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Third Time's a Charm: How the Uniform Law Commission Can Fit Series LLCs into the Uniform Limited Liability Company Act

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THIRD TIME'S A CHARM: HOW THE UNIFORM LAW COMMISSION CAN FIT SERIES LLCS INTO THE UNIFORM LIMITED LIABILITY COMPANY ACT

The series LLC may turn out to be a heaven-sent planning tool, or an attractive nuisance that will lure clients and advisors to economic disaster.[1]

INTRODUCTION

Limited liability companies (LLCs) have been at the forefront of legal debate in the business world ever since Wyoming enacted the first LLC statute in 1977.[2] As with any area containing legal uncertainty, states were slow to enact their own LLC statutes.[3] One of the main areas of concern was the tax classification of an LLC because it was unclear whether an LLC would be taxed as a partnership.[4] In 1988, the Internal Revenue Service (the IRS) determined that LLCs organized under the Wyoming LLC Act would be classified as partnerships for federal tax purposes.[5] Within three years of the IRS ruling, Kansas, Colorado, Virginia, Texas, Nevada, and Utah enacted LLC statutes that closely followed Wyoming's lead.[6]

Uncertainty still existed for LLCs,[7] but the attractive combination of partnership taxation and corporate limited liability enticed the revolution of unincorporated business models in the United States.[8] The adoption of the

1. Terence Floyd Cuff, *Delaware Series LLCs and Transactional Practice—Part 3*, 39 REAL EST. TAX'N 35, 35 (2011).

2. Act of March 4, 1977, ch. 158, 1977 Wyo. Sess. Laws 537, 537–549; Carter G. Bishop & Daniel S. Kleinberger, ¶ *1.01 Nature of Limited Liability Companies*, LIMITED LIABILITY COMPANIES: TAX AND BUSINESS LAW, 2012, at ¶ 1.01[3][a], *available at* Limited Liab. Co. ¶ 1.01.

3. Florida was the next state to enact an LLC statute, five years after Wyoming had done so. FLA. STAT. ANN. §§ 608.401–608.705 (West 1982); Thomas Earl Geu, *Understanding the Limited Liability Company: A Basic Comparative Primer (Part One)*, 37 S.D. L. REV. 44, 45 (1992).

4. Geu, *supra* note 3, at 45.

5. Rev. Rul. 88-76, 1988-2 C.B. 360.

6. Geu, *supra* note 3, at 45.

7. With the tax issue out of the way, the main uncertainty concerned the treatment of limited liability companies by states that did not have LLC statues. *Id.*

8. Eventually, an unincorporated business entity could elect to be taxed as either a partnership or corporation. Classification of Certain Business Entities, 26 C.F.R. § 301.7701-3 (1997). This occurred after January 1, 1997, when the IRS opened the floodgates for nationwide

"check-the-box" option, rather than the Kintner Regulations,[9] led to every state and the District of Columbia adopting LLC statutes.[10] The number of LLCs spiked from 221,000 to 1,630,161 between 1996 and 2006.[11]

After almost thirty-six years, numerous IRS rulings, statute enactments in every state, countless scholarly articles, and subcommittee reports from the American Bar Association (the ABA) and the Uniform Law Commission[12] (the ULC), it would seem as though LLCs have become a routine business entity.[13] But what would the fun in that be? As if limited liability, partnership taxation, and relaxed formalities were not enough, series LLCs are quickly becoming the new entity of choice.[14]

The main focus of this Comment centers on the need for a "uniform series LLC act" and exactly what such an act should contain. Part I describes the characteristics and history of series LLCs, along with their potential benefits and uses. Part II analyzes the desirability of a uniform series provision by comparing the evolution of series LLCs with original LLCs, as well as examining how uncertainties have affected state legislators, judges, and practitioners. Part III discusses the separate entity debate surrounding series LLCs, and how it greatly affects the limited liability shield of each series. Part

LLC statues with its "check-the-box" regulations. Bishop & Kleinberger, *supra* note 2, at ¶ 1.01[3][a]. *See* Geu, *supra* note 3, at 45.

9. The Regulations mandated that an unincorporated entity would be classified as a corporation if it met three of the four corporate characteristics (limited liability, continuity of life, free transferability of ownership interests, and centralized management). Bishop & Kleinberger, *supra* note 2, at ¶ 1.01[3][a].

10. REVISED UNIFORM LIMITED LIABILITY COMPANY ACT Prefatory Note (amended 2006). The Uniform Law Commission went on to state that "LLC filings are significant in every U.S. jurisdiction, and in many states new LLC filings approach or even outnumber new corporate filings on an annual basis." *Id.*

11. Bruce H. Kobayashi & Larry E. Ribstein, *The Non-Uniformity of Uniform Laws*, 35 J. CORP. L. 327, 331 n.19 (2009).

12. The ULC is also known as the National Conference of Commissioners on Uniform State Laws. *About the ULC*, UNIFORM LAW COMMISSION, http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC (last visited July 15, 2013).

13. The relevant committee for the ABA is the LLCs, Partnerships, and Unincorporated Entities Committee. *LLCs, Partnership and Unincorporated Entities*, AMERICAN BAR ASSOCIATION, http://apps.americanbar.org/dch/committee.cfm?com=CL590000 (last visited July 15, 2013). Additionally, the pertinent ULC committee is the Drafting Committee on Revisions to Uniform Limited Liability Company Act. *Committees: Series of Unincorporated Business Entities*, UNIFORM LAW COMMISSION, http://www.uniformlaws.org/Committee.aspx?title=Series%20of%20Unincorporated%20Business%20Entities (last visited July 15, 2013). *See also ULC Drafting Process*, UNIFIFORM LAW COMMISSION, http://www.uniformlaws.org/Narrative.aspx?title=ULC%20Drafting%20Process (last visited July 15, 2013).

14. Currently, there are approximately 15,000 series LLCs in Delaware, Illinois, Nevada, and Utah. Steven G. Frost, *Report of the Study Committee on Series of Unincorporated Business Entities*, XXIX A.B.A. THE SEC. OF BUS. L. THE LLC & P'SHIP REP., Oct. 2012, at 4, 6.

IV summarizes how administrative and regulatory agencies have defined the separate entity status of series LLCs. Part V reviews attempts at uniform series provisions, along with future plans to create more certainty within a new LLC act. This author argues that it is necessary to classify a series LLC as a separate legal entity, which the ABA's Revised Prototype Limited Liability Company Act fails to do because there are potential liability ramifications for classifying a series and its parent as one entity.

I. SERIES LLCS IN A NUTSHELL

The idea of a series began in the investment fund industry.[15] An umbrella corporation or trust would create separate series, each containing numerous portfolios with distinct objectives and goals.[16] This allowed shareholders to save expenses because there was only one registration fee and one board of directors for the umbrella organization.[17]

Perhaps unsurprisingly, in 1996, Delaware became the first state to enact series LLC legislation.[18] Currently, there are ten more jurisdictions that have added series LLC statutes: the District of Columbia, Illinois, Iowa, Kansas, Nevada, Oklahoma, Puerto Rico, Tennessee, Texas, and Utah.[19] Additionally, states such as Minnesota, North Dakota, and Wisconsin mention series in their LLC statutes, but do not grant the luxury of a limited liability shield.[20]

While there are differences among the statutes,[21] the main theme of series LLCs is the separation of assets and liabilities into individual series.[22]

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15. Amanda J. Bahena, *Series LLCs: The Asset Protection Dream Machines?*, 35 J. CORP. L. 799, 803 (2010).

16. Allan G. Donn et al., *Series LLCs*, AM. L. INST.-AM. B. ASS'N CONTINUING LEGAL EDUC., July 26, 2012, at *128, *available at* VCU0728 A.L.I.-ABA 123.

17. *Id.*

18. DEL. CODE ANN. tit. 6, § 18-215 (Supp. 2012); Donn et al., *supra* note 16, at *128.

19. D.C. CODE § 29-802.06 (LexisNexis 2001 & Supp. 2012); 805 ILL. COMP. STAT. ANN. 180/37-40 (LexisNexis 2005 & Supp. 2013); IOWA CODE § 489.1201 (2013); KAN. STAT. ANN. § 17-76,143 (West 2012); NEV. REV. STAT. § 86.296 (2011); OKLA. STAT. ANN. tit. 18, § 2054.4 (West 2011); P.R. LAWS ANN. tit. 14, § 3967 (2011); TENN. CODE ANN. § 48-249-309 (2012); TEX. BUS. ORGS. CODE ANN. § 101.601 (West 2012); UTAH CODE ANN. § 48-3-1202 (LexisNexis Supp. 2012).

20. MINN. STAT. § 322B.03(44) (2012); N.D. CENT. CODE § 10-32-02(57) (2012); WIS. STAT. § 183.0504 (2011–12). These statutes, unlike the other eleven jurisdictions that have series legislation, do not provide limited liability to each individual series. Thus, these statutes lack one of the most beneficial aspects of series LLCs. *See* Nicholas Karambelas, *§ 7.4 Series of Membership Interests*, LIMITED LIABILITY COMPANIES: LAW, PRACTICE AND FORMS, Nov. 2012, *available at* 1 Ltd. Liab. Co.: L., Prac. and Forms § 7:4.

21. *See* Donn et al., *supra* note 16, at *162–64 (stating "yes" or "no" as to common provisions in series LLC statutes).

22. 2 LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES § 4:17 (2d ed. 2012).

Therefore, the liabilities of a particular series are only enforceable against the assets of that series, and not on other series or the parent LLC.[23] Additionally, liabilities of the parent LLC are not enforceable against the assets of a particular series, unless parties specifically contract for it.[24] One wrinkle in the Delaware statute is the absence of a provision regarding members' and managers' exposure to liability,[25] but the majority of statutes either contain an express release of liability[26] or a catch-all provision that applies LLC law.[27] Finally, there are three procedural requirements for series to maintain limited liability, which include providing for the establishment of one or more series and its liability limitation in the operating agreement, setting forth notice of the liability limitation in the certificate of formation, and maintaining separate accounting records for each series.[28]

The ability to separate assets and liabilities within a single entity contains numerous benefits.[29] Probably the most intuitive benefit is the ability to diversify, as seen in the investment fund context.[30] Rather than invest in a single LLC, which may contain both conservative and risky assets, the series LLC structure allows investors to choose which assets to place in their portfolio.[31] In the real estate context, for example, a developer could separate low-risk from high-risk properties.[32]

Simplicity and administrative efficiency are other advantages of series LLCs. The normal protocol for separating assets in states that do not have

23. DEL. CODE ANN. tit. 6, § 18-215(b).

24. *Id.*

25. *Id.* tit. 6, § 18-215. *But see* tit. 6, § 18-215(d) (stating that a member or manager can agree to be personally liable for the debts of the series). Therefore, the Delaware statute likely implies a limited liability standard for members and managers. Donn et al., *supra* note 16, at *132.

26. *See* TEX. BUS. ORGS. CODE ANN. § 101.606(a) (West 2012).

27. *See* 805 ILL. COMP. STAT. ANN. 180/37-40(j) (LexisNexis 2005 & Supp. 2013); *see also* KAN. STAT. ANN. § 17-76,143(j) (West 2012) ("Except to the extent modified in this section, the provisions of this act which are generally applicable to limited liability companies, their managers, members and transferees shall be applicable to each particular series with respect to the operation of such series.").

28. DEL. CODE ANN. tit. 6, § 18-215(b).

29. *See* Karambelas, *supra* note 20 ("The series arrangement is most advantageous where an LLC has several valuable assets, each of which has associated with it different magnitudes of actual or potential liabilities.").

30. *See supra* notes 15–17 and accompanying text.

31. *See* Christopher S. McLoon & Margaret C. Callaghan, *The Dangerous Charm of the Series LLC*, 24 ME. B.J. 226, 227 (2009).

32. For an extensive list of risk diversification opportunities for series LLCs, *see* Bernie R. Kray, *Respecting the Concept and Limited Liability of a Series LLC in Texas*, 42 ST. MARY'S L.J. 501, 523 (2011).

series legislation is to create multiple single member LLCs.[33] However, there are a few issues with this concept. First, separate LLCs require separate filing fees for each LLC.[34] This creates larger costs for both the filing and attorney's fees to create the necessary documents. Series, on the other hand, only require filing for the parent LLC, and the operating agreement merely needs to establish notice of its ability to create series.[35] Second, the existence of multiple LLCs "present[s] a potentially open-ended risk that a court will consider related entities to be part of a single firm."[36] Piercing the LLC veil has been frequently litigated,[37] and the standards for determining when to do so are not clear-cut.[38] A well-drafted series LLC statute could clear up much of this judicial confusion, and allow practitioners to effectively shield themselves from liability.[39]

II. THE DESIRABILITY OF UNIFORMITY

Similar to the initial progress of LLCs, series LLCs have been slow to gain traction.[40] The largest contributor to their lack of growth has been the glut of uncertainties regarding the treatment of series LLCs.[41] These uncertainties include tax,[42] bankruptcy,[43] foreign recognition of limited liability and veil-piercing,[44] securities law,[45] entity classification,[46] non-uniform series statutes,[47]

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33. *See* REVISED UNIFORM LIMITED LIABILITY COMPANY ACT Prefatory Note (amended 2006) (indicating that multiple single member LLCs are a better alternative to series LLCs).

34. *See, e.g.*, 805 ILL. COMP. STAT. ANN. 180/50-10(b)(1) (LexisNexis 2005 & Supp. 2013); DEL. CODE. ANN. tit. 6, § 18-1105(a)(3) (Supp. 2012) (requiring a filing fee for each LLC).

35. DEL. CODE ANN. tit. 6, § 18-215 (Supp. 2012). *But see* 805 ILL. COMP. STAT. ANN. 180/37-40(d) (LexisNexis 2005 & Supp. 2013). Illinois is an exception because it requires a separate certificate of designation and fee for each series. *See also* Michael E. Fink, *The Series LLC: Suggestions for Surviving Some Series Uncertainties*, 72 U. PITT. L. REV. 597, 598 (2011).

36. 2 RIBSTEIN & KEATINGE, *supra* note 22, at §§ 4:17–4:18.

37. *See* 1 LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES § 12:3 nn.5–6 (2d ed. 2012) (listing numerous LLC veil piercing cases).

38. *Id.* at § 12:3.

39. *See infra* Part III.

40. *See supra* notes 2–4 and accompanying text (describing the uncertainties during the infancy of LLCs).

41. *See* Cuff, *supra* note 1, 35 ("Anyone involved with series LLCs should proceed with caution.").

42. Sandra Mertens, *Series Limited Liability Companies: A Possible Solution to Multiple LLCs*, 84 CHI.-KENT L. REV. 271, 277–84 (2009).

43. Shannon L. Dawson, *The Series LLC and Bankruptcy: When the Series Finds Itself in Trouble, Will It Need Its Parent to Bail It Out?*, 35 DEL. J. CORP. L. 515, 515 (2010).

44. McLoon & Callaghan, *supra* note 31, at 227–28.

45. Karambelas, *supra* note 20.

46. Thomas E. Rutledge, *Again, For the Want of a Theory: The Challenge of the "Series" to Business Organization Law*, 46 AM. BUS. L.J. 311, 321–26 (2009).

and a lack of case law.[48] Additionally, the California Senate Judiciary Committee noted that series LLCs provide "additional veils of secrecy to the LLC assets and liabilities," and that they "could create an avenue for an LLC to avoid legitimate responsibilities to third parties and/or members."[49] Thus, a sense of mistrust amidst legal uncertainty has prevented widespread use of series.[50]

A. The ULC's First Look at Uniformity

All of the uncertainty surrounding series LLCs, along with states enacting non-uniform statutes, led the ULC to seriously consider enacting a uniform series provision.[51] From May 2003 until October 2006,[52] the ULC considered enacting a revised version of the Uniform Limited Liability Company Act (RULLCA).[53] On October 4, 2006, the ULC adopted RULLCA as the new uniform LLC act.[54] Nine states have enacted RULLCA,[55] with Minnesota currently deciding on the issue.[56] Of these nine jurisdictions, Iowa, Utah, and the District of Columbia have added series provisions to the uniform statute.[57]

In its February 2006 meeting, the ULC Drafting Committee issued a proposed draft for a series provision.[58] Surprisingly, the draft looked similar to

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47. *Id.* at 317–18.

48. Mertens, *supra* note 42, at 289. *See also* Donn et al., *supra* note 16, at *133 (indicating that the first reported decision on series LLCs occurred in 2007).

49. *California Revised Uniform Limited Liability Company Act: Hearing on S.B. 323 Before the Senate Judiciary Committee*, 2011–12 Reg. Sess. 8–9 (Cal. 2012).

50. Thomas E. Rutledge, *Why Series??*, YAHOO! GROUPS (Oct. 21, 2006, 7:36 AM), http://groups.yahoo.com/group/lnet-llc/message/8483 (indicating that too many uncertainties have led him to continue using the multiple LLC form instead of series LLCs).

51. *See* REVISED UNIFORM LIMITED LIABILITY COMPANY ACT Prefatory Note (amended 2006).

52. *Limited Liability Company Act*, UNIFORM LAW COMMISSION, http://www.uniformlaws.org/Committee.aspx?title=Limited%20Liability%20Company%20Act (last visited July 16, 2013) (containing the dates of meetings for the drafting of RULLCA).

53. The first version of the Uniform Limited Liability Company Act was enacted in 1994, and then revised in 1996 for the "check-the-box" regulations. REVISED UNIFORM LIMITED LIABILITY COMPANY ACT Prefatory Note.

54. *Limited Liability Company Act*, *supra* note 52.

55. *Limited Liability Company (Revised)*, UNIFORM LAW COMMISSION, http://www.uniformlaws.org/Act.aspx?title=Limited%20Liability%20Company%20(Revised) (last visited July 16, 2013).

56. *H.F. 1274*, MINNESOTA STATE LEGISLATURE, https://www.revisor.mn.gov/bills/bill.php?f=HF1274&y=2011&ssn=0&b=house#actions (last visited July 16, 2013).

57. Donn et al., *supra* note 16, at *130.

58. *Series Draft*, ULCCA II (Feb. 2006), http://www.uniformlaws.org/shared/docs/limited%20liability%20company/ullca_series2_feb06.pdf.

the Illinois statute, rather than the more flexible Delaware approach.[59] Despite creating a series provision, the Drafting Committee ultimately decided against a series provision in RULLCA.[60] The Committee noted that series were very useful in the investment fund context, but were unwilling to extend series legislation to other contexts.[61] Several uncertainties gave the drafters caution, including conceptual, bankruptcy, efficacy of liability shields, tax, and securities issues.[62] Finally, the drafters balked at the idea because there were already "well-established alternate structures" in place, most notably multiple single-member LLCs.[63]

A "Progress Report" from the March 2006 meeting sheds some light on why series LLCs were not included in RULLCA:

> The tendrils of Delaware's influence already reach across the country, producing, for example, such bizarre effects as 'series LLCs' under Iowa law. Anyone who understands the origins, nature and problems of a series LLCs [sic] will understand that state legislatures should not be purveying the concept to ordinary users of the LLC form.
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> . . . .
>
> Originally devised by sophisticated Delaware lawyers for their 'funds' clients, series are now being (mis)used to subdivide assets of operating businesses and to provide unwarranted hopes of low cost 'asset protection.'
>
> . . . .
>
> 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.[64]

Clearly, the ULC was taking a patriarchal stance for states other than Delaware. Besides the ULC Drafting Committee, many commentators were worried about non-Delaware practitioners misunderstanding the formalities of

59. 805 ILL. COMP. STAT. ANN. 180/37-40 (LexisNexis 2005 & Supp. 2013) (providing for treatment as a separate legal entity, filing requirements for each series, and a catch-all provision); *Series Draft*, *supra* note 58 (containing these same provisions).

60. REVISED UNIFORM LIMITED LIABILITY COMPANY ACT Prefatory Note (amended 2006) ("The Drafting Committee considered a series proposal at its February 2006 meeting, but, after serious discussion, no one was willing to urge adoption of the proposal, even for the limited purposes of further discussion.").

61. REVISED UNIFORM LIMITED LIABILITY COMPANY ACT Prefatory Note.

62. *Id.*

63. *Id.*

64. Daniel S. Kleinberger, *Progress Report on the Revised Uniform Limited Liability Company Act ("ULLCA II") and the Issue of "Corpufuscation"*, Vol. XXIII A.B.A. THE SEC. OF BUS. L. PUBOGRAM, Mar. 2006, at 7, 8–9 (footnote omitted).

the series LLC, and thus opening themselves up to liability.[65] The drafters simply did not have enough information or guidance to feel comfortable with a series provision, and thus left the issue for another day.

Since the experts of the ULC decided against uniformity for series LLC statutes, it is necessary to question whether or not uniformity is even desirable in this area of law. Many of the statutes are modeled after Delaware, but there are certainly differences that can be spotted throughout the statutes.[66] However, non-uniformity may not immediately lead to the conclusion that a uniform statute is desirable. Indeed, there are many areas of law that do not contain uniform acts.[67] Moreover, even if an area of law contains a uniform act, a state still has the option to fully adopt it, only adopt certain provisions, or ignore it altogether.[68] Thus, further analysis is required to determine whether or not the ULC should adopt a uniform series provision.

B. Evolutionary Similarities

As mentioned earlier, only one state followed Wyoming after the first LLC statute appeared in 1977, until the IRS ruled on the LLC's tax status in 1988.[69] Six years after the IRS ruling, forty-six states had adopted LLC legislation.[70] Additionally, some scholars believe that the promulgation of the ABA's Prototype Limited Liability Company Act[71] led to uniformity in LLC

65. *See* Carol R. Goforth, *The Series LLC, and a Series of Difficult Questions*, 60 ARK. L. REV. 385, 400 (2007) (indicating that business owners may fail to keep separate records); *see also Why Series??*, YAHOO! GROUPS (Oct. 23, 2006, 2:08 PM), http://groups.yahoo.com/group/lnet-llc/message/8487 (providing posts from many of the drafters of RULLCA, and reasons why they chose not to adopt series legislation).

66. *See States with Series LLC Statutes*, NATIONAL CORPORATE RESEARCH, LTD. (Aug. 2012), http://www.nationalcorp.com/ncr/file/index?filename=Series_LLC_Chart_Oct_9_2012.pdf (containing a table of the various series LLC statutes and whether or not they contain certain provisions).

67. *See* Richard A. Epstein, *The Contextualization of Tort Law*, 88 TEX. L. REV. 105, 111 (2009) (indicating that there is no uniform law of torts); *see also* Fred H. Miller, *UCC Study Committee on Payment Systems Postponed*, 65 CONSUMER FIN. L. Q. REP. 437, 439 (2011) (noting that there is no uniform law on non-paper debt transfers or retail electronic payment systems).

68. *See* Frost, *supra* note 14, at Ex. C (noting that three jurisdictions have adopted RULLCA with non-uniform series statutes, demonstrating that states can pick and choose which portions of the uniform act it wants).

69. Rev. Rul. 88-76, 1988-2 C.B. 360; Geu, *supra* note 3, at 45.

70. Kobayashi & Ribstein, *supra* note 11, at 331.

71. PROTOTYPE LTD. LIAB. CO. ACT (amended 2011) (The Act was originally drafted in 1992 by the following American Bar Association committees: the Working Group on the Prototype Limited Liability Company Act, the Subcommittee on Limited Liability Companies, and the Committee on Partnerships and Unincorporated Business Organizations).

statutes.[72] Four years after the ABA's model act, the ULC followed suit with ULLCA,[73] which led to a massive spike in LLCs throughout the country.[74]

The series LLC has seen a very similar evolution. After Delaware passed its statute in 1996, no state enacted series legislation until Oklahoma did so on November 1, 2004.[75] Two more followed suit in 2005,[76] two in 2006,[77] and five more were added between 2008 and 2012.[78] Additionally, in September 2010 the IRS issued proposed regulations on the tax treatment of series LLCs.[79] Finally, the ABA drafted the Revised Prototype Limited Liability Company Act in November 2011, which contained series provisions.[80] All of these historical similarities seem to indicate that series LLCs are the wave of the future, despite some glaring uncertainties that still exist.

ULLCA has proven that one way to achieve certainty and growth is by adoption of a uniform law, as seen in the increase of LLCs after its adoption.[81] If series LLCs transact business across state lines, disparate series statutes will definitely give practitioners a cause for concern. First, practitioners will be unsure which statute a foreign jurisdiction will select. Second, it is unknown whether foreign jurisdictions will even adhere to the limited liability provisions in a series statute. Third, states who wish to create a series LLC statute will have to choose from a selection of other states' templates, not knowing the legal ramifications of each one.

The ULC has stated that clearing up this uncertainty is its main purpose, and it achieves this by "[researching, drafting, and promoting] uniform state laws in areas of state law where uniformity is desirable and practical."[82]

72. Kobayashi & Ribstein, *supra* note 11, 331 n.19.

73. UNIFORM LIMITED LIABILITY COMPANY ACT (amended 2006).

74. *See* Kobayashi & Ribstein, *supra* note 11, at 331 n.19 (indicating that the number of LLCs increased after 1996, the year ULLCA was created).

75. OKLA. STAT. ANN. tit. 18, § 2054.4 (West 2011).

76. 805 ILL. COMP. STAT. ANN. 180/37-40 (LexisNexis 2005 & Supp. 2013); NEV. REV. STAT. § 86.296 (2011).

77. TENN. CODE ANN. § 48-249-309 (2012); UTAH CODE ANN. § 48-3-1202 (LexisNexis Supp. 2012).

78. D.C. CODE § 29–802.06 (LexisNexis 2001 & Supp. 2012); IOWA CODE § 489.1201 (2013); KAN. STAT. ANN. § 17–76,143 (West 2012); P.R. LAWS ANN. tit. 14, § 3967 (2011); TEX. BUS. ORGS. CODE ANN. § 101.601 (West 2012).

79. Series LLCs and Cell Companies, 75 Fed. Reg. 55,699, 55,699 (proposed Sept. 14, 2010) (to be codified at 26 C.F.R. pt. 301.7701-1).

80. Revised Prototype Limited Liability Company Act Editorial Board, LLCs, Partnerships and Unincorporated Entities Committee & ABA Section of Business Law, *Revised Prototype Limited Liability Company Act*, 67 BUS. LAW. 117, 210–222 (2011) [hereinafter RPLLCA].

81. Kobayashi & Ribstein, *supra* note 11, 331 n.19.

82. *About the ULC*, *supra* note 12 ("The Uniform Law Commission . . . provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law . . . . ULC's efforts reduce the need for individuals and businesses to deal with different laws as they move and do business in different states.").

Additionally, a study regarding states' adoption of the ULC's uniform acts showed that states were more likely to adopt an act when uniformity was efficient.[83] Therefore, since the ULC rejected the series proposal in 2006, it must have concluded that uniform series provisions were not "desirable," "practical," or "efficient."[84] However, given the increased popularity and disparate series statutes, it appears as though the ULC got this one wrong.[85] Additionally, many of the uncertainties do not concern LLC law, such as securities, tax, and bankruptcy, and therefore the ULC would not have to worry about those issues.[86] The world did not end once ULLCA was passed, and history seems to point to the conclusion that a uniform series provision will be just as effective.[87]

III. CURING THE UNCERTAINTIES: SEPARATE ENTITY STATUS

Once uniformity has been found to be "desirable,"[88] the next question will be exactly what to put in a uniform series LLC statute. Given the uncertainties of a new area of law, this can be a daunting task. Since practitioners know very little about how to draft a series LLC operating agreement, the statute should be as comprehensive as possible.

A. Case Law

One area that practitioners could look for guidance is case law. However, the only case that analyzes series LLCs is a 2009 unreported decision from the United States District Court for the District of Maine, *GxG Management, LLC v. Young Bros. and Co., Inc*.[89] This case demonstrates that current series statutes create judicial confusion and points out the need for certain provisions in a uniform series act.

83. Kobayashi & Ribstein, *supra* note 11, at 330. Uniformity is efficient when "the parties' conduct or transactions may be subject to the laws of several different states, making it difficult to determine at the time of the conduct, or even at the time of litigation, which state law will apply . . . . Examples are torts and short-term commercial contracts . . . ." *Id.*

84. *Id.* at 229–30; *About the ULC*, *supra* note 12.

85. *See* 3 LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES app. E–2 (2d ed. 2012) (noting that "NCCUSL's mission should be to clarify the law of LLCs as it is rather than to wish away questions it would prefer did not exist.").

86. *Id.*

87. *See id.* (stating that federal law can adapt to state series legislation, just as the IRS adapted to the new LLC form).

88. *About the ULC*, *supra* note 12.

89. GxG Mgmt., LLC v. Young Bros. and Co., Inc., Civ. No. 05-162-B-K, 2007 WL 551761 (D. Me. Feb. 21, 2007).

There, GxG Management, LLC, operated a business organized in Delaware as a series LLC.[90] It purchased a boat from Young Brothers, the defendant, a Maine corporation.[91] Once the boat was delivered, GxG, the parent LLC, established two separate series, Series A and Series B.[92] GxG filed a Certificate of Documentation for the boat, in which Series B was the owner and GxG was the managing owner.[93] There were some issues with the operation of the boat, and GxG filed suit against Young Brothers.[94] Later in the trial, GxG attempted to join Series B as a party in interest since Series B was listed as the owner of the boat.[95]

Several uncertainties arising from the Delaware series provision prompted GxG's decision to join Series B as a party in interest. First, the statute was silent as to whether or not an LLC could pursue litigation on behalf of its series.[96] Second, the statute did not state whether or not a series could pursue litigation at all.[97] Third, there was no indication whether a series should be considered as a separate, distinct entity from its parent LLC.[98] Given all of these uncertainties and the fact that Series B had an interest in the boat, GxG argued that Series B was not a separate entity, and thus should be joined in the suit.[99] Young Brothers argued that Series B was a separate entity that owned the boat, and that an LLC may not assert claims in relation to assets owned by its series.[100] Additionally, Young Brothers argued, although to no avail, that GxG had transferred title to Series B, and thus all of the contract and tort claims belonged to Series B.[101] The argument appears to be that because a series could not sue on its behalf and because the parent LLC had transferred all of its interest in the boat, the suit could not lie.[102]

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90. *Id.* at *1.
91. *Id.*
92. *Id.*
93. *Id.* at *7. In distinguishing between owner and managing owner, the court noted that "GxG manages all aspects of the vessel, including use, maintenance, payment of obligations, and decisions regarding contracts. Series B is simply the listed legal owner and the entity whose assets would be responsible for satisfying any obligations that were incurred by the Captain Kidd IV." *Id.* at *8.
94. *GxG Mgmt., LLC*, 2007 WL 551761, at *2–5.
95. *Id.* at *7.
96. *Id.*
97. *Id.*
98. *Id.*
99. *GxG Mgmt., LLC*, 2007 WL 551761, at *7.
100. GxG Mgmt., LLC v. Young Bros. & Co., Inc., Civ. No. 05–162–B–K, 2007 WL 1702872, at *1 (D. Me. June 11, 2007).
101. *Id.* at *1–2.
102. *Id.* at *1.

Unfortunately, the court punted all three statutory issues.[103] Instead of doing some statutory analysis, the court ruled that GxG had a sufficient interest in the boat in order to maintain the action by itself.[104] Even if Series B was allowed to join, the court noted that it had a "unity of interest" with GxG, and therefore could not obtain separate judgments against Young Brothers.[105]

This holding makes sense given what was at stake. The issue here was a contract dispute between GxG and Young Brothers that existed before Series B was even created and did not pertain to any liabilities incurred by the boat.[106] Therefore, shielding the parent LLC from liability of a series-owned asset was not the issue. But what if it was? GxG created Series B to hold the boat and assume its liabilities, and that is it.[107] The parent LLC did all of the management functions, including writing checks out of the Series B bank account.[108] If the boat had injured someone, it is highly likely that GxG would argue that Series B is a distinct entity and that only its assets are at stake.[109]

This switching of the facts demonstrates a glaring hole in the statute, as well as some of the abuses that series LLCs can create. The Delaware statute still does not definitively state whether or not a series is a distinct legal entity, separate from the parent LLC.[110] Therefore, series LLCs such as GxG will likely try to play both sides of the coin. If the LLC is a plaintiff, it will argue that the series is not a distinct entity, and therefore can bring a suit along with the parent LLC. On the other hand, defendant LLCs will argue for separate entities in order to cabin the liability in a particular series. This seems like a ridiculous outcome, but it is certainly a fear of some legislators.[111]

B. Veil-piercing

Another issue that is apparent in the hypothetical flipping of *GxG Management* is judicial uncertainty. The Delaware statute was relatively new and ambiguous, and the court was not comfortable laying down definitive rules

103. *GxG Mgmt., LLC*, 2007 WL 551761, at *8.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at *1.
108. *GxG Mgmt., LLC*, 2007 WL 551761, at *7–8.
109. It can be assumed that GxG would argue this because cabining liability and shielding the parent LLC is one of the primary reasons for series LLCs. *See* Bahena, *supra* note 15, at 804 (arguing that asset segregation is one of the most important uses of series LLCs).
110. DEL. CODE ANN. tit. 6, § 18-215 (Supp. 2012); *see also* Donn et al., *supra* note 16, at *165 (stating that the Delaware LLC statute affirmatively classifies an LLC as a distinct entity, but the Delaware series LLC statute neglects to do so). The Delaware series legislation, in response to *GxG Management*, was amended to include the power for each series to "contract, hold title to assets . . . grant liens and security interests, and sue and be sued." tit. 6, § 18-215(c).
111. *See* Rutledge, *supra* note 50.

for series LLCs. This could be a major issue for the asset segregation feature of series because judges may be unfamiliar with the structure of series LLCs and "pierce the veil" of each individual series.[112]

Veil-piercing has long been an acceptable standard of enforcing liability on corporate owners.[113] Therefore, "courts will disregard the corporate form, or, to use accepted terminology, 'pierce the corporate veil', [sic] whenever necessary 'to prevent fraud or to achieve equity' [sic]."[114] Courts require there to be a "unity of interest"[115] between the corporations, as well as a fraud or injustice resulting from a court's adherence to separate corporate existence.[116]

While corporate law has readily adopted veil-piercing for corporations, it was uncertain whether or not it also applied to LLCs.[117] Given the differences between corporations and LLCs, the corporate veil-piercing standard may not fit the LLC structure.[118] For example, respecting corporate formalities, such as holding board meetings and adopting bylaws, is one way to avoid a court piercing a corporation's veil.[119] Since the structure of LLCs is generally more flexible than the corporate form, this safeguard may not even apply.[120] In fact, RULLCA explicitly states that failure to observe formalities is not a ground for imposing liability on an LLC.[121] Nevertheless, most courts have applied

112. *See* Mertens, *supra* note 42, at 307 ("[i]t 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.").

113. *See* Carter G. Bishop & Daniel S. Kleinberger , ¶ *6.03 Limits of the Shield: Piercing the Veil*, LIMITED LIABILITY COMPANIES: TAX AND BUSINESS LAW, 2012, at ¶ 6.03[1], *available at* Limited Liab. Co. ¶ 6.03 ("[C]orporate law has long been willing to disregard the corporate liability shield and hold the corporation's owners personally liable for the debts of the entity.").

114. Walkovszky v. Carlton, 223 N.E.2d 6, 7 (N.Y. 1966).

115. Van Dorn Co. v. Future Chem. and Oil Corp., 753 F.2d 565, 569 (7th Cir. 1985). The unity of interest includes four factors, including complying with corporate formalities, commingling of funds, undercapitalization, and one corporation treating the assets of another as its own. *Id.* at 570.

116. *Id.* at 570. *See also* Bishop & Kleinberger, *supra* note 2 (listing factors courts consider for piercing the corporate veil).

117. 2 RIBSTEIN & KEATINGE, *supra* note 22, at § 12:3.

118. *See* WILLIAM A. KLEIN ET AL., BUSINESS ASSOCIATIONS: AGENCY, PARTNERSHIPS, AND CORPORATIONS 281 (7th ed. 2009) (describing the LLC as a mixture between a corporation and a partnership); *see also* 2 RIBSTEIN & KEATINGE, *supra* note 22, at § 4:17 (describing courts' handling of the distinction between LLCs and corporations and whether or not veil-piercing applies to LLCs).

119. *Van Dorn Co.*, 753 F.2d at 570.

120. *See* 2 RIBSTEIN & KEATINGE, *supra* note 22, at § 4:17 (stating that LLCs have to observe fewer formalities than corporations).

121. REVISED UNIFORM LTIMITED LIABILITY CO. ACT § 304(b) (amended 2006) ("The failure of a limited liability company to observe any particular formalities relating to the exercise of its powers or management of its activities is not a ground for imposing liability on the members or managers for the debts, obligations, or other liabilities of the company.").

corporate standards to LLCs, and therefore allow veil-piercing in the LLC context.[122]

C. How Series LLCs Fit in with Veil-Piercing Standards

All eleven series LLC statutes contain (1) the formality provisions of maintaining separate records and accounting for assets and (2) some degree of notice in the articles of formation.[123] As mentioned previously, these statutes deviate on certain matters,[124] which can lead to confusion and disparate treatment. Possibly the most important deviation, which the drafters of RULLCA and many commentators have struggled over,[125] is whether each series is a separate legal entity.

Only four statutes explicitly provide that each series shall be treated as a separate entity to the extent set forth in the certificate of organization.[126] States that have followed Delaware, which does not provide for separate entity status, merely state that each series may have a "separate business purpose or investment objective."[127] Interestingly, the four statutes that allow separate entity status also contain additional notice requirements.[128] Giving LLCs the ability to establish series as separate entities, along with providing notice to third parties, seems to indicate a trend to move away from the Delaware approach and establish a "separateness" component of series LLCs.[129]

Additionally, certain characteristics of a series LLC tend to militate towards a separate entity approach. First, the series "may have separate rights,

122. *See* 2 RIBSTEIN & KEATINGE, *supra* note 22, at § 4:17 (noting that there is more case law and statutory guidance behind corporate veil-piercing, which is probably the reason courts have used corporate standards for piercing the LLC veil); *see also* Kaycee Land and Livestock v. Flahive, 46 P.3d 323, 327 (Wyo. 2002) (deciding on the question of whether or not to apply corporate veil-piercing to LLCs, and concluding that it "can discern no reason, in either law or policy, to treat LLCs differently than we treat corporations.").

123. *E.g.*, DEL. CODE ANN. tit. 6, § 18-215(b) (Supp. 2012). *See also* Karambelas, *supra* note 20 (listing the formalities that each state requires).

124. Rutledge, *supra* note 46.

125. *See* REVISED UNIFORM LIMITED LIABILITY COMPANY ACT Prefatory Note (listing the concerns over series LLCs).

126. 805 ILL. COMP. STAT. ANN. 180/37-40(b) (LexisNexis 2005 & Supp. 2013) ("A series with limited liability shall be treated as a separate entity to the extent set forth in the articles of organization."); D.C. CODE § 29-802.06(h) (LexisNexis 2001 & Supp. 2012); IOWA CODE § 489.1201(3) (2013); KAN. STAT. ANN. § 17-76,143(b) (West 2012).

127. tit. 6, § 18-215(a); NEV. REV. STAT. § 86.296(2) (2011); OKLA. STAT. ANN. tit. 18, § 2054.4(A) (West 2011); TENN. CODE ANN. § 48-249-309(a) (2012); TEX. BUS. ORGS. CODE ANN. § 101.601(a)(2) (West 2012); UTAH CODE ANN. § 48-3-1202(1)(a) (LexisNexis Supp. 2012).

128. *See infra* text accompanying notes 153–55 (discussing notice requirements in series LLC statutes).

129. D.C. and Kansas are the newest series LLC statutes, both of which provide for separate entity status. D.C. CODE § 29-802.06(h); KAN. STAT. ANN. § 17-76,143(b).

powers or duties . . . and any such series may have a separate business purpose or investment objective."[130] Second, the series may segregate assets and liabilities from other series and the parent LLC.[131] Third, each series "shall have the power and capacity to, in its own name, contract, hold title to assets . . . and sue and be sued."[132] Finally, each series must maintain separate records, account for assets separately, and provide notice in its articles of organization.[133] All of these characteristics give a series powers that distinguish it from its parent.[134]

Luckily, all of the series LLC statutes list certain "formalities" that are necessary in order to maintain limited liability.[135] Similar to corporate law, one of the most important formalities for series LLCs seems to be avoiding the commingling of funds.[136] However, there is always concern that unwary clients will not keep separate records, given the structure of the series LLC. In fact, one practitioner stated that:

> [Clients] will almost certainly figure out that it is more efficient to have a common bank account into which revenue is deposited, and from which expenses are paid, with a book keeping adjustment at year end to figure out what each series is entitled to. That could result in a failure to observe the statutory requirement of separateness, with liability "sloshing" back and forth among the series. You can't control the clients in their day-to-day activities, and therein lies the biggest concern of all.[137]

130. *E.g.*, DEL. CODE ANN. tit. 6, § 18-215(a).

131. *Id.* tit. 6, § 18-215(b).

132. *Id.* tit. 6, § 18-215(c).

133. *Id.* tit. 6, § 18-215(b). *See also supra* text accompanying note 28.

134. *See* William Meade Fletcher, *§ 25 Corporation Distinct from Shareholders, Directors and Officers*, FLETCHER CYCLOPEDIA OF THE LAW OF CORP., 2012, *available at* https://1.next.westlaw.com/Document/Ia4c61acd3a6311d98fda8225aecac63f/View/FullText.html?listSource=Foldering&originationContext=MyResearchHistoryRecents&transitionType=MyResearchHistoryItem&contextData=%28oc.Category%29&VR=3.0&RS=cblt1.0 ("It is a practical convenience to consider the [separate entity] as a legal personality capable of making and executing contracts, possessing and owning real and personal property in its own name, suing and being sued as a person distinct from its owners, and carrying on business in much the same manner as a natural person acting through agents of its own selection.").

135. *See, e.g.*, DEL. CODE ANN. tit. 6, §18-215(b); 805 ILL. COMP. STAT. ANN. 180/37-40(b) (LexisNexis 2005 & Supp. 2013). *See also supra* text accompanying note 28.

136. This is in reference to the duty to keep separate records and make sure that the assets are accounted for separately. *See, e.g.*, DEL. CODE ANN. tit. 6, §18-215(b) (limited liability will be afforded to each individual series "if the records maintained for any such series account for the assets associated with such series separately from the other assets of the limited liability company . . . ."); 805 ILL. COMP. STAT. ANN. 180/37-40(b) ("separate and distinct records [must be] maintained . . . and the assets associated with any such series [must be] held . . . and accounted for separately from the other assets of the limited liability company . . . .").

137. Linscott R. Hanson, *Series LLC*, YAHOO! GROUPS (Nov. 14, 2011, 7:56 PM), http://groups.yahoo.com/group/lnet-llc/message/11871.

Piercing the veil in this context is certainly a rational fear. In fact, a court has already included the assets of numerous series LLCs in the bankruptcy estate of an individual.[138]

1. Maintaining Separate Records

It is difficult to conceive how a series can both be considered a non-distinct entity from its parent, as well as having the requirement of keeping separate records and accounting its assets separately. Judicial confusion may certainly arise even if a client is diligent about keeping separate records because the non-distinct relationship between a series and its parent makes for a compelling reason to join the assets in litigation.[139] Further, non-classification of a series as a distinct legal entity will create problems in maintaining the separate records requirement, mainly because banks will be hesitant to open accounts for individual series if each individual series is not a separate entity.[140] Thus, a series will likely have to share an account with its parent LLC, which would almost certainly violate this formality.

Classifying a series as a separate, distinct entity would likely cure much of the judicial confusion around the separate records requirement and, thus, would avoid piercing the series LLC veil. The first step that needs to be taken is legislative clarification as to what "accounted for separately" actually means for the members and managers of separate series.[141] Once this is in place, judges and clients alike will have a template to work from and thereby reducing the likelihood of veil-piercing.

As mentioned previously, one reason the drafters of RULLCA declined to adopt a series provision was that alternative structures were in place, namely multiple single-member LLCs.[142] The thought was probably that multiple LLCs would reduce the risk of veil-piercing. However, the close relationship between multiple LLCs gives judges a compelling reason to join all of the commonly owned assets in litigation.[143] In fact, the Eleventh Circuit recently pierced the veil of several single-member LLCs, even though the particular LLCs were not involved in the disputed transaction.[144] Thus it appears that additional single-member LLCs may not be effective as "alternate structures," which is contrary to the thoughts of RULLCA's Drafting Committee.[145] On the

138. *See* Donn et al., *supra* note 16, at *132.

139. *See* Karambelas, *supra* note 20, at § 7:4 ("[A] court will probably strictly construe the 'accounted for separately' requirement to the point of rendering the limited liability protection meaningless.").

140. *Id.*

141. *See id.*

142. REVISED UNIFORM LIMITED LIABILITY COMPANY ACT Prefatory Note (amended 2006).

143. *See* Karambelas, *supra* note 20.

144. Fed. Trade Comm'n v. Peoples Cred. First, LLC, 621 F.3d 1327, 1328 (11th Cir. 2010).

145. REVISED UNIFORM LIMITED LIABILITY COMPANY ACT Prefatory Note.

other hand, series LLC statutes specifically instruct courts that if separate records are kept, assets are accounted for separately, and proper notice has been given to third parties, then the limited liability of each series shall be protected from the creditors of the parent or other series.[146] Therefore, statutory guidance from series LLC statutes can cure judicial confusion and reduce the risk of veil-piercing.[147]

2. Notice to Third Parties

Another important protection against liability is notice to third parties, since a series can (1) contract in its own name and (2) sue and be sued.[148] Therefore, notice is one of the requisite formalities in order to obtain limited liability for each series. Notice, along with separating assets, makes sense because creditors will need to know which assets to attach to and which series owns them.

Although there is no case law regarding notice for individual series, there have been decisions regarding LLCs. For example, in *Water, Waste & Land, Inc., d/b/a Westec v. Lanham*, the court held that the manager of an LLC was liable under agency theory.[149] One of the members gave the plaintiff his business card, which only contained the letters "P.I.I." (Preferred Income Investors), and did not mention that it was a limited liability company.[150] The defendant argued that filing the articles of organization with the Secretary of State was constructive notice, but the court rejected that argument.[151] Instead, the court noted that the Colorado LLC statute "requires limited liability companies to use the words 'Limited Liability Company' or the initials 'LLC' as part of their names . . . ."[152]

Given the lesson of providing notice in *Lanham*, it would seem sensible that series LLC statutes would require the same. Oddly enough, only three states require a certification of designation to be filed for each series,[153] and

146. *See* DEL. CODE ANN. tit. 6, § 18-215(b) (Supp. 2012).

147. *See* LARRY E. RIBSTEIN, THE RISE OF THE UNCORPORATION 146 (2010) (noting that series LLC statutes can mitigate the risks of piercing the veil).

148. *E.g.*, DEL. CODE ANN. tit. 6, § 18-215(c); ILL. COMP. STAT. ANN. 180/37-40(b) (LexisNexis 2005 & Supp. 2013).

149. Water, Waste & Land, Inc., d/b/a Westec v. Lanham, 955 P.2d 997, 1004–05 (Colo. 1998) (en banc).

150. *Id.* at 999.

151. *Id.* at 1002–03. ("[T]he [Colorado] legislature did not intend the notice language of section 7-80-208 to relieve the agent of a limited liability company of the duty to disclose its identity in order to avoid personal liability."). *Id.* at 1003.

152. *Id.*

153. D.C. CODE § 29-802.06(b)(4) (LexisNexis 2001 & Supp. 2012); 805 ILL. COMP. STAT. ANN. 180/37-40(b) ("a certificate of designation for a series . . . on file in the Office of the Secretary of State shall constitute notice . . . ."); KAN. STAT. ANN. § 17-76,143(b) (West 2012); *see also States with Series LLC Statutes*, *supra* note 66 (demonstrating that Illinois, D.C., and

five require that the name of each series be distinguishable from each other and include the name of the parent LLC.[154] Most other statutes only require notice in the certificate of formation that the series will have limited liability.[155] Therefore, it appears as though the majority of statutes rely on constructive notice to create the limited liability shield. However, as seen in *Lanham*, this is not good practice. Only providing limited liability notice in the certificate of formation for the parent LLC will likely trick third parties into believing they are dealing with one entity, and therefore one pool of assets. Creditors will then find it difficult to ascertain which assets to attach, which will inevitably lead to litigation. Further, it is likely that judges will view this as a form of deception and, therefore, pool each series' assets as if it was one big LLC. Luckily, the trend is moving toward providing more notice, as the newest series LLC statutes follow the Illinois approach.[156]

Go back to the hypothetical flipping of *GxG Management*. The court ruled that a series was not a distinct entity that could pursue legal claims; instead, it was merely "a 'series of interest' maintained by the LLC . . . ."[157] It would have been a disaster for GxG if the court had ruled that Series B was a separate entity at that point because Delaware had not yet amended its statute to allow series to "sue and be sued."[158] Since Series B was a "series of interest"[159] with GxG, it is likely that the court would have included the assets of GxG and Series B in a lawsuit arising out of damages caused by the boat. Currently, classifying series as separate entities would lead to a much better result for GxG because of the increase in judicial certainty. This certainty would arise from GxG maintaining separate records, accounting for assets separately, providing notice to Young Brothers that it was dealing with a separate series, and statutory guidance that explicitly states that series should be regarded as separate entities.

Kansas are the only jurisdictions that require a certificate of designation to be filed for each series).

154. D.C. CODE § 29-802.06(d)(1); 805 ILL. COMP. STAT. ANN. 180/37-40(c); IOWA CODE § 489.1201(1) (2013); KAN. STAT. ANN. § 17-76,143(c); UTAH CODE ANN. § 48-3-1202(1)(a) (LexisNexis Supp. 2012).

155. *See, e.g.*, DEL. CODE ANN. tit. 6, § 18-215(b) (Supp. 2012) ("Notice in a certificate of formation of the limitation of liabilities of a series . . . shall be sufficient . . . and there shall be no requirement that any specific series of the limited liability company be referenced in such notice.").

156. D.C. CODE § 29-802.06(d)(1); 805 ILL. COMP. STAT. ANN. 180/37-40(c); IOWA CODE § 489.1201(1); KAN. STAT. ANN. § 17-76,143(c); UTAH CODE ANN. § 48-3-1202(1)(a).

157. GxG Mgmt., LLC v. Young Bros. & Co., Inc., Civ. No. 05-162-B-K, 2007 WL 1702872, at *1 (D. Me. June 11, 2007).

158. DEL. CODE ANN. tit. 6, § 18-215(c). The Delaware statute became effective on August 1, 2007. DEL. CODE ANN. tit. 6, § 18-215.

159. *GxG Mgmt., LLC*, 2007 WL 1702872, at *2.

D. Cost Considerations

The Illinois statute was likely drafted in an effort to mitigate issues that foreign courts may have with a series' entity status.[160] While certainty is definitely a plus, another factor that needs to be considered is the cost. Classifying a series as a separate entity may clear up judicial confusion, but the added costs of filing needs to be taken into account when deciding whether an LLC should file its articles of organization in Illinois or Delaware.

In Illinois, each series is required to file a certificate of designation with the Secretary of State, rather than the parent LLC filing one certificate.[161] The fee to establish an LLC without series provisions is $500.[162] Additionally, there is a $250 annual filing fee.[163] In contrast, an LLC with series provisions costs $750,[164] and an additional fifty dollars for each series.[165] There is also a $250 annual filing fee for the parent, along with fifty dollars for each series every year.[166] Therefore, the greater amount of series there are, then the greater the savings in filing fees because the cost of each series is less than an additional LLC. If a business owner wanted to create ten multiple LLCs in order to separate assets and liabilities, the filing fees would add up to $5000 initially and $2500 per year. For a parent LLC and nine series, the initial filing fee is $1200 and $700 annually. After two years, a series LLC designation would save a business owner $5600 in filing fees.[167] Additionally, there only needs to be one registered agent for a parent LLC and its series,[168] whereas multiple LLCs require an agent for each LLC.[169] Therefore, a series LLC could also save on registered agent fees.[170] Larger savings would result the longer each series existed or if new series were created.

Delaware, by contrast, has a much lower filing fee than Illinois.[171] It costs seventy dollars to file a certification of formation, and the statute does not

160. Wendell Gingerich, *Series LLCs: The Problem of the Chicken and the Egg*, 4 ENTREPRENEURIAL BUS. L.J. 185, 190, 194 (2009).

161. 805 ILL. COMP. STAT. ANN. 180/37-40(b).

162. *Id.* 180/50-10(b)(1).

163. *Id.* 180/50-10(b)(11).

164. *Id.* 180/50-10(b)(1).

165. *Id.* 180/50-10(b)(18); *see also An Act Concerning Business: Transcription of House of Representatives Debate on S.B. 504*, 2005 Leg., 54th Sess. 83-85 (Ill. 2005) (representatives Giles and Joyce explaining the cost arrangement of series LLCs).

166. 805 ILL. COMP. STAT. ANN. 180/50-10(b)(11).

167. For multiple LLCs, the math is $5000 (ten times $500) plus $2500 (ten times $250), which equals $7500. For series LLCs, the initial fee is $1200 (parent is $750, plus nine series at fifty dollars each) plus $700 ($250 for the parent, plus nine series at fifty dollars each), which equals $1900. $7500 minus $1900 is $5600.

168. 805 ILL. COMP. STAT. ANN. 180/37-40(f).

169. *Id.* 180/1-35(a).

170. *See id.* 180/37-40(f); *Id.* 180/1-35(a).

171. *See* DEL. CODE ANN. tit. 6, § 18-1105(a)(3) (Supp. 2012).

distinguish between multiple LLCs or series LLCs.[172] Additionally, the statute does not mandate a filing fee for each additional series.[173] The annual fee for each LLC is $250.[174] Ten LLCs would cost $5700 after two years, whereas one LLC with nine series would cost $570.[175] Therefore, a series designation in Delaware would save $5130.[176] Compared with Illinois, a Delaware series would save a business owner $2030.[177] Therefore, if cost savings are more important than an internal liability shield, filing in Delaware may be the best approach.

IV. ADMINISTRATIVE AND REGULATORY AGENCIES

A. Internal Revenue Service

Clearly, states have different views on the separate entity status of series LLCs.[178] Another consideration is how federal regulatory agencies will view them. As seen earlier, the 1988 IRS regulation had a significant impact on the proliferation of LLCs.[179] Tax clarity was significant during the infancy of LLCs,[180] and it is reasonable to assume that states are waiting for the IRS to have a say in the classification of series.

Series LLCs obtained some tax clarification when the Department of the Treasury and the IRS came out with Proposed Regulations on September 14, 2010.[181] These Proposed Regulations would modify regulation part 301.7701–1, the classification of organizations for federal tax purposes.[182] More

172. *Id.* tit. 6, § 18-1105(a)(3).

173. *See id.* tit. 6, § 18-1105.

174. *Annual Report and Tax Instructions*, STATE OF DELEWARE: THE OFFICIAL WEBSITE OF THE FIRST STATE, http://corp.delaware.gov/paytaxes.shtml (last visited July 22, 2013).

175. For ten LLCs, the math is the $5000 (the $250 annual filing fee times two years times ten LLCs) plus $700 (the seventy dollar certificate of formation fee times ten LLCs), which equals $5700. For one LLC with nine series, the math is $500 (the $250 annual filing fee times two years) plus seventy dollars (for the one time certificate of formation fee), which equals $570.

176. $5700 minus $570 is $5130.

177. *See supra* text accompanying notes 164–66. The two year filing fees for an Illinois LLC with nine series is $2600 (for year one, the $750 filing fee, plus fifty dollars each for nine series, plus $250 to file the annual report, plus fifty dollars each for nine series to file the annual report; for year two, $250 to file the annual report, plus fifty dollars each for nine series to file the annual report) whereas a Delaware series costs $570. Similar to Illinois, Delaware does not require additional registered agent fees for each series. DEL. CODE ANN. tit. 6, § 18-104(a)(2); *see also* tit. 6, § 18-215 (not requiring a registered agent for each series).

178. *See supra* Part III and accompanying notes.

179. Geu, *supra* note 3, at 45.

180. *Id.*

181. Series LLCs and Cell Companies, 75 Fed. Reg. 55,699, 55,699 (proposed Sept. 14, 2010) (to be codified at 26 C.F.R. pt. 301.7701-1).

182. *Id.*; Classification of Organizations for Federal Tax Purposes, 26 C.F.R. § 301.7701-1 (1996).

specifically, the modification would add a subsection that classifies a series for federal income tax purposes.[183] Sections A and B of regulation 301.7701–1 state whether or not a separate entity should be included for federal tax purposes.[184] If the Proposed Regulations are finalized and include a series as a separate entity for Federal tax purposes,[185] then the series would have to elect whether to be a partnership, corporation, or disregarded entity under sections 301.7701–2 and 301.7701–3.[186]

The Proposed Regulations state that it does not "address the entity status or filing requirements of series organizations for federal tax purposes."[187] However, it goes on to state that "[a] series organization generally is an entity for local law purposes," and that "[a]n organization that is an entity for local law purposes generally is treated as an entity for federal tax purposes."[188] Therefore, it appears as though the IRS is leaning towards classifying a series as a separate entity, at least in the context of federal tax.[189] Additionally, the Proposed Regulations define what a series statute is,[190] and lists Delaware, Illinois, Iowa, Nevada, Oklahoma, Tennessee, Texas, Utah, and Puerto Rico as series statutes.[191] This at least establishes federal recognition of series LLCs, which provides certainty for states considering a series LLC statute.

Besides the Proposed Regulations, the IRS has indicated its opinion on the separate entity status of series in a private letter ruling.[192] For example, an investment trust wanted to reorganize as a series LLC and asked the IRS to determine the classification of the series.[193] The IRS indicated that each series would be a separate entity and decided to treat each series with one owner as a disregarded entity and each series with two or more owners as a partnership or corporation.[194]

183. Series LLCs and Cell Companies, 75 Fed. Reg. at 55,707-09.

184. 26 C.F.R. § 301.7701-1.

185. *See* Series LLCs and Cell Companies, 75 Fed. Reg. at 55,707 (indicating how to treat a series LLC in the statute).

186. 26 C.F.R. § 301.7701-1(b); 26 C.F.R. § 301.7701-2; 26 C.F.R. § 301.7701-3. These sections are the "check-the-box" regulations.

187. Series LLCs and Cell Companies, 75 Fed. Reg. at 55,704.

188. *Id. See also id.* at 55,707 (indicating that a series formed under the laws of the United States or of any state is treated as an entity formed under local law).

189. *See* Donn et al., *supra* note 16, at *138. ("Thus, by clarifying that each series within an LLC presumptively constitutes a separate entity for federal tax purposes, the Proposed Regulations make it easier to determine the federal tax classification of a domestic series LLC.").

190. Series LLCs and Cell Companies, 75 Fed. Reg. at 55,708.

191. Series LLCs and Cell Companies, 75 Fed. Reg. at 55,701. The Kansas and the District of Columbia series statutes had not yet been enacted when the Proposed Regulations were released.

192. I.R.S. Priv. Ltr. Rul. 200803004 (Jan. 18, 2008).

193. *Id.*

194. *Id.*

B. American Bar Association Section of Taxation

The ABA Section of Taxation has also offered some guidance on the matter. In a letter to the Commissioner of the IRS, Charles Egerton, Chair of the ABA Section of Taxation, gave suggestions to the IRS and encouraged the finalized regulations to contain more clarity regarding entity status.[195] The letter distinguished between series with de minimis assets and those with assets separate from the parent LLC.[196] If a series has de minimis assets and has not elected to be taxed as a corporation, then it is suggested that the series should not be treated as a separate series for federal tax purposes.[197] Otherwise, if a series does have assets and business separate from the other series and the parent LLC, then the letter suggested that the IRS should provide factors that determine separate entity status.[198] One factor that could indicate separate entity status, the letter suggested, is "ownership of income producing property by the series organization . . . ."[199]

The ABA Section of Taxation has also sent out a survey to state departments of revenue or finance.[200] The survey asked the states various questions about the Proposed Regulations, but probably the most important question asked was the following: "[w]ill your state conform with the Proposed Series LLC Regulations by classifying each series as a separate entity that can make its own tax elections?"[201] Sixteen states responded, with fourteen of them answering that they would follow Federal tax treatment.[202] Indiana was undecided,[203] and Texas was the only state that would treat all series as one taxpayer.[204] The survey disagreed with Texas' approach, indicating that Texas

195. Charles H. Egerton, *ABA Section of Taxation Comments on Reg-119921-09 Proposed Regulations on Series of a Domestic Series Organization*, Vol. XXVIII A.B.A. THE SEC. OF BUS. L. PUBOGRAM, Aug. 2011, at 8, 18 (letter from Charles Egerton to IRS Commissioner Shulman).

196. *Id.* at 12.

197. *Id.*

198. *Id.*

199. *Id.*

200. Bruce P. Ely et al., *Survey of State Departments of Revenue/Finance Regarding Their Intent to Conform with the Classification of Series LLCs as Discussed in Treasury Department/IRS-Proposed Regulations*, AM. B. ASS'N SEC. OF TAX'N, COMM. ON ST. AND LOCAL TAX'N, & TASK FORCE ON PROPOSED SERIES LLCS REG., Jan. 2012, at 1, 1; Leigh Griffith et al., *Current Developments: Series LLCs*, AM. B. ASS'N SEC. OF TAX'N, 2012, at *1, *available at* 2012 ABATAX-CLE 0217011.

201. Ely et al., *supra* note 200, at 2.

202. *Id.* The states that answered "yes" were Arkansas, California, Florida, Georgia, Idaho, Illinois, Kentucky, Maine, Missouri, Nebraska, North Carolina, Rhode Island, Tennessee, and Utah. *Id.* at 9 n.39.

203. *Id.* at 2, 9 n.41.

204. *Id.* at 3, 9 n.40.

would have difficulty collecting taxes from series LLCs, and also noted that series would suffer from a diminished limited liability shield.[205]

Additionally, numerous states have issued rulings and publications indicating how they would classify series LLCs.[206] For example, the California Franchise Tax Board stated that it would treat foreign series as a separate LLC, and require each series to file its own tax form and pay an annual LLC fee.[207] Texas, on the other hand, issued a policy ruling that reached the opposite conclusion.[208] The only other state with a series statute to offer an opinion was Tennessee, which concluded that each series would be treated as a separate LLC for franchise and excise taxes.[209]

C. Securities and Exchange Commission

Another regulatory agency that has offered interpretive guidance is the Securities and Exchange Commission (SEC). In a letter to the SEC, a broker-dealer questioned how the SEC's rules would apply to an entity formed as a series LLC.[210] The broker-dealer was set up as one parent LLC with two series, in which the parent had no business operations.[211] One series would operate the retail broker-dealer, while the other would handle institutional activities.[212] The parent LLC would be the only SEC registrant, and it would file the assets and liabilities of the two series on one consolidated financial statement.[213]

The SEC determined that this structure would violate the net capital, customer protection, and financial reporting rules.[214] It worried that this could hide information from the SEC and the public, as well as prevent the public from receiving money in the event of liquidation of one of the series.[215] While the SEC has not offered any rules pertaining to series LLCs, this letter should give practitioners a beginning template. If one or more series sells non-exempt securities, it is advisable that each prepares individual financial statements and contains enough capital in the event of liquidation. Therefore, following the

205. *Id.* at 3–4.

206. Leigh Griffith et al., *supra* note 200, at *5–6 (describing states' private rulings, which include California, Florida, Massachusetts, New York, Texas, and Tennessee).

207. STATE OF CALIFORNIA FRANCHISE TAX BOARD: LIMITED LIABILITY COMPANY FILING INFORMATION (2011).

208. TEXAS COMPTROLLER OF PUBLIC ACCOUNTS: 201005184L (2010).

209. TENNESSEE DEPARTMENT OF REVENUE: LETTER RULING #11-42 (2011).

210. Susan M. DeMando, SEC No-Action Letter, 2009 WL 2768418 (S.E.C. No-Action Letter) (Sept. 1, 2009).

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. DeMando, 2009 WL 2768418 (S.E.C. No-Action Letter). If only one series was being liquidated and it did not have enough capital to pay investors, the SEC was concerned that the internal liability shield would prevent proper payment. *Id.*

statutory formalities and treating each series as a separate entity would likely lead to less conflict with the SEC.

V. THE TIME FOR UNIFORMITY

Veil-piercing, notice to third parties, filing costs, and regulatory agency guidance are all reasons to maintain separate entity status for series LLCs, rather than creating multiple LLCs. There seems to be a trend moving in this direction amongst state statutes,[216] but guidance from a uniform law is lacking.

The first uniform LLC act to contain a series provision was the ABA's Revised Prototype Limited Liability Company Act (the Act), which was published in the November 2011 edition of the Business Lawyer.[217] In deciding to adopt series provisions, the preamble states that "[s]eries provisions were provided throughout the Act in an effort to acknowledge a number of jurisdictions that have added series to their statutes."[218] Despite the added exposure that this may have given series LLCs, the Act is silent as to separate entity status.[219] In fact, the preamble indicates that the provisions of the Act were taken from the Delaware and Texas statutes.[220] These two statutes, as mentioned earlier, do not discuss the separate entity status of series LLCs,[221] and Texas has explicitly stated that series should not be separate entities.[222] Therefore, it is no surprise that the ABA failed in its attempt to provide clarification for series LLCs.

Going back a few years, the ULC drafted a series provision to be included in RULLCA.[223] However, the provision was never included in the finalized version of RULLCA, thus leaving states in the dark.[224] The series draft is interesting because it is modeled after the Illinois statute, rather than Delaware or Texas.[225] Some examples include filing a certificate of designation for each series,[226] each certificate containing the name of the series and the parent LLC,[227] *separate entity status for each series*,[228] and a catch-all provision that

216. 2 RIBSTEIN & KEATINGE, *supra* note 22, at § 4:17 (indicating that states are beginning to follow the separate entity approach).

217. RPLLCA, *supra* note 80, at 117.

218. *Id.* at 122.

219. *See id.* at 210–12 (no series provisions that provide for separate entity status).

220. *Id.* at 123.

221. *See supra* note 127 and accompanying text.

222. TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, *supra* note 208.

223. *Series Draft*, *supra* note 58.

224. *See supra* note 60 and accompanying text.

225. *See supra* note 59 and accompanying text. *See also infra* notes 226–29 and accompanying text.

226. *Series Draft*, *supra* note 58.

227. *Id.*

228. *Id.*

states that LLC law will provide gap-fillers.[229] The drafters of RULLCA were concerned with the uncertainties surrounding series, thus leading them to drop the series draft from the finalized version.[230] Hopefully the ULC, when the time comes to draft a new uniform LLC act, will adhere to the trend towards the Illinois statute and maintain many of the provisions from its 2006 draft.

Luckily, the ULC has noticed the need for a uniform series provision. On July 8, 2011, the ULC Committee on Scope and Program formed the Study Committee on Series of Unincorporated Business Entities.[231] The Study Committee was charged with deciding whether or not series provisions should be added to unincorporated business acts, including RULLCA.[232] After meeting six times, the Study Committee concluded that a drafting committee should be formed to add series provisions to unincorporated business acts.[233]

The first portion of the study report noted that the main reason that RULLCA declined to adopt a series provision was lack of time.[234] The Study Committee believed that they would have the necessary time to complete the project and also had access to attorneys who used series LLCs in practice.[235] Additionally, the Study Committee noted that many developments had occurred since RULLCA was drafted in 2006, many of which have been described in this Comment.[236] Finally, the Study Committee concluded that uniform series provisions are desirable because of the large variance and absence of key issues in current state statutes.[237]

In July 2012, the ULC Committee on Scope and Program accepted the Study Committee's proposal and formed a drafting committee.[238] Currently there are no drafts or meetings posted from this committee.[239] However, there does appear to be hope that the drafting committee will resolve several key areas of uncertainty. In its proposal to become a Study Committee, the drafters

229. *Id.*

230. *See supra* notes 60–63 and accompanying text.

231. *Annual Meeting of the Committee on Scope and Program*, UNIFORM LAW COMMISSION (July 8, 2011), http://www.uniformlaws.org/Shared/Minutes/scope070811mn.pdf.

232. *Id.*

233. Frost, *supra* note 14, at 4.

234. *Id.* at 6.

235. *Id.*

236. *Id.* at 6–7. Some of these developments include series legislation in Texas, D.C., and Kansas, re-enactments in Iowa and Utah, the IRS Proposed Regulations, state regulatory rulings on entity classification, and the ABA's Revised Prototype Limited Liability Company Act.

237. *Id.* at 7 ("[f]irst, existing statutes are incomplete and vary dramatically, and uniformity would be advantageous. Second, existing statutes do not address many key issues and may not appropriately address the potential for misuse.").

238. *Annual Meeting of the Committee on Scope and Program*, UNIFORM LAW COMMISSION (July 14–15, 2012), http://uniformlaws.org/Shared/Docs/Scope/Scope%20Minutes%207-14-12%20Final.pdf.

239. *Committees: Series of Unincorporated Business Entities*, *supra* note 13.

indicated that some of the main issues were "1) whether the series may be a separate legal entity, 2) the nature of the public filing necessary to establish a series and 3) the power of series to hold title to assets."[240] The issue of separate entity status has lasted for seventeen years, and it is up to the ULC to finally end the debate.

CONCLUSION

The confusion that has plagued commentators, practitioners, and courts may soon come to an end with the adoption of a uniform act. Hopefully the ULC will take its 2006 series draft out of the waste bin and put it to good use. While a separate entity status may take away from some of the alluring aspects of a series LLC, such as no additional filing fees or relaxed notice requirements, it may also incentivize risk-adverse practitioners to begin using its structure.

The best possible outcome for a uniform act is to provide that a series may elect to be a separate entity, distinct from its parent. As mentioned earlier, the series concept arose out of the investment fund context.[241] Owners of those series structures may not be as worried about veil-piercing for tort or contract liability. Therefore, an investment fund series LLC may consider savings on filing fees and taxes as more important than individualized liability shields. Since Delaware was the first series statute, it could very well be that this is what the legislature had in mind. On the other hand, business entities that regularly enter into arm's length transactions may prefer the separate entity approach. Those entities are probably more concerned with liability to third parties, and therefore the added certainty surrounding the liability shield would be more preferable than filing and tax savings.

Whatever the case may be, practitioners need guidance and valid options. A uniform series provision, along with guidance from the IRS, would certainly popularize the series structure and provide much needed certainty. The ULC needs to provide that a series may elect to be a separate, distinct entity, in case an LLC desires a strong limited liability shield. Hopefully the drafters will look at recent statutory trends and regulatory guidance in making their decision, which should lead them to the conclusion that separate entity status is the best result.

JUSTIN T. FEZZI*

240. Frost, *supra* note 14, at 11.

241. Bahena, *supra* note 15, at 803; Donn et al., *supra* note 16, at *128.

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