{257} further frustrates creditors who have no way to discover how limited the recoverable assets may be.

Subsequent to the outcome of this case, Delaware amended its statutes to provide that a series “shall have the power and capacity to, in its own name, contract, hold title to assets ... and sue and be sued.”\textsuperscript{258} This language was adopted from the Illinois statute\textsuperscript{259} “to confirm the broad purposes and powers permitted of a series established under subsection 18-215(b) of the [LLC] Act.”\textsuperscript{260} However, it is unclear whether this change was intended to merely lay out a series’ basic rights or to hint that a series is a separate legal entity. In any case, the Delaware statutory amendments have superseded any guidance inherent in \textit{GxG Mgmt.}
D. Regression: The Drafting Committee Considered and Rejected Series LLC Provisions for the Revised ULLCA

Recognizing the developments in state law, the Drafting Committee for the RULLCA originally drafted a provision that would authorize series LLCs. Many of its subparts utilized the innovative provisions found in the Illinois statute, such as requiring a certificate of designation and specific "separate entity" language. The Drafting Committee considered the series LLC provisions at a February 2006 meeting, but did not adopt it.

In its final draft of RULLCA, published in July 2006, the Drafting Committee noted the remaining unanswered questions that presented risks and complexities it refused to endorse. The risks the committee members discussed included: conceptual, bankruptcy, efficacy of the internal shields in the courts of other states, tax treatment, and securities law.

In March 2006, the Drafting Committee published a Progress Report discussing the many changes throughout RULLCA. Overall, it worried about "corpusfuscation": infusing unwarranted aspects of corporate law into the law of unincorporated business organizations. This was a concern because most LLCs are closely held businesses and states usually seek to control these businesses to prevent abuse. Yet, the Drafting Committee cautioned that Delaware LLC law "exalts freedom of contract to the point of authorizing the total elimination of fiduciary duty." Most LLCs are formed by people unsophisticated in law and not represented by or unable to pay for counsel, whereas Delaware law is designed to handle the most sophisticated and highly lawyered of transactions. Thus, the Drafting Committee called the creation of series LLC provisions in Iowa "bizarre."

Justifying its rejection of series LLC provisions, the Drafting Committee stated that the nature and problems with series LLCs are unique. The
committee questioned whether some assets of an LLC should be immune from some of the creditors of the LLC. Concluding, the reporter stated that:

What’s good for Delaware and highly sophisticated deals is not necessarily good for the LLC law of other states. A philosophy that works wonders for ‘high end’ transactions may be bad medicine for the thousands of more prosaic but nonetheless important closely held businesses that choose to house themselves within LLCs. For such businesses, a modern, balanced, common and uniform LLC Act is necessary.

Daniel Kleinberger and Carter Bishop, reporters for RULLCA, revealed why the Drafting Committee rejected these provisions in a recent article in Business Lawyer. They published an earlier posting to the listserve focusing on LLCs by a previous ABA advisor to the RULLCA Drafting Committee suggesting that there is no real need for series LLCs outside of Delaware. The advisor further said that it is not enough that he can avoid forming multiple single-member LLCs to segregate liabilities and assets; the cost is de minimis and the requirements and effects of forming multiple LLCs are more certain. He concluded by saying that he had not seen a compelling case for series LLCs outside of the mutual fund and structured finance area.

E. Updates to RULLCA & Other Laws

National Conference of Commissioners on Uniform State Laws (NCCUSL) has recently decided to include series provisions, modeled upon the Delaware statute, to the Uniform Statutory Trust Act. This will be the first uniform act to include series provisions. However, according to several NCCUSL members, series provisions are no longer being considered for any other uniform acts for several reasons. The series LLC concept was fraught with many problems, while the formation of a

273. Id. at 9.
274. Id.
275. Kleinberger & Bishop, supra note 22, at 541–43.
276. Id. at 542 (quoting Thomas E. Rutledge). The author’s exact words were that there was no need for Series LLCs “in the practical world,” suggesting that Delaware is itself removed from the mainstream. Id.
277. Id. at 543.
278. Id.
280. DEL. CODE ANN. tit. 12, § 3804 (as amended 2006).
282. Telephone interview with Tom Rutledge, supra note 279.
regular LLC was very simple.\textsuperscript{283} Thus, any perceived advantages were outweighed by the complexities and attendant costs.\textsuperscript{284} The committee was divided on whether it should attempt to improve series LLC law through a uniform act or whether it should wait for development by state legislation and common law.\textsuperscript{285} If the committee took the paternalistic approach, it might fail to assess the true needs of a business.\textsuperscript{286} Thus, any forward movement on series LLC legislation must come from the states themselves.

It is clear that the current state of series LLC legislation and use displays ongoing uncertainty. The continued lack of solid case law leads some attorneys to refuse to utilize series LLCs. Clients refuse to use series LLCs due to their complex nature, and the drafters of the RULLCA refused to include series provisions due to the uncertainty surrounding such a new concept. Thus, series LLCs are currently on very shaky ground.

\textbf{IV. UNDER CURRENT LAW, MULTIPLE LLCs MAY BE SUPERIOR TO SERIES LLCs.}

One word will describe the current state of series LLC law: Uncertainty. It is difficult to determine whether the flaw exists in the application of the series concept or in the underlying concept itself. The internal shield in a series LLC may not protect assets in a way that meets or exceeds that available with multiple LLCs. In fact, the LLC or any of its series may be pierced. This is reflected in legal practice, as some attorneys refuse to suggest series LLCs to clients, and some clients deem series LLCs too complex and risky.

\textbf{A. Asset Protection & Risk of Piercing}

The term “piercing the veil” refers to the veil of limited liability between the assets of the LLC, limited partnership, or corporation and its members, partners, or shareholders, and seeks to set aside the rule that the owners of a business are not liable for the debts and obligations of that business.\textsuperscript{287} A common law doctrine, piercing has developed in the corporate context for some time, allowing a plaintiff creditor to break through the

\textsuperscript{283} Telephone interview with David Walker, Chair, Revised Uniform Limited Liability Company Act of the National Conference of Commissioners on Uniform State Laws (Jan. 15, 2008).
\textsuperscript{284} Id.
\textsuperscript{285} Telephone interview with Tom Geu, ABA Section of Real Property, Probate and Trust Advisor, Revised Uniform Limited Liability Company Act of the National Conference of Commissioners on Uniform State Laws (Jan. 15, 2008).
\textsuperscript{286} Id.
\textsuperscript{287} Rapp, supra note 214, at 1065.
veil of limited liability and reach the assets of the business owner to satisfy the entity’s debts or obligations.288 The courts used this tool to prevent substantial injustice in cases where the owners abuse the limited liability of the business by acquiring debt which the entity cannot satisfy.289 A series LLC complicates this problem exponentially. Assuming each series contains one asset, that asset may not be able to satisfy a judgment against the series. While contracting parties previously had the opportunity to investigate assets, the limited notice requirement in most series LLC jurisdictions may place a contractual claim on the same level as a tort claim. Thus, a plaintiff creditor will seek to not only pierce through to the owner’s assets, but also collapse the series to reach the assets of the Parent LLC and other series.

Although some scholars argue against the use of veil piercing in unincorporated entity law,290 it is clear that courts unanimously seem to enforce veil piercing in the LLC context.291 Although different in each state, the corporate context provides several factors that most courts will generally look at to determine whether to pierce the veil or maintain shareholder limited liability. First, the court may pierce in the presence of fraud or illegality.292 Second, the court will look to various factors, including inadequate capitalization, failure to adhere to corporate formalities, and whether the corporation is the alter ego of the owners.293

In the context of series LLCs, the uncertainties of piercing in LLCs are expounded and magnified. It is as if the series statutes have designed an entity which is so likely to be pierced that an individual series does not even acquire rights as a separate entity. Further, creditors have virtually no notice of the limited liability of each series, since most state statutes require only that the LLC note it is a series on its filed articles of organization. This limited notice will be nearly impossible to find when a series has a different name than its Parent LLC. The one saving grace is the requirement that each series maintain separate records. However, in application, the series LLC concept seems very dangerous.

Further, it is unclear whether a court will apply the piercing standard from the corporate law analysis, a different analysis, or no analysis. Although widely accepted, piercing is not yet a clear-cut standard for LLCs in

288. Id.
291. Rapp, supra note 214, at 1065.
292. Fox, supra note 289, at 1155.
293. Id.
many states. However, assuming the corporate standard is applied, a court might collapse the assets of a series LLCs to satisfy a judgment based on all three factors.

1. Inadequate Capitalization

Courts are more likely to pierce the veil of limited liability where an owner contributed insufficient capital to meet the debts and obligations of the entity.\textsuperscript{294} Since the series concept is based upon the idea of segregating assets to protect them from debts and obligations, undercapitalization seems likely, if not anticipated. Business owners may manipulate the series LLC structure by heavily segregating assets. Entities which place an asset in one series and the operating company in another may find the series collapsed by a court, since the operating company may have little capital investment to meet any claims that may arise. Even LLCs which hold an asset in each series may be considered undercapitalized by a court, if the asset is not valued high enough to cover the liabilities associated with it. However, the undercapitalization factor alone is usually not enough for a court to pierce an entity’s veil.\textsuperscript{295}

2. Observing Corporate Formalities

The second factor considered by courts in the corporate context involves failing to follow corporate formalities such as electing directors or officers, issuing stock certificates, or maintaining records.\textsuperscript{296} Translated to series LLCs, members or managers may fail to file required documents, maintain separate records, or maintain separate bank accounts. However, this factor is generally not determinative, and some states have further relaxed the formalities required in an LLC.\textsuperscript{297} It may be argued that owners of series LLCs may be even more likely to treat the series informally if they view the entity as a unified business. The Illinois statute even allows series to share costs, such as an insurance contract, and cooperate together.\textsuperscript{298} Further, the relationship between the series and its Parent LLC is unclear. The limited liability concept is based on freedom to contract.\textsuperscript{299}

\textsuperscript{294} \textit{Id.} at 1157.
\textsuperscript{295} \textit{Id.} at 1162.
\textsuperscript{296} \textit{Id.}
\textsuperscript{297} \textit{Id}. Illinois law states that failing to observe corporate formalities is not grounds for imposing personal liability on the manager or members. 805 ILL. COMP. STAT. ANN. 180/10-10(c) (West Supp. 2008).
\textsuperscript{298} \textit{Id.} § 180/37-40(b).
\textsuperscript{299} Kleinberger, \textit{supra} note 196, at 8.
This is evident in the series statutory language, which tends to define the relationship as whatever is stated in the operating agreement. Thus, series LLCs will have varying degrees of separateness.

In that light, the stage is set for confusion about the inter-relations of each series and the Parent LLC. Then, the lax nature of the relationship may lead to lax concerns for keeping separate records for each series. Coupled with the fact that most laypersons, attorneys, and judges fail to understand the complexities of a series LLC, courts may be more likely to pierce.

3. Alter Ego

The third factor that courts will consider when deciding whether to pierce the veil is whether the entity is so dominated by the owners that it no longer has a personality separate from its owners. Generally, this factor is met if the individual is using the entity to conduct personal business. In a series LLC context, this translates to actions such as if the Parent LLC owns and controls the series, or if the series are sharing costs, contracting jointly, working cooperatively, or electing to be treated as a single tax entity. However, these are all allowed by the Illinois statute, suggesting that the series concept frustrates the alter ego doctrine.

Thus, the series concept is centered on ideas fundamental to the veil-piercing analysis. It may take several years, but it seems very likely that a creditor who did not know of the limited liability of the series would attempt to pierce the LLC veil or collapse the series to attain the assets of the members or of the other series. However, without any case law, whether the series concept will truly protect assets has yet to be determined.

B. Current Use of Series LLCs: Notes from the Field

The ability to subdivide assets and their corresponding liabilities brings to mind copious opportunities to use series LLCs in practice. For example, a Parent LLC acting on behalf of its series may successfully obtain licenses in multiple states where the business operates in lieu of having each separate series become licensed and pay regulatory fees. Steve Frost, a Chicago attorney, stated that clients would likely use series LLCs

300. Fox, supra note 289, at 1163–64.
302. 805 ILL. COMP. STAT. ANN. 180/37-40(b).
for investment funds. Similarly, a client might use a series LLC if the client has multiple properties and does not want to create multiple LLCs. However, he noted that a wealthy family using a series LLC to segregate assets may prefer to form multiple LLCs.

Lin Hanson, attorney and author of numerous articles regarding series LLCs, stated that the series concept may benefit taxicab companies or franchise operations with many franchises. However, he would never form a series LLC in Illinois for real estate, since it would be cheaper to form multiple LLCs in a foreign state with less expensive fees and then qualify in Illinois as a holding company, exempt from registration. Terry Anderson has suggested series LLCs to his clients, who find the concept too complicated and hard to understand.

Carter Bishop, Professor at Suffolk University College of Law, is a proponent of series LLCs and believes that every state will adopt series provisions within the next five to ten years. He stated that practicing lawyers prefer series provisions since such legislation presents a much simpler method of forming entities. A business owner no longer must file ten different forms for ten different LLCs; most states require a single form to create the LLC and all its series.

Anthony Calandriello, a partner at Dale & Gensburg, P.C., has actually formed series LLCs on behalf of clients holding multiple properties. He stated that series LLCs provide an additional ease of administration, since the series do not require separate operating agreements when real properties are owned by the same parties in the same proportion. Further, his clients retain more privacy than with other entities, since Illinois designates series’ names and requires only the names of managers listed on

304. Interview with Steve Frost, Attorney, Chapman and Cutler LLP, Member, National Conference of Commissioners on Uniform State Laws, Drafting Committee to revise ULLCA, at Berghoff’s in Chicago, Ill. (Nov. 20, 2007).
305. Id.
306. Id.
307. Telephone interview with Linscott “Lin” Hanson, Member, DiMonte & Lizak, LLC, Member, Institute on Illinois Business Laws of Chicago-Kent College of Law, the successor to the Secretary of State’s Business Laws Advisory Committee (Nov. 1, 2007).
308. Id. (discussing the activities that do not constitute transacting business as listed in 805 ILL. COMP. STAT. ANN. 5/13.75 (2003)).
309. Telephone interview with Terry Anderson, supra note 124.
310. Telephone interview with Carter Bishop, Professor, Suffolk University College of Law, Co-Reporter, Drafting Committee to revise ULLCA, National Conference of Commissioners on Uniform State Laws (Nov. 6, 2007).
311. Id.
313. Id.
the Certificate of Formation, hiding the true owners, assets, or projects. Finally, he refused to jeopardize the opportunities available with a series LLC for matters such as lack of tax guidance.

In summary, it is clear that people are using series LLCs. Searches on Secretary of State websites for series states show that they are being used. Although many of the attorneys interviewed for this Note have never formed a series themselves, they claim to know another attorney who has indeed formed a series LLC.

CONCLUSION

Since only seven states presently authorize series LLCs, using this entity type may be risky. First, a series LLC owner must understand that the outcome and issues are uncertain in absolutely any litigation in which a series is a party, since there is minimal case law and analysis on which attorneys can rely. This is clearly evident from the GxG Management case discussed in Part III. Similarly, a bankruptcy court is not bound by the Delaware series LLC statute and may find it within its authority to order substantive consolidation of all series LLCs. Second, although some states have adopted legislation protecting aspects of a series, like separateness or limited liability, registering a series to do business in another state may be complicated and uncertain. For example, a state which does not recognize a series may require the entire LLC to qualify to transact business in that state, perhaps removing the shields of limited liability between each series. If the business owner instead used multiple LLCs, each LLC would be separately registered and separately recognized for liability purposes. However, each state may enact vastly different legislation, further complicating the transaction for a series LLC.

The fact is that series LLCs create a complex mess that not even attorneys or government agencies understand. A quick survey of Tennessee legislative history and current instructions shows that the series provisions were passed without comment. Summaries of the bills fail to even recognize the weighty provisions just made. The Tennessee Secretary of State revised its Filing Guide but failed to explain how to form a series LLC.

314. Id.
315. Id.
317. Stein, supra note 64, at 20.
It seems that several states simply woke up one morning and decided to follow blindly in the footsteps of Delaware, without understanding what it was they were doing.

The series LLC concept appears to offer opportunities and flexibility that advance business organization law far beyond that previously imagined. States without series LLC legislation plead for it. Yet, the plethora of unanswered questions surrounding series LLCs, the potential pitfalls, and the possibility to lose everything puts attorneys in an impossible predicament. Should they mention or even recommend the series concept to clients? No. Attorneys should not use series LLCs unless and until the drafters of such legislation fix the problems discussed throughout this Note.

The series LLC concept is an idealistic one at best, with a potential for greatness. However, at this time, the concept is too ambiguous and incoherent. Even seemingly harmless business entities risk much by using a series LLC rather than multiple LLCs.

Therefore, attorneys and business owners should demand better drafting from their state legislatures. To be effective, a series LLC statute should lay out all the rights of the several series and the rights reserved for the Parent LLC. For example, each state statute should specify whether a series may sue or be sued or may hold title to property in its own name. The statute should provide a default rule for the amount of separateness between the LLC and each series, providing guidance not only for the business owner, but also for civil and bankruptcy courts. Although the series LLC may, by statute, define a different magnitude of separateness, the distance between each series and its LLC may determine the tax implications and piercing ability for each series. Additionally, the statute should define the role of the Parent LLC in regards to its several series, as discussed above, to assist attorneys in forming the entity. The statute should state whether a series LLC may, through its articles of organization, chart a relationship similar to either the Parent-Subsidiary or the Brother-Sister diagrams in Part I. A series LLC statute should also provide guidance on whether the series LLC may file a unified income tax return or whether each series may, by choice, file its own tax return at both the state and federal levels.

Finally, a series LLC statute should provide notice of the limited liability of each series to creditors of the LLC. The statute may do this through filing requirements, such as the Certificate of Designation that each series in Illinois must file. At a minimum, this process allows the Secretary
of State to keep track of the many series in its state. Similarly, a statute may imply name requirements on each series, similar to the Illinois requirements. If each series is required to incorporate the Parent LLC’s name into its own name, creditors will likely be informed that they are dealing with a series. Further, a series LLC statute may require additional disclosures to creditors of a particular series, the violation of which will result in the ability of the creditor to pierce the veil of limited liability between the many series and the LLC.

Series LLCs are not likely to disappear in the future. The theories behind the series LLC grasp at efficiencies currently unknown, but the application of the idea shows that state statutes are flawed. Thus, states must improve their legislation to provide sophisticated guidance to attorneys, judges, and business owners.