

# THE TEMPLE 10-Q

— TEMPLE'S BUSINESS LAW MAGAZINE —

January 22, 2015 / Legal Developments

## Series of LLCs: *The Next Big Thing?*

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A “series LLC” is an LLC that has one or more “series.” A “series” is like, but not quite, a subsidiary. About a dozen states currently offer series LLCs. Most can have their own assets and liabilities. Internal liability shields provide that assets associated with a series are available only to creditors of that series, and not to creditors of other series or of the series LLC. Generally, series can conduct their affairs in their own names. But it’s unclear whether a given state will honor another state’s series or their internal liability shields, which has important implications for those who would lend to series LLCs against the value of their assets. Moreover, UCC Article 9, which generally governs secured transactions in personal property and fixtures, and the Bankruptcy Code, present challenges and uncertainties with respect to series LLCs that create traps for the unwary.

Prerequisites to the existence of internal shields differ, but generally include publicly available notice of series existence. Some statutes require general notice filing with the Secretary of State (*e.g.*, Delaware—notice can simply indicate that the series LLC has or may in the future have series). Others require specific notice filing with the Secretary of State (*e.g.*, Illinois—notice must be filed with respect to and specifically referencing each series by name).

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One may wonder whether internal shields will be widely respected.

Some say yes, and look to the law of the state under which the series was formed. This approach implicitly assumes that shields are always and necessarily internal affairs under the internal-affairs/conflict-of-laws doctrine. Others take a contrary view. In *Alphonse v. Arch Bay Holdings, L.L.C.* (548 F. App’x 979 (5th Cir. 2013), for example, the court noted that different conflict-of-laws principles apply where the rights of third parties are involved. This might leave the series assets exposed to claims of non-series creditors under the law of another state.

Many assume series are separate entities. But most statutes are silent (*e.g.*, Delaware). Some statutes state that an LLC’s governance documents may provide that series are to be treated as separate entities (*e.g.*, District of Columbia), with the consequence that entity status is a matter of contract construction. Others (*e.g.*, Illinois) provide separate entity status only where internal liability shields are in place and to the extent provided in the entity’s governance documents. Still others explicitly disclaim separate entity status (*e.g.*, Texas).

Where series are not entities, they may fall outside the scope of UCC Article 9. By definition, the “debtor” is the *person* having an interest in collateral within the meaning of UCC RA9 § 102(a)(28). Section 1-201(b)(27) of UCC Article 1 defines “person” to include an LLC and “*any other legal or commercial entity.*” It may be unclear whether a given series is a legal or commercial entity at all, and thus whether it is a “person” for UCC purposes. It is, for example, quite clear that a series of a Texas LLC is not a person for this purpose.

Equally clear, but widely misunderstood, is that most series are not “registered organizations” under the UCC, with important consequences for taking series assets as collateral.

Under UCC § 9-102(a)(71), a registered organization is “*an organization organized solely under the law of a single State . . . by the filing of a public organic record with . . . the State.*” A corporation is the classic form of registered organization. In simple terms, the UCC generally provides that a security interest in assets of a registered organization is perfected (made enforceable against third parties, such as other creditors or a bankruptcy trustee) by notice-filing in its state of formation (*e.g.*, Delaware for a Delaware corporation). Only the Illinois statute contemplates that series can be formed or organized by the filing of a public organic record, thus satisfying the UCC’s definition of a “registered organization.” In other states, the juridical status of LLC series is simply unknown.

The interrelation between series LLCs and the Bankruptcy Code is still more uncertain. Under the Bankruptcy Code, a debtor is “*a person. . . concerning which a case . . . has been commenced.*” 11 U.S.C. § 101(13). “Person,” in turn, is defined to include individuals, partnerships, and corporations. *Id.* § 101(41). The definition does not explicitly include LLCs, though many people have become comfortable that LLCs are close enough to corporations for Bankruptcy Code purposes. But it is far from certain whether series of an LLC will fit the definition. Similarly, while there are arguments that internal shields should be respected in a bankruptcy proceeding of the LLC itself, there is no precedent assuring such treatment, an uncertainty many find unsettling.

None of this is to suggest a deficiency in the various statutes. For example, the series provisions of the Delaware LLC Act (6 Del. C. § 18-101 et seq.), like those of the Delaware Statutory Trust Act (12 Del. C. § 3801 et seq.), were intended to facilitate certain usages (*e.g.*, as registered investment companies under the Investment Company Act of 1940, as amended (15 U.S.C. § 80a-1 *et seq.*). But some may assume a simpler interrelation between series statutes and debtor-creditor law than is warranted. Beware what you do not – and cannot – know about series LLCs.