

Opining on Limited Liability Company Series



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Don't assume that all Series are the same, or even similar. And don't assume each opinion you can give with respect to an LLC can be given with respect to a Series. In short, know what you know, and opine only on that.

LIMITED LIABILITY COMPANIES (LLCs) have become the preferred business entity in many private and some public transactions, including the financing of commercial real estate. Delaware LLCs are formed under and governed by the Delaware Limited Liability Company Act (the "Delaware LLC Act").¹ Long a preferred venue for entity formation, Delaware now has about twice as many LLCs as corporations. Since the mid-1990s, the Delaware LLC Act has permitted the formation of LLCs with separate series, and now more than a dozen states permit the formation of LLCs with separate series of members, interests or assets ("Series"). This article is limited to Series of assets. Where the requisite steps are taken in the establishment and maintenance of Series, the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to a particular Series are enforceable against the assets of such Series only, and not against the assets of the LLC generally or any other Se-

¹ DEL. CODE ANN. tit. 6, §§ 18-101 to -1109. Unless otherwise indicated, all citations to § 18-___ are to the Delaware LLC Act.

ries.² Though significant issues arise when a Series becomes a debtor for Uniform Commercial Code Article 9 purposes, and it is doubtful that a Series can be a debtor under the Bankruptcy Code,³ in recent years a small but increasing number of Series have been utilized as borrowers in real estate and other financing transactions. Opinions regarding LLCs, and their differences from opinions regarding corporations, have been widely considered.⁴ This article considers issues unique to opinions on Series, with emphasis on Series established under the Delaware LLC Act,⁵ and concludes with suggested approaches to the delivery of such opinions.

SERIES ARE DEPENDENT UPON, YET DIFFERENT FROM LLC SERIES • No Series can exist other than during the existence of the LLC in connection with which it was established. One consequence is that a Series is terminated, and its affairs must be wound up, upon the dissolution of the related LLC.⁶ Despite this dependence, there are significant nomenclatural, conceptual and existential differences between an LLC and a Series. Default rules in most LLC statutes may be, and often are, overridden by language in the LLC's governing instrument. When opining on an LLC, it is

therefore essential to review the relevant governing instrument in light of applicable law, including contract law. These concerns are even more salient in the case of Series.

Status

A Series is not the same as an LLC, and is not a subsidiary thereof. In fact, it is generally agreed that most Series, though endowed with certain characteristics commonly found in separate legal entities, are statutorily prohibited from having other such characteristics, and generally are not viewed as entities for state law purposes.⁷ Thus, even the simplest of opinions, the so-called "status" opinion, must be rendered differently for Series than for LLCs. Under the Delaware LLC Act, Series are not formed, but instead are established.⁸ The Delaware LLC Act provides that an LLC Agreement may establish or provide for the establishment of series of members, managers, limited liability company interests or assets.⁹ Thus, the establishment of a Series must be effectuated by the LLC agreement or in accordance with the provisions thereof. In the latter case, it is incumbent on the drafter to specify exactly what conditions must be satisfied so as to establish a Series. Similarly, the drafter must specify exactly what constitutes a given Series. Thus, the Series, like the LLC itself (perhaps even more so), is a creature of contract. Just as LLCs formed under the same statute may differ significantly from one another, so may Series of the same LLC.

Power

The Delaware LLC Act contemplates the establishment of Series with or without internal shielding, which is to say the insulation of assets associated with one Series from the claims of creditors

² See, e.g., § 18-215.

³ See Norman M. Powell, *Series LLCs, the UCC, and the Bankruptcy Code – A Series of Unfortunate Events?*, 41 UCC L.J. 103 (2008).

⁴ See Norman M. Powell, *Limiting Your Liability for LLC Opinions*, THE PRACTICAL LAWYER, June 2012, at 29; TriBar Opinion Committee, *Third-Party Closing Opinions: Limited Liability Companies*, 61 BUS. LAW. 679 (2006); TriBar Opinion Committee, *Supplemental TriBar LLC Opinion Report: Opinions on LLC Membership Interests*, 66 BUS. LAW. 1065 (2011) (herein, "TriBar 2011").

⁵ Other U.S. jurisdictions currently permitting series under their LLC statutes include Alabama (in 2015) Illinois, Iowa, Kansas, Montana, Nevada, Oklahoma, Tennessee, Texas, and Utah, as well as the District of Columbia and Puerto Rico. The reader is cautioned that there are significant differences among the ways many of the issues discussed in this article are treated under these various statutes.

⁶ § 18-215(k).

⁷ Prop. Treas. Reg. §§ 301.6011-6, 301.6071-2, 301.7701-1, 75 Fed. Reg. 55,699, 55,707-55,709 (Sept. 14, 2010).

⁸ Compare § 18-201(a) with § 18-215(a).

⁹ § 18-215(a).

of another Series or of the LLC itself. In general terms, internal shielding requires that: (i) records maintained for the Series account for assets associated with the Series separately from other assets of the LLC or other Series thereof; (ii) the LLC agreement provide for the desired shielding; and (iii) a general notice—to the effect that the LLC has or may have Series with a limitation on liabilities—appear in the LLC’s certificate of formation.¹⁰ Thus, it is possible to have a Series that does not enjoy, or ceases to enjoy, internal shields. In addition, read literally, the Delaware LLC Act permits a Series established with internal shields to carry on “any lawful business, purpose or activity, whether or not for profit, with the exception of the business of banking”¹¹ But the Delaware LLC Act is silent with respect to the purposes permitted a Series not so established.

Separate accounting for assets associated with Series is an ongoing requirement for continued enjoyment of the internal shield. The consequence of any later shortcoming in such accounting is loss of the internal shield, but such a shortcoming apparently has no effect on the Series’ establishment, continued existence or power. Similarly, while the statute provides that a Series meeting the requirements for internal shields “shall have the power and capacity to, in its own name, contract, hold title to assets . . . , grant liens and security interests, and sue and be sued,”¹² it is silent with respect to Series not established with internal shields. Thus, the careful opinion giver may wish to treat the contemporaneous existence of internal shields as an antecedent to an opinion as to a Series’ power, whether such powers purport to be broad or limited.

¹⁰ § 18-215(b).

¹¹ § 18-215(c).

¹² *Id.*

Action

As it does with respect to LLCs themselves, the Delaware LLC Act provides for management of Series by the members associated with them, in proportion to their economic interests in such Series.¹³ And, as with LLCs themselves, this default rule is contractually displaced in a great many LLC agreements in favor of a managing member, a non-member manager or another governance structure. Recall that the Delaware LLC Act defines the term “limited liability company agreement” to include “any agreement . . . as to the affairs of a limited liability company and the conduct of its business.”¹⁴ Thus, while an LLC and its Series may be governed by a single document, other arrangements are possible. For example, the matters relating uniquely to the affairs and conduct of a given Series are often addressed in a “series supplement” to a base LLC agreement applicable to an LLC and applicable for general matters to the various Series thereof. Issues related to authority of a Series, and of specified persons to act on its behalf, may be handled differently for a given Series than with respect to the LLC itself or its other Series, and may be memorialized in a separate writing applicable only to such Series.

Enforceability

Opinion preparers without requisite expertise in the entirety of applicable general contract law should not opine on the enforceability of LLC agreements or series supplements. Section 1101(b) of the Delaware LLC Act provides that “[i]t is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements,” and Section 1101(c) expressly permits expansion, restriction or elimination of certain duties

¹³ Significantly, Series do not have members *per se*; rather, certain members of the LLC are “associated” with a given Series.

¹⁴ § 18-101(7).

(including fiduciary duties). The “enforceability” opinion of necessity embraces state contract law. Many of the bankruptcy-remoteness and other features commonly found in LLCs and Series thereof arise solely from the terms of the LLC agreement, having no antecedent in (but nonetheless facilitated by) the language of the Delaware LLC Act. Thus, opinion givers should consider that a qualification limiting opinions to the Delaware LLC Act may not effectively limit their opinions as they intend. Similarly, opinion recipients should consider that in the event an opinion can be effectively limited to the four corners of the Delaware LLC Act, it may provide little comfort on the matters addressed to the extent they go beyond the language of the Delaware LLC Act. These issues are present in the context of Series in much the same way they are present in the context of LLCs generally.

Admission

Sometimes an opinion is sought to the effect that the person acquiring an LLC interest has (or will) become a member of the LLC. As a threshold matter, it is important to recognize that acquiring an LLC interest is different from achieving member status. Moreover, LLC statutes, LLC agreements and certificates of formation can establish different requirements for admission as a member of an LLC at the time of formation, on the one hand, and at some later time, on the other. To be admitted as a member, typically the purchaser of an LLC interest in a Delaware LLC must explicitly and specifically be constituted a member in compliance with the Delaware LLC Act at the relevant time, the LLC agreement, and (if applicable) the LLC’s certificate of formation. That is, an assignee of an LLC interest does not necessarily or automatically become a member. Rather, member status is achieved only by approval of all members¹⁵ or compliance with any procedure provided for in the LLC agreement.

The issue is no different as regards the acquirer of an LLC interest associated with a given Series, though additional or separate documents (e.g., a series supplement) may be relevant or controlling. Practitioners should be mindful that conditions to admission sometimes appear in subscription agreements that are incorporated by reference into or otherwise made a part of the LLC agreement (including any series supplement), or that may contain preconditions to membership that the LLC may not waive. The “admission to membership” opinion does not address whether the LLC, any Series or other members can enforce the (newly admitted) member’s obligations under the LLC agreement (including any series supplement), or whether any such member that is an entity (as contrasted with a natural person) has the power to be a member under the law and documents under which it was formed and exists.

Obligations

For years, many have sought opinions that an LLC interest being acquired is “fully paid and non-assessable.” Such opinions are awkward, at best, in that the requested phrase generally has no antecedent in LLC statutes (by contrast, the language does appear in Section 152 of the Delaware General Corporation Law¹⁶), and has no accepted or customary meaning in the LLC context. The TriBar Committee has reframed the issue in terms of the meaning generally thought to be intended—whether LLC interests are fully paid for upon tender of the purchase price, such that the acquirer is without exposure to further assessment, or by contrast, there is possibility for capital calls.¹⁷ *TriBar 2011* suggests limiting such opinions to applicable LLC statutes, rather than applicable state law generally. Given the distinction between “assignees” and “members” discussed above, opinion givers should take care, as

¹⁵ § 18-301(b)(2).

¹⁶ DEL. CODE ANN. tit. 8, §§ 101-398.

¹⁷ *TriBar 2011* § 3.1.

appropriate, to phrase their opinions in terms of potential financial obligations of holders of LLC interests or members, as the case may be. Opinion givers should, as appropriate, exclude obligations in subscription agreements and LLC agreements other than in the nature of capital calls, obligations to repay to the LLC wrongfully distributed funds, and obligations arising from a member's demand (e.g., cost of copies of books and records), though at least with respect to this last issue *TriBar 2011* regards explicit exclusion as unnecessary (the demand itself, rather than the status of being a member, giving rise to such obligations). As with admission, the issue is no different as regards LLC interests associated with a given Series, though additional or separate documents (e.g., a series supplement) may be relevant or controlling.

Liability

As an adjunct to the opinion discussed immediately above, recipients sometimes seek an opinion as to the absence of personal liability of purchasers of LLC interests to third parties. This opinion has no analogue in the corporate context and derives from an opinion commonly delivered in the limited partnership context. Opinion givers should adopt an approach similar to that suggested in the preceding paragraph, limiting their statements to liability arising solely by reason of being a member of the LLC or a holder of an LLC interest.

PRACTICE POINTS • What follows is a sample phrasing of each opinion discussed above, as the same might be delivered with respect to either a Delaware LLC or a Series thereof, followed by enumeration of the due diligence steps suggested to accompany each such opinion and discussion of their differences.

1. For Status Opinions:

LLC Formulation. The LLC has been duly formed and is validly existing in good standing as a limited liability company under the Delaware LLC Act.

Series Formulation. Series A has been duly established under the Delaware LLC Act and the Governance Documents.

As rendered with respect to an LLC, this opinion has three discrete components:

- Duly formed. The steps taken to form the LLC satisfied all then-applicable statutory requirements;
- Validly existing. This opinion states that the LLC exists de jure as an LLC under applicable law, that its existence has not ceased, but continues.¹⁸ Traditionally, it is supported by both due diligence¹⁹ as to the non-occurrence of an event causing termination and a certificate to such effect from the Delaware Secretary of State;
- In good standing. Based on a certificate from the Delaware Secretary of State, this generally conveys that required reports have been filed and franchise taxes paid, with the consequence that the LLC's status as such has not been revoked or suspended.

As rendered with respect to a Series, this opinion is somewhat narrower:²⁰

¹⁸ See DONALD W. GLAZER, SCOTT T. FITZGIBBON, & STEVEN O. WEISE, *GLAZER AND FITZGIBBON ON LEGAL OPINIONS* § 6.4 (3d ed. 2008) (herein, "GLAZER AND FITZGIBBON").

¹⁹ The scope and manner of performance of such due diligence being informed by customary practice.

²⁰ Note that most LLC statutes require some sort of notice filing, separate record keeping and the like before internal shields arise. That is, there may be a meaningful difference between the antecedents to establishment of Series and establishment of Series with internal shields. Care should be taken that the opinion is sufficiently clear and consistent with

Duly Established

While the Delaware LLC Act speaks of LLCs being formed, it speaks of Series being established. This nomenclatural difference is fairly common in the jurisdictions that permit Series. The distinction is consistent with the notion that a Series is not, in fact, a separate entity. To opine that a Series has been duly established is to opine that all of the steps necessary to establish such Series have been taken.

Due diligence includes:

- Reviewing the LLC’s certificate of formation (as amended through the date of the opinion). As discussed above, inclusion of a statement to the effect that an LLC has, or may in the future have, one or more Series with limitation on liabilities, while a condition precedent to Series having internal shields, does not appear to be a condition precedent to establishment of a Series. Nevertheless, it is possible that the certificate of formation may constitute or evidence part of the LLC agreement, and may specify conditions precedent to establishment of Series. Against this possibility, the certificate of formation should be reviewed and compliance with any such provisions confirmed;
- Reviewing the LLC agreement, which must either establish or provide for the establishment of the Series, and confirming that the specified steps have been taken by the proper parties. While the Delaware LLC Act permits such agreements to be oral, written or implied, this article assumes opinion givers will speak only to LLCs governed by written agreements.

Validly Existing

In the context of a Series, any “validly existing” opinion can rest only on the non-occurrence of termination, whether: (i) on a specified date; (ii) on the happening of a specified occurrence; (iii) by the

the relevant law on this point.

requisite vote of members; or (iv) by court order.²¹ While due diligence can illuminate certain of these questions, the opinion when rendered with respect to LLCs and other entities generally rests, at least to some extent, on a certificate to such effect obtained from the Secretary of State (or similar office) of the jurisdiction under whose law the LLC was formed and exists. Because no filing with the Delaware Secretary of State is necessary to establish a Series, the Secretary of State has no record of the existence of any Series, and so can offer no certificate regarding valid existence.

In Good Standing

In the context of an LLC, the “good standing” opinion, also based on a certificate from the Secretary of State (or similar office) of the jurisdiction under whose law the LLC was formed and exists, generally conveys that required reports have been filed and franchise taxes paid, with the consequence that the LLC’s status as such has not been revoked or suspended. As mentioned above, the Delaware Secretary of State has no record of the existence of any Series, nor does it require the filing of any reports or payment of franchise taxes with respect to Series, with the consequence that it can offer no certificate regarding good standing. The concept is simply inapposite.

2. For “Power” Opinion

LLC Formulation. The LLC has power and authority under the LLC Act and the Governance Documents to execute and deliver the Transaction Documents, and to perform its obligations thereunder.

²¹ See, e.g., § 18-215(k). Note also that the shielding characteristic of a Series with asset shielding may be lost if the records for the Series cease to account for its assets separately, pursuant to (e.g.) § 18-215(b).

Series Formulation. Series A has power and authority under the LLC Act and the Governance Documents to execute and deliver the Transaction Documents, and to perform its obligations thereunder.

The “power” opinion, of course, requires a referent. The phrasing suggested above assumes that referent is the documents governing the transaction. It indicates that, as an organic matter, the specified actions are among those the LLC (or the Series) may rightly take. While most LLC statutes provide for potentially broad powers, opinion givers should recall that a great many LLCs are structured as so-called “special purpose entities” and their powers severely constrained. As discussed above, a literal reading of the Delaware LLC Act reveals explicit and permissive statements, in § 18-215(b), as to the powers potentially afforded a Series established in compliance with the prerequisites to internal shields, but is silent on the powers potentially afforded other Series. Consider, therefore, whether satisfaction of the requirements of § 18-215(b) is necessary to giving the “power” opinion. Note it is generally understood that “power” and “authority” opinions address power and authority under the relevant enabling statute and organic documents, and do not address restrictions arising under other (i.e., non-entity) law, such as licensing requirements to engage in certain activities. Due diligence includes confirming that:

- The LLC statute permits Series to have the power and authority to take the relevant actions; and
- The Series at issue in fact has such power and authority, and that no provision of the LLC agreement (including any series supplement or similar document) or certificate of formation compromises or deprives the Series of such power and authority.

3. For “Action” Opinion

LLC Formulation. The execution and delivery by the LLC of the Transaction Documents, and the performance by the LLC of its obligations thereunder, have been duly authorized by all necessary limited liability company action on the part of the LLC.

Series Formulation. The execution and delivery by Series A of the Transaction Documents, and the performance by Series A of its obligations thereunder, have been duly authorized by all necessary limited liability company action on the part of Series A.

Like the “power” opinion, the “action” opinion requires a referent. The phrasing suggested above assumes that referent is the documents governing the transaction. The “action” opinion provides comfort that the appropriate person or persons, having been vested with the requisite managerial authority to do so, have taken the type of action required by the LLC statute and LLC agreement (including any series supplement), in the manner so required, to approve the specified actions on behalf of the LLC or the Series. Note that management structures can vary widely in LLCs and Series. As discussed above, the statutory default rule for Series is management by the members associated with them in proportion to their economic interests in the Series. But that default rule can be, and often is, varied. Some Series follow a corporate model and through the provisions of their LLC agreements (including any series supplements) create a board of managers or board of directors. Some follow a limited partnership model, designating a manager (who may or may not be a member). Still others follow a general partnership model, leaving managerial authority in associated members (though perhaps vesting members with authority disproportionate to their economic interests). Due diligence includes:

- Determining the range of governance or management structures permitted by the applicable LLC statute;
- Confirming that the structure adopted by the relevant Series is permitted and is adequately clear and unambiguous;
- Determining what person(s) are vested with or constitute the bodies vested with the requisite managerial authority to authorize the relevant action; and
- Confirming that such person(s) or bodies have clearly and unambiguously authorized the relevant action in accordance with all formalities and procedures imposed by the LLC statute and the LLC agreement (including any series supplement).

A further action opinion is sometimes sought, to the effect that specified documents or agreements have been “duly executed and delivered” by a particular entity. As discussed elsewhere, while there is some question as to whether a given Series is, or will be treated as, an entity, most LLC statutes permit Series, or at least those with internal shields, to contract, unless governing documents provide otherwise. This opinion is generally understood to mean that “persons having actual authority to bind the company signed the agreement on behalf of the company and that the agreement was delivered in such a manner as to bring it into effect as a binding obligation of the company.”²² Properly understood, this opinion reflects the application of legal judgment to underlying facts. That is, it is assumed, whether explicitly or implicitly,²³ that the signature of “John Smith, Vice President” is genuine. The opinion expressed is that, based on consideration of relevant entity, agency and contract law, John Smith, Vice President, is someone who, by signing in the name of the company, will have bound it to

the contract at issue. The question of whether John Smith, Vice President, or some poseur, actually signed is factual, and might perhaps be addressed by a notarial officer, but is not properly understood to be within the scope of this legal opinion.²⁴ Notwithstanding the question of whether a given series is an entity, opinion givers should be able to approach the execution and delivery opinion for Series in much the way they do for LLCs and corporations, if with somewhat greater emphasis on its contractual antecedents in a given instance.

4. For “Enforceability” Opinions

LLC Formulation. The LLC agreement is a valid and binding obligation of the Members, and is enforceable against the Members, in accordance with its terms.

Series Formulation. The LLC agreement, including the Series A Supplement, is a valid and binding obligation of the Members associated with Series A, and is enforceable against such Members, in accordance with its terms.

The “enforceability,” or “remedies,” opinion may be reasonably requested where the recipient is acquiring an LLC interest contemporaneously with becoming a member, or a lender or rating agency has particular reason to be concerned about enforceability of covenants, restrictions and internal governance provisions of the LLC agreement, including any series supplement. The opinion is generally understood to mean that each specific remedy provided in the LLC agreement will be enforced,

²² GLAZER AND FITZGIBBON § 9.2.

²³ *Id.* § 9.4.

²⁴ The subtlety of the “genuineness” assumption, even when explicitly stated, and resulting misunderstandings have caused some to add a more salient assumption, e.g. that the document was executed by John Smith in his capacity as Vice President of the company. See Norman M. Powell, *Does the Fortress Decision Offer Any Lessons for Opinion Givers?* 69 BUS. LAW. 969 (2014).

and that whether or not the LLC agreement specifies remedies, the other terms, such as governance provisions, will be enforced by a court applying applicable law. Standard exceptions include bankruptcy and equitable principles. This is the most difficult of the opinions discussed in this article, in large part because it cannot clearly and coherently be limited to the relevant LLC statute, but instead implicates the entire body of relevant contract law. Due diligence includes:

- Confirming that the applicable prerequisites to contract formation have been met (within the confines of appropriate qualifications); and
- Analyzing each undertaking to determine whether, in the reasonable exercise of the opinion giver's professional judgment, the highest court of the state whose law governs would decline to give effect to any of them.

5. The “Admission” Opinion

LLC Formulation. Each of the Transferees has been duly admitted to the LLC as a member of the LLC.

Series Formulation. Each of the Transferees has been duly admitted to the LLC as a member of the LLC associated with Series A.

Recognizing that becoming a transferee of a limited liability company interest, e.g., by assignment, bears no fixed correlation to achieving member status, this opinion addresses the independent, though perhaps contemporaneous, step of admission as an LLC member (and, thus, obtaining the rights of a member). As a general matter, only members may exercise membership rights (unless, of course, provision to the contrary is made in the LLC agreement), and only members associated with a given Series have any significant rights with respect to that Series. Due diligence includes:

- Determining the preconditions to admission established by the applicable LLC statute;
- Determining the preconditions to admission as a member and, as appropriate, association as a member with a particular Series established by the applicable LLC agreement (including any series supplement) and, if relevant, the certificate of formation, subscription agreements, and the like; and
- Confirming compliance with the foregoing insofar as relevant.

6. For “Obligations” Opinions

LLC Formulation. Under the Delaware LLC Act, the Transferee has no obligation to make any payments to the LLC in connection with its purchase of LLC Interests or contributions to the LLC solely by reason of its ownership of LLC Interests or its status as a member of the LLC except in each case as provided in any Subscription Agreement to which it is a party or the LLC agreement and except for its obligation to repay any funds wrongfully distributed to it and except insofar as such payments or contributions have already been made.

Series Formulation. Under the Delaware LLC Act, the Transferee has no obligation to make any payments to the LLC in connection with its purchase of LLC Interests associated with Series A or contributions to the LLC or Series A solely by reason of its ownership of LLC Interests associated with Series A or its status as a member of the LLC associated with Series A except in each case as provided in any Subscription Agreement to which it is a party or the LLC agreement (including any series supplement) and except for its obligation to repay any funds wrongfully distributed to it and except insofar as such payments or contributions have already been made.

In the corporate context, this is the “fully paid and non-assessable” opinion. As discussed above,

those words generally have no antecedent, and thus no clear meaning, in the LLC context. Instead, opinions should be drafted to speak directly to obligations to make payments or contributions. Due diligence includes:

- Reviewing the applicable LLC statute;
- Reviewing the applicable LLC agreement (including any series supplement) and, if relevant, the certificate of formation, subscription agreements, and the like;
- Confirming that none of the foregoing give rise to obligations of the type addressed by the opinion. Examples include both general provision for capital calls and specific provision for further contributions in narrowly described circumstances.

7. For “Liability” (Combined with “Obligations”) Opinions

LLC Formulation. Under the Delaware LLC Act, the Transferee has no obligation to make any payments to the LLC in connection with its purchase of LLC Interests or contributions to the LLC solely by reason of its ownership of LLC Interests or its status as a member of the LLC except insofar as such payments or contributions have already been made, and no personal liability for the debts, obligations and liabilities of the LLC, whether arising in contract, tort or otherwise, solely by reason of being a Transferee or member of the LLC except in each case as provided in any Subscription Agreement to which it is a party or the LLC agreement and except for its obligation to repay any funds wrongfully distributed to it.

Series Formulation. Under the Delaware LLC Act, the Transferee has no obligation to make any payments to the LLC in connection with its purchase of LLC Interests associated with Series A or contributions to the LLC or Series A solely by reason of its ownership of LLC Interests associated

with Series A or its status as a member of the LLC associated with Series A except insofar as such payments or contributions have already been made, and no personal liability for the debts, obligations and liabilities of the LLC, Series A or any other Series of the LLC, whether arising in contract, tort or otherwise, solely by reason of being a Transferee or member of the LLC associated with Series A except in each case as provided in any Subscription Agreement to which it is a party or the LLC agreement (including any series supplement) and except for its obligation to repay any funds wrongfully distributed to it.

There is no analogue to the “liability” opinion in the corporate context, and the TriBar Committee is hopeful that as opinion recipients become more comfortable with the protections afforded by LLC statutes, such opinions will cease to be requested or given.²⁵ The comparative novelty of Series, though, is such that this opinion may persist somewhat longer in the Series context. When given, the opinion generally is combined with the “obligations” opinion discussed at paragraph 6 above. The “liability” opinion does not address liabilities imposed on controlling persons by state or federal laws, because mere transferee or member status does not give rise to such liability. Similarly, the opinion does not address veil-piercing, alter ego, or similar theories, nor tortious or other wrongful conduct. Due diligence includes:

- Reviewing the applicable LLC statute;
- Reviewing the applicable LLC agreement and, if relevant, the certificate of formation, subscription agreements, and the like;
- Confirming that none of the foregoing give rise to the specified liabilities on the part of transferees or members, as appropriate; and
- In the case of a Series opinion, establishing the existence and integrity of internal shields be-

²⁵ *TriBar 2011* § 3.2.

tween Series, and between each Series and the LLC itself.

CONCLUSION • LLCs are uniquely creatures of contractual provisions adopted under enabling language in governing statutes. Many of the issues of greatest interest to participants will have been the subject of negotiation and will be governed by language in the LLC agreement. This is equally the case, if not more so, with Series. Counsel is sometimes expected to provide legal opinions regarding various issues in relation to Series. Some are relatively easy, some very hard. Some require a comprehensive command of applicable contract law, and others are nonsensical (or, at least, unclear) in the context of Series. Simply put, Series differ from LLCs, and the differences have consequences in the opinion context.

Series are established by contract and generally are not persons distinct from the LLCs with which they are associated. Nor can a Series exist independent of the existence of the LLC with which it is associated. Valid existence is not a concept that can be applied to Series in the same way it is applied to LLCs, and good standing—a concept that depends on a government-monitored status—is simply inapposite. The governance of a Series may be identical to, or completely different from, the governance of the LLC with which it is associated. Because Series are established (or their establishment provided for) under an LLC agreement, they are truly creatures of contract, not of statute except in the broadest sense. Series do not issue LLC interests, nor do they

have members. Rather, LLCs issue LLC interests. Certain such interests may be associated with a given Series, as may certain members of the LLC. It follows, then, that members are not admitted to a Series, but rather to the LLC (though, perhaps, associated with a Series). Conceptually, the opinion to the effect that a member has “fully paid for” his interest associated with a given Series is no different from such opinion vis-à-vis the LLC itself. Finally, the opinion to the effect that a member, as such, has no liability for the obligations of the LLC itself easily translates to the Series, but might be expanded to speak of a member’s non-liability for the obligations of the LLC itself, the Series at issue, or any other Series of the LLC. This, of course, would require a thorough knowledge of the LLC and each of its Series, and may be deemed overbroad and cost-prohibitive in many contexts.

While delivery of a third-party opinion does not establish a lawyer-client relationship with the opinion recipient, the lawyer nonetheless owes the recipient a duty to exercise care—to exercise the competence and diligence normally exercised by lawyers on similar matters.²⁶ Don’t assume that all Series are the same, or even similar. And don’t assume each opinion you can give with respect to an LLC can be given with respect to a Series. In short, know what you know, and opine only on that.

²⁶ RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS §§ 51(2), 52(1), 52 cmt. b (2000).

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