

Delaware Harmonizes Alternative Entity Series and UCC Article 9

By Norman M. Powell*

Delaware statutory trusts, limited liability companies, and limited partnerships can form separate series of assets that, if certain statutory requirements are met, cannot be reached by creditors of the entity as a whole or of any other series. Recently, many practitioners and commentators have been concerned that such series may not be among the entities falling under the UCC's definition of "person" and thus may fall outside the realm of potential "debtors" for purposes of Article 9 of the UCC. This article reviews the series provisions in the acts governing Delaware statutory trusts, limited liability companies, and limited partnerships, and provides a framework for analyzing questions regarding the perfection of security interests in the assets of a series.

I. INTRODUCTION

The term "alternative entity" is widely used to refer to legal entities other than corporations. Among the more popular alternative entities available under Delaware law are the statutory trust (the "DST"), the limited liability company (the "DLLC"), and the limited partnership (the "DLP"). They are formed and exist, respectively, under the Delaware Statutory Trust Act of the Delaware Code (the "DST Act"),¹ the Delaware Limited Liability Company Act of the Delaware Code (the "DLLC Act"),² and the Delaware Limited Partnership Act of the Delaware Code (the "DLP Act").³ Each of these statutes facilitates the formation of entities with attributes carefully crafted to meet the needs of a given application, and is regularly revised so as to best assure that Delaware alternative entities can be crafted to meet the ever-developing needs of the marketplace. Each explicitly invokes Delaware's policy to give "maximum effect to the principle of freedom of contract and to the enforceability of [governing agreements]."⁴

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1. DEL. CODE ANN. tit. 12, §§ 3801–3829 (West, Westlaw through ch. 18 of the 151st Gen. Assemb. (2021–2022)).

2. DEL. CODE ANN. tit. 6, §§ 18-101–18-1208 (West, Westlaw through ch. 18 of the 151st Gen. Assemb. (2021–2022)).

3. *Id.* §§ 17-101–17-1208.

4. DEL. CODE ANN. tit. 12, § 3828(b) (West, Westlaw through ch. 18 of the 151st Gen. Assemb. (2021–2022)); DEL. CODE ANN. tit. 6, §§ 17-1101(c), 18-1101(b) (West, Westlaw through ch. 18 of the 151st Gen. Assemb. (2021–2022)).

Formation of a DST, DLLC, or DLP (each, an “Alternative Entity”) requires the filing of a short and simple certificate with the Delaware Secretary of State,⁵ and generally includes drafting of an operating agreement endowing the entity with the special attributes desired in the application at hand.⁶ Thus, many of the most sought-after and bargained-for attributes of a given Alternative Entity are a function not of governing statutes but of carefully drafted operating agreements that alter or displace otherwise applicable statutory default rules, or make use of other contractual freedoms. For several decades now, the establishment of “series” has been permitted under all three types of Alternative Entities.⁷

A. WHAT’S A SERIES?

In some ways, a “series” is like a subsidiary. A DST with series (a “Series DST”) is permitted, in the name of such series, to contract, hold title to assets, grant liens and security interests, and sue and be sued.⁸ Reflecting still greater autonomy, series of a DLLC or DLP (“DLLC Series” and “DLP Series,” respectively) are permitted to do these things in their own names, and to carry on any lawful business other than the business of banking.⁹ That is to say, the DST Act stops short of declaring that series of a DST (“DST Series”) themselves have power and authority to do such things.¹⁰ Thus, DLLC Series and DLP Series have more, and DST Series fewer, of the attributes and capabilities one generally associates with legal or commercial entities. All three Alternative Entity series differ in another fundamental way from subsidiaries—no such series can exist beyond the existence of the Alternative Entity under which it was established and exists.¹¹

5. DEL. CODE ANN. tit. 12, § 3801(i)(2) (West, Westlaw through ch. 18 of the 151st Gen. Assemb. (2021–2022)); DEL. CODE ANN. tit. 6, §§ 17-201(a), 18-201(a) (West, Westlaw through ch. 18 of the 151st Gen. Assemb. (2021–2022)).

6. DEL. CODE ANN. tit. 12, § 3801(e), (i)(1) (West, Westlaw through ch. 18 of the 151st Gen. Assemb. (2021–2022)); DEL. CODE ANN. tit. 6, §§ 17-201(d), 18-201(d) (West, Westlaw through ch. 18 of the 151st Gen. Assemb. (2021–2022)).

7. DEL. CODE ANN. tit. 12, § 3806(b) (West, Westlaw through ch. 18 of the 151st Gen. Assemb. (2021–2022)); DEL. CODE ANN. tit. 6, §§ 17-218, 17-221, 18-215, 18-218 (West, Westlaw through ch. 18 of the 151st Gen. Assemb. (2021–2022)).

8. DEL. CODE ANN. tit. 12, § 3804(a) (West, Westlaw through ch. 18 of the 151st Gen. Assemb. (2021–2022)).

9. DEL. CODE ANN. tit. 6, §§ 17-218(b)(2), 17-221(c)(2), 18-215(b)(1), 18-218(c)(1) (West, Westlaw through ch. 18 of the 151st Gen. Assemb. (2021–2022)).

10. See, e.g., DEL. CODE ANN. tit. 12, § 3804(a) (West, Westlaw through ch. 18 of the 151st Gen. Assemb. (2021–2022)).

11. See DEL. CODE ANN. tit. 6, §§ 17-218(b)(10), 17-221(c)(10) (West, Westlaw through ch. 18 of the 151st Gen. Assemb. (2021–2022)) (providing that a series is terminated or dissolved upon the dissolution of DLP); *id.* §§ 18-215(b)(9), 18-218(c)(9) (providing that a series is terminated or dissolved upon the dissolution of DLLC). While the DST Act does not contain an explicit statement to like effect, it is implicit from the statutory provisions relating to DST Series that they, too, cannot exist beyond the existence of the related DST. See DEL. CODE ANN. tit. 12, § 3810(a)(1) (West, Westlaw through ch. 18 of the 151st Gen. Assemb. (2021–2022)) (“Every [DST] shall file a certificate of trust in the office of the Secretary of State.”); *id.* § 3804(a) (for a DST Series to be protected by internal liability shields, “notice of the limitation on liabilities” of the DST Series must be “set forth in the certificate of trust of the [Series DST]”); *id.* § 3810(d) (“A certificate of trust shall be cancelled upon the dissolution and the completion of winding up of a [DST] . . .”).

Where specified requirements are met, internal liability shields provide that assets associated with a given series are available only to creditors of that series, and not to creditors of other series or of the Alternative Entity under which the series was established and exists.¹²

B. WHAT'S THE DIFFICULTY WITH SERIES AND UCC ARTICLE 9?

A given series' lack of entity status may be helpful, even necessary, in some contexts, but presents troubling issues where series purport to be debtors under the Uniform Commercial Code (the "UCC").¹³ Generally speaking, the UCC defines "debtor" as "a person having an interest . . . in the collateral."¹⁴ "Person" is defined as "an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity."¹⁵ Recently, many practitioners and commentators have been concerned that a given series may be none of those entities falling under the UCC's definition of "person" and thus may fall outside the realm of potential "debtors" for UCC purposes.¹⁶ Much of this concern has focused on DLLC Series.¹⁷ By legislation enacted in 2018, with a delayed effective date of August 1, 2019, the Delaware General Assembly sought to relieve these concerns by amendments to the DLLC Act.¹⁸ By legislation enacted and effective in 2019, the DLP Act was amended to include substantially similar provisions.¹⁹ Amendments to the DST Act enacted and effective in 2020 take a different approach consistent with historical differences between DST Series, on the one hand, and DLLC Series and DLP Series, on the other.²⁰

II. A BRIEF HISTORY OF SERIES UNDER THE DST ACT

The DST Act, initially enacted in 1988,²¹ has always provided that DSTs may sue and be sued, and that property of a DST shall be subject to attachment and

12. DEL. CODE ANN. tit. 12, § 3804(a) (West, Westlaw through ch. 18 of the 151st Gen. Assemb. (2021–2022)); DEL. CODE ANN. tit. 6, §§ 17-218(b), 17-221(c), 18-215(b), 18-218(c) (West, Westlaw through ch. 18 of the 151st Gen. Assemb. (2021–2022)).

13. References to the UCC are to the official text promulgated by the Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws) and the American Law Institute, (i) as to Article 1, in 2001, as amended through 2018, and (ii) as to Article 9, in 1998 (which generally took effect on July 1, 2001), as amended through the 2010 Amendments thereto (which generally took effect on July 1, 2013).

14. U.C.C. § 9-102(a)(28) (AM. L. INST. & UNIF. L. COMM'N 1998). The term also includes sellers of accounts, chattel paper, payment intangibles, or promissory notes, and consignees. *Id.*

15. U.C.C. § 1-201(b)(27) (AM. L. INST. & UNIF. L. COMM'N 2001).

16. See, e.g., Norman M. Powell, *Secured Lending to Series of LLCs: Beware What You Do Not (and Cannot) Know*, 46 UCC L.J. 95, 99–103 (2015).

17. See *id.*

18. Act of July 23, 2018, ch. 357, §§ 1–35, 81 Del. Laws (2017–2018).

19. Act of June 19, 2019, ch. 46, §§ 1–31, 82 Del. Laws (2019–2020).

20. Act of July 23, 2020, ch. 264, §§ 1–19, 82 Del. Laws (2019–2020).

21. Act of June 21, 1988, ch. 279, § 1, 66 Del. Laws 514 (1987–1988) (creating DEL. CODE ANN. tit. 12, §§ 3801–3815).

execution as if the DST were a corporation.²² The DST Act was amended in 1990 to permit the establishment of series.²³ The 1990 amendments explicitly provided that, if separate and distinct records are maintained for a series and other formalities observed, the debts, liabilities, obligations, and expenses incurred, contracted for, or otherwise existing with respect to a particular series shall be enforceable against the assets of such series only, and not against the assets of the DST generally, but only in the case of a DST that is a registered investment company under the Investment Company Act of 1940.²⁴ Amendments enacted in 1994 made these internal liability shields available to all DST Series satisfying the statutory prerequisites, regardless of whether the related DST is a registered investment company.²⁵ Amendments enacted in 1998 provided that, if the statutory prerequisites have been satisfied, none of the debts, liabilities, obligations and expenses incurred, contracted for, or otherwise existing with respect to a DST generally or any other DST Series shall be enforceable against the assets of any DST series.²⁶ Amendments effective in 2016 added language central to the consideration of DST Series in this article:

As used in this chapter, a reference to assets of a series includes assets associated with a series and a reference to assets associated with a series includes assets of a series. Except to the extent otherwise provided in the governing instrument of a statutory trust, a statutory trust that has established series in accordance with this subsection (a) may contract, hold title to assets (including real, personal and intangible property), grant liens and security interests, and sue and be sued, in each case, in the name of a series.²⁷

The first sentence quoted above is generally understood to have been included for the reason that in amendments over the years the language enacted referred variously to “assets of a series” or “assets associated with a series,” with no distinction intended.²⁸ The second sentence quoted above addressed the growing practice of drafting documents, intended to create liabilities for and give rise to recourse against assets of a given series, for execution in the name of such series. Note that, unequivocally, the power to contract, hold title to assets, grant security interests, and the like, remains vested in the Series DST as such, despite the Series DST’s taking such action in the name of a DST Series.

22. DEL. CODE ANN. tit. 12, § 3804 (West, Westlaw through ch. 18 of the 151st Gen. Assemb. (2021–2022)).

23. Act of July 5, 1990, ch. 297, § 4, 67 Del. Laws 682 (1989–1990) (amending DEL. CODE ANN. tit. 12, § 3806).

24. *Id.* § 18, 67 Del. Laws 688 (amending DEL. CODE ANN. tit. 12, § 3804).

25. Act of June 27, 1994, ch. 265, § 2, 69 Del. Laws 525 (1993–1994) (amending DEL. CODE ANN. tit. 12, § 3804(a)).

26. Act of June 29, 1998, ch. 335, § 2, 71 Del. Laws 859 (1997–1998) (amending DEL. CODE ANN. tit. 12, § 3804(a)).

27. Act of July 13, 2016, ch. 304, § 2, 80 Del. Laws (2015–2016) (amending DEL. CODE ANN. tit. 12, § 3804(a)).

28. See S. 243, 148th Gen. Assemb. § 2 (Del. 2016) (synopsis). Currently, the DST Act references “assets of [a] series” in sections 3804(a), 3806(b)(3), and 3808(g); it references “assets associated with a series” in section 3804(a). DEL. CODE ANN. tit. 12, §§ 3804, 3806, 3808 (West, Westlaw through ch. 18 of the 151st Gen. Assemb. (2021–2022)).

In 2020, a new sentence was added at the end of DST Act section 3804(a):

Solely with respect to any liens or security interests granted in any assets of a series or any assets associated with a series of a statutory trust, only the statutory trust shall be the “debtor” within the meaning of Article 9 of the [UCC] as the person having the power to transfer rights in such assets.²⁹

This addition was intended to confirm, rather than to change, existing law.³⁰ It explicitly states what historically has been implicit—that the Series DST, not a given DST Series, is the debtor for UCC purposes with respect to any assets of, or associated with, a given DST Series.

III. A BRIEF HISTORY OF SERIES UNDER THE DLLC ACT AND THE DLP ACT

Following two years behind the DST Act, since 1996, both the DLLC Act and the DLP Act have permitted series. More specifically, the DLLC Act and the DLP Act have permitted the establishment of designated series of members, managers, or limited liability company interests (in the case of the DLLC Act), or limited partners or partnership interests (in the case of the DLP Act) with separate rights, powers, or duties with respect to specified property or obligations of a DLLC with series (a “Series DLLC”) or a DLP with series (a “Series DLP”).³¹ In 2000, the DLLC Act and DLP Act were amended to explicitly allow assets associated with a series to be held “directly or indirectly, including through a nominee or otherwise.”³² Since 2007, the DLLC Act and the DLP Act have afforded DLLC Series and DLP Series the power and capacity, in their own names, to “contract, hold title to assets (including real, personal and intangible property), grant liens and security interests, and sue and be sued.”³³ Thus, and in contrast with DST Series, DLLC Series and DLP Series may in fact hold title to their own assets in their own names. Thus, in the parlance of UCC Article 9, the DLLC Series or DLP Series, to the exclusion of the Series DLLC or Series DLP itself, may “have an interest” in the collateral and be a “debtor” with respect to such assets.³⁴

29. Act of July 23, 2020, ch. 264, § 2, 82 Del. Laws (2019–2020) (amending DEL. CODE ANN. tit. 12, § 3804).

30. S. 244, 150th Gen. Assemb. § 2 (Del. 2020) (synopsis).

31. Act of June 10, 1996, ch. 360, § 9, 70 Del. Laws 801 (1995–1996) (creating DEL. CODE ANN. tit. 6, § 18-215); Act of June 10, 1996, ch. 362, § 13, 70 Del. Laws 811 (1995–1996) (creating DEL. CODE ANN. tit. 6, § 17-218).

32. Act of June 30, 2000, ch. 389, § 14, 72 Del. Laws (1999–2000) (amending DEL. CODE ANN. tit. 6, § 18-215(b)); Act of June 30, 2000, ch. 386, § 13, 72 Del. Laws (1999–2000) (amending DEL. CODE ANN. tit. 6, § 17-218(b)).

33. Act of July 10, 2007, ch. 105, § 25, 76 Del. Laws (2007–2008) (amending DEL. CODE ANN. tit. 6, § 18-215 to add new subsection (c)); Act of July 10, 2007, ch. 104, § 28, 76 Del. Laws (2007–2008) (amending DEL. CODE ANN. tit. 6, § 17-218 to add new subsection (c)).

34. U.C.C. § 9-102(a)(28)(A) (AM. L. INST. & UNIF. L. COMM’N 1998).

IV. SERIES AND SECURED TRANSACTIONS

Those dealing with the creation and perfection of security interests in assets of, or associated with, a DST Series, a DLLC Series, or a DLP Series must be particularly careful in identifying their “debtor,” within the meaning of Article 9 of the UCC,³⁵ and in answering each question that follows from that threshold issue. The remainder of this article discusses, and the chart at the end of this article provides a helpful reference guide on, how to file financing statements under UCC Article 9 to perfect security interests in assets associated with Alternative Entities and series thereof.

Most lawyers are comfortable that DSTs, DLLCs, and DLPs are “registered organizations” within the meaning of Article 9 of the UCC.³⁶ Thus, a DST (including a Series DST), a DLLC (including a Series DLLC), and a DLP (including a Series DLP) is “located” in Delaware under section 9-307(e) of the UCC,³⁷ and a UCC financing statement identifying a Series DST, a Series DLLC, or a Series DLP as “debtor” must feature the Series DST’s, Series DLLC’s, or Series DLP’s name (only), as specified in UCC section 9-503(a)(1), in box 1a,³⁸ and be filed in Delaware under UCC section 9-301.³⁹ But, what if the Series DLLC or Series DLP is not the “debtor”—if the DLLC Series or DLP Series itself, to the exclusion

35. *Id.*

36. *Id.* § 9-102(a)(71). Note that, if so provided in its certificate of trust and its governing instrument, a DST may not be a separate legal entity. DEL. CODE ANN. tit. 12, § 3810(a)(2) (West, Westlaw through ch. 18 of the 151st Gen. Assemb. (2021–2022)). Regardless, every DST is an “unincorporated association,” *id.* § 3801(i), and thus a “person” under the UCC. See U.C.C. § 1-201(b)(27) (AM. L. INST. & UNIF. L. COMM’N 2001) (defining “person” to include “association”).

37. U.C.C. § 9-307(e) (AM. L. INST. & UNIF. L. COMM’N 1998) (addressing “Location of Debtor”); *id.* § 9-102(a)(71) (defining “registered organization” to mean “an organization formed or organized solely under the law of a single State or the United States by the filing of a public organic record with . . . the State”). Formation of any DST requires the filing of a certificate of trust with the Delaware Secretary of State. DEL. CODE ANN. tit. 12, §§ 3801(i), 3810 (West, Westlaw through ch. 18 of the 151st Gen. Assemb. (2021–2022)). Similarly, formation of any DLLC or DLP requires the filing of a certificate of formation or certificate of limited partnership with the Delaware Secretary of State. DEL. CODE ANN. tit. 6, §§ 17-201, 18-201 (West, Westlaw through ch. 18 of the 151st Gen. Assemb. (2021–2022)). Thus, excepting for the remote possibility that a given Alternative Entity will fail to be a “registered organization” by reason of its being formed or organized under the laws of more than one state, see U.C.C. § 9-102(a)(71) (AM. L. INST. & UNIF. L. COMM’N 1998), every Alternative Entity is itself a “registered organization” for UCC purposes.

38. See U.C.C. § 9-503 (AM. L. INST. & UNIF. L. COMM’N 1998) (addressing “Name of Debtor”); *id.* § 9-521 (“Uniform Form of Written Financing Statement”). Throughout this article, the text refers to the “box” identified in the “safe harbor” Form UCCL (Rev. 04/20/11), but should be understood to include the analogous field(s) in an electronic filing interface. As of this writing, a small but growing minority of states require or encourage electronic filing. See, e.g., *Uniform Commercial Code*, DEL. DIV. CORP., <https://corp.delaware.gov/ucc/> (last visited June 2, 2021) (“Effective December 1, 2015, the Delaware Division of Corporations . . . will require that all UCC filings be submitted to the Division electronically.”); *UCC Forms and Fees*, VA. STATE CORP. COMM’N, <https://www.scc.virginia.gov/pages/UCC-Forms-Fees> (last visited June 2, 2021) (“The UCC-1 Financing Statement . . . can be filed online through the Clerk’s Information System . . . Alternatively, [one may] submit a UCC document for filing by postal mail . . .”). In deference to common parlance, and for ease of comprehension, this article speaks of “boxes” in the “safe harbor” Form UCCL.

39. U.C.C. §§ 9-301, 9-501 (AM. L. INST. & UNIF. L. COMM’N 1998). Of course, this general “where to file” rule, while applicable to most UCC filings, does not apply to fixture filings and perfection of a security interest in timber to be cut or as-extracted collateral. See *id.* § 9-301(3), (4).

of the Series DLLC or Series DLP, holds an interest in the collateral? To qualify as a “debtor” under the UCC, such series must be a “*person* having an interest” in the collateral.⁴⁰

A. DST SERIES AND SECURED TRANSACTIONS

In the case of DSTs, the “debtor,” for UCC purposes, is the DST itself, even with respect to assets of, or associated with, a given DST Series. A security agreement might provide for the Series DST’s granting of a security interest in its own name or in the name of a given DST Series as debtor, but any UCC financing statement would properly identify the debtor by featuring the Series DST’s name in box 1a. Any person wishing to reflect that only the assets of, or associated with, a given series comprise the collateral might do so elsewhere on the financing statement. Because the Series DST is a “registered organization,” the financing statement would generally be filed with the Delaware Secretary of State in accord with UCC section 9-307(e).⁴¹

B. DLLC SERIES, DLP SERIES, AND SECURED TRANSACTIONS

Amendments to the DLLC Act and the DLP Act effective August 1, 2019, have resulted in more harmonious interrelation of these Alternative Entity statutes and UCC Article 9. Among other things, the amendments provide that all DLLC Series and all DLP Series are “persons” under the UCC, and a new type of DLLC Series and DLP Series—the “registered series”—is a “registered organization” under UCC Article 9.

1. *Who’s the Debtor?*

Amendments to the DLLC Act enacted in 2018 and effective August 1, 2019, and amendments to the DLP Act enacted in 2019 and effective August 1, 2019, essentially create a new type of series—a “registered series”—and distinguish series of the type historically available and featuring internal liability shields by referring to them as “protected series.”⁴² Protected series of DLLCs and DLPs (“DLLC Protected Series” and “DLP Protected Series,” respectively, and together, “Protected Series”) are explicitly stated to be “associations,”⁴³ and so fall within the UCC’s definition of “person” and, by implication, are embraced by its definition of “debtor.”⁴⁴ Likewise, registered series of DLLCs and DLPs (“DLLC Registered Series” and “DLP Registered Series,” respectively, and together, “Registered Series”) are explicitly stated to be “associations,” and so fall

40. *Id.* § 9-102(a)(28)(A) (emphasis added).

41. *Id.* §§ 9-102(a)(71), 9-307(e).

42. DEL. CODE ANN. tit. 6, §§ 17-101(18), (19), 18-101(16), (17) (West, Westlaw through ch. 18 of the 151st Gen. Assemb. (2021–2022)).

43. *Id.* §§ 17-218(b)(13), 18-215(b)(12).

44. U.C.C. § 1-201(b)(27) (AM. L. INST. & UNIF. L. COMM’N 2001) (defining “person”); U.C.C. § 9-102(a)(28) (AM. L. INST. & UNIF. L. COMM’N 1998) (defining “debtor”).

within the UCC's definition of "person" and, by implication, are embraced by its definition of "debtor."⁴⁵ For further ease and certainty in determining their names and locations for filing purposes in secured transactions, Registered Series are intended to be "registered organizations," as discussed in greater detail below.⁴⁶

2. Statutory Provisions—Protected Series

The DLLC Act and DLP Act historically have used substantially similar nomenclature regarding what are now termed Protected Series, giving rise to the same question: As regards the assets of a given Protected Series, who is the "debtor" within the meaning of Article 9 of the UCC? Possibilities include the Series DLLC or DLLC Protected Series itself, and the Series DLP or DLP Protected Series itself.

The DLLC Act provides, with respect to DLLC Protected Series, at section 18-215 in relevant part as follows:

(b) . . . Assets associated with a protected series may be held directly or indirectly, including in the name of such series, in the name of the limited liability company, through a nominee or otherwise. . . .

(1) . . . Unless otherwise provided in a limited liability company agreement, a protected series shall have the power and capacity to, in its own name, contract, hold title to assets (including real, personal and intangible property), grant liens and security interests, and sue and be sued.⁴⁷

Similarly, the DLP Act provides, with respect to DLP Protected Series, at section 17-218 in relevant part as follows:

(b) . . . Assets associated with a protected series may be held directly or indirectly, including in the name of such series, in the name of the limited partnership, through a nominee or otherwise. . . .

(2) . . . Unless otherwise provided in a partnership agreement, a protected series shall have the power and capacity to, in its own name, contract, hold title to assets (including real, personal and intangible property), grant liens and security interests, and sue and be sued.⁴⁸

Thus, in substance, these provisions of the DLLC Act and the DLP Act are identical.

45. DEL. CODE ANN. tit. 6, §§ 17-221(c)(13), 18-218(c)(12) (West, Westlaw through ch. 18 of the 151st Gen. Assemb. (2021–2022)); see U.C.C. § 1-201(b)(27) (AM. L. INST. & UNIF. L. COMM'N 2001) (defining "person"); U.C.C. § 9-102(a)(28) (AM. L. INST. & UNIF. L. COMM'N 1998) (defining "debtor").

46. See S. 183, 149th Gen. Assemb. § 21 (Del. 2018) (synopsis); S. 89, 150th Gen. Assemb. § 18 (Del. 2019) (synopsis); see *infra* Parts IV.B.3.–4.

47. DEL. CODE ANN. tit. 6, § 18-215(b) (West, Westlaw through ch. 18 of the 151st Gen. Assemb. (2021–2022)).

48. *Id.* § 17-218(b).

3. *Statutory Provisions—Registered Series*

The DLLC Act provides, with respect to DLLC Registered Series, at section 18-218 in relevant part as follows:

(c) . . . Assets associated with a registered series may be held directly or indirectly, including in the name of such series, in the name of the limited liability company, through a nominee or otherwise. . . .

(1) . . . Unless otherwise provided in a limited liability company agreement, a registered series shall have the power and capacity to, in its own name, contract, hold title to assets (including real, personal and intangible property), grant liens and security interests, and sue and be sued.⁴⁹

Similarly, the DLP Act provides, with respect to DLP Registered Series, at section 17-221 in relevant part as follows:

(c) . . . Assets associated with a registered series may be held directly or indirectly, including in the name of such series, in the name of the limited partnership, through a nominee or otherwise. . . .

(2) . . . Unless otherwise provided in a partnership agreement, a registered series shall have the power and capacity to, in its own name, contract, hold title to assets (including real, personal and intangible property), grant liens and security interests, and sue and be sued.⁵⁰

Thus, in substance, these provisions of the DLLC Act and the DLP Act are identical. Moreover, the parallel provisions of the DLLC Act and the DLP Act dealing with Protected Series and Registered Series are likewise identical.

4. *Sorting Through the Possible Debtors and Filing Against the Debtor*

Given that assets associated with either a Protected Series or a Registered Series can be held in a variety of ways, including in the name of the Series DLLC or Series DLP, and in the name of the Protected Series or Registered Series, determining which option has been elected in a given instance will require review of relevant records. For instance, one should determine, among other things, how titled assets are held and how bills of sale are styled. Of course, some indicia will be more definitive than others.

a. The Series DLLC or Series DLP as Debtor

If the Series DLLC or Series DLP itself is the debtor, UCC Article 9 requires an ordinary filing against and naming the Series DLLC or Series DLP as debtor, in

49. *Id.* § 18-218(c).

50. *Id.* § 17-221(c).

the Series DLLC's or Series DLP's location (that is, Delaware).⁵¹ Matters unique to the series might be addressed in the collateral description, or in box 17 (miscellaneous) of the financing statement addendum, as appropriate.⁵²

b. A Nominee as Debtor

If a nominee is the debtor, one must consider whether that nominee is an organization, a registered organization, an individual, or something else. An effective filing against the assets of the corresponding series would be filed in such nominee's location (which may not be Delaware) as determined under the applicable subpart of UCC section 9-307, and name the nominee (only) in box 1a (if an organization) or box 1b (if an individual) in accord with UCC section 9-503.⁵³

c. A Protected Series as Debtor

If a Protected Series is the debtor, one must consider whether it is a registered organization, an organization (other than a registered organization), or something else. "Registered organization," as defined in Article 9 of the UCC, means "an organization formed or organized solely under the law of a single State or the United States by the filing of a public organic record with, the issuance of a public organic record by, or the enactment of legislation by the State or the United States."⁵⁴ Protected Series do not fit the UCC's definition of "registered organization." The Delaware Secretary of State does not necessarily receive any record showing a given Protected Series to have been organized (nor, of interest to the would-be filer, indicating its name), and the Series DLLC or Series DLP as a whole is issued a single organizational identification number. No Protected Series is issued any organizational identification number.

Section 18-215(b) of the DLLC Act requires that notice of the limitation on liabilities of a DLLC Protected Series be set forth in the certificate of formation of the Series DLLC so as to give rise to the internal liability shields discussed earlier in this article, but requires nothing more in the organic filing. Likewise, section 17-218(b) of the DLP Act imposes the same requirement for DLP Protected Series. Indeed, the notice may refer to the LLC agreement's (or LP agreement's) establishment, or provision for future establishment, of DLLC Protected Series or DLP Protected Series. The DLLC Act provides that such notice "shall be sufficient for all purposes of this subsection whether or not the limited liability company has established any protected series when such notice is included in the certificate

51. Recall that a Series DLLC or Series DLP is a "registered organization," U.C.C. § 9-102(a)(71) (AM. L. INST. & UNIF. L. COMM'N 1998), with the consequence that its name is that stated on its public organic record, *id.* § 9-503(a)(1), and it is located in Delaware. *Id.* § 9-307(e). See generally *id.* § 9-301 (providing that the law of the jurisdiction in which a debtor is located generally governs perfection by filing); *id.* § 9-501(a) (generally providing for filing with a secretary of state or similar central office, with exception for fixture filings, as-extracted collateral, and timber to be cut, which instead are to be filed in the appropriate real property records office).

52. See *id.* § 9-521 ("Uniform Form of Written Financing Statement").

53. See *id.* §§ 9-307, 9-503, 9-521.

54. *Id.* § 9-102(a)(71).

of formation, and there shall be no requirement that . . . any specific protected series of the limited liability company be referenced in such notice.”⁵⁵ The parallel provision of the DLP Act is to like effect for DLP Protected Series.⁵⁶ Simple notice that one or more (unnamed) Protected Series might come into existence at some unspecified time in the future will suffice. Thus, filing the certificate specified in the DLLC Act or DLP Act with respect to Protected Series is necessary (while not sufficient) to endow them with the attribute of series liability shields, but is existentially irrelevant—it has nothing to do with the formation or organization of a Protected Series. In that sense, Protected Series are analogous to limited liability partnerships (“LLPs”). General partnerships may be formed without any filings, and LLPs are a subset of general partnerships that acquire limited liability features only by way of filing, but that filing does not form the entity.⁵⁷ Thus, LLPs are not “registered organizations.”⁵⁸ For the same reasons, neither are Protected Series.

“Organization,” as defined in the UCC, means “a person other than an individual.”⁵⁹ In turn, “person,” as defined in the UCC, means “an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.”⁶⁰ Historically, there had been some concern that a Protected Series may not have constituted a “person” or an “organization.” As mentioned above, the 2018 amendments to the DLLC Act, effective in 2019, and the 2019 amendments to the DLP Act, addressed this issue by adding new sections 18-215(b)(12) and 17-218(b)(13), respectively, providing that, “[f]or all purposes of the laws of the State of Delaware, a ‘protected series’ is an association.”⁶¹

One is left to determine the Protected Series’ name and location for UCC filing purposes. Assuming any Protected Series debtor will have a name, its name for filing purposes will be that organizational name,⁶² and likely can be determined

55. DEL. CODE ANN. tit. 6, § 18-215(b) (West, Westlaw through ch. 18 of the 151st Gen. Assemb. (2021–2022)).

56. *Id.* § 17-218(b) (“Notice in a certificate of limited partnership of the limitation on liabilities of a protected series as referenced in this subsection shall be sufficient for all purposes of this subsection whether or not the limited partnership has established any protected series when such notice is included in the certificate of limited partnership, and there shall be no requirement that . . . any specific protected series of the limited partnership be referenced in such notice . . .”).

57. *See id.* § 15-202 (addressing the formation of a general partnership); *id.* § 15-1001(b) (“In order for an existing partnership to become a limited liability partnership, . . . the partnership shall file a statement of qualification [with the Delaware Secretary of State].”).

58. *See* PERMANENT ED. BD. FOR THE UNIF. COMMERCIAL CODE, PEB COMMENTARY NO. 17: LIMITED LIABILITY PARTNERSHIPS UNDER THE CHOICE OF LAW RULES OF ARTICLE 9 2–3 (June 29, 2012), https://www.ali.org/media/filer_public/d6/51/d65184b6-e23d-4fdb-9c9a-81a1b30df556/peb_commentary_on_llps-final.pdf.

59. U.C.C. § 1-201(b)(25) (AM. L. INST. & UNIF. L. COMM’N 2001).

60. *Id.* § 1-201(b)(27).

61. DEL. CODE ANN. tit. 6, §§ 17-218(b)(13), 18-215(b)(12) (West, Westlaw through ch. 18 of the 151st Gen. Assemb. (2021–2022)); *see supra* Part IV.B.1.

62. U.C.C. § 9-503(a)(6)(A) (AM. L. INST. & UNIF. L. COMM’N 1998) (Alternative A); *id.* § 9-503(a)(5)(A) (Alternative B). Recall that the UCC’s official text provides enacting states alternative language for certain parts of section 9-503 with respect to debtors’ names.

by reference to the governing agreement for the Series DLLC or Series DLP under which it was established, inclusive of any series-specific supplement thereto. Under UCC section 9-307(b), a Protected Series' location, for filing purposes, is its place of business or, if it has more than one place of business, its chief executive office.⁶³

The DLLC Act and the DLP Act contain parallel provisions facilitating the conversion of Protected Series to Registered Series,⁶⁴ and the conversion of Registered Series to Protected Series.⁶⁵ Under those provisions, one precondition to conversion in either direction is the filing of a certificate of conversion with the Delaware Secretary of State.⁶⁶ One might suspect that the filing of the certificate that converts a Protected Series to a Registered Series would yield a "registered organization" under UCC Article 9.⁶⁷ It is well to note, however, that conversion of a Protected Series to a Registered Series requires the filing of both a certificate of conversion and a certificate of registered series.⁶⁸ By contrast, conversion of a Registered Series to a Protected Series requires the filing of only a certificate of conversion.⁶⁹ It seems sound to view the certificate of conversion as a late-stage filing in the life of the incumbent series of either type intended to be converted to the other type and not, in the case of conversion from a Registered Series to a Protected Series, as a formational document of the resulting Protected Series. That is, no Protected Series is a "registered organization."

d. A Registered Series as Debtor

If a Registered Series is the debtor, the task of the secured party is both simpler and more certain. A Registered Series is an "association"⁷⁰ and a "registered organization."⁷¹ The DLLC Act and the DLP Act contain substantially similar provisions for DLLC Registered Series and DLP Registered Series.⁷² Thus, a Registered Series' name is as stated in its certificate of registered series as filed with

63. *Id.* § 9-307(b)(2)–(3). *But see id.* § 9-307(c) (addressing situations in which the pertinent jurisdiction lacks a UCC Article 9-style filing system).

64. DEL. CODE ANN. tit. 6, §§ 17-222, 18-219 (West, Westlaw through ch. 18 of the 151st Gen. Assemb. (2021–2022)).

65. *Id.* §§ 17-223, 18-220.

66. *See id.* §§ 17-222(e), 17-223(e), 18-219(e), 18-220(e).

67. *See* U.C.C. § 9-102(a)(71) (AM. L. INST. & UNIF. L. COMM'N 1998).

68. *See* DEL. CODE ANN. tit. 6, §§ 17-222(a), 18-219(a) (West, Westlaw through ch. 18 of the 151st Gen. Assemb. (2021–2022)).

69. *See id.* §§ 17-223(e), 18-220(e).

70. *See id.* §§ 17-221(c)(13), 18-218(c)(12); *supra* Part IV.B.1.

71. *See* DEL. CODE ANN. tit. 6, §§ 17-221(a), 18-218(a) (West, Westlaw through ch. 18 of the 151st Gen. Assemb. (2021–2022)); U.C.C. § 9-102(a)(71) (AM. L. INST. & UNIF. L. COMM'N 1998). Of course, there is at least the theoretical possibility that a given Registered Series will fail to be a "registered organization," as defined in Article 9 of the UCC, by reason of its being formed or organized under the laws of more than one state (as, for instance, certain public utilities are incorporated and exist simultaneously under the laws of two or more states), but this seems an exceedingly remote possibility.

72. *Compare* DEL. CODE ANN. tit. 6, § 18-218 (West, Westlaw through ch. 18 of the 151st Gen. Assemb. (2021–2022)) (addressing DLLC registered series), *with id.* § 17-221 (addressing DLP registered series).

the Delaware Secretary of State,⁷³ and its location is Delaware—the state under the laws of which it is organized.⁷⁴ Note that the DLLC Act and the DLP Act mandate that the name of each Registered Series shall begin with the name of the related Series DLLC or Series DLP.⁷⁵ Recall that the DLLC Act mandates that the names of DLLCs contain the words “Limited Liability Company” or the abbreviation “L.L.C.” or the designation “LLC.”⁷⁶ Similarly, the DLP Act mandates that the names of DLPs contain the words “Limited Partnership” or the abbreviation “L.P.” or the designation “LP.”⁷⁷ Under the search logic employed by many UCC filing offices, including the Delaware Secretary of State’s office, “ending noise words,” such as the foregoing, are disregarded.⁷⁸ Imprecise rendering of “ending noise words,” thus, will not cause a financing statement to be “seriously misleading” by reason of failing the search logic test of UCC section 9-506(c).⁷⁹ But, where such “noise words” are not at the end—as in the case of a Registered Series—the search logic test is not so forgiving.

V. CONCLUSION

Delaware’s Alternative Entities provide extraordinary flexibility and can be formed with characteristics chosen to facilitate outcomes not feasible for corporations and other traditional operating companies. Such characteristics include legal isolation of assets in a given transaction from the consequences of a future insolvency, special mechanisms to better assure continuity of existence, and modification of fiduciary and other duties. There is a complicated interplay between the series provisions of Delaware’s Alternative Entity acts and UCC Article 9. Recent amendments to each of the DLLC Act and the DLP Act provide much needed certainty where series of DLLCs or DLPs endeavor to borrow on a secured basis. More recent amendments to the DST Act confirm that a Series DST, not a given DST Series, is the debtor for UCC Article 9 purposes. Still, care must be taken in determining how, in fact, assets associated with a given series are held, and the related questions as to the identity of the relevant debtor, as well as its name for UCC section 9-503 purposes and its location for UCC section 9-307 purposes. Indeed, the price of contractual freedom is careful consideration and drafting. The chart below provides a helpful reference guide for filing financing statements under UCC Article 9 to perfect security interests in assets associated with Delaware’s Alternative Entities and series thereof.

73. U.C.C. § 9-503(a)(1) (AM. L. INST. & UNIF. L. COMM’N 1998).

74. *Id.* § 9-307(e).

75. DEL. CODE ANN. tit. 6, §§ 17-221(e)(1), 18-218(e)(1) (West, Westlaw through ch. 18 of the 151st Gen. Assemb. (2021–2022)).

76. *Id.* § 18-102(1).

77. *Id.* § 17-102(1).

78. See, e.g., UNIF. COM. CODE ART. 9 MODEL ADMIN. RULES r. 503.1.3 (2015); DEL. SEC’Y OF STATE, ADMIN. RULES FOR UCC ART. 9 § 503.1.5 (July 11, 2017).

79. See U.C.C. § 9-506(c) (AM. L. INST. & UNIF. L. COMM’N 1998) (“If a search of the records of the filing office under the debtor’s correct name, using the filing office’s standard search logic, if any, would disclose a financing statement that fails sufficiently to provide the name of the debtor in accordance with Section 9-503(a), the name provided does not make the financing statement seriously misleading.”).

Filings Against Delaware Alternative Entities and Series Thereof Under UCC Article 9

UCC1 Financing Statement Box (rev. 04.20.11)	Collateral is "Associated with" a Series of a Delaware LLC or LP							
	Collateral is Owned by or "Associated with" a Delaware LLC, Delaware LP, or Delaware Statutory Trust (whether with or without series)				Collateral is "Associated with" a Series of a Delaware LLC or LP			
	Held in Series' Name	Held in LLC's or LP's Name	Held in Nominee's Name	Held in Series' Name	Registered Series LLC's or LP's Name	Held in Nominee's Name	Held in Series' Name	Held in Nominee's Name
Box 1a (debtor organization's name)	A	B	A	D*	C	A	D*	A
Box 1b (debtor individual's name)	N/A	N/A	N/A	E*	N/A	N/A	E*	N/A
Box 1c (debtor's mailing address)	J	K	J	M	L	J	M	J
Where to File	F	G	F	I	H	F	I	F

KEY

A	Name of LLC, LP, or DST per RA-9 § 503(a)(1)	H	Location of Registered Series per RA-9 § 307(c) (Delaware)
B	Name of Protected Series per RA-9 § 503(a)(6) [Alternative A] or RA-9 § 503(a)(5) [Alternative B]	I	Location of Nominee per RA-9 § 307
C	Name of Registered Series per RA-9 § 503(a)(1)	J	Mailing Address of LLC, LP, or DST
D	Name of Organization Nominee per RA-9 § 503*	K	Mailing Address of Protected Series
E	Name of Individual Nominee per RA-9 § 503(a)(4) or (5) [Alternative A] or RA-9 § 503(a)(4) [Alternative B]*	L	Mailing Address of Registered Series
F	Location of LLC, LP, or DST per RA-9 § 307(c) (Delaware)	M	Mailing Address of Nominee
G	Location of Protected Series per RA-9 § 307(b)(2) or (3)	*	In any given financing statement, either, but not both, of Boxes 1a and 1b will be completed.

