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Respecting the Concept and Limited Liability of a Series LLC in Texas Comment.

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COMMENT

RESPECTING THE CONCEPT AND LIMITED LIABILITY OF A SERIES LLC IN TEXAS

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I. INTRODUCTION

For many years, practitioners have favored the unincorporated business form of a limited liability company (LLC) to help their clients realize the combined advantages of "a corporation (limited

liability for all owners, centralized management, and potentially unlimited duration) and a limited partnership (economic flexibility and pass-through taxation)."[1] Like corporations and limited partnerships, the primary advantage of LLCs has been to shield their owners from personal liability for the contract and tort obligations of their business entities.[2] To further protect a business's assets from exposure to the liability of the business itself, best practices have typically dictated "advis[ing] clients to form multiple LLCs, placing a single asset in each LLC."[3] Perhaps at the outset or over time, however, owners of businesses with numerous assets could consider managing an equally large number of LLCs as unnecessarily inefficient or even cost-prohibitive.[4]

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1. *See* Jacob Stein, *Tax Tips: Advanced Asset Protection and Tax Planning with LLCs*, L.A. LAW., June 2006, at 17, 17, *available at* http://www.lacba.org/Files/LAL/Vol29No4/2266.pdf (emphasizing the soaring popularity of the LLC in California since 1994 over the historically favored choice of corporations); *see also* David L. Cohen, *Theories of the Corporation and the Limited Liability Company: How Should Courts and Legislatures Articulate Rules for Piercing the Veil, Fiduciary Responsibility and Securities Regulation for the Limited Liability Company?*, 51 OKLA. L. REV. 427, 447 (1998) ("The LLC has spread like wildfire[,] . . . combin[ing] a partnership-like structure with corporate-like limited liability."); Natalie Smeltzer, Comment, *Piercing the Veil of a Texas Limited Liability Company: How Limited Is Member Liability?*, 61 SMU L. REV. 1663, 1663 (2008) (noting that the combined tax advantages of a partnership and limited liability of a corporation have made the LLC a popular choice).

2. *See* Steven C. Bahls, *Application of Corporate Common Law Doctrines to Limited Liability Companies*, 55 MONT. L. REV. 43, 54 (1994) (recognizing the corporate-like statutory protection for owners of LLCs to avoid liability for the contract or tort debts of their companies). For example, a tenant injured in a slip-and-fall accident in an apartment building owned by an LLC may have a lawsuit against the LLC but not the individual owner. Jacob Stein, *Tax Tips: Advanced Asset Protection and Tax Planning with LLCs*, L.A. LAW., June 2006, at 17, 17, *available at* http://www.lacba.org/Files/LAL/Vol29No4/2266.pdf.

3. Jacob Stein, *Tax Tips: Advanced Asset Protection and Tax Planning with LLCs*, L.A. LAW., June 2006, at 17, 20, *available at* http://www.lacba.org/Files/LAL/Vol29No4/2266.pdf; *see also* Jay Adkisson & Chris Riser, *When One Is Better than Many: The Series LLC*, ASSETPROTECTIONBOOK.COM (July 12, 2009, 11:16 AM), http://www.assetprotectionbook.com/forum/viewtopic.php?f=102&t=869 ("Best practices would dictate that every distinct business or major business asset be segregated into a different limited liability entity."). For example, the owner of a number of taxi-cabs might establish multiple LLCs, placing a single cab within each LLC, to insure that liability for a serious accident by one cab driver could not potentially wipe out all of the assets of the overall taxi company. Carol R. Goforth, *The Series LLC, and a Series of Difficult Questions*, 60 ARK. L. REV. 385, 393 (2007).

4. *See* Jay Adkisson & Chris Riser, *When One Is Better than Many: The Series LLC*, ASSETPROTECTIONBOOK.COM (July 12, 2009, 11:16 AM), http://www.assetprotectionbook.com/forum/viewtopic.php?f=102&t=869 (questioning the practicality of paying the administrative costs and government fees for multiple LLCs); *accord* Wendell Gingerich,

Enter "the next step in the evolution" of the unincorporated business form—the "series" LLC.[5] Essentially, a series LLC permits a company "to partition its assets and liabilities among various cells or 'series' and . . . have different economic arrangements with respect to the different series contained within [a] single [legal] entity."[6] Thus, a series LLC allows a single "master" LLC to compartmentalize different series of properties or operations, perhaps with diverse business purposes or object-ives, without the need for a distinct holding company governing multiple separate subsidiaries.[7] Conceptually, it enables the multiple series to function as if they were separate LLCs, with separate liability shields around each series and the LLC itself.[8] These liability shields, therefore, protect not only the owners against personal liability for the obligations of the "parent" LLC and each series, but also protect the parent LLC and each series against individual entity liability for the obligations of each other.[9]

Note, *Series LLCs: The Problem of the Chicken and the Egg*, 4 ENTREPRENEURIAL BUS. L.J. 193, 196 (2009) (pointing out that the formation of many separate LLCs may be reasonably safe to limit liability on multiple properties but "requires a large amount of paperwork, taxes, and state filing fees"); Julia Gold, *Series Limited Liability Companies—Too Good to Be True?*, NEV. LAW., July 2004, at 18, 18 (asserting that a person with multiple pieces of real estate could benefit from a business structure that has the ability to segregate the liabilities of numerous assets under the ease of a single LLC's administration and management).

5. Dominick T. Gattuso, *Series LLCs: Let's Give the Frog a Little Love*, BUS. L. TODAY, July/Aug. 2008, at 33, 33.

6. Julia Gold, *Series Limited Liability Companies—Too Good to Be True?*, NEV. LAW., July 2004, at 18, 18.

7. Wendell Gingerich, Note, *Series LLCs: The Problem of the Chicken and the Egg*, 4 ENTREPRENEURIAL BUS. L.J. 193, 193 (2009).

8. *See* Vicki R. Harding, *Series LLCs: A Wave of the Future—Or Not?*, MICH. BUS. L.J., Spring 2007, at 19, 19–20 (referencing statutory language from the Delaware LLC Act to contend that "a series . . . may be protected from liabilities of other series and of the LLC itself" and possibly "function in virtually all respects as though they were separate LLCs" (citing DEL. CODE ANN. tit. 6, § 18-215(b) (West Supp. 2008))). *But see* 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, 319–21 (2009) (disputing that a series LLC is similar to a "chimera" in that it lacks some of the characteristics of a separate legal entity and rises to the level of a corporate-like entity for which limited liability is a natural consequence).

9. *E.g.*, 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, 318–19 (2009) (listing the three implications of these liability shields as (1) "neither the assets of the parent entity . . . nor those of any other series of the entity, are subject to the debts and obligations of any individual series"; (2) "the owners of the series are not personally liable for the debts and obligations of the series which they own"; and (3) "the assets of a particular series are not

Yet, as with anything that "seems 'too good to be true,'" this concept has been met with great skepticism.[10] Despite its innovative features, uncertainty remains for the legal implications of a series LLC, including how they will be treated for tax purposes and bankruptcy and how far courts will be willing to respect the efficacy of the internal liability shields.[11]

In 1996, Delaware—the consistent forerunner in innovative business law—became the first state to promulgate series LLC legislation.[12] Although the source of this concept is not entirely clear, Delaware may have adopted the idea "from the offshore mutual fund and captive insurance industries, which have used segregated portfolio companies and protected cell companies [for some time] . . . in locations such as the Cayman Islands, the British Virgin Islands, Belize, Bermuda, Guernsey, and Mauritius."[13] By

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available to satisfy the debts and obligations of another series, of the parent organization, or of the members of that series").

10. *See* Wendell Gingerich, Note, *Series LLCs: The Problem of the Chicken and the Egg*, 4 ENTREPRENEURIAL BUS. L.J. 193, 198 (2009) (noting that "[s]kepticism of the series LLC may spring, in part, from a belief that the [series LLC] seems 'too good to be true'"); *accord* MARK A. SARGENT & WALTER D. SCHWIDETZKY, LIMITED LIABILITY COMPANY HANDBOOK § 3:85 (West 2009) (observing that practitioners will resist using series LLCs until there is more certainty in how their liability shields will be respected in non-series states and how the entities themselves will be treated in bankruptcy); Vicki R. Harding, *Series LLCs: A Wave of the Future—Or Not?*, MICH. BUS. L.J., Spring 2007, at 19, 23 ("It remains to be seen whether the series LLC will become the new entity of choice, or whether it will be the right alternative in only limited circumstances."); John C. Murray, *A Real Estate Practitioner's Guide to Delaware Series LLCs*, FIRST AM. (2007), http://www.firstam.com/ekcms/uploadedFiles/firstam_com/References/Reference_Article/John_C_Murray_Reference/Limited_Liability_Companies/jm-delaware.pdf (contending that "unless there is some overriding business purpose or cost justification, it may be prudent to just create separate LLCs"). *But cf.* Dominick T. Gattuso, *Series LLCs: Let's Give the Frog a Little Love*, BUS. L. TODAY, July/Aug. 2008, at 33, 33 (analogizing that the series LLC is a fairy tale—"frog . . . a prince, warts and all"); Julia Gold, *Series Limited Liability Companies—Too Good to Be True?*, NEV. LAW., July 2004, at 18, 21 (advocating for the enactment of a series LLC statute to help Nevada promote itself as a business-friendly state, regardless of the uncertainties).

11. NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, PREFATORY NOTE: REVISED UNIFORM LIMITED LIABILITY COMPANY ACT 5–6 (2006), *available at* http://www.law.upenn.edu/bll/archives/ulc/ullca/2006act_final.pdf.

12. Julia Gold, *Series Limited Liability Companies—Too Good to Be True?*, NEV. LAW., July 2004, at 18, 18.

13. Dominick T. Gattuso, *Series LLCs: Let's Give the Frog a Little Love*, BUS. L. TODAY, July/Aug. 2008, at 33, 33. *But see* Wendell Gingerich, Note, *Series LLCs: The Problem of the Chicken and the Egg*, 4 ENTREPRENEURIAL BUS. L.J. 193, 196 (2009) (referencing the differing opinions that "[t]he series LLC may have originated from the need in investment banking to maintain separate investment portfolios under one entity" (citing Vicki R. Harding, *Series LLCs: A Wave of the Future—Or Not?*, MICH. BUS. L.J.,

Spring 2007, at 19, 22)). Comparatively, the legislative constructs of the segregated portfolio company (SPC) and protected cell company (PCC) in a number of offshore jurisdictions are essentially synonymous, *see* NIGEL FEETHAM & GRANT JONES, PROTECTED CELL COMPANIES: A GUIDE TO THEIR IMPLEMENTATION AND USE 3 n.2 (2008) (noting other terms for the same concept), used "for the segregation of cell assets and liabilities . . . restricting creditor enforcement to cell assets," *id.* at 27, and instituted in response to the lobbying efforts of the captive insurance industry to protect assets that insure against the risks of companies participating in a "rent-a-captive" insurance program, Francisco P. Ferreira, *The Protected Cell Companies in a Nutshell*, LEGALINFO-PANAMA, http://www.legalinfo-panama.com/articulos/articulos_41a.htm (last visited Jan. 24, 2011). In its purest form, "[a] captive is a corporate [subsidiary] created and controlled by a parent company . . . whose main purpose is to provide insurance for determined risks of [the] parent company." *Id.* Using this self-insurance scheme, the parent company obtains advantages in reduced costs, easy risk management, and coverage not otherwise affordable or available in traditional insurance markets. *Id.* Originally, rent-a-captive schemes provided the same advantages to companies lacking the resources to self-insure, yet had the inherent flaw of exposing assets allocated to the risks of one participant to cover any unjustified and unrelated claims of other participants. *Id.* Thus, enabling captive insurance companies to segregate assets and liabilities into different cells ensured that a claimant "dealing with one particular cell [could] only have recourse to the assets of that cell." Paul Scrivener, *Segregated Portfolio Companies—Any Drawbacks?*, THE FREE LIBRARY (June 5, 2006), http://www.mondaq.com/article.asp?articleid=40256. In its evolution, the SPC and PCC concept has realized similar cost efficiencies for the operation of offshore mutual funds, whereby investors purchase distinct classes of shares in sub-funds within a single entity structure of an umbrella fund. *See* Francisco P. Ferreira, *The Protected Cell Companies in a Nutshell*, LEGALINFO-PANAMA, http://www.legalinfo-panama.com/articulos/articulos_41b.htm (last visited Jan. 24, 2011) (explaining the reduced costs from the use of "a single board, the same distributor, custodian, transfer and payment agent, and the same prospectus"). However, much like the quandary for the series LLC, practitioners in countries that recognize SPCs and PCCs must likewise concern themselves with the potential for courts in jurisdictions alien to these business forms to not respect their limited liability structures. *See* NIGEL FEETHAM & GRANT JONES, PROTECTED CELL COMPANIES: A GUIDE TO THEIR IMPLEMENTATION AND USE 29–33 (2008) (discussing the challenge of a foreign court to give effect to PCC legislation protecting cell assets located in that jurisdiction and theorizing the answer may depend on whether such legislation would be deemed a substantive provision rather than merely a procedural device); Paul Scrivener, *Segregated Portfolio Companies—Any Drawbacks?*, THE FREE LIBRARY (June 5, 2006), http://www.mondaq.com/article.asp?articleid=40256 (recommending that "as much as possible should be done to try and avoid connecting the SPC with jurisdictions other than the Cayman Islands," such as "ensuring that policies and other legal agreements are governed by Cayman Islands law").

In fact, the clear precursor to series LLC legislation in Delaware was its prior enactment of the statutory trust, which companies can use to manage series of securitized assets or mutual funds with a single trustee board. *See* 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, 313 (2009) (recounting the history of the series as arising "in Delaware in the context of [statutory] trusts utilized for asset securitization and the organization of investment companies"). In contrast to the series LLC concept, however, the statutory trust's purported function is for administrative organization and not the creation of series as distinct legal entities. *See id.* at 313–14 (discussing the administrative function of statutory trusts, which is to issue securities on classes of assets or to register with the

2007, six other states had joined the ranks of series LLC jurisdictions: Illinois, Iowa, Nevada, Oklahoma, Tennessee, and Utah.[14] In 2009, the Texas legislature enacted Senate Bill 1442 (S.B. 1442) to, *inter alia*, add the series LLC to the Texas Business Organizations Code (TBOC).[15] Thus, the uncertain legal ramifications of the series LLC now present more significance for practitioners in Texas, who must weigh the pros and cons of using this

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Securities and Exchange Commission on behalf of a "fund family," and also discussing precedent holding that such series had no independent legal status).

14. Carol R. Goforth, *The Series LLC, and a Series of Difficult Questions*, 60 ARK. L. REV. 385, 386 n.8 (2007). Notably, the United States territory of Puerto Rico also appears to have followed Delaware's lead to enact a series LLC statute. *See generally* P.R. LAWS ANN. tit. 14, § 3426p (2008) (imparting the general provisions for the administration of series LLCs in Puerto Rico, with language similar to the Delaware statute). Additionally, the states of Minnesota, North Dakota, and Wisconsin briefly mention in their LLC statutes a similar concept for a series of ownership interests. *See* MINN. STAT. ANN. § 322B.03(44) (West 2004) (defining a "[s]eries" as "a category of membership interests ... that have some of the same rights and preferences as other membership interests within the same class, but that differ in one or more rights and preferences"); N.D. CENT. CODE § 10-32-02(57) (West Supp. 2009) (implementing the same definitional language as the Minnesota statute); WIS. STAT. ANN. § 183.0504 (West 2002) (granting that "[a]n operating agreement may establish ... designated series or classes of members, managers, or [LLC] interests that have separate or different preferences, limitations, rights, or duties, with respect to profits, losses, distributions, voting, property, or other incidents associated with the [LLC]"). However, these statutes fall short of providing the necessary provisions to fully implement this new business form. *See* John C. Murray, *A Real Estate Practitioner's Guide to Delaware Series LLCs*, FIRST AM. (2007), http://www.firstam.com/ekcms/UploadedFiles/firstam_com/References/Reference_Articles/John_C_Murray_Reference/Limited_Liability_Companies/jm-delaware.pdf (discussing statutes that lack the special provisions present in states that "specifically authorize the formation of series LLCs").

15. *See* Act of May 11, 2009, 81st Leg., R.S., ch. 84, § 45, 2009 Tex. Gen. Laws 128, 140 (codified at TEX. BUS. ORGS. CODE ANN. §§ 101.601–.621 (West 2010)) (adding sections 101.601–.621 to the Texas Business Organizations Code). At the time this Comment was written, however, the introduction of the series LLC in Texas has garnered little fanfare or commentary from the legal community. *See* Doug Batey, *Texas Joins the Series LLC Crowd*, LLC LAW MONITOR (July 28, 2009), http://www.llclawmonitor.com/2009/07/articles/series-llcs/texas-joins-the-series-llc-crowd (discussing how Texas has joined the series LLC crowd of seven other states with no comments posted in response); Gary Rosin, *Series LLCs & Assumed Names*, UNINCORP. BUS. L. PROF BLOG (June 23, 2009), http://lawprofessors.typepad.com/unincorporated_business/2009/06/series-llcs-assumed-names.html (questioning how to handle assumed name filing requirements for a particular series with only one brief comment posted); Gary Rosin, *Texas Adopts Series LLCs*, UNINCORP. BUS. L. PROF BLOG (June 12, 2009), http://lawprofessors.typepad.com/unincorporated_business/2009/06/texas-adopts-series-llcs.html (summarizing the essential provisions of the series LLC amendment with no commentary from other bloggers); *cf.* Dominick T. Gattuso, *Series LLCs: Let's Give the Frog a Little Love*, BUS. L. TODAY, July/Aug. 2008, at 33, 33 (remarking that the series LLC has garnered little—mostly negative—attention despite its arrival in Delaware over ten years ago).

burgeoning business form.

This Comment addresses the legislature's implementation of the series LLC in Texas and, more specifically, the potential circumstances under which courts may not fully respect the limited liability that largely makes a series LLC a viable option. Part II examines the statutory provisions for the Texas series LLC, primarily regarding its structure, requirements, and rights, and how they compare to series LLC statutes in other jurisdictions. Part III looks at the potential benefits and pitfalls of the series LLC in key areas concerning asset protection, costs, fractional ownership, interest transfers, legal capacity, and choice of law provisions in non-series LLC states. Part III further contemplates the possible practical uses for the series LLC and briefly touches on questions about bankruptcy, taxation, and securities law. Part IV analyzes the implications of several legal theories under which courts may opt to disregard the series LLC business form and thereby circumvent the limited liability shields between each series and the master LLC itself. This Comment concludes that the recognition of the series LLC and the scope of its limited liability ultimately depend on judicial acknowledgment of a series as a separate legal entity and on judicial deference to legislative intent. In addition, given the current uncertainties and risks, this Comment suggests that prudent practitioners should proceed with caution. It also offers recommendations for the conservative and beneficial use of a series LLC in Texas.

II. THE SERIES LLC AS ENACTED IN TEXAS

Despite Delaware's lead, uncertainties over the application and treatment of the series LLC concept abound in part because the states adopting it have done so in different ways.[16] As a consequence, according to at least one expert, "there now exists no model, no prototype of what a series is beyond the provision of

16. *See* 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, 312 (2009) (contending that questions about the series LLC have not been addressed in a unified manner due to differences in how states have developed it). Not surprisingly, when analyzing these different statutes, commentators in non-series states have pondered adopting legislation that relies on the language in one series LLC jurisdiction over another. *E.g.*, Carol R. Goforth, *The Series LLC, and a Series of Difficult Questions*, 60 ARK. L. REV. 385, 405–06 (2007) (implying that the Illinois approach better addresses the potential problems with the series LLC concept, although at the expense of some of its potential advantages).

limited liability to each."[17] Thus, a fundamental understanding of the series LLC as enacted in Texas initially depends on examining not only the legislative provisions in Texas but also how they compare to the statutes in other series LLC jurisdictions.

A. *The Texas Statutory Provisions for a Series LLC*

As of January 1, 2010, chapter 101 of the TBOC governs all traditional LLCs in Texas.[18] S.B. 1442 amended chapter 101 to add subchapter M for the administration of series LLCs in Texas.[19] Incorporated as "a statute-within-a-statute,"[20] where subchapter M does not address any particular aspects of a series LLC, the provisions of chapter 101 apply.[21] Subchapter M,

17. 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, 339 (2009). In fact, the significant and unanswered questions regarding the series LLC recently led the drafting committee for the Revised Uniform Limited Liability Company Act (RULLCA) to not include a series proposal, which could have provided a uniform model. *See* NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, PREFATORY NOTE: REVISED UNIFORM LIMITED LIABILITY COMPANY ACT 5–6 (2006), *available at* http://www.law.upenn.edu/bll/archives/ulc/ullca/2006act_final.pdf (noting that "it made no sense for [RULLCA] to endorse the complexities and risks of a series approach" when other, well-established organizational structures were available).

18. *See* TEX. BUS. ORGS. CODE ANN. § 402.001 (West 2010) (applying the Texas Business Organizations Code to all LLCs formed on or after January 1, 2006); *id.* § 402.005 (applying the Texas Business Organizations Code retroactively on January 1, 2010 to all LLCs formed before January 1, 2006). Originally adopted in 2003, the TBOC has developed over the years as a joint project of the Secretary of State's Office and the Business Law Section of the State Bar of Texas in order to consolidate and codify numerous disparate acts governing the enacted business forms in Texas. H. COMM. ON BUS. & INDUS., BILL ANALYSIS, Tex. H.B. 2235, 81st Leg., R.S. (2009), *available at* http://www.hro.house.state.tx.us/pdf/ba81r/hb2235.pdf#navpanes=0. Although this project spawned amendments in 2005 and 2007, S.B. 1442 stands as the final revision of TBOC before the 2010 transition date so that all Texas businesses may follow its uniform standards. *See id.* (relating the impact of the 2009 amendments with respect to House Bill 2235, the companion bill identical to S.B. 1442).

19. Act of May 11, 2009, 81st Leg., R.S., ch. 84, § 45, 2009 Tex. Gen. Laws 128, 140 (codified at TEX. BUS. ORGS. CODE ANN. §§ 101.601–.621 (West 2010)).

20. Gary Rosin, *Texas Adopts Series LLCs*, UNINCORP. BUS. LAW PROF BLOG (June 12, 2009), http://lawprofessors.typepad.com/unincorporated_business/2009/06/texas-adopts-series-llcs.html.

21. *See* BUS. ORGS. § 101.609 (expressing that chapter 101 applies to a series "[t]o the extent not inconsistent with this subchapter," and correlating any extrinsic reference to "company," "member," or "manager" to mean "series," "member associated with the series," and "manager associated with the series," respectively (internal quotations marks omitted)). For example, it seems fairly certain that a judgment creditor of a series member could obtain a charging order against "any distribution to which the judgment debtor would otherwise be entitled" to receive from that series. *See id.* § 101.112

however, covers a great deal of statutory ground for a series LLC, including specific provisions for its formation, powers, management, assets, liabilities, distributions, and termination.[22]

A company that plans to conduct business as a series LLC must designate in its LLC agreement "one or more ... series of members, managers, membership interests, or assets."[23] The agreement must also establish each series with either "a separate business purpose or investment objective" or "separate rights, powers, or duties with respect to ... [,] or profits and losses associated with[,] specified property or obligations."[24] The

(delineating the method for subjecting the membership interest of an LLC member to a charging order not otherwise addressed under subchapter M). Similarly, and of significant implication, each separate entity of a series LLC with "fewer than 35 members[] and ... no membership interests listed" on an open market could potentially be considered a "closely held series." *See id.* § 101.463 (defining the requirements and exceptions for a "closely held limited liability company" not otherwise addressed under subchapter M). In contrast, a potential conflict exists between chapter 101's mandatory rule of at least one member for an LLC, *id.* § 101.101(a), and subchapter M's provision permitting—but not mandating—the establishment of one or more members for a series, *id.* § 101.607(a), as well as the caveat that the dissociation of the last remaining member of a series does not "require the winding up of" said series, BUS. ORGS. § 101.610(b). This apparent inconsistency, however, may be rationally resolved by recognizing that members of a particular series do not have to be separate from the members of other series; rather, members can simultaneously be associated with more than one series and the parent LLC itself. *Cf. id.* § 101.610(b) (clarifying that "[a]n event that ... causes a member to cease to be associated with a series does not, in and of itself, cause the member to cease to be associated with any other series or terminate the continued membership of a member in the [LLC]").

22. *See generally id.* §§ 101.601–.621 (furnishing the specific statutory provisions for a series LLC in Texas).

23. *Id.* § 101.601(a). Despite the rather vague language for this core requirement, subchapter M provides no guidance on exactly how to "designate" one or more series. *See generally* TEX. BUS. ORGS. CODE ANN. §§ 101.601–.621 (West 2010) (elucidating no specific provisions for designating one or more series in the company agreement). Presumably, the general provisions for a traditional LLC agreement would likewise govern how to establish (i.e., designate) a series. *See id.* § 101.001 (defining "company agreement" as "any agreement, written or oral, of the members concerning the affairs or the conduct of the business of a limited liability company"). However, subchapter M does include additional flexibility for a series regarding the classification or grouping of members or managers with respect to their "relative rights, powers, and duties, including voting rights." *See id.* § 101.607 (enumerating ways in which the company agreement may establish, provide for, and amend the classes or groups of series members or managers).

24. *Id.* § 101.601(a)(1)–(2). More specifically, with respect to particular properties or obligations of the parent LLC, each series must have "separate rights, powers, or duties"; otherwise, each series must have segregated profits and losses associated with any distinct properties or obligations. *Id.* § 101.601(a)(1). According to one professor, these terms imply that a series derives its ownership capacity from the parent LLC and not as an independent entity. *See* Ann E. Conaway, *A Business Review of the Delaware Series:*

relative flexibility of these provisions, combined with the broad permissibility for each series to "carry on any business, purpose, or activity, whether or not for profit," exacts virtually unlimited possibilities for the implementation of this innovative business form.[25]

Central to the concept of limited liability for a series LLC, subchapter M further explicates in section 101.602(a) that:

> (1) 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 that series only, and shall not be enforceable against the assets of the [LLC] generally or any other series; and
> (2) none of the debts, liabilities, obligations, and expenses incurred, contracted for, or otherwise existing with respect to the [LLC] generally or any other series shall be enforceable against the assets of a particular series.[26]

Good Business for the Informed, at 645, 700 (PLI Corp. Law & Prac. Course, Handbook Series No. 14533, 2008), *available at* 1677 PLI/Corp 645 (Westlaw) (concluding that the legislative intent behind the same language in the Delaware statute results in a division of assets, with liability limited on those assets, and not the creation of a separate legal entity). Additionally, the statutory distinction between these different rights and separate purposes or objectives does not necessarily mean that a series cannot be imbued with both. *But see* DEL. CODE ANN. tit. 6, § 18-215(a) (West Supp. 2008) (specifying the same choice of rights but using the conjunctive "and" instead of "or"); 805 ILL. COMP. STAT. ANN. 180/37-40(a) (West Supp. 2009) (stipulating the same choice of rights but also using the conjunctive "and" instead of "or"). That is, the Texas Code permits series to have different business purposes or investment objectives, as well as separate rights, powers, or duties, but does not mandate both requirements (i.e., the series can share the same purpose or objective as long as they exercise distinctively different roles and responsibilities).

25. *But see* BUS. ORGS. § 101.601(b) (pronouncing that "[a] series . . . may carry on any business, purpose, or activity, whether or not for profit, that is not prohibited by Section 2.003"). Thus, pursuant to section 2.003 of the TBOC, a series LLC cannot be formed for the operation of a bank, cemetery, insurance company (including abstract or title insurance), savings association, or trust company. *Id.* § 2.003(2). Not surprisingly, a series LLC cannot be employed for a business or activity that would otherwise be illegal. *See id.* § 2.003(1) (specifying that "a domestic entity may not . . . engage in a business or activity that . . . is expressly unlawful or prohibited by a law of this state[,] or . . . cannot lawfully be engaged in by that entity under state law"). For example, a series LLC most likely could not be used to directly conduct business for both oil production and oil pipelining because the law expressly prohibits a for-profit corporation from engaging in such a combination of business operations. *See id.* § 2.007(3) (precluding a for-profit corporation in Texas to engage in both "the petroleum oil producing business" and "the oil pipeline business . . . other than through stock ownership in a for-profit corporation engaged in the oil pipeline business . . . or . . . [for] private pipelines in and about the corporation's refineries, fields, or stations").

26. *Id.* § 101.602(a). One business organization expert describes this statutory language as "afford[ing] both an affirmative and a negative liability shield." *See* Thomas

To ensure the validity of these limited liability shields, the company must comply with three conditions: first, recount in the company agreement "a statement to the effect of the limitations" in section 101.602(a); second, incorporate in the certificate of formation a notice of these limitations; and third, maintain records that separately account for the assets of each series and the parent LLC itself.[27] Clearly, restating the language of section 101.602(a) verbatim in the company agreement should easily meet the first requirement. Similarly, a general notice of limited liability in the certificate of formation should satisfy the second prerequisite because no series has to exist at the time the certificate is filed.[28] The task of maintaining segregated records of series assets, however, will likely entail greater diligence in accounting practices perhaps unfamiliar to owners accustomed to the less formal administration of a traditional LLC.[29]

E. Rutledge, *Again, for the Want of a Theory: The Challenge of the "Series" to Business Organization Law*, 46 AM. BUS. L.J. 311, 311 (2009) (summarizing a series as a confusing notion of an internal organizational compartment with limited liability and only some of the characteristics of a legal entity).

27. TEX. BUS. ORGS. CODE ANN. § 101.602(b) (West 2010).

28. *See id.* § 101.604 (expounding that notice of the series limited liabilities "contained in [the] certificate of formation" is sufficient "regardless of whether . . . the [LLC] has established any series . . . [or] makes a reference to a specific series"). However, courts could view this general notice requirement as fundamentally unfair to third parties who may have no reason to know that they are transacting business with a series, particularly if the filing cannot be readily found because the series has a significantly different name than the registered LLC. *See* Carol R. Goforth, *The Series LLC, and a Series of Difficult Questions*, 60 ARK. L. REV. 385, 403–04 (2007) (questioning the fairness to creditors of a statute that allows a single filing to provide sufficient notice of the limitation of liability of a series, without additional requirements to identify the series in the certificate of formation or ensure they use substantially similar names); *see also* John C. Murray, *A Real Estate Practitioner's Guide to Delaware Series LLCs*, FIRST AM. (2007), http://www.firstam.com/ekcms/uploadedFiles/firstam_com/References/Reference_Articles/John_C_Murray_Reference/Limited_Liability_Companies/jm-delaware.pdf (asserting that "creditors doing business with the LLC may have no actual knowledge of such limited liability unless they are so informed by members or managers of the LLC" because the only required notice "appears in the LLC's certificate of formation"). Practitioners should note that the secretary of state intends to provide no particular form for the filing of a series LLC certificate of formation, instead instructing a person to "add the additional required information by using the 'Supplemental Provisions/Information' section" of the standard LLC form. HOPE ANDRADE, TEX. SEC'Y OF STATE, 2009 LEGISLATIVE UPDATE: SEPTEMBER 1, 2009—NEW AND AMENDED FILING PROVISIONS & REQUIREMENTS 3 (2009), *available at* http://www.sos.state.tx.us/corp/forms/boc/legislative-update-SB1442.doc.

29. *Compare* BUS. ORGS. § 101.603(b) (mandating a manner or method of recordkeeping that renders the assets of a series reasonably identifiable or objectively

Despite the many general powers the TBOC expressly accords any domestic entity,[30] subchapter M explicitly limits the powers of a series to "sue and be sued[,] contract[,] hold title to assets[,] . . . and . . . grant liens and security interests" in its own name.[31] Much like a traditional LLC, either managers or members govern each series in accordance with the certificate of formation, company agreement, or by default.[32] The company agreement may also designate classes or groups of members and managers for each series, delineating their respective rights, powers, and duties, the manner for amending these classifications, and the basis for—or elimination of—their voting rights.[33] Additionally, members of a series may receive distributions from the series as long as "the total amount of [its] liabilities . . . exceeds the fair value of [its] assets" after the distribution is made, without regard to the assets and liabilities of any other series or the LLC as a whole.[34] Finally, a series can be wound up and terminated without affecting any other series or the parent LLC;[35] however, termination of the

determinable), *with id.* § 3.151 (stating that every business entity must keep "books and records of accounts"), *and id.* § 101.501 (listing the supplemental records required of an LLC to account for such items as membership interests, member names, and tax returns). In fact, where a series can opt to hold its associated assets indirectly (i.e., "in the name of the [LLC], through a nominee, or otherwise") and still be in full compliance with the Code, *id.* § 101.603(a), owners taking full advantage of these flexible options could find the task of maintaining adequate records quite onerous, *cf.* Carol R. Goforth, *The Series LLC, and a Series of Difficult Questions*, 60 ARK. L. REV. 385, 400–01 (2007) (concluding that, based on the ambiguous statutory language and lack of clear guidance, "[c]aution dictates that careful records be kept, [which] may be an unexpected and unwelcome requirement for business owners used to the simplicity and informality of regular LLCs").

30. *See generally* BUS. ORGS. § 2.101 (enumerating twenty-two general powers for a domestic entity "[e]xcept as otherwise provided by this code").

31. *Id.* § 101.605. Therefore, as limited by section 101.605, a series arguably does not have the power to, *inter alia*, lend money, pay pensions, or indemnify its members, *see id.* § 2.101(7), (13), (15), (16) (identifying some of the general powers of a domestic entity not listed in section 101.605), although no such restrictions presumably apply to the parent LLC itself.

32. *Compare id.* § 101.608 (prescribing the method for determining the governing authority of a series), *with* TEX. BUS. ORGS. CODE ANN. § 101.251 (West 2010) (providing that the governing authority of a traditional LLC consists of either managers or members, as stated or excluded in the certificate of formation).

33. *See generally id.* § 101.607 (outlining broad provisions for the internal regulation of members or managers by company agreement).

34. *Compare id.* § 101.613 (stipulating the method for a series distribution to a member and precluding the application of section 101.206), *with id.* § 101.206 (prohibiting a traditional LLC from making a distribution when its liabilities exceed the fair value of its total company assets immediately after the distribution).

35. *Id.* § 101.614.

parent LLC does require a winding up of all series within it.[36]

B. *In Comparison to Other Series LLC Statutes*

The main impetus behind the Texas legislation for the series LLC was to maintain parity and to remain competitive with the business formation concepts of Delaware.[37] In fact, like the majority of states codifying the series LLC concept, the statutory language of the Texas series LLC provisions generally track that of the Delaware code.[38] Differences in wording are mostly attributed to ensuring the Texas version conforms to other provisions of the Texas code governing traditional LLCs, particularly the terms related to the winding up and termination of a series.[39]

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36. *See* BUS. ORGS. § 101.616 (mandating that a series must be wound up "if the winding up of the [LLC] is required"). The winding up of a series may also be triggered by events specified in the company agreement or by majority vote of its associated managers or members. *Id.* § 101.616(2). Additionally, any associated member can petition a court with jurisdiction over the LLC to compel the winding up and termination of a series on grounds that "it is not reasonably practicable to carry on the business of the series in conformity with the company agreement." *Id.* § 101.621.

37. E-mail from Mark Harmon, Policy Analyst, Texas Senate Committee on Business and Commerce, to author (Nov. 12, 2009, 11:14 CST) (on file with the St. Mary's Law Journal). In fact, supporters of this legislation urged its enactment to provide businesses in Texas the flexibility to adopt innovative practices, remain competitive and aggressive, and match or exceed the benefits offered in other jurisdictions—particularly Delaware—as well as maintain the TBOC as a recognized model for excellence in legal standards. H. COMM. ON BUS. & INDUS., BILL ANALYSIS, Tex. H.B. 2235, 81st Leg., R.S. (2009), *available at* http://www.hro.house.state.tx.us/pdf/ba81r/hb2235.pdf#navpanes=0. However, opponents argued that adopting revisions for additional flexibility and complexity would enable organizations to exploit the Code to construct more questionable and financially disastrous schemes, referencing Enron as the preeminent example for economic impropriety. *Id.*

38. *Compare* BUS. ORGS. §§ 101.601–.621 (adding a subchapter of specific series LLC provisions to the traditional LLC chapter of the Texas Business Organizations Code), *with* DEL. CODE ANN. tit. 6, § 18-215 (West Supp. 2008) (innovating series LLC legislation in the United States), IOWA CODE ANN. § 490A.305 (West 1999) (following Delaware's lead to codify a series LLC statute), NEV. REV. STAT. ANN. §§ 86.1255, .161, .296, .343 (West 2009) (codifying a fairly limited version of the Delaware series LLC concept), OKLA. STAT. ANN. tit. 18, §§ 2005, 2054.4 (West Supp. 2009) (incorporating series LLC provisions similar to those enacted in Delaware), *and* UTAH CODE ANN. §§ 48-2c-606 to -610 (West Supp. 2007) (using series LLC language similar to the language used in Delaware). *See also* DARYL B. ROBERTSON & RICHARD A. TULLI, 2009 LEGISLATIVE UPDATE: TEXAS BUSINESS ORGANIZATIONS CODE 4 (2009), *available at* http://www.utcle.org/eLibrary (search for "Robertson Tulli") (clarifying that "[t]he provisions of Subchapter M are generally modeled after the series LLC provisions in . . . Delaware").

39. DARYL B. ROBERTSON & RICHARD A. TULLI, 2009 LEGISLATIVE UPDATE: TEXAS BUSINESS ORGANIZATIONS CODE 4 (2009), *available at* http://www.utcle.org/

Several notable distinctions between these statutes raise some potentially significant advantages and disadvantages. First, while nearly all of the states with series LLC legislation permit designating series of members and managers,[40] Nevada explicitly limits an LLC to recognize "series of members" as the only choice.[41] Additionally, an LLC registered in Iowa, Oklahoma, Tennessee, or Texas can establish a series regarding "membership interests,"[42] whereas an LLC in Delaware, Illinois, or Utah may designate a series respecting interests of the company itself.[43] However, only Texas and Delaware recognize the ability for series segregation of assets.[44] Similarly, Tennessee stands alone in

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eLibrary (search for "Robertson Tulli").

40. DEL. CODE ANN. tit. 6, § 18-215(a) (West Supp. 2008); 805 ILL. COMP. STAT. ANN. 180/37-40(a) (West Supp. 2009); IOWA CODE ANN. § 490A.305(1) (West 1999); OKLA. STAT. ANN. tit. 18, § 2054.4(A) (West Supp. 2009); TENN. CODE ANN. § 48-249-309(a) (West Supp. 2008); TEX. BUS. ORGS. CODE ANN. § 101.601(a) (West 2010); UTAH CODE ANN. § 48-2c-606(1)(a) (West Supp. 2007).

41. NEV. REV. STAT. ANN. § 86.296(2) (West 2009). More specifically, even though the Nevada code appears to mandate series segregation solely on the basis of members only—the corollary being that different members must necessarily own each series—it nonetheless includes provisions regarding the separate nature of assets and liabilities for each series consistent with the statutes in other series LLC jurisdictions. *See id.* § 86.161(1)(e) (stating that "the debts or liabilities of any series are to be enforceable against the assets of that series only"); *id.* § 86.296(3) (providing that "[t]he debts, liabilities, obligations, and expenses . . . with respect to a particular series are enforceable against the assets of that series only"); *id.* § 86.343(2) (prohibiting "a distribution . . . if, after giving it effect: (a) [t]he company would not be able to pay the debts of the series from assets of the series . . . or (b) . . . the total assets of the series would be less than the sum of the total liabilities of the series").

42. IOWA CODE ANN. § 490A.305(1) (West 1999); OKLA. STAT. ANN. tit. 18, § 2054.4(A) (West Supp. 2009); TENN. CODE ANN. § 48-249-309(a) (West Supp. 2008); TEX. BUS. ORGS. CODE ANN. § 101.601(a) (West 2010). To fully appreciate this nuance, practitioners should remember that a member's interest in an LLC is personal property (i.e., an interest in profits and losses) and not a right in the specific property of the LLC itself. *See* Ann E. Conaway, *A Business Review of the Delaware Series: Good Business for the Informed*, at 645, 674–75 (PLI Corp. Law & Prac. Course, Handbook Series No. 14533, 2008), *available at* 1677 PLI/Corp 645 (Westlaw) (discussing the nature and assignability of a member's interest in an LLC).

43. DEL. CODE ANN. tit. 6, § 18-215(a) (West Supp. 2008); 805 ILL. COMP. STAT. ANN. 180/37-40(a) (West Supp. 2009); UTAH CODE ANN. § 48-2c-606(1)(a) (West Supp. 2007).

44. *Compare* DEL. CODE ANN. tit. 6, § 18-215(a) (West Supp. 2008) ("[A]greement may establish . . . 1 or more designated series of . . . assets."), *and* TEX. BUS. ORGS. CODE ANN. § 101.601(a) (West 2010) ("[A]greement may establish . . . one or more designated series of . . . assets."), *with* 805 ILL. COMP. STAT. ANN. 180/37-40(a) (West Supp. 2009) (lacking the word "assets" for a series designation), IOWA CODE ANN. § 490A.305(1) (West 1999) (missing "assets" as a series option), NEV. REV. STAT. ANN. § 86.296(2)

listing "holders, . . . directors, . . . or financial rights" as additional options.[45] Although these differences in statutory language may be deemed a matter of semantics, the Texas version seems to comparatively provide more flexibility in creating series, at least for the separation of membership interests and assets. Second, the Texas code expressly proscribes the formation of a series LLC for certain types of business activities,[46] sharing only with Delaware a specific prohibition against the use of a series LLC for the business of banking.[47] Thus, Texas businesses stand at a disadvantage if they want to use the series LLC form for certain enumerated business purposes. Third, the default allocation of governing authority for a series in Texas arguably vests equally between the associated managers or members,[48] while the default management allocation in Delaware, Iowa, Oklahoma, and Utah vests either proportionally in the associated members according to their share of the profits—with decisions controlled by members having greater than fifty percent ownership interest.[49] Finally, in

(West 2009) (providing only "members" as a series classification), OKLA. STAT. ANN. tit. 18, § 2054.4(A) (West Supp. 2009) (omitting "assets" for establishing a series), TENN. CODE ANN. § 48-249-309(a) (West Supp. 2008) (listing "financial rights" but not "assets"), *and* UTAH CODE ANN. § 48-2c-606(1)(a) (West Supp. 2007) (mirroring the language in the Illinois statute). One likely explanation for the lack of "assets" in these other jurisdictions is that the original version of the Delaware statute did not include the term, *see* DEL. CODE ANN. tit. 6, § 18-215(a) (West 2005) ("A [LLC] agreement may establish . . . series of members, managers, or [LLC] interests . . . ."), which was added in a 2007 amendment, *see* Act of July 10, 2007, ch. 105, §§ 22–23, 76 Del. Laws 124, 125 (2007) (amending section 18-215 under title 6 of the Delaware Code to insert the word "assets" in the section title and subsection (a)).

45. TENN. CODE ANN. § 48-249-309(a) (West Supp. 2008).

46. *See* TEX. BUS. ORGS. CODE ANN. § 101.601(b) (West 2010) (referencing section 2.003, which prohibits a domestic entity from operating a bank, cemetery, insurance company, savings association, or trust company).

47. *See* DEL. CODE ANN. tit. 6, § 18-215(c) (West Supp. 2008) (granting that a series "may carry on any lawful business, purpose or activity, . . . with the exception of the business of banking").

48. *See* BUS. ORGS. § 101.608(b) (requiring that the governing authority of a series consist of either the associated managers, if the certificate of formation provides that the company will have managers, or the associated members, if the certificate of formation does not provide for managers). Of course, the certificate of formation or company agreement can expressly vary the division of management authority from the default rule. *See id.* § 101.608(a) (recognizing that the governing authority of a series is in accordance with the company agreement, "notwithstanding any conflicting provision of the certificate of formation").

49. *See, e.g.*, DEL. CODE ANN. tit. 6, § 18-215(g) (West Supp. 2008) ("[T]he management of a series shall be vested in the members . . . in proportion to the then current percentage or other interest of members in the profits[,] . . . the decision of

comparison to the limited powers of a Texas series (i.e., to "sue and be sued[,] contract[,] hold title to assets[,] ... and ... grant liens and security interests"),[50] only Delaware grants the same express limitations,[51] whereas Illinois explicitly permits a series to additionally "exercise the powers of [an LLC],"[52] both Nevada and Oklahoma implicitly confer the powers of an LLC to a series,[53] Utah appears to restrict a series to only contract on its own behalf,[54] and both Iowa and Tennessee lack any legislative determination on the matter.[55] For the most part, these statutory constraints—or lack thereof—underscore the uncertainties in how courts may or may not deem a series as its own separate legal entity and the potential consequences of such a decision.

In contrast, the Illinois legislation presents an alternative approach which primarily addresses the legal capacity of a series. Significantly, the Illinois statute specifically proclaims that a series shall be treated as a legal entity, separate from other series and the LLC itself, "to the extent set forth in the articles of organization."[56] It also categorically permits series to "consolidate ... operations as a single taxpayer" (barring any law to the contrary), work cooperatively, contract jointly, and "elect to be

members owning more than 50 percent of the said percentage or other interest in the profits controlling."). However, the codes in these states—like the Texas statute—enable the company agreement to not only preclude the default rule but also require management of a series to vest in managers and not members. *E.g.*, *id.* (mandating that proportional member management does not apply when otherwise provided for in the company agreement, or when the "agreement provides for the management of the series, in whole or in part, by a manager").

50. BUS. ORGS. § 101.605.

51. *See* DEL. CODE ANN. tit. 6, § 18-215(c) (West Supp. 2008) ("[A] series ... shall have the power and capacity to, in its own name, contract, hold title to [property], grant liens and security interests, and sue and be sued.").

52. 805 ILL. COMP. STAT. ANN. 180/37-40(b) (West Supp. 2009).

53. *See* NEV. REV. STAT. ANN. § 86.161(3) (West 2008) (negating the need for the articles of organization to define any of the powers enumerated in the LLC code); OKLA. STAT. ANN. tit. 18, § 2005(C) (West Supp. 2009) (vitiating the need "to set out in the articles of organization any of the powers enumerated in [the LLC] act").

54. *See* UTAH CODE ANN. § 48-2c-606(5) (West Supp. 2007) ("A series may contract on its own behalf and in its own name, including through a manager."). *But see id.* § 48-2c-606(1)(b) (implying that the operating agreement can identify the separate powers of a series).

55. *See generally* IOWA CODE ANN. § 490A.305 (West 1999) (omitting any language pertinent to the powers of a series); TENN. CODE ANN. § 48-249-309 (West Supp. 2008) (lacking specific provisions to explicate the powers of a series).

56. 805 ILL. COMP. STAT. ANN. 180/37-40(b) (West Supp. 2009).

treated as a single business" in any state, without affecting the limited liability shields.[57] The Illinois code conditions the existence of the liability limitations, however, on the separate filing of a certificate of designation for each series—a provision rather counter-intuitive to a basic benefit of the series LLC concept.[58] Yet, the certificate of designation prerequisite includes individualized notice of limited liability for each series[59] and a stipulation to list the names of members or managers associated with a series that differ from those managing the company.[60] Additionally, the Illinois statute explicitly requires that each series have a distinguishable name—also set forth in the certificate of designation—that contains the entire name of the LLC itself.[61] To varying degrees, all of these provisions support the legal separateness of a series entity far more definitively than the legislation in Texas and the other series LLC jurisdictions.[62] Additionally, the Illinois certificate of designation arguably provides a better method for notice to potential third parties to actually know when they are dealing with series.[63] Ultimately, these differences may take on greater importance as the series LLC business form grows in popularity,[64] particularly if its proliferation inevitably results in the maturation of pertinent case law.

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57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. 805 COMP. 180/37-40(c).

62. *But see* TENN. CODE ANN. § 48-249-309(d)–(g) (West Supp. 2009) (articulating that provisions for classes of interests and voting rights, management duties, member admission, transfer of interests, and termination apply to a series "as if the series were a separate LLC"). Commentators contend that these qualifying clauses put the Tennessee code more in line with the Illinois approach to the series LLC concept. *See* Wendell Gingerich, Note, *Series LLCs: The Problem of the Chicken and the Egg*, 4 ENTREPRENEURIAL BUS. L.J. 193, 197 n.34 (2009) (noting the similarities between the Tennessee and Illinois statutes' treatment of series as separate entities). Note that Part III of this Comment includes further discussion on recognizing the separate legal capacity of a series in Texas.

63. *See* Carol R. Goforth, *The Series LLC, and a Series of Difficult Questions*, 60 ARK. L. REV. 385, 391–92 (2007) (contrasting the Illinois approach, requiring substantially more filed information about series, with the Delaware model, providing minimal notice).

64. *See generally* Vicki R. Harding, *Series LLCs: A Wave of the Future—Or Not?*, MICH. BUS. L.J., Spring 2007, at 19, 19–22 (discussing the differences in series LLC statutes, significant questions that remain, and implications of using a series entity in states without series legislation).

III. POTENTIAL BENEFITS AND PITFALLS

With the availability of many well-known business entities, attorneys might wonder about the realistic need to enact such statutes and the reasons to ever recommend the formation of a series LLC to their clients.[65] Like the advent of the traditional LLC, this evolution in the unincorporated business form further "blur[s] the lines between corporate and partnership law."[66] As a result, this concept has generated a significant number of questions among academics regarding both the practical application of series legislation and its ultimate integration with other key areas of the law affecting business organizations.[67] Although this Comment does not attempt to answer all of these questions, further understanding of the series LLC as enacted in Texas hinges on considering the potential benefits and pitfalls of this concept in practice and in the context of existing law.

A. *Asset Protection and Costs*

As previously inferred, the main advantage of the series LLC is the legislatively authorized ability to compartmentalize a single LLC into different series, eliminating the need to create—while achieving the liability protection of—multiple business forms.[68] Practitioners should not confuse this innovation with traditional notions about prioritizing "series" of stock or "classes" of partnership interests.[69] Rather, "the separation of assets and liabilities [in a series LLC] . . . protect[s] the assets of one series from lawsuits that are filed against any of the other series."[70] In

65. Carol R. Goforth, *The Series LLC, and a Series of Difficult Questions*, 60 ARK. L. REV. 385, 392–93 (2007).

66. *See* Brian R. Fons, *Serious About Series LLCs*, CBA REC., Apr. 2007, at 46, 49, *available at* 21-Apr CBAR 46 (Westlaw) (concluding that the relationship between the LLC and its series can be inaccurately viewed as a corporation, with a parent and subsidiaries, or as a partnership, with each series comprising pieces of a whole LLC).

67. *E.g.*, 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, 321–25 (2009) (cataloging many of the questions raised by the series LLC concept).

68. Julia Gold, *Series Limited Liability Companies—Too Good to Be True?*, NEV. LAW., July 2004, at 18, 19.

69. *See id.* (explaining the difference between "traditional 'classes' or 'series' of stock or partnership interests" with "the compartmentalization of liabilities among the respective . . . series of interests within a single entity").

70. Wendell Gingerich, Note, *Series LLCs: The Problem of the Chicken and the Egg*, 4 ENTREPRENEURIAL BUS. L.J. 193, 193 (2009).

theory, the enforceability of the liability protection of a series should solely depend on strict adherence to the statutory "notice" and "records" requirements (discussed in Part II of this Comment).[71] In practice, however, uncertainty remains over how far courts will respect the series LLC liability shields,[72] especially in non-series jurisdictions.[73]

This flexibility to form one business organization with segregated liabilities should also necessarily reap the complementary benefit of reduced costs. "Intuitively, a single business should involve less expense, less paperwork, less overhead, and be simpler to operate than a multiplicity of businesses."[74] For example, the filing fee for a traditional LLC certificate of formation remains $300.[75] This same fee should apply for creating a series LLC,[76] regardless of how many series may exist initially or in the future.[77] Thus, in comparing the use of the series concept with the traditional method of creating multiple separate entities, the

71. *See* Ann E. Conaway, *A Business Review of the Delaware Series: Good Business for the Informed*, at 645, 671 (PLI Corp. Law & Prac. Course, Handbook Series No. 14533, 2008), *available at* 1677 PLI/Corp 645 (Westlaw) (contending, in the context of similar language in the Delaware series LLC statute, that courts should enforce the limited liability of a series against third parties when the notice and records requirements are met).

72. *See* Dominick T. Gattuso, *Series LLCs: Let's Give the Frog a Little Love*, BUS. L. TODAY, July/Aug. 2008, at 33, 37 ("Courts . . . may disregard the internal liability shield of a [s]eries LLC to fashion a remedy for third parties injured by a series."); Carol R. Goforth, *The Series LLC, and a Series of Difficult Questions*, 60 ARK. L. REV. 385, 396–97 (2007) (suggesting that potential problems with the purported limited liability for a series LLC may be a major disincentive when compared to the known risks associated with forming multiple LLCs). For further discussion on potential theories for courts to disregard the series limited liability shields, see Part IV of this Comment.

73. *E.g.*, MARK A. SARGENT & WALTER D. SCHWIDETZKY, LIMITED LIABILITY COMPANY HANDBOOK § 3:85 (West 2009) (noting that practitioners have resisted using series LLCs partly because of the uncertainty about whether non-series states will respect the series liability shields). For further discussion about the potential treatment of series LLCs in non-series jurisdictions, see subsection E in Part III of this Comment.

74. Carol R. Goforth, *The Series LLC, and a Series of Difficult Questions*, 60 ARK. L. REV. 385, 395 (2007).

75. *See* TEX. BUS. ORGS. CODE ANN. § 4.152 (West 2010) (listing the certificate of formation filing fee for a for-profit corporation as $300); *id.* § 4.154 (stating the filing fees for an LLC shall be the same as "for a similar instrument under Section 4.152").

76. *Cf. id.* § 101.609 (providing that statutory provisions governing traditional LLCs also apply to the series).

77. *See* HOPE ANDRADE, TEX. SEC'Y OF STATE, 2009 LEGISLATIVE UPDATE: SEPTEMBER 1, 2009—NEW AND AMENDED FILING PROVISIONS & REQUIREMENTS 3 (2009), *available at* http://www.sos.state.tx.us/corp/forms/boc/legislative-update-SB1442.doc ("No filing action is required by the LLC on the establishment of a series.").

savings in formation costs alone could be substantial.[78] Similarly, a series LLC should pay less in franchise taxes[79] and realize lower administrative expenses in discharging such responsibilities as submitting one annual report and maintaining one registered agent.[80] However, costs associated with the unfamiliar complexities of preparing the operational documents for a series LLC, drafting independent agreements to govern each series, and adequately maintaining separate accounts and records for each series might significantly offset the potential savings.[81]

B. *Fractional Ownership and Interest Transfers*

In its purest form, a series LLC would have each series set up to hold distinct assets entirely separate from other series.[82] However, as enacted, this concept enables even greater structural flexibility because series may be established for membership interests that have "separate rights, powers, or duties with respect to specified property."[83] That is, a series can be used to segregate

78. *See* Jay Adkisson & Chris Riser, *When One Is Better than Many: The Series LLC*, ASSETPROTECTIONBOOK.COM (July 12, 2009, 11:16 AM), http://www.assetprotectionbook.com/forum/viewtopic.php?f=102&t=869 (contending that the use of a series LLC instead of forming multiple separate LLCs "may save several thousand dollars in startup costs").

79. *See* Jacob Stein, *Tax Tips: Advanced Asset Protection and Tax Planning with LLCs*, L.A. LAW., June 2006, at 17, 20, *available at* http://www.lacba.org/Files/LAL/Vol29No4/2266.pdf (adducing that a series LLC segregating forty parcels of real estate should only pay a $800 franchise tax instead of the $32,000 required for forty separately registered entities, based on California law); *see also* Wendell Gingerich, Note, *Series LLCs: The Problem of the Chicken and the Egg*, 4 ENTREPRENEURIAL BUS. L.J. 193, 206–07 (2009) (illustrating that even an investor with only two properties would save a significant amount in Illinois filing fees and franchise taxes when using a series LLC versus separate LLCs). To put the Illinois example in context, however, similar savings for a series LLC in Texas would be greater because Illinois expressly imposes separate fees on a series LLC, including a higher sum for filing the articles of organization, an additional annual report charge for each series, and a separate certificate of designation amount for each series. 805 ILL. COMP. STAT. ANN. 180/50-10 (West Supp. 2009).

80. Brian R. Fons, *Serious About Series LLCs*, CBA REC., Apr. 2007, at 46, 47, *available at* 21-Apr CBAR 46 (Westlaw).

81. Carol R. Goforth, *The Series LLC, and a Series of Difficult Questions*, 60 ARK. L. REV. 385, 396 (2007).

82. *Cf.* NICK MARSICO, NAT'L BUS. INST., ADVANCED LLC ISSUES: CURRENT UPDATES AND EMERGING TRENDS 10 (2006), *available at* 35395 NBI-CLE 7 (Westlaw) (defining the "classic use" of a series LLC as a real estate company with each parcel held in a separate series).

83. TEX. BUS. ORGS. CODE ANN. § 101.601(a) (West 2010).

fractional (i.e., joint) ownership interests in the same asset.[84] For example, one of the few cases involving a series LLC addressed the manner in which a New York entity organized in Delaware structured just such an arrangement to divide the ownership interests in a personal boat between the LLC and one of its series.[85]

Theoretically, this structural flexibility also lends itself to "tax-free transfers [of interests] within the [series] LLC."[86] Although the available literature provides little guidance on this matter, commentators agree that the ability to freely transfer assets between series will depend on proper planning and compliance with pertinent legal requirements.[87] As one concrete example, commentator analysis supports the proposition that the series LLC could be beneficially employed for intra-family wealth transfers at virtually no cost.[88] Practitioners can rest assured, however, that

84. *See* Jay Adkisson & Chris Riser, *When One Is Better than Many: The Series LLC*, ASSETPROTECTIONBOOK.COM (July 12, 2009, 11:16 AM), http://www.assetprotectionbook.com/forum/viewtopic.php?f=102&t=869 (suggesting the use of series for the joint ownership of aircraft and watercraft in accordance with Federal Aviation Administration rules). *But see* Ann E. Conaway, *A Business Review of the Delaware Series: Good Business for the Informed*, at 645, 699–700 (PLI Corp. Law & Prac. Course, Handbook Series No. 14533, 2008), *available at* 1677 PLI/Corp 645 (Westlaw) (asserting that the ownership of property resides solely in the LLC and series merely possess allocated interests).

85. *See* GxG Mgmt. LLC v. Young Bros. & Co., Inc., No. 05-162-B-K, 2007 WL 551761, at *7–8 (D. Me. Feb. 21, 2007) (concluding that the unity of interest in a boat was composed of a managing owner, the LLC, and a record owner (one of its series); the LLC contracted for the boat before the series was created, and subsequently "transferred" legal title to the series), *amended by* 2007 WL 1702872 (D. Me. June 11, 2007).

86. *See* Julia Gold, *Series Limited Liability Companies—Too Good to Be True?*, NEV. LAW., July 2004, at 18, 19–20 (listing tax-free transfers as a primary benefit of the series LLC, based on Delaware law).

87. *See* Wendell Gingerich, Note, *Series LLCs: The Problem of the Chicken and the Egg*, 4 ENTREPRENEURIAL BUS. L.J. 193, 197 (2009) ("With proper planning ... ownership and assets could be shifted among series." (citing Carol R. Goforth, *The Series LLC, and a Series of Difficult Questions*, 60 ARK. L. REV. 385, 387 (2007))); *see also* John C. Murray, *A Real Estate Practitioner's Guide to Delaware Series LLCs*, FIRST AM. (2007), http://www.firstam.com/ekcms/uploadedFiles/firstam_com/References/Reference_Articles/John_C_Murray_Reference/Limited_Liability_Companies/jm-delaware.pdf (contending that assets and ownership interests should be freely transferable from one series to another, "[a]ssuming compliance with appropriate statutory and contractual requirements").

88. *See generally* Jared L. Peterson, Note, *Unlimited Potential or Uncertain Future: Series LLCs and Intra-Family Wealth Transfers*, 9 J.L. & FAM. STUD. 385 (2007) (discussing how the series LLC can be used for intra-family wealth transfers). In a nutshell, the author describes the process as follows:

> [Parents] will first need to amend their articles of organization and operating

taxing authorities will challenge such transfers.[89]

C. *Practical Uses*

As mentioned earlier, the beneficial uses for this new business form are virtually limitless. The most touted and perhaps ideal situation is to employ a series LLC for real estate development as a more efficient and cost-effective method for protecting low-risk properties (e.g., residential real estate) from high-risk properties (e.g., commercial parcels with environmental problems).[90] For similar reasons, a series LLC may be favorable for a diversified business to segregate disparate activities—such as research, manufacturing, distribution, and retail—and to use as a viable alternative to structuring a holding corporation with multiple

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agreement to permit the creation of a Series LLC and to identify the rights and responsibilities of the members connected with each Series. They should then transfer one or more pieces of property into that Series. In conjunction with the transfer, [parents] will want to create a separate bank account for the property, inform mortgagees of the Series, and begin accounting for the transaction of the Series apart from those of the other assets of the Series. After receiving a qualified valuation of the Series property, they can decide the appropriate percentage of the Series to gift to their children. . . . In the absence of IRS direction, [parents] should treat the Series as a separate entity for taxation purposes and file an accompanying gift tax return. By following these steps, [parents] will effectively and efficiently be able to transfer intra-family wealth to their children to assist with future educational expenses.

Id. at 399. The Internal Revenue Code grants donors the right to gift a present interest in property, up to a certain value, to any person without tax consequences. I.R.C. § 2503(b) (2006). For the calendar year 2010, the amount excluded from the gift tax is $13,000. Rev. Proc. 2009-50, 2009-45 I.R.B. 617. Thus, in this scenario, the main benefit is obtained from the ability of each parent to annually transfer up to $13,000 in family assets or business interests to a child with no tax consequences, as well as the ability to shift any eventual capital gains to a lower tax bracket. Jared L. Peterson, Note, *Unlimited Potential or Uncertain Future: Series LLCs and Intra-Family Wealth Transfers*, 9 J.L. & FAM. STUD. 385, 398 (2007). Furthermore, the use of a series LLC to accomplish this task results in additional benefits, including convenience and ease, avoiding real estate closing costs, protecting the assets from personal liabilities, and affording "children an opportunity to actively participate in a family business." *Id.* at 394.

89. John C. Murray, *A Real Estate Practitioner's Guide to Delaware Series LLCs*, FIRST AM. (2007), http://www.firstam.com/ekcms/uploadedFiles/firstam_com/References/Reference_Articles/John_C_Murray_Reference/Limited_Liability_Companies/jm-delaware.pdf.

90. *See, e.g.*, Ann E. Minarik, *A Series of Limited Liability Company Interests: A New Tool to Further Isolate Liability*, CHI. METRO (July 2006), http://www.cmetro.ctic.com/TitleIssues/v15n1_full.pdf (pontificating on the preference of investors to use LLCs and how the series concept is "conducive to encouraging investment in real estate").

subsidiaries or even creating multiple LLCs.[91] Other specific examples, primarily illustrating better risk allocation, include series ownership of a patent for an automobile tire,[92] series segregation for owners of a cattle ranch and a tack and feed store,[93] series separation of professional legal, medical, and dental services in multiple jurisdictions,[94] and series segmentation of organic farm operations and bio-tech start-ups with multiple vaccines.[95] Additionally, investors might well obtain comparable series advantages in areas such as "capital investments, oil and gas deals, hedge funds, ... [and] securitization of assets."[96] In sum, "[a]ny time a business owner has a business with a variety of assets, operations, or where there are multiple owners who may have different stakes in different parts of the enterprise, a series LLC might make sense."[97]

Beyond the more obvious limited liability implications, however, the practical uses for this concept may be even greater. One suggestion is to use the series LLC "to facilitate an equity compensation program in a business with multiple divisions."[98]

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91. Carol R. Goforth, *The Series LLC, and a Series of Difficult Questions*, 60 ARK. L. REV. 385, 394 (2007).

92. *See* Jacob Stein, *Tax Tips: Advanced Asset Protection and Tax Planning with LLCs*, L.A. LAW., June 2006, at 17, 22, *available at* http://www.lacba.org/Files/LAL/Vol29No4/2266.pdf (contending that a series licensing the patent to the corporation could protect the valuable patent from a lawsuit against the manufacturer based on defective tires that cause damage).

93. *See* Julia Gold, *Series Limited Liability Companies—Too Good to Be True?*, NEV. LAW., July 2004, at 18, 20–21 (illustrating how the ranch land, cattle, and store could be placed in separate series for limited liability purposes and reduced costs).

94. *See* Carol R. Goforth, *The Series LLC, and a Series of Difficult Questions*, 60 ARK. L. REV. 385, 394–95 (2007) (asserting that large-scale professional operations in multiple states divided into series for each jurisdiction could be a boon for limiting malpractice liability).

95. *See* Dominick T. Gattuso, *Series LLCs: Let's Give the Frog a Little Love*, BUS. L. TODAY, July/Aug. 2008, at 33, 36 (reasoning that series allocations of an organic farm's operations or a bio-tech start-up's vaccines would provide "owners flexibility and enhanced asset protection at a fraction of the cost of using multiple entities").

96. *Id.* at 33, 35.

97. Carol R. Goforth, *The Series LLC, and a Series of Difficult Questions*, 60 ARK. L. REV. 385, 395 (2007).

98. *See* Jay Adkisson & Chris Riser, *When One Is Better than Many: The Series LLC*, ASSETPROTECTIONBOOK.COM (July 12, 2009, 11:16 AM), http://www.assetprotectionbook.com/forum/viewtopic.php?f=102&t=869 (asserting that employees with separate equity interests in series divisions, rather than the whole business organization, would "reward[] employees at productive divisions and protect[] them from the potential downside of other divisions").

Another is to leverage the series structure to combine different businesses without undertaking a traditional merger.[99] Additionally, organizing multiple liquor stores into separate series, with the LLC holding a single liquor license, might work in states that prohibit related parties from having multiple liquor licenses.[100] In one real world example, a bank applied the series business form for multiple venture capital investment funds, thereby simplifying documentation for each fund and avoiding lengthy delays in licensing from the Small Business Administration.[101] In practice as well, estate planners have found series LLCs easier to use when passing separate assets to different beneficiaries.[102] One can only wonder how many other beneficial uses creative legal minds will eventually conceive for this concept.

D. *Legal Capacity*

Despite the various potential benefits of the series LLC discussed thus far, one of the major unanswered questions concerns how a series can be treated as a separate legal person when it is essentially part of another legal entity.[103] One might

99. *See id.* (emphasizing the unique flexibility of the series LLC to enable distinct businesses to join forces by contributing their assets to separate series and drafting agreements "to determine exactly which rights and responsibilities are shared and which are maintained separately").

100. MARK A. SARGENT & WALTER D. SCHWIDETZKY, LIMITED LIABILITY COMPANY HANDBOOK § 3:85 (West 2009). In fact, while Texas has such a licensing restriction, *see* TEX. ALCO. BEV. CODE ANN. § 11.13(b) (West 2007) (prohibiting "a person who is within the fourth degree by consanguinity or affinity of [a] current licensee . . . [from] apply[ing] for any license"), it is unlikely that a series LLC could hold one liquor license for multiple locations, *see id.* § 61.06 (restricting the "use or display [of] a license or [the] exercise [of] a privilege granted by the license except at the licensed premises").

101. *See* Vicki R. Harding, *Series LLCs: A Wave of the Future—Or Not?*, MICH. BUS. L.J., Spring 2007, at 19, 22 (evaluating the usefulness of a series LLC to realize additional administrative efficiencies, "[r]ather than form[ing] multiple entities, each of which was required to go through the entire licensing process").

102. *See* MARK A. SARGENT & WALTER D. SCHWIDETZKY, LIMITED LIABILITY COMPANY HANDBOOK § 3:85 (West 2009) (illustrating that "assets A, B and C go in series 1 and the series 1 interest is given to Johnny under the will[;] assets D, E, and F go in series 2 and the series 2 interest is given to Susie under the will"); *cf.* Carol R. Goforth, *The Series LLC, and a Series of Difficult Questions*, 60 ARK. L. REV. 385, 394 (2007) (theorizing that using a series LLC for estate planning could be accomplished with the drafting of a single document, providing potentially less cost and easier client management).

103. NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, PREFATORY NOTE: REVISED UNIFORM LIMITED LIABILITY COMPANY ACT 5 (2006), *available at*

reason that a series should never be treated like a separate LLC because it lacks any articles of organization and exists as a mere "bookkeeping concept."[104] In contrast, one could also argue that principles of statutory construction support the legal status of a series as a separate entity.[105]

Uncertainty about the extent of legal capacity that should be accorded to a series will likely be a threshold issue for courts to determine under a number of different facts and circumstances and within various areas of the law. For example, in *GxG Management LLC v. Young Brothers and Company*,[106] the court considered whether a Delaware series with legal title to property—which the LLC itself managed—had the capacity to sue on a contract claim regarding that property.[107] Rather than expressly

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http://www.law.upenn.edu/bll/archives/ulc/ullca/2006act_final.pdf.

104. *See* Jacob Stein, *Tax Tips: Advanced Asset Protection and Tax Planning with LLCs*, L.A. LAW., June 2006, at 17, 20–22, *available at* http://www.lacba.org/Files/LAL/Vol29No4/2266.pdf (arguing that, for California tax law purposes, a series should be treated as part of one LLC).

105. The Texas Code Construction Act defines a "person" as a "corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity" for the application of other statutes, except when the context or explicit language clearly means otherwise. *See* TEX. GOV'T CODE ANN. § 311.005 (West 2005) (clarifying that "[t]he following definitions apply unless the statute or context in which the word or phrase is used requires a different definition"). The exception to this rule of statutory construction, however, does not clearly appertain in the context of a series LLC. The TBOC not only applies the same definition for a person, *see* TEX. BUS. ORGS. CODE ANN. § 1.002(69-b) (West 2010) (stating that "'[p]erson' has the meaning assigned by Section 311.005, Government Code"), but also clarifies that an LLC is an entity governed by chapter 101, *see id.* § 1.002(46) (defining "'[l]imited liability company' . . . [as] an entity governed . . . under Title 3 [Limited Liability Companies] or 7 [Professional Entities]"). Subchapter M of chapter 101 further states that any statutory reference to "limited liability company" or "company" within that chapter includes the series within a series LLC. *Id.* § 101.609(b). Thus, each series within a parent LLC should be accorded the status of a person to the same extent as a traditional LLC, albeit expressly limited in legal capacity to "sue and be sued[,] contract[,] hold title to assets[,] . . . and . . . grant liens and security interests." *Id.* § 101.605. Therefore, any principle of law applicable to an LLC or a legal person should likewise be relevant to a series entity. *But see* Ann E. Conaway, *A Business Review of the Delaware Series: Good Business for the Informed*, at 645, 698 (PLI Corp. Law & Prac. Course, Handbook Series No. 14533, 2008), *available at* 1677 PLI/Corp 645 (Westlaw) (challenging Delaware's statutory definition of a "person," which includes any series of an entity, as falling short of according a series "with legal personhood independent of its organizing entity status").

106. GxG Mgmt. LLC v. Young Bros. & Co., Inc., No. 05-162-B-K, 2007 WL 551761 (D. Me. Feb. 21, 2007), *amended by* 2007 WL 1702872 (D. Me. June 11, 2007).

107. *Id.* at *7–8. The record showed that GxG originally contracted with Young Brothers to build a new boat, listed itself as the managing owner on the certificate of

ruling on the series capacity question, the court concluded that the LLC had a sufficient interest in maintaining the action, even though it had transferred "nominal ownership" to the series and further reasoned that judgment in the case would preclude the series from pursuing the same claim, even if it had the requisite capacity to sue.[108] In a subsequent opinion, the court clarified that "the unique relationship between a Delaware LLC and its series does not create a truly separate legal entity capable of independently pursuing its own legal claims."[109] However, the court's analysis involved the original Delaware statute. In response, the Delaware legislature amended the statute to explicitly provide that a series could, *inter alia*, sue and be sued.[110]

The TBOC likewise imbues each series with the same short list of express powers.[111] This impliedly limited capacity suggests that a series could be characterized at best as a second-class citizen.[112] Additionally, although the Texas enactment does not expressly state that a series shall be treated as a separate legal entity consistent with the Illinois statute,[113] such legislative proclamations should not be dispositive as to the capacity determination.[114]

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documentation, and later formed a series to hold the assets and liabilities associated with the boat. *Id.* at *1. The court noted that the governing Delaware statute (at the time) did not indicate what capacity a series had or even if it should be regarded as a distinct entity. *Id.* at *7.

108. *Id.* at *8.

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

110. *See* Wendell Gingerich, Note, *Series LLCs: The Problem of the Chicken and the Egg*, 4 ENTREPRENEURIAL BUS. L.J. 193, 203–04 (2009) (recounting that "the Delaware LLC statute was amended in 2007 to rectify the belief that a series LLC only has an *interest* in its assets").

111. *See* TEX. BUS. ORGS. CODE ANN. § 101.605 (West 2010) (specifying the general powers of a series to "sue and be sued[,] contract[,] hold title to assets[,] . . . and . . . grant liens and security interests" in its own name).

112. *Cf.* Ann E. Conaway, *A Business Review of the Delaware Series: Good Business for the Informed*, at 645, 672 (PLI Corp. Law & Prac. Course, Handbook Series No. 14533, 2008), *available at* 1677 PLI/Corp 645 (Westlaw) (declaring that these same powers enumerated in the Delaware statute, as amended, make the nature of a series "appear . . . derivative of the [LLC] entity whose property it holds").

113. *Compare* BUS. ORGS. § 101.605 (enumerating the general power of a series), *with* 805 ILL. COMP. STAT. ANN. 180/37-40(b) (West Supp. 2009) ("A series with limited liability shall be treated as a separate entity to the extent set forth in the articles of organization.").

114. *See* 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, 327 (2009) (refuting that a legislative designation of a series as a legal entity resolves the capacity question because it

Rather, an entity exists "only as an object of reason,"[115]

> evidenced by (i) the ability to sue and be sued in its own name, (ii) the ability to hold and convey property in its own name, (iii) the organization being afforded a legal personality distinct from the collective identity of its owners (sometimes referred to as continuity of life or perpetuity of succession), and (iv) limited liability to the owners qua owners.[116]

Thus, while a Texas series appears to share most of the characteristics of a distinct entity, a court may nevertheless hold that it does not exist with full legal capacity independent of the registered LLC that contains it, particularly given a perpetual existence ultimately dependent on the existence of the LLC itself.[117] In practice, the true consequences of such a holding remain to be seen.

E. *Doing Business in Other States*

Although a company may center its operations in a single state, many businesses will reach interstate commerce to some extent, inevitably resulting in out-of-state litigation and choice-of-law concerns.[118] Use of series LLCs to conduct business in other series states should not pose a problem because all of their statutes include a provision for the recognition of foreign series LLCs.[119] The potential implications for transacting business in non-series

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simply ascribes a label with no substantive explanation).

115. *Id.* at 325 (quoting THE OXFORD ENGLISH DICTIONARY (2d ed. 1989)) (internal quotation marks omitted).

116. *Id.* at 325–26.

117. *See* BUS. ORGS. § 101.616 (requiring the winding up of a series when the LLC is required to be wound up pursuant to either section 101.552(a) or chapter 11).

118. Carol R. Goforth, *The Series LLC, and a Series of Difficult Questions*, 60 ARK. L. REV. 385, 397 (2007).

119. *See* DEL. CODE ANN. tit. 6, § 18-215(n) (West Supp. 2008) (specifying the requirements for a foreign series LLC to register in Delaware); 805 ILL. COMP. STAT. ANN. 180/37-40(o) (West Supp. 2009) (detailing the statutory rules for a foreign series LLC to register in Illinois); IOWA CODE ANN. § 490A.305(13) (West 1999) (authorizing a foreign series LLC to apply and do business in Iowa); NEV. REV. STAT. ANN. § 86.544 (West 2009) (enumerating the registration requirements for a foreign series LLC to conduct business in Nevada); OKLA. STAT. ANN. tit. 18, § 2054.4(M) (West Supp. 2009) (according foreign series LLCs the statutory rules for registering in Oklahoma); TENN. CODE ANN. § 48-249-309(i) (West Supp. 2008) (designating the parameters for series of foreign LLCs to receive a certificate of authority to transact business in Tennessee); UTAH CODE ANN. § 48-2c-616 (West Supp. 2007) (stating the application requirements for a foreign series LLC to transact business in Utah).

jurisdictions, however, raises dangerous risks about the extent to which states without series legislation will either authorize the independent operation of a series[120] or respect the limited liability shields the series structure provides.[121] In the former context, the issue is whether the LLC itself would be required to register as a foreign LLC, a matter that will likely depend on a legal capacity determination.[122]

Resolving the latter situation may be contingent on one of several viewpoints. "Basic principles of comity would suggest that a foreign court would recognize the [Texas] series and apply [Texas] law to interpret the legal effect of a series upon members, managers or claimants to assets shielded by the internal series limitations on liability."[123] Similarly, the Full Faith and Credit Clause of the U.S. Constitution may control the choice of law determination.[124] Alternatively, most LLC statutes deem the law of the state of formation as controlling at least any internal issues related to the liability of members of a foreign LLC.[125] However, the statutory internal-affairs doctrine will most likely not dictate respect for the internal liability shields of a foreign series LLC because this rule stems from the fact that all states now permit the formation of LLCs, not series LLCs, and because the rule nevertheless does not encompass the LLC's liability for its own

120. *See* Brian R. Fons, *Serious About Series LLCs*, CBA REC., Apr. 2007, at 46, 48, *available at* 21-Apr CBAR 46 (Westlaw) (questioning whether a series could conduct business in another state without involving the LLC itself).

121. *E.g.*, NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, PREFATORY NOTE: REVISED UNIFORM LIMITED LIABILITY COMPANY ACT 5 (2006), *available at* http://www.law.upenn.edu/bll/archives/ulc/ullca/2006act_final.pdf ("Will the internal shields be respected in the courts of states whose LLC statutes do not recognize series?").

122. *See* Brian R. Fons, *Serious About Series LLCs*, CBA REC., Apr. 2007, at 46, 48, *available at* 21-Apr CBAR 46 (Westlaw) (correlating that the required or deemed involvement of the LLC itself, to transact business in non-series jurisdictions, depends on whether one considers a series an integral part of the LLC).

123. *See* Ann E. Conaway, *A Business Review of the Delaware Series: Good Business for the Informed*, at 645, 698 (PLI Corp. Law & Prac. Course, Handbook Series No. 14533, 2008), *available at* 1677 PLI/Corp 645 (Westlaw) (hypothesizing that non-series states should respect series provisions in the context of Delaware law, which is substantially analogous to the Texas series legislation).

124. *See* Wendell Gingerich, Note, *Series LLCs: The Problem of the Chicken and the Egg*, 4 ENTREPRENEURIAL BUS. L.J. 193, 213 (2009) (referencing that "states must generally respect the law of another state governing a particular transaction" under the Full Faith and Credit Clause (citing U.S. CONST. art. IV, § 1)).

125. *Id.*

debts and obligations to third parties.[126] From another perspective, a non-series state may apply its own laws on the conclusion that a series LLC violates public policy, based on either the loss in fees that separate entities would otherwise pay or on the idea that foreign series LLC accords greater rights or privileges than a domestic LLC.[127] Presumably, a series entity will be treated as a traditional LLC in states that do not respect the series provisions, providing little incentive for businesses to even attempt to qualify a foreign series to do business in non-series jurisdictions over the safer prospect of forming domestic entities.[128] Thus, until a majority of states adopt the series concept, resulting in more certainty for its recognition, "a business operating in [non-series] jurisdictions would [probably] be foolish to utilize a series LLC."[129]

F. *Bankruptcy, Taxation, and Securities Law*

Other major concerns, mainly due to a lack of reported decisions, revolve around how bankruptcy courts will treat a series LLC.[130] In this area, the uncertainties are mostly contingent on the ability of a series to independently file (or have filed against it) a bankruptcy petition.[131] That is, the dispositive issue is whether a

126. *See* 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, 329–31 (2009) (discussing the effect of the statutory internal affairs doctrine for the recognition of the series limited liability shield in non-series states).

127. Wendell Gingerich, Note, *Series LLCs: The Problem of the Chicken and the Egg*, 4 ENTREPRENEURIAL BUS. L.J. 193, 213 (2009).

128. *See* Jay Adkisson & Chris Riser, *When One Is Better than Many: The Series LLC*, ASSETPROTECTIONBOOK.COM (July 12, 2009, 11:16 AM), http://www.assetprotectionbook.com/forum/viewtopic.php?f=102&t=869 (illustrating the hurdles for a series LLC to work in a non-series state such as California).

129. Wendell Gingerich, Note, *Series LLCs: The Problem of the Chicken and the Egg*, 4 ENTREPRENEURIAL BUS. L.J. 193, 212 (2009).

130. *E.g.*, Carol R. Goforth, *The Series LLC, and a Series of Difficult Questions*, 60 ARK. L. REV. 385, 398 (2007) (noting the absence of reported bankruptcy cases addressing series LLCs, and discussing the risks involved with a future bankruptcy court's decision to consolidate the assets of the entire series).

131. *But see* John C. Murray, *A Real Estate Practitioner's Guide to Delaware Series LLCs*, FIRST AM. (2007), http://www.firstam.com/ekcms/uploadedFiles/firstam_com/References/Reference_Articles/John_C_Murray_Reference/Limited_Liability_Companies/jm-delaware.pdf (listing a number of questions about the interplay of bankruptcy and series LLC law in addition to the petition eligibility issue). More specifically, the author also asked:

bankruptcy court will view a series as a separate legal "person" or instead require the entire series LLC to proceed as one entity.[132] It is likely that bankruptcy courts will defer to state determinations on the separate entity status of a series.[133] Until then, a substantial risk exists for bankruptcy of a single series to jeopardize the assets of the entire series LLC.[134] In fact, regardless of the answer, a series LLC may be more prone to the "substantive consolidation" doctrine, under which a bankruptcy court can disregard the internal liability shields of entities in order to equitably make creditors whole.[135] For owners of Texas series

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> Will LLC series be subject to separate claims classification or entitled to vote separately on plan confirmation? Will a bankruptcy court substantively consolidate an insolvent series LLC with one or more other series LLCs (especially if they share all or some of the same members or do not observe the requirement of separate assets and/or books and records) or with the master LLC? Will fraudulent-conveyance issues arise with respect to inter-series guarantees? Will section 1111(b) of the Bankruptcy Code (which allows a secured creditor with a nonrecourse loan to elect to treat its claim as being with recourse against the debtor) apply to creditors whose recourse is limited to the assets of a particular series? Will multiple committees (and consultants and professionals) be required for LLCs with more than one series? Will separate counsel be required for each series (as opposed to the LLC's counsel) to protect the separate interests of each series?

Id.

132. *See* Wendell Gingerich, Note, *Series LLCs: The Problem of the Chicken and the Egg*, 4 ENTREPRENEURIAL BUS. L.J. 193, 212, 217 (2009) (debating the unknown status of a series to be treated as a debtor in bankruptcy). Although not included in the bankruptcy code's definition of a person, case law supports the ability of a traditional LLC to be treated as a debtor; however, no such authority exists for a series. Dominick T. Gattuso, *Series LLCs: Let's Give the Frog a Little Love*, BUS. L. TODAY, July/Aug. 2008, at 33, 37. Furthermore, the series LLC does not conceptually fall within the recognized personage of a corporation or partnership under the bankruptcy code. *See* Ann E. Conaway, *A Business Review of the Delaware Series: Good Business for the Informed*, at 645, 697–98 (PLI Corp. Law & Prac. Course, Handbook Series No. 14533, 2008), *available at* 1677 PLI/Corp 645 (Westlaw) (addressing the unlikely prospect for a series to file a petition in bankruptcy as an independent person). Also, at least one federal bankruptcy judge unofficially opined "that only the entire LLC could file," rather than an individual series. MARK A. SARGENT & WALTER D. SCHWIDETZKY, LIMITED LIABILITY COMPANY HANDBOOK § 3:85 (West 2009).

133. *See* Dominick T. Gattuso, *Series LLCs: Let's Give the Frog a Little Love*, BUS. L. TODAY, July/Aug. 2008, at 33, 37 ("In the event the bankruptcy courts consider [state] status determinative, a series cloaked with separate legal entity status may file as a debtor in a bankruptcy.").

134. Carol R. Goforth, *The Series LLC, and a Series of Difficult Questions*, 60 ARK. L. REV. 385, 398 (2007).

135. *See* Dominick T. Gattuso, *Series LLCs: Let's Give the Frog a Little Love*, BUS. L. TODAY, July/Aug. 2008, at 33, 37 (contending that bankruptcy courts might exercise their equitable power to consolidate the assets of related but separate legal entities when

LLCs, therefore, a viable alternative to bankruptcy may be statutory measures for a failing series to be placed in receivership and rehabilitated or liquidated.[136]

Concurrently, both federal and state taxation questions, centered on the entity status of series, remain largely unanswered.[137] Even if courts hold that series LLC statutes accord separate entity status to series for state law purposes, this determination does not necessarily control the treatment of series for federal tax purposes.[138] At the federal level, concerns mainly focus on whether a series can elect its tax classification—like a traditional LLC—or whether the IRS will categorically treat each series as a distinct entity, requiring the filing of separate income tax returns.[139] Although not binding,[140] a recent private letter ruling

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they appear to operate as a single business or when they fail to follow statutory formalities, particularly for series LLCs that fail to adequately maintain separate accounts and records).

136. *See generally* TEX. BUS. ORGS. CODE ANN. §§ 11.401–.414 (West 2010) (providing the governing code for receivership of domestic entities under subchapter I of TBOC chapter 11); *see also id.* § 101.617 (specifying that the provisions of TBOC chapter 11 apply to series).

137. *See, e.g.*, Michael E. Mooney, *Series LLCs: The Loaves and Fishes of Subchapter K*, 813 P.L.I. TAX 355, 369–72 (2008) (discussing the lack of guidance on how series should be treated for tax purposes, whether as part of a single entity, disregarded entities with a single LLC owner, or separate entities directly owned by members of the series).

138. Michael W. McLoughlin & Bruce P. Ely, *The Series LLC Raises Serious State Tax Questions but Few Answers Are Yet Available*, J. MULTISTATE TAX'N & INCENTIVES, Jan. 2007, at 7, 10, *available at* 2007 WL 80567. Conversely, even if courts determine that state law does not authorize legal entity status for series, the application of federal tax law may nonetheless elevate the series as a separate entity, given a distinctive business activity or purpose, *see* Carter G. Bishop, *Through the Looking Glass: Status Liability and the Single Member and Series LLC Perspective*, 42 SUFFOLK U. L. REV. 459, 489 (2009) (assuming that federal tax law will follow state law entity status for a series, or otherwise elevate the series to separate entity status based on its business relationship), and state tax authorities will tend to follow federal tax treatment, *see* Michael W. McLoughlin & Bruce P. Ely, *The Series LLC Raises Serious State Tax Questions but Few Answers Are Yet Available*, J. MULTISTATE TAX'N & INCENTIVES, Jan. 2007, at 7, 10, *available at* 2007 WL 80567 (contending that "most states probably will piggyback the federal tax treatment of the series, at least for income tax purposes").

139. *E.g.*, NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, PREFATORY NOTE: REVISED UNIFORM LIMITED LIABILITY COMPANY ACT 6 (2006), *available at* http://www.law.upenn.edu/bll/archives/ulc/ullca/2006act_final.pdf (listing questions about series tax treatment that, in part, resulted in no adoption of a series proposal in RULLCA).

140. Comerica Bank, N.A. v. United States, 93 F.3d 225, 230 (6th Cir. 1996) ("While Private letter rulings are not binding authority, they may be cited as evidence of

of the IRS suggests that series will be accorded separate tax status based on their individual characteristics.[141] Additionally, authoritative precedent exists for the separate-entity treatment of the analogous series of a statutory trust.[142] At the state level, other unresolved issues persist as to franchise taxes, the filing of composite returns, withholding requirements, accounting for net operating losses, the proper apportionment of income, and sales-and-use taxes.[143] To date, state tax authority rulings also support the recognition of series as separate entities in California[144] and Massachusetts.[145] Thus, despite the lack of state law decisions on the legal capacity of series, the trend appears to favor series as separate entities for at least federal and state tax purposes.[146] Yet, given the profound effect that a landmark IRS revenue ruling

administrative interpretation." (citing Phi Delta Theta Fraternity v. Comm'r of Internal Revenue, 887 F.2d 1302 (6th Cir. 1989))).

141. *See* I.R.S. Priv. Ltr. Rul. 20-08-03-004 (Jan. 18, 2008), *available at* 2008 WL 163064 (Westlaw) (issuing a regulatory opinion, specifically addressing the federal tax classifications for an investment trust after its proposed reorganization into a series LLC, to treat each series with one owner as a disregarded entity, each series with two or more owners as a partnership, or each series as an association taxable as a corporation, if so elected).

142. *See* Michael E. Mooney, *Series LLCs: The Loaves and Fishes of Subchapter K*, 813 P.L.I. TAX 355, 376–77 (2008) (analyzing the relevance of a leading tax court case and a subsequent IRS revenue ruling that concluded series of a statutory trust may be regarded as separate taxpayers (citing Nat'l Sec. Series-Indus. Stocks Series v. Comm'r, 13 T.C. 884 (1949), *acq.* 1950-1 C.B. 4; Rev. Rul. 55-416, 1955-1 C.B. 416)).

143. *See generally* Michael W. McLoughlin & Bruce P. Ely, *The Series LLC Raises Serious State Tax Questions but Few Answers Are Yet Available*, J. MULTISTATE TAX'N & INCENTIVES, Jan. 2007, at 7, 10–14, *available at* 2007 WL 80567 (deliberating on the many potential problems with state tax treatment of series LLCs).

144. *See Shop Talk: California Takes a Stand on Delaware Series LLCs but There's No News From IRS . . .*, 104 J. TAX'N 315, 315 (May 2006), *available at* 2006 WL 1217225 (reporting on the California Franchise Tax Board's proclamation that series would be viewed as separate LLCs in order to avoid losing revenue). *But see* Jacob Stein, *Tax Tips: Advanced Asset Protection and Tax Planning with LLCs*, L.A. LAW., June 2006, at 17, 20, *available at* http://www.lacba.org/Files/LAL/Vol29No4/2266.pdf (arguing that California statutes do not support the Franchise Tax Board's decision).

145. *See* Carter G. Bishop, *Through the Looking Glass: Status Liability and the Single Member and Series LLC Perspective*, 42 SUFFOLK U. L. REV. 459, 490–91 (2009) (expounding on a recent Massachusetts state tax ruling to treat Delaware series as separate entities for income tax purposes, which cited the *National Securities* case, Revenue Ruling 55-416, and numerous private letter rulings on trust series as supporting authorities).

146. *See* Wendell Gingerich, Note, *Series LLCs: The Problem of the Chicken and the Egg*, 4 ENTREPRENEURIAL BUS. L.J. 193, 216 (2009) (stating that the IRS private letter and California tax rulings "may be forming a trend toward the recognition of each series as a separate entity").

and the "check-the-box" federal tax regulations had on the proliferation of the traditional LLC,[147] similar watershed developments may be needed before effective tax planning can be accomplished when using series LLCs.[148]

Finally, practitioners might need to consider series compliance issues with both federal and state securities laws, particularly regarding disclosure requirements.[149] As an unintended consequence of no clear guidance, membership interests in series could be deemed securities, triggering substantial disclosure rules upon the sale of such interests.[150] In light of all the unanswered questions regarding this concept, ensuring full and adequate disclosure of all material risks with a series might be impossible.[151] Consequently, the uncertain ramifications of securities law, and the treatment for bankruptcy and taxation, significantly heighten the risks of using series LLCs.

IV. DISREGARDING THE SERIES LLC FORM

The introduction of the series LLC portends to raise many questions of first impression for courts in Texas to address, particularly regarding the statutorily defined liability limitations. Like a traditional LLC, members and managers associated with a series LLC will generally be shielded from personal liability for the debts and obligations of a series or the master LLC itself, unless

147. *See* Carter G. Bishop, *Through the Looking Glass: Status Liability and the Single Member and Series LLC Perspective*, 42 SUFFOLK U. L. REV. 459, 459–61 (2009) (recounting the history of the LLC and its rapid growth in popularity after the release of Revenue Ruling 88-76 and the federal check-the-box tax regulations).

148. *But cf.* Michael E. Mooney, *Series LLCs: The Loaves and Fishes of Subchapter K*, 813 P.L.I. TAX 355, 380 (2008) ("The problem is not that these consequences are particularly adverse depending on classification, but rather the inability of taxpayers using series LLCs to plan effectively without greater certainty as to what rules will apply.").

149. *See, e.g.*, NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, PREFATORY NOTE: REVISED UNIFORM LIMITED LIABILITY COMPANY ACT 6 (2006), *available at* http://www.law.upenn.edu/bll/archives/ulc/ullca/2006act_final.pdf (questioning the types of disclosures that will be required if membership interests are subject to securities law).

150. Carol R. Goforth, *The Series LLC, and a Series of Difficult Questions*, 60 ARK. L. REV. 385, 402 (2007); *cf.* David L. Cohen, *Theories of the Corporation and the Limited Liability Company: How Should Courts and Legislatures Articulate Rules for Piercing the Veil, Fiduciary Responsibility and Securities Regulation for the Limited Liability Company?*, 51 OKLA. L. REV. 427, 464–68 (1998) (discussing the trend for the SEC and courts to view interests in traditional LLCs as securities despite substantial arguments against it).

151. Carol R. Goforth, *The Series LLC, and a Series of Difficult Questions*, 60 ARK. L. REV. 385, 402–03 (2007).

they voluntarily assume liability in their individual capacity.[152] Presuming that legal rules for the personal liability of company owners should still apply to series LLC managers and members, this section instead examines the extent to which courts will respect the limited liability shields accorded to the LLC and constituent series themselves.

As a general rule, "corporations are separate and distinct 'persons' as a matter of law, and the separate entity of corporations will generally be observed by the courts even where one company may dominate or control the other company, or treats the other company as a mere department, instrumentality, or agency."[153] Conceptually, however, the series LLC attaches characteristics of both corporations and partnerships without being either.[154] More important, the series LLC statute provides an explicit and unique protection for each series from any liability for the actions of other series within the same LLC.[155] Thus, one can only guess as to the ways courts might possibly disregard the statutory liability shields of series LLCs under principles of law pertaining to corporations and partnerships as well as traditional LLCs. Although not an exclusive or exhaustive list, four potential theories on this subject include: agency theory, joint enterprise, veil piercing, and single business enterprise theory.

A. *Agency Theory*

Agency is a consensual and fiduciary relationship under which an agent acts on behalf and for the benefit of a principal.[156] As a

152. *See* TEX. BUS. ORGS. CODE ANN. § 101.606(a) (West 2010) ("Except as and to the extent the company agreement specifically provides otherwise, a member or manager associated with a series or a member or manager of the company is not liable for a debt, obligation, or liability of a series.").

153. CNOOC Se. Asia Ltd. v. Paladin Res. (Sunda) Ltd., 222 S.W.3d 889, 898 (Tex. App.—Dallas 2007, pet. denied) (quoting Valero S. Tex. Processing Co. v. Starr Cnty. Appraisal Dist., 954 S.W.2d 863, 866 (Tex. App.—San Antonio 1997, pet. denied)).

154. *See* Brian R. Fons, *Serious About Series LLCs*, CBA REC., Apr. 2007, at 46, 49, *available at* 21-Apr CBAR 46 (Westlaw) (concluding that the relationship between the LCC and its series can be inaccurately viewed as a corporation, with a parent and subsidiaries, or as a partnership, with each series comprising pieces of a whole LLC).

155. *See* BUS. ORGS. § 101.602(a) (prohibiting the liabilities of a particular series from being enforceable against the assets of any other series or the LLC itself, and vice versa).

156. *See* Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 200 (Tex. 2002) ("[A]gency is . . . a special relationship that gives rise to a fiduciary duty." (citing Kinzbach Tool Co. v. Corbett-Wallace Corp., 138 Tex. 565, 160 S.W.2d 509, 513 (1942))); Hand v.

consequence, an agent's conduct can legally bind a principal for both contractual and tort liability.[157] In addition to natural persons, artificial entities can act as a principal or agent.[158] In fact, Texas law recognizes the applicability of agency theory to partners in a partnership,[159] to associated LLCs,[160] and, under particular facts and circumstances, between affiliated corporations.[161] "The [party] alleging agency has the burden to prove its existence,"[162] based primarily on the principal's right to control the agent's conduct and actions falling within the scope of the agent's authority.[163] Additionally, the requisite authority may be actual

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Dean Witter Reynolds Inc., 889 S.W.2d 483, 493 (Tex. App.—Houston [14th Dist.] 1994, writ denied) ("Agency is a consensual relationship ...."); ROBERT W. HAMILTON, BUSINESS ORGANIZATIONS: UNINCORPORATED BUSINESSES AND CLOSELY HELD CORPORATIONS 11 (1996) (explaining the basic concepts of agency law to define a fiduciary relation whereby an agent acts for a principal's benefit as mutually consented).

157. *See* ROBERT W. HAMILTON, BUSINESS ORGANIZATIONS: UNINCORPORATED BUSINESSES AND CLOSELY HELD CORPORATIONS 16–21 (1996) (illustrating the power of an agent, acting with actual or apparent authority, to affect the legal rights and duties of the principal regarding contract and tort claims).

158. *Id.* at 11.

159. *See* BUS. ORGS. § 152.301 (stating in the portion of the Code governing general partnerships, "[e]ach partner is an agent of the partnership for the purpose of its business"). More specifically, an act of a partner binds the partnership as authorized by the other partners, or as apparently for carrying on in the ordinary course the partnership business, unless the partner lacks such authority and the person dealing with that partner has knowledge of that fact. *Id.* § 152.302.

160. *See In re* Credit Suisse First Bos. Mortg. Capital, L.L.C., 273 S.W.3d 843, 848–49 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (concluding that the plaintiff developer had asserted an agency relationship between two affiliated LLCs, involving one LLC's origination of commercial mortgage loans and the other LLC's negotiations for them).

161. *See* Tractebel Energy Mktg., Inc. v. E.I. Du Pont De Nemours & Co., 118 S.W.3d 60, 72 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (determining the facts provided sufficient evidence to support a jury finding of agency between parent and subsidiary corporations because "a company's status in a corporate hierarchy does not limit its power to agree to act as an agent"); Hanson Sw. Corp. v. Dal-Mac Constr. Co., 554 S.W.2d 712, 718–19 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.) (ruling that there was insufficient evidence to support a jury finding of an agency relationship to hold the parent corporation liable for the contract of its subsidiary).

162. Disney Enters., Inc. v. Esprit Fin., Inc., 981 S.W.2d 25, 30 (Tex. App.—San Antonio 1998, pet. dism'd w.o.j.) (citing Buchoz v. Klein, 184 S.W.2d 271, 271 (Tex. 1994)).

163. *See* Walker Ins. Servs. v. Bottle Rock Power Corp., 108 S.W.3d 538, 549–51 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (explaining that the essential elements to show an agency relationship are "the alleged principal's right to control the actions of the alleged agent" and either actual or apparent authority (quoting Townsend v. Univ. Hosp.-Univ. of Colo., 83 S.W.3d 913, 921 (Tex. App.—Texarkana 2002, pet. denied) (internal quotation marks omitted))).

or apparent, "created through conduct of the principal communicated either to the agent (actual authority) or to a third party (apparent authority)."[164] But could a series be deemed to act as an agent for the LLC or another series, enabling a litigant to hold the LLC or other series liable as a principal?

Perhaps for a series LLC structured like a corporation with centralized management of subsidiaries, or even where the series are separately managed but operating jointly, agency theory may be relevant. Given the requirements, however, applying this doctrine to series presents several problems. Primarily, it is uncertain that a series can be treated as a legal person to qualify as an agent.[165] Similarly, even if the company agreement does not explicitly waive fiduciary duties, it is questionable that individual series would by default owe fiduciary duties to each other or the LLC itself.[166] Notwithstanding these issues, meeting the elements of control and authority may largely depend on what rights, powers, and duties the certificate of formation and company

164. *Disney*, 981 S.W.2d at 30 (citing Currey v. Lone Star Steel Co., 676 S.W.2d 205, 210 (Tex. App.—Fort Worth 1984, no writ)).

165. *Cf.* Ann E. Conaway, *A Business Review of the Delaware Series: Good Business for the Informed*, at 645, 697–98 (PLI Corp. Law & Prac. Course, Handbook Series No. 14533, 2008), *available at* 1677 PLI/Corp 645 (Westlaw) (discussing the unlikely prospect for a series to file a petition in bankruptcy as an independent person). Certainly, the individual managers or members associated with the series, and the people they employ to work for them, would be agents, but if courts do not deem a series a true entity, "on what basis may it retain agents, and would any agent so retained identify its principal as being the individual series or the primary organization?" 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, 324 (2009).

166. *Cf.* David L. Cohen, *Theories of the Corporation and the Limited Liability Company: How Should Courts and Legislatures Articulate Rules for Piercing the Veil, Fiduciary Responsibility and Securities Regulation for the Limited Liability Company?*, 51 OKLA. L. REV. 427, 462–64 (1998) (discussing the policy arguments for and against the imposition of fiduciary duties as between managers and members in a traditional LLC). *But see* TEX. BUS. ORGS. CODE ANN. § 101.606(b) (West 2010) (providing that "[t]he company agreement may *expand or restrict* any duties, including fiduciary duties" (emphasis added)); *Tractebel*, 118 S.W.3d at 72 (reasoning that, because "the existence of a fiduciary relationship is a *result* of an agency relationship, not an *element* of it," an agent's breach of fiduciary duty does not negate the existence of an agency); Ann E. Conaway, *A Business Review of the Delaware Series: Good Business for the Informed*, at 645, 701–02 (PLI Corp. Law & Prac. Course, Handbook Series No. 14533, 2008), *available at* 1677 PLI/Corp 645 (Westlaw) (contending that, based on case law in Delaware, courts will likely impose fiduciary duties on series even if the operating agreement is silent on the matter).

agreement confer on the series.[167] If the organizing documents clearly accord series with their own governing authority to act completely independent of each other, a plaintiff would probably have a high burden to show that the facts and circumstances surrounding the event or transaction proved otherwise.

Conversely, courts will impose liability solely on an agent that fails to adequately disclose its representative capacity and the identity of the principal.[168] Thus, even if a series were effectively acting as an agent, but did so without imparting any knowledge of that fact, a third party harmed by the conduct of that series would only have recourse against that particular series. However, at least apparent authority might exist if the series used the same or similar name as another series or the LLC itself.[169] Likewise, because TBOC requires no specific information to identify series in the certificate of formation, third parties dealing with a particular series may reasonably believe that they are transacting with the LLC instead.[170]

Finally, proponents for the series concept may argue that the notion of extending agency theory in this context would unduly circumvent the statutory limited-liability provisions. However, the underlying purpose of holding a principal liable for the legally intended consequences of an agent's actions does not seem incongruent with stating that the obligations of a series "shall be enforceable against the assets of that series only."[171] Rather, agency theory would essentially enforce the obligations of a

167. *Cf.* Hanson Sw. Corp. v. Dal-Mac Constr. Co., 554 S.W.2d 712, 719 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.) ("The power of a corporate agent to bind the corporation depends upon the authority conferred by the bylaws, charter, and resolutions of the directors, as well as the general rules governing the relation of principal and agent.").

168. Lake v. Premier Transp., 246 S.W.3d 167, 171 (Tex. App.—Tyler 2007, no pet.) (citing Burch v. Hancock, 56 S.W.3d 257, 261–62 (Tex. App.—Tyler 2001, no pet.)).

169. *But see id.* at 172 (citing *Burch*, 56 S.W.3d at 261–62) (recognizing that adequate disclosure of a principal corporation requires a corporate agent to provide the actual name of the corporation and not a trade name).

170. *Cf.* John C. Murray, *A Real Estate Practitioner's Guide to Delaware Series LLCs*, FIRST AM. (2007), http://www.firstam.com/ekcms/uploadedFiles/firstam_com/References/Reference_Articles/John_C_Murray_Reference/Limited_Liability_Companies/jm-delaware.pdf (asserting that "creditors doing business with the LLC may have no actual knowledge of such limited liability unless they are so informed by members or managers of the LLC" because the only required notice appears in the LLC's certificate of formation).

171. BUS. ORGS. § 101.602(a)(1).

series—or the LLC—that directed and authorized another series to act on its behalf. This outcome, therefore, should respect the statutory language because the series acting as an agent should not be liable for the obligations of another series.

B. *Joint Enterprise*

The joint enterprise doctrine developed as a confluence of agency theory and partnership principles for imposing vicarious liability as between joint venturers in a business or commercial context.[172] The elements of a joint enterprise consist of: "(1) an express or implied agreement among the members of the group, (2) a common purpose to be carried out by the group, (3) a community of pecuniary interest in that purpose, and (4) an equal voice in the direction of the enterprise, which gives an equal right of control."[173] To clarify, the economic benefit derived from the enterprise must be shared by the members of the community "without special or distinguishing characteristics."[174] This standard requires more than a mere agreement to carry out a common business or pecuniary interest typically evidenced in such commercial ventures as the franchisor/franchisee or wholesaler/retailer relationship.[175] Additionally, the requisite equal voice

172. *See* Shoemaker v. Estate of Whistler, 513 S.W.2d 10, 16–17 (Tex. 1974) (discussing the history of the joint enterprise concept and adopting it in Texas as codified in section 491 of the *Restatement (Second) of Torts*).

173. Omega Contracting, Inc. v. Torres, 191 S.W.3d 828, 850 (Tex. App.—Fort Worth 2006, no pet.) (citing Triplex Commc'ns, Inc. v. Riley, 900 S.W.2d 716, 718 (Tex. 1995)).

174. St. Joseph Hosp. v. Wolff, 94 S.W.3d 513, 528 (Tex. 2002) (plurality opinion) (quoting Ely v. Gen. Motors Corp., 927 S.W.2d 774, 779 (Tex. App.—Texarkana 1996, writ denied) (internal quotation marks omitted)).

175. *See id.* at 527–28 (reasoning that the financial benefits of a franchisor's, wholesaler's, or supplier's interest in downstream sales does not constitute a community pecuniary interest—with franchisees, retailers, or customers—because they are not shared "'without special or distinguishing characteristics'" (quoting *Ely*, 927 S.W.2d at 779)). The court further illustrated this point as follows:

> For example, both a franchisor and its franchisee may be said to have a common business and pecuniary interest in the retail marketing or sales of the franchised product or service. The franchisee benefits from receiving the income and any resulting profits generated by its sales and by the market value of his or her franchise resulting from its profitability. The franchisor benefits by receiving royalty payments from its franchisee based on those sales and by the enhanced value accruing to its franchise opportunities resulting from the financial success of the existing franchises.
>
> Similarly, wholesalers and retailers may also be said to have a common business or pecuniary interest in the retail marketing and sales of their products. Without retail

must be tantamount to a contractual right to direct and control the enterprise.[176]

In practical effect, many potential uses of the series LLC to structure a business for a common purpose could easily meet the first two elements for joint enterprise liability.[177] The company agreement in particular would likely provide the necessary evidence.[178] However, where the series operate for distinctly different purposes, or clearly at arm's length with each other, it would be less likely that a plaintiff dealing with one particular series could pursue claims against other parts of a series LLC under a theory of joint enterprise. Additionally, where the statutory liability protection requires the maintenance of separate accounts and recordkeeping, and owners of series LLCs adequately comply with these formalities, an argument regarding a shared community interest would likely fail.[179] Further, the same potential problem

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demand for the product they distribute, neither the wholesaler nor the retailer will stay in business very long. And the same could also be said of a retailer's supplier—both the baker and the owner of a hot dog stand benefit financially from the latter's hot dog sales—although the baker's benefit is indirect.

Id.

176. *See* Tex. Dep't of Transp. v. Able, 35 S.W.3d 608, 615–16 (Tex. 2000) (concluding that different government agencies dividing responsibility for the maintenance of a highway were subject to joint enterprise liability because they enjoyed contractual rights of control under a master agreement); *Riley*, 900 S.W.2d at 719 (holding that a radio station promoting drink prices for a nightclub could not be liable under a joint enterprise theory because there was no evidence the station had a contractual right, or exercised any actual right of control, over what patrons the nightclub served, admitted, or ejected).

177. *See* Dominick T. Gattuso, *Series LLCs: Let's Give the Frog a Little Love*, BUS. L. TODAY, July/Aug. 2008, at 33, 36 (reasoning that series allocations of an organic farm's operations or a bio-tech start-up's vaccines would provide "owners flexibility and enhanced asset protection at a fraction of the cost of using multiple entities"); Carol R. Goforth, *The Series LLC, and a Series of Difficult Questions*, 60 ARK. L. REV. 385, 394–95 (2007) (suggesting that a series LLC would be advantageous for a diversified business to segregate disparate activities, such as research, manufacturing, distribution, and retail, or to limit malpractice liability for large-scale professional operations in multiple states); Julia Gold, *Series Limited Liability Companies—Too Good to Be True?*, NEV. LAW., July 2004, at 18, 20–21 (illustrating the benefits of series LLC limited liability and economic efficiency for multiple real estate development projects or to segregate related ranch land, cattle, and a retail store).

178. *See* TEX. BUS. ORGS. CODE ANN. § 101.601(a) (West 2010) (stating that the company agreement may establish series having separate rights, powers, or duties, or profits and losses, as to specific property or obligations, *or* separate business purposes).

179. *See id.* § 101.602(b)(1) (providing that the limited liability shields apply only if "the records maintained for [a] particular series account for the assets associated with that series separately from the other assets of the company or any other series"). Conversely,

with the comparable control requirement for a joint enterprise claim also exists with an agency theory argument.[180]

Finally, in contrast to agency theory, the notion of applying the joint enterprise doctrine in this context would appear to directly conflict with the statutory limited liability provisions.[181] That is, the language of the series statutes seems to underscore a legislative intent for individuals to essentially use a series LLC as a joint enterprise without the vicarious liability that would otherwise attach. Generally, where a statutory provision directly conflicts with a common law principle, the statute preempts the common law.[182] Accordingly, judicial deference to this legislative intent should render the joint enterprise doctrine entirely inapplicable to a series LLC, regardless of sufficient evidence to prove the requisite agreement, common purpose, and control elements.

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if the accounts and records are not adequately maintained, the liability protection would presumably disappear, subjecting the entire series LLC to treatment as a single entity and negating the need for alleging joint enterprise liability. *Cf.* Dominick T. Gattuso, *Series LLCs: Let's Give the Frog a Little Love*, BUS. L. TODAY, July/Aug. 2008, at 33, 37 (suggesting that a bankruptcy court could disregard the limited liability shields of series if they fail to maintain separate accounts and records of their assets).

180. *Compare* Walker Ins. Servs. v. Bottle Rock Power Corp., 108 S.W.3d 538, 549 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (explicating that an essential element for an agency "is the alleged principal's right to control the actions of the alleged agent"), *with* Omega Contracting, Inc. v. Torres, 191 S.W.3d 828, 851 (Tex. App.—Fort Worth 2006, no pet.) (stating that "[t]he 'critical inquiry' in analyzing the 'equal right of control' element is whether the defendant charged with joint enterprise liability had the right to control the tortfeasor at the time of the tort[i]ous conduct" (citing *Ely*, 927 S.W.2d at 780)).

181. *See* BUS. ORGS. § 101.602(a)(1) (mandating that "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 that series only").

182. Collins v. Tex Mall, L.P., 297 S.W.3d 409, 415 (Tex. App.—Fort Worth 2009, no pet.) (citing Cash Am. Int'l Inc. v. Bennett, 35 S.W.3d 12, 16 (Tex. 2000)). More specifically:

> In construing a statute, [a court's] purpose is to give effect to the Legislature's intent. To do so, [the court] consider[s] the statute's language, history, and purposes and the consequences of alternate constructions. A statute that deprives a person of a common-law right "will not be extended beyond its plain meaning or applied to cases not clearly within its purview." Abrogating common-law claims "is disfavored and requires a clear repugnance between the common law and statutory causes of action."

Bennett, 35 S.W.3d at 16 (internal citations omitted). This rule is based on a presumption that a "legislature enacts statutes with full knowledge of, and reference to, the existing common law." Collins, 297 S.W.3d at 415 (citing *In re* Pirelli Tire, L.L.C., 247 S.W.3d 670, 677 (Tex. 2007) (orig. proceeding)).

C. *Veil Piercing*

The limited-liability protection of corporate owners exists as a natural consequence of recognizing the corporation as a separate legal entity,[183] and courts will generally respect it barring sufficient reason to pierce the corporate veil.[184] Stated another way, "[c]ourts are willing to disregard or pierce the corporate veil if circumstances make it equitable to do so."[185] In *Castleberry v. Branscum*,[186] the Supreme Court of Texas expansively listed the equitable reasons to justifiably disregard the corporate form:

> (1) when the [corporate] fiction is used as ["a sham to perpetrate fraud"];
> (2) where a corporation is organized and operated as a mere tool or business conduit of another corporation ["alter ego"];
> (3) where the corporate fiction is resorted to as a means of evading an existing legal obligation;
> (4) where the corporate fiction is employed to achieve or perpetrate monopoly;
> (5) where the corporate fiction is used to circumvent a statute; and
> (6) where the corporate fiction is relied upon as a protection of crime or to justify wrong.[187]

The opinion footnoted inadequate capitalization as another basis.[188] In response, the legislature amended article 2.21 of the

183. *See* 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, 319–20 (2009) (contrasting the series concept from the corporate form based on limited liability being "not . . . necessarily the consequence of incorporation, but rather a consequence of the appreciation that the corporation is a legal entity and the recognition that it is the corporation, and not its constituent owners, who is the debtor").

184. *See* Eric Fox, Note, *Piercing the Veil of Limited Liability Companies*, 62 GEO. WASH. L. REV. 1143, 1154 (1994) (summing as a general rule that "a corporation will be looked upon as a legal entity . . . until sufficient reason to the contrary appears[,] [such as] when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime" (quoting United States v. Milwaukee Refrigerator Transit Co., 142 F. 247, 255 (C.C.E.D. Wis. 1905))).

185. Steven C. Bahls, *Application of Corporate Common Law Doctrines to Limited Liability Companies*, 55 MONT. L. REV. 43, 61 (1994).

186. Castleberry v. Branscum, 721 S.W.2d 270 (Tex. 1986), *superseded in part by statute*, Act of May 13, 1997, 75th Leg., R.S., ch. 375, § 7, 1997 Tex. Gen. Laws 1516, 1522 (expired Jan. 1, 2010) (recodified at TEX. BUS. ORGS. CODE ANN. §§ 21.223–.225 (West 2010)), *as recognized in* SSP Partners v. Gladstrong Invs. (USA) Corp., 275 S.W.3d 444 (Tex. 2008).

187. *Castleberry*, 721 S.W.2d at 272.

188. *Id.* at 272 n.3.

Texas Business Corporation Act to substantially limit *Castleberry*, statutorily permitting veil piercing on a contract claim—regardless of a failure to observe corporate formalities—only when "the corporation [is] used for the purpose of perpetrating and did perpetrate an actual fraud."[189] Notably, article 2.21 has been recodified in TBOC sections 21.223 through 21.225 with substantially the same language.[190]

No similar statute speaks to veil piercing for LLCs; however, Texas case law supports piercing the veil of at least traditional LLCs, although this concept has not been applied equally since the statutory abrogation of *Castleberry*.[191] In *Pinebrook Properties, Ltd. v. Brookhaven Lake Property Owners Ass'n*,[192] the court of appeals addressed the plaintiffs' successful attempts to pierce the veil of Pinebrook Properties, Ltd. (a limited partnership) and Pinebrook Properties Management, L.L.C. (the general partner) under an alter ego theory for claims arising from a restrictive

189. Act of May 13, 1997, 75th Leg., R.S., ch. 375, § 7, 1997 Tex. Gen. Laws 1516, 1522 (expired Jan. 1, 2010) (recodified at TEX. BUS. ORGS. CODE ANN. §§ 21.223–.225 (West 2010)).

190. *See* TEX. BUS. ORGS. CODE ANN. §§ 21.223–.225 (West 2010) (defining the extent of limited liability for corporate obligations, the preemptive effect of section 21.223, and other exceptions under section 21.225).

191. *See* Natalie Smeltzer, Comment, *Piercing the Veil of a Texas Limited Liability Company: How Limited Is Member Liability?*, 61 SMU L. REV. 1663, 1663–64 (2008) (observing that, given the lack of a statutory provision and the way Texas courts have applied veil piercing to LLCs, "one may be subject to pre-Article 2.21 laws . . . when using the LLC form"). Strikingly, lawmakers recently introduced legislation to amend TBOC chapter 101 to explicitly apply sections 21.223 through 21.225 to an LLC. *See* Tex. S.B. 1773, 81st Leg., R.S. (2009) (enumerating that any references in sections 21.223 through 21.226 to "shares" would include "membership interests"; "holder," "owner," or "shareholder" would include a "member" and an "assignee"; "corporation" or "corporate" would include a "limited liability company"; "directors" would include "managers" and "members"; and "bylaws" would include "company agreement"). The intent was to "align the standards for piercing the liability shield of [LLCs] with the standards used to pierce the liability shield of corporations." H. COMM. ON BUS. & INDUS., BILL ANALYSIS, Tex. S.B. 1773, 81st Leg., R.S. (2009), *available at* http://www.hro.house.state.tx.us/pdf/ba81r/sb1773.pdf#navpanes=0. Unfortunately, this legislation did not make it out of committee consideration, leaving a lack of statutory clarity on the matter. *See id.* (noting that, although S.B. 1773 passed a Senate vote, the Business and Industry Committee in the House considered its companion bill and left it pending). For a more in-depth empirical and policy analysis of applying veil piercing to LLCs, see generally Geoffrey C. Rapp, *Preserving LLC Veil Piercing: A Response to Bainbridge*, 31 J. CORP. L. 1063 (2006).

192. Pinebrook Props., Ltd. v. Brookhaven Lake Prop. Owners Ass'n, 77 S.W.3d 487 (Tex. App.—Texarkana 2002, pet. denied).

covenant.[193] Although the court ruled that partnerships could not be subject to veil piercing as a matter of law, it did not negate that possibility for the LLC.[194] Rather, the court examined the sufficiency of evidence to support the trial court's finding of the LLC as an alter ego under *Castleberry* while noting that "[f]ailure to comply with corporate formalities" was not a factor to consider under article 2.21.[195] Similarly, the court in *McCarthy v. Wani Venture, A.S.*,[196] in a suit on a sworn account, held that a member of an LLC can be found personally liable when the LLC is used as a sham to perpetrate a fraud.[197] A bankruptcy court in Texas also evaluated both an alter ego and a sham-to-perpetrate-a-fraud claim in a case where owners of an LLC, involved in an underlying breach of contract suit, had transferred all assets into a new LLC before the entry of default judgment.[198] Comparatively, these opinions appear inconsistent with the statutory approach for corporate veil piercing, which limits contract claims to proving actual fraud.

How then should courts handle veil piercing for a series LLC? Presumably, the liability shields may be disregarded without resorting to veil-piercing claims where series owners neither provide the general notice of liability limitations in the certificate of formation and company agreement nor maintain separate records and accounts for the assets of each series.[199] Otherwise, even with

193. *Id.* at 491–92.

194. *See id.* at 499–501 (holding veil piercing inapplicable to partnerships but proceeding to analyze whether the LLC was an alter ego of the president and managing partner of Pinebrook Management).

195. *Id.* at 499.

196. McCarthy v. Wani Venture, A.S., 251 S.W.3d 573 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

197. *See id.* at 590–91 (stating that "Texas courts and other jurisdictions[] have applied to LLCs the same state law principles for piercing the corporate veil that they have applied to corporations," and referencing both *Castleberry* and article 2.21).

198. *See In re* JNS Aviation, LLC, 376 B.R. 500, 526–31 (Bankr. N.D. Tex. 2007) (explaining the applicability of veil piercing claims under Texas law, referencing both *Castleberry* and TBOC section 21.223, but ultimately concluding that a valid veil piercing claim existed based on actual fraud), *amended in part by* No. 04-21055-RLJ-7, 2008 WL 686159 (Bankr. N.D. Tex. Mar. 7, 2008), *aff'd sub nom.* JNS Aviation, Inc. v. Nick Corp., No. 2:08-CV-130-J, 2009 WL 3487515 (N.D. Tex. Oct 29, 2009).

199. *See* TEX. BUS. ORGS. CODE ANN. § 101.602(b) (West 2010) (stating that the liability limitations only apply if separate records are maintained for each series, "the company agreement contains a statement to the effect of the limitations," and the "certificate of formation contains a notice of the limitations"); Dominick T. Gattuso, *Series LLCs: Let's Give the Frog a Little Love*, BUS. L. TODAY, July/Aug. 2008, at 33, 37

proper observance of the required formalities, sufficient grounds to pierce the veil of a series or the series LLC itself would likely raise one of two overriding conflicts. First, in the context of a tort-based claim, it would present a conflict between the com-mon law rule of *Castleberry* and the statutory limitation of liability between series.[200] As similarly explained in the section regarding the joint enterprise doctrine, this direct conflict and deference to the intent of the statute should likewise negate the application of veil piercing to a series LLC for tort claims.[201] Second, in the context of a contract-based claim, it would manifest a conflict between TBOC sections 21.223 and 101.602.[202] Generally, courts must construe conflicting statutes "so that effect is given to both."[203] When an irreconcilable conflict exists, however, "the special ... provision prevails as an exception to the general provision."[204]

(postulating that "courts may not even need to struggle with a veil-piercing analysis if the [s]eries LLC fails to adhere to the statutory prerequisites to formation and operation").

200. *Compare* Castleberry v. Branscum, 721 S.W.2d 270, 272 (Tex. 1986) (permitting a court to disregard the limited liability of related business entities as a matter of equity), *superseded in part by statute*, Act of May 13, 1997, 75th Leg., R.S., ch. 375, § 7, 1997 Tex. Gen. Laws 1516, 1522 (expired Jan. 1, 2010) (recodified at TEX. BUS. ORGS. CODE ANN. §§ 21.223–.225 (West 2010)), *as recognized in* SSP Partners v. Gladstrong Invs. (USA) Corp., 275 S.W.3d 444 (Tex. 2008), *with* BUS. ORGS. § 101.602(a) (prohibiting the liabilities of a particular series from being enforceable against the assets of any other series or the LLC itself, and vice versa).

201. *See* Collins v. Tex Mall, L.P., 297 S.W.3d 409, 415 (Tex. App.—Fort Worth 2009, no pet.) (explaining that "[t]he statutory provision controls and preempts the common law only when a statute directly conflicts with a common law principle" (citing Cash Am. Int'l Inc. v. Bennett, 35 S.W.3d 12, 16 (Tex. 2000))); *id.* at 415 (basing the rule on a presumption that a "legislature enacts statutes with full knowledge of, and reference to, the existing common law" (citing *In re* Pirelli Tire, L.L.C., 247 S.W.3d 670, 677 (Tex. 2007) (orig. proceeding))).

202. *Compare* BUS. ORGS. § 21.223 (authorizing veil piercing, on any obligation or matter related to or arising from a contract, when a corporation has been used to perpetrate an actual fraud), *with id.* § 101.602(a) (limiting the liabilities of a series as being "enforceable against the assets of that series only").

203. *See* TEX. GOV'T CODE ANN. § 311.026(a) (West 2005) (providing the rule of construction for when "a general provision conflicts with a special or local provision").

204. *Id.* § 311.026(b); *see also* Forwood v. City of Taylor, 147 Tex. 142, 214 S.W.2d 282, 285–86 (1948) ("A fundamental and universally accepted rule of construction is that a general provision must yield to a succeeding specific provision dealing with the same subject matter."); City of Houston v. Arney, 680 S.W.2d 867, 875 (Tex. App.—Houston [1st Dist.] 1984, no writ) (noting that "when the law makes a general provision for all cases and a special provision for a particular class of cases, the general must yield to the special insofar as the particular class is concerned"), *overruled on other grounds by* Univ. of Tex. Med. Branch at Galveston v. York, 871 S.W.2d 175 (Tex. 1994). This is because "the specific statute more clearly evidences the intention of the Legislature than the general one." San Antonio & A. P. Ry. Co. v. State, 128 Tex. 33, 95 S.W.2d 680, 687 (1936); *see*

Viewing section 21.223 as the general provision for veil piercing and section 101.602 as the specific provision for proscribing inter-series liability, the apparently irreconcilable conflict between them should mean that the series LLC statute stands as a legislatively intended exception to veil piercing on contract claims as well. One might argue that these statutes can be reconciled because section 21.223 is expressly intended for piercing the veil of a *corporation*, not that of a series LLC;[205] yet, notwithstanding ample authority for veil piercing of traditional LLCs, any such reconciliation to give effect to both statutes would still leave series LLCs virtually immune to veil piercing under existing law.

Nevertheless, public policy should at the very least disallow proprietors to use the series LLC business form to commit actual fraud related to contractual obligations under the statutory rule for corporate veil piercing, or to achieve any of the inequities related to tortious injuries, as enumerated in *Castleberry*.[206] Moreover, the continued lack of statutory guidance and inconsistent judicial application of this doctrine to traditional LLCs suggests that courts may likewise be left to develop a separate and distinct common law approach to veil piercing of series LLCs.[207] Indeed, the differentiating characteristics of the series LLC business form, in contrast with the corporation as well as the traditional LLC, should necessitate a different set of veil piercing rules.[208]

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also Magnolia Fruit & Produce Co. v. Unicopy Corp. of Tex., 649 S.W.2d 794, 797 (Tex. App.—Tyler 1983, no writ) (stating that "legislative intent is more clearly shown by the special act rather than by the general one"); City of W. Lake Hills v. Westwood Legal Def. Fund, 598 S.W.2d 681, 686 (Tex. Civ. App.—Waco 1980, no writ) ("It is said that this rule is based upon the principle that a specific clause or statute more clearly evidences the intention of the Legislature."); State v. Jones, 570 S.W.2d 122, 123 (Tex. Civ. App.—Austin 1978, no writ) (noting the same as "a well-settled rule of statutory construction" (citing Townsend v. Terrell, 118 Tex. 463, 16 S.W.2d 1063, 1064 (1929))).

205. *See* BUS. ORGS. § 21.223 (stating liability limitations for corporate obligations).

206. *See* Castleberry v. Branscum, 721 S.W.2d 270, 273 (Tex. 1986) (explaining how Texas takes an equitable approach "to prevent use of the corporate entity as a cloak for fraud or illegality or to work an injustice" (quoting Gentry v. Credit Plan Corp., 528 S.W.2d 571, 575 (Tex. 1975)), *superseded in part by statute*, Act of May 13, 1997, 75th Leg., R.S., ch. 375, § 7, 1997 Tex. Gen. Laws 1516, 1522 (expired Jan. 1, 2010) (recodified at TEX. BUS. ORGS. CODE ANN. §§ 21.223–.225 (West 2010)), *as recognized in* SSP Partners v. Gladstrong Invs. (USA) Corp., 275 S.W.3d 444 (Tex. 2008).

207. *Cf.* Natalie Smeltzer, Comment, *Piercing the Veil of a Texas Limited Liability Company: How Limited Is Member Liability?*, 61 SMU L. REV. 1663, 1682 (2008) (commenting on the need for the legislature to "speak statutorily to LLC piercing" due to the "vagueness of the doctrine, coupled with its haphazard application by the courts").

208. *Cf. id.* at 1687 (asserting that the distinctly different characteristics between the

Otherwise, given that the failure to observe corporate formalities is not a factor under TBOC section 21.223 and that the legal status of series as separate entities remains uncertain, courts could haphazardly disregard the series liability shields under broad applications of alter ego and sham-to-perpetrate-fraud concepts in a manner contrary to the legislative intent for the governing statutes.[209]

D. *Single Business Enterprise Theory*

Although it is a similar equitable doctrine, the single business enterprise theory differs from veil piercing principles—based on disregarding the corporate fiction to avoid injustice—because it confers partnership-type liability on different corporations that "integrate their resources and operations to achieve a common business purpose."[210] Founded in equity, it applies only in exceptional circumstances but advantageously does not require proof of fraud, an equal right of control, or any of the elements of a partnership or even a joint venture.[211] The factors for courts to consider in determining when to treat constituent corporations as a single enterprise include:

> (1) common employees; (2) common offices; (3) centralized accounting; (4) payment of wages by one corporation to another corporation's employees; (5) common business name; (6) services rendered by the employees of one corporation on behalf of another corporation; (7) undocumented transfers of funds between corporations; and (8) unclear allocation of profits and losses between corporations.[212]

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traditional LLC and the corporation should make piercing the LLC veil more difficult than piercing the corporate veil).

209. *Cf. id.* at 1688 (contending that the lack of clear statutory and Texas Supreme Court authority on this issue may result in courts arbitrarily disregarding the traditional LLC entity).

210. *See* N. Am. Van Lines, Inc. v. Emmons, 50 S.W.3d 103, 119 (Tex. App.—Beaumont 2001, pet. denied) (defining the general difference between the alter ego doctrine and single business enterprise theory).

211. *See id.* at 119–20 (discussing the specific distinctions between single business enterprise theory and the alter ego, partnership, and joint venture doctrine theories).

212. Formosa Plastics Corp. v. Kajima Int'l, Inc., 216 S.W.3d 436, 460 (Tex. App.—Corpus Christi 2006, pet. denied) (en banc) (citing Paramount Petroleum Corp. v. Taylor Rental Ctr., 712 S.W.2d 534, 536 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.), *abrogated by* SSP Partners v. Gladstrong Invs. (USA) Corp., 275 S.W.3d 444 (Tex. 2008)).

For example, in *Paramount Petroleum Corp. v. Taylor Rental Center*,[213] the court found sufficient evidence to support the liability of an oil company under the single business enterprise theory for unpaid equipment rental invoices that were signed in the name of a subsidiary.[214] The record supported most of the enumerated factors, showing that, among other things, both corporations were solely owned by the same stockholder, shared the same trade name, operated from the same office with the same address and phone number, used the same employee to perform accounting, and combined efforts to complete repair work on a shipping vessel using the rented equipment.[215]

Recently, however, the Texas Supreme Court effectively nullified the single business enterprise theory as a viable basis for corporate liability in light of the legislative intent currently codified in TBOC sections 21.223 through 21.225 (i.e., corporate veil piercing).[216] Nevertheless, the advent of the series LLC concept raises the prospect for courts to reexamine the original rationale for this theory. Certainly, a series LLC could be essentially structured as a single business enterprise like the constituent corporations in *Paramount Petroleum*.[217] Yet, the statutory liability shields would purportedly be enforceable as long as a general notice of the limitations existed in the certificate of formation and company agreement and if separate records were maintained to account for the assets of each series.[218] If one could hide behind adherence to these relatively minimal formalities without being subject to the narrow veil piercing exceptions, a greater potential for abuse of this new business form could

213. Paramount Petroleum Corp. v. Taylor Rental Ctr., 712 S.W.2d 534 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.), *abrogated by* SSP Partners v. Gladstrong Invs. (USA) Corp., 275 S.W.3d 444 (Tex. 2008).

214. *See id.* at 536 (justifying an implied finding of liability under single business enterprise theory based on evidence such as stock ownership and place of business).

215. *See id.* at 536–37 (discussing the factors considered in determining that a single business enterprise existed).

216. *See Gladstrong*, 275 S.W.3d at 456 (abrogating the holding in *Paramount Petroleum* because "[t]he single business enterprise liability theory is fundamentally inconsistent with the approach taken by the Legislature in article 2.21" of the Texas Business Corporation Act (recodified as TEX. BUS. ORGS. CODE ANN. §§ 21.223–.225 (West 2010))).

217. *See, e.g.*, Carol R. Goforth, *The Series LLC, and a Series of Difficult Questions*, 60 ARK. L. REV. 385, 394 (2007) (suggesting that a series LLC would be advantageous for a diversified business to segregate disparate activities).

218. TEX. BUS. ORGS. CODE ANN. § 101.602 (West 2010).

arguably subsist.[219] Thus, restoration of a contrary doctrine against enabling a common enterprise to achieve inequitable results may be needed as a judicial check on the otherwise unjust use of series that the legislature did not intend.[220]

V. CONCLUSION

Ultimately, respecting the concept and limited liability of a series LLC in Texas depends on whether courts will hold series as separate legal entities and defer to the intent of the enacted series legislation. In the latter context, existing legal theories to potentially disregard the series form may be entirely irrelevant given a statutory "trump card," which expressly stipulates enforceability of the internal liability shields "[n]otwithstanding any other provision of this chapter or *any other law*."[221] Without a definitive answer, however, proprietors using series LLCs cannot be certain that their companies will be treated as anything more than traditional LLCs.[222] Further, the additional unknown consequences when series conduct business in other states, proceed in bankruptcy, and properly comply with tax and securities laws, will likely continue to hinder widespread acceptance of this concept.

Until binding decisions resolve these concerns, practitioners who find a series LLC an appropriate business form for their clients should proceed with caution and diligently heed a number of recommendations. First, "[a]dvise the client of the formation requirements [and the need to] . . . [m]aintain separate accounts

219. *See* H. COMM. ON BUS. & INDUS., BILL ANALYSIS, Tex. H.B. 2235, 81st Leg., R.S. (2009), *available at* http://www.hro.house.state.tx.us/pdf/ba81r/hb2235.pdf#nav panes=0 (recounting the concern of opponents to series legislation that adopting revisions for additional flexibility and complexity would enable organizations to construct more questionable and financially disastrous schemes, referencing Enron as a prime example).

220. *But see Gladstrong*, 275 S.W.3d at 455 (explaining that, in addition to considering the relationship between two entities, disregarding the corporate structure also requires analyzing "whether the entities' use of limited liability was illegitimate . . . [for which] the *Paramount Petroleum* factors are almost entirely irrelevant").

221. BUS. ORGS. § 101.602 (emphasis added).

222. *Cf.* MARK A. SARGENT & WALTER D. SCHWIDETZKY, LIMITED LIABILITY COMPANY HANDBOOK § 3:85 (West 2009) (contending that "[i]f the series are not respected, one may be no worse off than if a regular LLC were used"); Jay Adkisson & Chris Riser, *When One Is Better than Many: The Series LLC*, ASSETPROTECTIONBOOK.COM (July 12, 2009, 11:16 AM), http://www.assetprotection book.com/forum/viewtopic.php?f=102&t=869 (asserting that "even if the [s]eries provisions [do not] stand up, the entity should be treated as an ordinary LLC").

and records for the LLC and each series."[223] Next, draft separate operating agreements for the LLC and each series and include notice of the liability limitations in each of them, as well as in contracts and any other documents with third parties.[224] For the notice of limited liability, "track the language [in] the statute."[225] Include the name of the LLC in the name of each series, in addition to a series designation,[226] and have each series sign contracts "in the capacity of" or "as a series of" the organization.[227] Properly document any asset transfers between series and ensure that series act independently, without "commingling assets, preparing consolidated financial statements, obtaining joint financing, or entering into loan guarantees with other series."[228] Avoid cross-collaterization of assets among series and provide a method in the operating agreements to designate unallocated property to particular series.[229] Overall, a series LLC should be organized in a way that avoids the appearance of a purpose for evading taxes or perpetrating fraud.[230] Finally, consider that the series LLC works best for a single owner or very few owners who have multiple businesses or investments with the same ownership structure.[231]

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223. Dominick T. Gattuso, *Series LLCs: Let's Give the Frog a Little Love*, BUS. L. TODAY, July/Aug. 2008, at 33, 38.

224. *Id.*

225. Ann E. Conaway, *A Business Review of the Delaware Series: Good Business for the Informed*, at 645, 703 (PLI Corp. Law & Prac. Course, Handbook Series No. 14533, 2008), *available at* 1677 PLI/Corp 645 (Westlaw).

226. *Cf.* John C. Murray, *A Real Estate Practitioner's Guide to Delaware Series LLCs*, FIRST AM. (2007), http://www.firstam.com/ekcms/uploadedFiles/firstam_com/References/Reference_Articles/John_C_Murray_Reference/Limited_Liability_Companies/jm-delaware.pdf (discussing the ways a series should be designated to hold title).

227. Ann E. Conaway, *A Business Review of the Delaware Series: Good Business for the Informed*, at 645, 704 (PLI Corp. Law & Prac. Course, Handbook Series No. 14533, 2008), *available at* 1677 PLI/Corp 645 (Westlaw).

228. *See* Dominick T. Gattuso, *Series LLCs: Let's Give the Frog a Little Love*, BUS. L. TODAY, July/Aug. 2008, at 33, 37 (enumerating ways to reduce the risk of substantive consolidation of series in bankruptcy).

229. *See* Ann E. Conaway, *A Business Review of the Delaware Series: Good Business for the Informed*, at 645, 703 (PLI Corp. Law & Prac. Course, Handbook Series No. 14533, 2008), *available at* 1677 PLI/Corp 645 (Westlaw) ("Advisors using a series arrangement . . . anticipate a decision-making mechanism whereby unallocated property may be designated among series or otherwise.").

230. Wendell Gingerich, Note, *Series LLCs: The Problem of the Chicken and the Egg*, 4 ENTREPRENEURIAL BUS. L.J. 193, 218 (2009).

231. *See* Brian R. Fons, *Serious About Series LLCs*, CBA REC., Apr. 2007, at 46, 47, *available at* 21-Apr CBAR 46 (Westlaw) (noting it may be easier "to consolidate the series as one taxpayer" when the series have the same management and ownership structure).